

**DISCIPLINARY  
BOARD  
REPORTER**

Report of Lawyer Discipline Cases  
Decided by the Disciplinary Board  
and by the  
Oregon Supreme Court  
for 2015

**VOLUME 29**

*January 1, 2015, to December 31, 2015*

## 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 2015 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 29 DB Rptr \_\_\_\_ (2015).

In 2015, 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 ([www.osbar.org](http://www.osbar.org), click on Rules Regulations and Policies) and ORS 9.536.

The decisions printed in this DB Reporter have been reformatted and corrected for typographical errors, spelling errors, obvious grammatical or word usage errors, and errors in citation formatting, but no substantive changes have been made to them. Because of space restrictions, 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, 2015, 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.

DAWN EVANS  
*Disciplinary Counsel*  
*Oregon State Bar*

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**Cite full opinion as 356 Or 691 (2015)**

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of )  
)  
BARNES H. ELLIS, )  
)  
Accused. )

(OSB 09-54; SC S061385)

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

Argued and submitted March 4, 2014.

W. Michael Gillette, Schwabe Williamson & Wyatt PC, Portland, argued the cause and filed the briefs for the Accuseds.

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

Before Balmer, Chief Justice, and Walters, Linder, Landau, Brewer, and Baldwin, Justices.

PER CURIAM

This lawyer disciplinary proceeding involves several allegations under the former Code of Professional Responsibility. The accuseds (also individually referred to as Ellis or Rosenbaum in the full opinion) represented a public company involved in various protracted proceedings over several years and also represented some company directors, officers, and managers during some of those same proceedings. The Bar charged the accuseds in separate complaints with multiple violations of several former Disciplinary Rules, including *former* DR 5-105(C) (waivable former-client conflicts with insufficient disclosure); *former* DR 5-105(E) (nonwaivable current-client conflicts and waivable current-client conflicts with insufficient disclosure); and *former* DR 1-102(A)(3) (misrepresentation by omission). A trial panel of the Disciplinary Board concluded that, although the Bar had not proved most of the charged violations, it did sufficiently prove that some client conflicts of interest had existed, that the accuseds had made insufficient disclosures as to those conflicts, and that the accuseds had made related misrepresentations by omission in a particular conflict disclosure

Cite as *In re Ellis*, 29 DB Rptr 1 (2015)

letter. The panel determined that a public reprimand was the appropriate sanction. The accuseds sought review as to all allegations that the panel determined that the Bar had proved, and the Bar sought review as to some additional allegations that the panel determined had not been proved. For the reasons explained [in the full opinion], we dismiss the amended complaints.

**Cite full opinion as 356 Or 691 (2015)**

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of )  
 )  
LOIS O. ROSENBAUM, )  
 )  
Accused. )

(OSB 09-55; SC S061385)

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

Argued and submitted March 4, 2014.

W. Michael Gillette, Schwabe Williamson & Wyatt PC, Portland, argued the cause and filed the briefs for the Accuseds.

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

Before Balmer, Chief Justice, and Walters, Linder, Landau, Brewer, and Baldwin, Justices.

PER CURIAM

This lawyer disciplinary proceeding involves several allegations under the former Code of Professional Responsibility. The accuseds (also individually referred to as Ellis or Rosenbaum in the full opinion) represented a public company involved in various protracted proceedings over several years and also represented some company directors, officers, and managers during some of those same proceedings. The Bar charged the Accuseds in separate complaints with multiple violations of several former Disciplinary Rules, including *former* DR 5-105(C) (waivable former-client conflicts with insufficient disclosure); *former* DR 5-105(E) (nonwaivable current-client conflicts and waivable current-client conflicts with insufficient disclosure); and *former* DR 1-102(A)(3) (misrepresentation by omission). A trial panel of the Disciplinary Board concluded that, although the Bar had not proved most of the charged violations, it did sufficiently prove that some client conflicts of interest had existed, that the accuseds had made insufficient disclosures as to those conflicts, and that the accuseds had made related misrepresentations by omission in a particular conflict disclosure

Cite as *In re Rosenbaum*, 29 DB Rptr 3 (2015)

letter. The panel determined that a public reprimand was the appropriate sanction. The accuseds sought review as to all allegations that the panel determined that the Bar had proved, and the Bar sought review as to some additional allegations that the panel determined had not been proved. For the reasons explained [in the full opinion], we dismiss the amended complaints.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-68
	)	
SUSAN E. SNELL,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	David J. Elkanich
Disciplinary Board:	None
Disposition:	Violations of RPC 1.3, RPC 1.4(b), and RPC 1.7(a)(1). Stipulation for Discipline. 60-day suspension, all but 30 days stayed, 2-year probation.
Effective Date of Order:	March 16, 2015

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, all but 30 days stayed, pending completion of a two-year term of probation, effective March 15, 2015, or the date approved by the Disciplinary Board, whichever is later, for violations of RPC 1.3, RPC 1.4(b), and RPC 1.7(a)(1).

DATED this 16th day of March, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Susan E. Snell, attorney at law (“Snell”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Snell 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 Bar continuously since that time, having her office and place of business in Washington County, Oregon.

3.

Snell 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 June 14, 2013, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Snell for alleged violations of RPC 1.3 (neglect of a legal matter), RPC 1.4(b) (failure to communicate with client sufficient to allow client to make informed decisions regarding the representation), and RPC 1.7(a)(1) (current client conflict of interest) of the Oregon Rules of Professional Conduct.

On September 24, 2013, a Formal Complaint was filed against Snell pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.3, RPC 1.4(b), and RPC 1.7(a)(1). 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 early 2009, Snell filed a lien against WHI Hotel (“WHI”) on behalf of her client, Wholesale Commercial Interiors, Inc. (“WCI”), for construction work WCI had performed on the Holiday Inn in Wilsonville. A few months later in June 2009, Snell filed another construction lien for the same project on behalf of Modrich Construction (“Modrich”).

6.

In July 2009, Snell sent a demand letter to WHI and its mortgagee for the amount of the Modrich lien and billed Modrich for her services.

7.

On September 16, 2009, on WCI's behalf, Snell filed a lawsuit in Washington County Circuit Court against WHI seeking to foreclose the WCI lien. Later in October 2009, Snell prepared for Modrich an Answer to the complaint for foreclosure she had filed for WCI. The Answer denied the allegations of the complaint; cross claimed against the other lien-holder defendants, including WCI, that Modrich's lien took priority over all other liens; and prayed that the complaint be dismissed, that Modrich's lien be declared a first, valid, and subsisting lien against the improvement at the Holiday Inn, that the other defendants be foreclosed of all right, title, and interest in the improvement, and that the property be sold to satisfy Modrich's lien.

8.

WCI's interests in the foreclosure proceeding were directly adverse to Modrich's interests. By representing both Modrich and WCI in the foreclosure proceeding, Snell had a current client conflict of interest. When she represented Modrich as well as WCI, Snell failed to disclose to Modrich or WCI that she could not ethically represent Modrich until after she had completed her representation of WCI; and she failed to disclose to Modrich that, on WCI's behalf, she would immediately foreclose Modrich's lien.

9.

Shortly thereafter on October 23, 2009, Snell advanced the filing fee on Modrich's behalf and filed the Answer. Thereafter, Snell did nothing to advance Modrich's cross-claim.

10.

Between 2010 and 2011, Modrich's principal, Chad Meengs ("Meengs"), made several inquiries about the status of the case. Snell failed to disclose to Meengs that in 2010, she entered negotiations with the hotel on behalf of WCI. Instead, Snell told Meengs that the hotel was dragging its feet and that she was waiting for a trial date. Snell did not tell Meengs that she could not represent Modrich until WCI's claim concluded; rather, she asserted various reasons why efforts to recover on Modrich's claim were delayed.

11.

Although Snell filed the lien and asserted a cross-claim for Modrich in the WCI litigation, for the next 21 months she failed to take any action to pursue Modrich's claim.

### Violations

12.

Snell admits that, by engaging in the conduct described above in paragraphs five through eleven, she neglected Modrich's legal matter, failed to communicate with a client sufficient to allow client to make informed decisions regarding the representation, and engaged in a current client conflict when she knowingly represented two lien claimants, WCI and Modrich Construction, in a construction dispute against WHI Hotel violated RPC 1.3 (neglect of a legal matter), RPC 1.4(b) (failure to communicate sufficient to allow client to make informed decisions), and RPC 1.7(a)(1) (current client conflict of interest).

### Sanction

13.

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

- a. **Duty Violated.** The most important duties are those that a lawyer owes a client. *Standards*, p. 5. Snell's failure to act with reasonable diligence and promptness in representing and communicating with her clients and to avoid conflicts of interest violated her duty she owed to her clients. *Standards*, §§ 4.1, 4.3, and 4.4.
- b. **Mental State.** Snell acted knowingly. Snell should have known that her representation of WCI and Modrich implicated conflicts of interest. Her subsequent failure to explain to Modrich's principal, Chad Meengs, the status of the case was knowing.
- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0. Modrich was actually injured to the extent that they paid for services that did not benefit them, and to the extent that their lawsuit was delayed by Snell's lack of candid communication. The court has held that there is actual injury to the client where an attorney fails to actively pursue his or her case. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offense. In 2001, Snell received a public reprimand for violating DR 5-105. *Standards*, § 9.22(a).
  2. Substantial experience in the practice of law in Oregon. Snell has been licensed to practice law in Oregon since 1985. *Standards*, § 9.22(i).

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Full and free disclosure to disciplinary board or cooperative attitude toward. *Standards*, § 9.32(e).
  2. Character and reputation. *Standards*, § 9.32(g).
  3. Remorse. *Standards*, § 9.32(l).
  4. Remoteness of prior offense. *Standards*, § 9.32(m).

14.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards*, § 4.32.

Under the ABA *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. *Standards*, § 4.42.

15.

Violation of a conflict of interest rule, by itself, warrants a 30-day suspension. *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010). The court has imposed varying lengths of suspensions for somewhat similar misconduct. *In re Campbell*, 345 Or 670, 202 P3d 871 (2009) (60-day suspension for violations of DR 2-106(A) and DR 5-105(C) where lawyer knowingly engaged in an improper conflict and the aggravating circumstances, including prior discipline, outweighed the mitigating circumstances); *In re Germundson*, 301 Or 656, 724 P2d 793 (1986) (63-day suspension for violations of DR 1-102(A)(3), DR 5-101(A), and DR 5-104(A)).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that Snell shall serve a two-year probation with a 60-day suspension, all but 30 days stayed pending successful completion of probation. The terms of the probation are as follows:

1. Schedule to meet with a Professional Liability Fund (“PLF”) practice management advisor for specific instructions on updating and formalizing client file handling procedures and conflict checks by May 1, 2015, and implement the recommendations;
2. Follow up with a PLF practice management advisor within 6 months to confirm implementation of any recommended procedures;
3. Attend 15 hours of continuing legal education on conflicts of interest, neglect, and client communication;

4. Meet quarterly with a practice supervisor attorney on law practice management and conflict procedures;
5. Submit quarterly written reports to the Bar on her progress;
6. Attend ethics school; and
7. Not engage in further conduct that would be in violation of the disciplinary rules.

The sanction imposed is for violation of RPC 1.3, RPC 1.4(b), and RPC 1.7(a)(1). The sanction is to be effective March 15, 2015, or the date approved by the Disciplinary Board, whichever is later.

17.

Snell 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, Snell has arranged for Thomas J. Elliot (“Elliot”), an active member of the Bar, to either take possession of or have ongoing access to Snell’s client files and serve as the contact person for clients in need of the files during the term of her suspension. Snell represents that Elliot has agreed to accept this responsibility.

18.

Snell 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. Snell 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.

19.

Snell acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

20.

Snell represents that, aside from Oregon, she is not admitted to practice law in any other jurisdiction. If she were admitted in another jurisdiction the Bar would inform these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Snell is admitted: None.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 2nd day of March, 2015.

/s/ Susan E. Snell

Susan E. Snell

OSB No. 853356

EXECUTED this 9th day of March, 2015.

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. 14-127  
)  
VICKI R. VERNON, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3 and RPC 1.4(a). Stipulation for  
discipline. 60-day suspension, all stayed, 2-year  
probation.  
Effective Date of Order: April 26, 2015

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, all stayed, pending successful completion of a 2-year term of probation, effective 30 days from the approval of the stipulation by the Disciplinary Board, for violations of RPC 1.3 and RPC 1.4(a).

DATED this 27th day of March, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Vicki R. Vernon, attorney at law (“Vernon”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Vernon was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 14, 1989, and has been a member of the Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

Vernon enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On November 22, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Vernon 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.

In August 2009, James E. Riggs was convicted in Lane County Circuit Court of the crime of Attempted Sexual Abuse in the First Degree and sentenced to serve a 13-month period of imprisonment and a period of post-prison supervision. Lane County Circuit Court Case No. 20-09-12381 (“*State v. Riggs*”).

6.

In January 2010, while serving his term of incarceration, Riggs filed *pro se* a petition for post-conviction relief seeking to “reverse” his conviction on grounds that he had relied upon alleged erroneous advice from his attorney regarding how much good time credit he could receive and the sentencing court’s alleged application of the wrong sentencing guidelines. Washington County Circuit Court Case No. C10-0424CV (“*Riggs v. Howton*”).

7.

In February 2010, Vernon was appointed to represent Riggs in *Riggs v. Howton*. Vernon met with Riggs in the following weeks to discuss his claims. Vernon also arranged to receive material from the court and Riggs' prior counsel relevant to his claims.

8.

In early May 2010, the state filed an answer to the *pro se* petition in *Riggs v. Howton*.

9.

Vernon informed Riggs that he would likely be released before the relief he sought could be granted and that if he obtained the relief of setting aside his conviction he would only return to the circumstances he faced prior to his conviction, with the possibility that he could be reincarcerated for a longer period. Riggs remained committed to pursue claims that he had relied to his detriment upon erroneous advice from his trial counsel when he agreed to resolve the *State v. Riggs* matter, but did not want to vacate his conviction and negotiated sentence. Vernon promised to represent Riggs on that claim.

10.

In May 2010, Riggs was released from prison and began serving a term of post-prison supervision.

11.

In June 2010, Vernon moved for and obtained leave to file an amended petition in *Riggs v. Howton*. Vernon arranged to obtain documentation from the court and Riggs' trial counsel concerning Riggs' claims. Despite repeated requests from Vernon's office, Riggs never signed the releases necessary for Vernon to obtain documents from Riggs' trial counsel.

12.

In November 2011, the court sent Vernon a notice that Riggs' petition in the *Riggs v. Howton* matter would be dismissed for want of prosecution. In mid-December 2011, Riggs' petition was dismissed and the court sent notice of the dismissal to Vernon.

13.

In a May 2012 review of her caseload, Vernon discovered that she had not filed an amended petition in *Riggs v. Howton* and the petition had been dismissed. In June 2012, Vernon informed Riggs that his petition had been dismissed and she promised to seek its reinstatement. However, Vernon never thereafter filed any motion to reinstate the petition. Vernon did not, prior to November 2013, return Riggs' telephone calls seeking information regarding the status of the petition.

14.

In October 2013, Riggs complained to the Client Assistance Office of the Bar that Vernon was not returning his telephone calls. In November 2013, after learning of Riggs' complaint, Vernon delivered a letter to Riggs informing him about the status of the case, apologizing for her failure to return his calls, and referring him to other counsel.

### Violations

15.

Vernon admits that by neglecting Riggs' petition, and failing to communicate with Riggs about the status of the petition, she violated RPC 1.3 and RPC 1.4(a).

### Sanction

16.

Vernon 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* ("*Standards*"). The *Standards* require that Vernon'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.** Vernon violated her duty to act with reasonable diligence and promptness in representing a client, including adequate communication with the client. *Standards*, § 4.4.
- b. **Mental State.** Vernon acted negligently when she failed to ensure that she followed up in pursuing Riggs' petition and keep him informed about the status of his matter. Negligence is defined as the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 9. Vernon acted knowingly in failing to return Riggs' telephone calls after she had promised to reinstate the petition. 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. *Id.*
- c. **Injury.** The *Standards* provide the injury can be actual or potential. *Standards*, § 3.0. Because Riggs had already been released and his petition was of doubtful merit, the only actual injury was that Riggs was deprived of the opportunity to have his petition adjudicated on its merits and the anxiety and frustration he experienced as a result of Vernon's failure to return calls and keep him informed. See *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of attorney neglect can constitute

actual injury under the *Standards*). Vernon’s inaction may have shielded Riggs from some potential injury because success on the petition had the possibility of exposing Riggs to an additional period of incarceration.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior disciplinary offenses. *Standards*, § 9.22(a).<sup>1</sup> Vernon was suspended for 90 days for neglect of a legal matter and failure to communicate in two similar post-conviction relief petition matters. *In re Vernon*, 27 DB Rptr 184 (October 2013). While Vernon’s misconduct in this matter is similar to her prior misconduct, Vernon had not been sanctioned for the prior misconduct when she engaged in the misconduct addressed by this stipulation.
  2. 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. Full and free disclosure to the disciplinary board. *Standards*, § 9.32(e).
  3. Remorse. *Standards*, § 9.32(l).

17.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42(b).

18.

Oregon case law supports a 60-day suspension. *See, e.g., In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for lawyer’s knowing neglect of his client’s tort claim, including his failure to timely file proof of service). *See also, In re Kissling*, 303 Or 638, 740 P2d 179 (1987); *In re Dugger*, 299 Or 21, 697 P2d 973 (1985); *In re Morrow*, 297 Or 808, 688 P2d 820 (1984); and *In re Fuller*, 284 Or 273, 586 P2d 1111 (1978) (all of whom received 60- or 63-day suspensions for similar violations). In *LaBahn*, after the court dismissed the case the lawyer did not inform his client of the dismissal and avoided his client’s telephone calls. Only after the client asked another lawyer to look into the matter

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<sup>1</sup> In determining the weight of prior disciplinary offenses, 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 offenses; 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 195, 200, 951 P2d 149 (1997).

more than a year later did the client discover that the court had dismissed his case. The aggravating and mitigating factors under the *Standards*, which included the absence of a prior disciplinary history, were found to be in equipoise. While Vernon has previously been sanctioned for similar misconduct as noted above, that sanction is not given substantial weight in this matter because of its timing. Furthermore, the misconduct in the present matter is less egregious than either *LaBahn* or Vernon's prior disciplinary matter in that, upon realizing Riggs' petition had been dismissed, Vernon took the initiative to inform him of that fact.

19.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See Standards*, § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct that may be corrected). A period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

20.

Consistent with the *Standards* and Oregon case law, the parties agree that Vernon shall be suspended for 60 days for her violations of RPC 1.3 and RPC 1.4(a), effective 30 days from the approval of this stipulation by the Disciplinary Board. All 60 days of the suspension shall be stayed pending Vernon's successful completion of a 2-year period of probation. Probation shall commence on the date this stipulation becomes effective. The probation shall include the following conditions:

- (a) Within 30 days of the date this stipulation is approved by the Disciplinary Board, Vernon shall contact the Professional Liability Fund ("PLF") and schedule an appointment to consult with PLF practice management advisors to obtain advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, and effectively managing a client caseload. Vernon shall notify the Bar of the time and date of the appointment.
- (b) Vernon shall attend the appointment with the PLF practice management advisor. No later than 30 days after recommendations are made by the PLF, Vernon shall adopt and implement those recommendations.
- (c) No later than 60 days after recommendations are made by the PLF, Vernon shall provide a copy of the office practice assessment from the PLF and file a report with Disciplinary Counsel's Office stating the date of her consultation(s) with the PLF; that she has adopted and implemented those recommendations; or explaining where and why she has not adopted and implemented the recommendations.

- (d) Colette Cameron shall serve as Vernon's probation supervisor ("Supervisor"). Vernon shall cooperate and comply with all reasonable requests made by her Supervisor that her probation Supervisor, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Vernon's clients, the profession, the legal system, and the public. Beginning with the first month of her probation, Vernon shall meet with her Supervisor in person at least once a month for the purpose of reviewing the status of Vernon's law practice and her performance of legal services on the behalf of clients. Each month, her Supervisor shall conduct a random audit of five to ten files to ensure that Vernon is timely attending to matters.
- (e) During the term of her probation, Vernon shall attend not less than 6 MCLE accredited programs, for a total of 30 hours, which shall emphasize law practice management and time management. These credit hours shall be in addition to those MCLE credit hours required of Vernon for her normal MCLE reporting period.
- (f) Every month for the term of this agreement, Vernon shall review all client files to ensure that she is timely attending to the clients' matters and that she is maintaining adequate communication with clients, the court, and opposing counsel.
- (g) On a quarterly basis, on dates to be established by Disciplinary Counsel beginning no later than 30 days after probation commences, Vernon shall submit to Disciplinary Counsel's Office a written report, approved as to substance by her Supervisor, advising whether she is in compliance with the terms of this agreement. In the event that Vernon has not complied with any term of the agreement, the quarterly report shall describe the noncompliance and the reason for it.
- (h) Throughout the term of probation, Vernon shall attend to client matters, including diligently pursuing them and adequately communicating with clients regarding them.
- (i) Vernon authorizes her Supervisor to communicate with Disciplinary Counsel regarding her compliance or noncompliance with the terms of this agreement, and to release to Disciplinary Counsel any information necessary to permit Disciplinary Counsel to assess her compliance.
- (j) Vernon is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (k) Vernon's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to Disciplinary Counsel's Office, or

with any reasonable request of her Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension. A compliance report is timely if it is emailed, mailed, faxed, or delivered on or before its due date. An SPRB decision to prosecute Vernon for unethical conduct that occurred or continued during the period of her probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

21.

Vernon acknowledges that, in the event probation is revoked and a suspension imposed, reinstatement is not automatic on expiration of the period of suspension; she will be required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Vernon also acknowledges that, in the event a suspension is imposed, 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.

22.

Vernon acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of reinstatement.

23.

Vernon represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Vernon is admitted: none.

24.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

Cite as *In re Vernon*, 29 DB Rptr 12 (2015)

EXECUTED this 20th day of March, 2015.

/s/ Vicki R. Vernon

Vicki R. Vernon

OSB No. 891338

EXECUTED this 23rd day of March, 2015.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 032221

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 13-24  
)  
JOSEPH R. SANCHEZ, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: David A. Rabbino, Chairperson  
Courtney C. Dippel  
JoAnn Jackson, Public Member  
Disposition: Violations of RPC 8.1(a)(1) and RPC 8.4(a)(3). Trial  
Panel Opinion. 1-year suspension.  
Effective Date of Opinion: March 31, 2015

**TRIAL PANEL OPINION**

**INTRODUCTION**

This matter came on for trial on January 22, 2015. The Trial Panel consisted of the Trial Panel Chair, David A. Rabbino (“Chair”), Courtney Dippel, Esq., and public member JoAnn Jackson. Linn Davis, Assistant Disciplinary Counsel (“counsel for the Bar”), represented the Oregon State Bar (“Bar”), and the Accused, Joseph R. Sanchez (“Accused”), appeared pro se.

**PROCEDURAL HISTORY**

This matter is before this Trial Panel based on a formal complaint filed and served by the Bar on August 22, 2013. The Bar thereafter filed and served an amended complaint, the operative complaint for purposes of this decision, on July 25, 2014. The Accused, Joseph R. Sanchez, filed and served his answer to the amended complaint on or about August 8, 2014.

The Accused has been a licensed attorney since approximately 2000. He is a licensed member of the New York State Bar (2000), the Oregon Bar (2003), and the Maine Bar (2004). He currently has a law office in the State of New York, and effectively conducts the

bulk of his law practice from that office. He acknowledges that he has a very limited practice within Oregon.

On or about August 29, 2014, the Bar filed a motion pursuant to BR 5.1(a) seeking permission for an out-of-state witness to testify telephonically. The subject of the motion was discussed among the Chair, the Accused, and counsel for the Bar during a pre-hearing conference conducted that same day. During that conference, the Accused stated he had no objection to the motion being granted. Based on the authority cited in the Bar's motion, as well as there being no opposition from the Accused, the Chair granted the Bar's motion on September 3, 2014.

The hearing in this matter was scheduled to take place on Monday, September 22, 2014. On Thursday, September 18, 2014, counsel for the Bar advised the Chair and the Accused that the out-of-state witness, who had previously represented she would testify voluntarily, had advised him that she would not be able to testify voluntarily on September 22, 2014, and would need time to have counsel appointed to represent her.<sup>1</sup> Pursuant to BR 5.4, counsel for the Bar requested a 30-day adjournment of the hearing. As this was the first such request from the Bar (prior adjournments or changes in hearing date had been made at the request of the Accused and the Chair), and because the Chair understood that both the Bar and the Accused planned to question this witness (the only non-party witness to be called), the Chair granted the Bar's request and adjourned the hearing that same day. By agreement of the parties, the hearing of this matter was to be rescheduled for some time in January 2015.

On September 18, 2014, the same day the hearing was adjourned, the Accused advised the Chair and counsel for the Bar that: 1) he was withdrawing his consent to the out-of-state witness testifying by telephone; and 2) that he intended to file a motion to compel the in-person appearance of the out-of-state witness. The Accused filed his motion on or about September 26, 2014. The Bar filed its opposition on October 6, 2014. The Accused filed his reply on October 17, 2014. By written opinion on October 20, 2014, the Chair denied the Accused's motion to compel the in-person testimony of the out-of-state witness, but required that the Bar make the out-of-state witness available at the hearing via video conference, thereby enabling the Accused to see the witness as the testimony was provided.

After further discussion and communication with the parties and panel members, a hearing date of January 22, 2015, was agreed to.

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<sup>1</sup> The out-of-state witness is an employee of Further Ed, Inc., the owners of Lawline, Inc. ("Lawline"). The Lawline witness' need for counsel apparently was at the request of Lawline's insurer and arose out of a concern that the Accused's affirmative defense of negligence on Lawline's part could have exposed Lawline to liability. The Chair took no position on the merits of the insurer's belief, but acknowledges that as a practical matter it precluded the witness' voluntary participation in this matter.

## NATURE AND SCOPE OF THE CHARGES

The gravamen of the amended complaint is that: 1) on April 11, 2012, at approximately 10:51 am PST, the Accused purchased a set of Continuing Legal Education (“CLE”) courses from Lawline, Inc. (“Lawline”), an online CLE provider, for the purposes of fulfilling his mandatory 45 hours of CLE requirement with the Bar for the reporting period of 2009 to 2011;<sup>2</sup> 2) on April 12, 2012, the Accused falsely represented to Lawline that he had attended and completed each of the courses purchased in order to obtain Certificates of Completion for each of the courses; and 3) on April 13, 2012, the Accused falsely represented to the Bar that he had completed 48 hours of accredited CLE as required for his reporting period from January 1, 2009 to December 31, 2011. The Bar asserts that as a result of the Accused’s alleged misrepresentations to both Lawline and the Bar concerning his attendance and completion of the CLE courses, the Accused has violated both RPC 8.1(a)(1) and RPC 8.4(a)(3) of the Rules of Professional Conduct.

In his answer to the amended complaint, the Accused admitted purchasing the courses from Lawline on April 11, 2012, admitted obtaining the Certificates of Completion from Lawline (Exh. 8, Bar Exhibits)<sup>3</sup>, and admitted that he submitted the Compliance Report to the Bar on April 13, 2012 (Exh. 4, Bar Exhibits), but denied making any false misrepresentations to either Lawline or the Bar, and asserted by way of an affirmative defense that “any error in maintaining, tracking or reporting the continuing legal education credits completed by the Accused is due to the sole negligence of Lawline.com.” (Answer to Amended Formal Complaint, ¶ 61.)

## JANUARY 22, 2015 HEARING

On January 22, 2015, a hearing was conducted in this matter. The hearing was attended by counsel for the Bar, the Accused, and the panel members, David Rabbino (Chair), JoAnn Jackson (public member), and Courtney Dippel, Esq. Counsel for the Bar submitted a Trial Memorandum with exhibits on January 12, 2015. The Accused also submitted a Trial Memorandum on January 12, 2015, but submitted no additional exhibits, noting instead that he did “not anticipate” introducing exhibits “other than those already offered by the Oregon Bar . . . along with pleadings which have been filed in this matter.”

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<sup>2</sup> There was some dispute whether the purchase took place at 1:51 pm eastern standard time (“EST”) (as the Accused asserts) or at 1:51 pm pacific standard time (“PST”), as the Bar initially contended. This was clarified at the hearing by the Lawline witness, and it is now clear the purchase took place at 1:51 pm EST, or 10:51 am PST.

<sup>3</sup> The Bar submitted a total of 21 documentary exhibits with its pre-trial brief. At the hearing, all parties consented to the admissibility of the documents for the purposes of the hearing. Unless otherwise noted, all references to exhibits are those submitted by the Bar, by the number applied to them by the Bar in its pre-trial submission.

At the beginning of the trial, counsel for the Bar and the Accused were offered the opportunity to object to any of the exhibits that had previously been submitted to the panel. No objections were made. The Chair then asked if both sides stipulated to the inclusion of all previously tendered exhibits into the record, and both sides so stipulated on the record.

During the hearing, both documentary and testimonial evidence was received. For the sake of clarity, the facts that the panel finds were established by the documents are discussed immediately below. The facts that the panel finds were established by the testimony of witnesses will be discussed thereafter.

### **Facts Established by Documents:**

The Bar submitted approximately 21 documents as exhibits. These exhibits included copies of correspondence between the Bar and the Accused relating to this matter (e.g., Exhs. 1, 5, 6, 11, 14, and 15), communications between the Bar and Lawline regarding the Certificates of Completion regarding the courses the Accused allegedly attended (e.g., Exhs. 2, 8, 9, 13, 16, 17, and 18), and the deposition transcript of the Accused's September 3, 2014, telephonic deposition (Exh. 21). The Accused submitted two documents on his own, and elected to rely upon those submitted by the Bar.

As relevant herein, the panel finds that the documents submitted by the Bar, and which were not contested by the Accused, establish the facts set forth below.

On February 10, 2012, the Bar sent the Accused a Notice of Noncompliance, advising the Accused that he had not filed a completed MCLE report as required by January 31, 2012. (Exh. 1). That on April 11, 2012, at approximately 10:51 am PST, the Accused purchased a "Specialty Oregon Bundle" from Lawline, which contained courses that if watched or listened to, would satisfy the Accused's MCLE requirements for Oregon.<sup>4</sup> (Exh. 3). That on April 13, 2012, the Accused submitted to the Bar an MCLE Compliance Report ("Compliance Report"), dated April 12, 2012, in which he certified that he had completed his MCLE requirements. (Exh. 4). The MCLE Compliance Report Itemization that was attached to the MCLE Compliance Report, which the Accused admitted he prepared, listed all of the courses the Accused purchased from Lawline, and stated that he had completed them on the same date, April 12, 2012. (Exh. 4). On April 13, 2012, at 11:14 am PST, Denise Cline, MCLE Administrator for the Bar, acknowledged receipt of the Accused's Compliance Report. (Exh. 5). Ms. Cline contacted the Accused again on April 13, 2012, at 3:54 pm PST regarding his Compliance Report, noting that the report indicated that the Accused has watched or listened to 48 hours of CLE in one day, asking the Accused "[h]ow did you do that?" (Exh. 6). The Accused responded to Ms. Cline's inquiry at 4:31 pm PST, providing copies of his CLE Completion Certificates. (Exh. 7). As these Certificates appear to have been printed out

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<sup>4</sup> The Accused admits that he had not completed any of the required CLE hours for the 2009 to 2011 reporting period prior to purchasing the "Oregon Specialty Bundle."

within an approximate seven (7) hour time period, Ms. Cline wrote to the Accused at 7:34 pm PST on April 13, 2012, asking “how” he had completed “48 CLE credits in less than seven hours.” (Exh. 7). The Accused responded that he had actually started the viewing or listening process on April 11, 2012, and that the dates on the Certificates were simply the date they were printed. (Exh. 7).

Due to the very compressed time frame in which the Accused represented he had completed the CLE courses, the Bar contacted Lawline to obtain additional information regarding when the Accused purchased and thereafter watched or listened to the CLE courses. (Exh. 9). An employee of Lawline at that time, Robert Joyce,<sup>5</sup> advised the Bar that the Accused had purchased his “Specialty Oregon Bundle” on April 11, 2012, and that it appeared he opened and thereafter “jumped around in the courses” looking for the verification codes he would need to obtain his Certificates of Compliance, and that in many instances, he spent approximately 10 seconds in a portion of the course before fast forwarding (an ability Lawline provided attorneys at the time when viewing their course) to locate the codes. (Exh. 9). As a result of Mr. Joyce’s response, Ms. Cline referred this matter to Chris Mullmann, the Assistant General Counsel of the Bar. (Exh. 10).

Mr. Mullmann communicated with the Accused by letter dated April 24, 2012, asking for the Accused to provide his account of the matter on or before May 15, 2012. (Exh. 11). On May 14, 2012, the Accused responded to Mr. Mullmann, stating that he began the courses on April 11, and finished them on April 12. (Exh. 12). He also, for the first time, noted that he periodically had to stop and restart the courses because he received a “javascript error.” Most importantly, he represented that “[o]n April 12, 2012, after completing all of the courses, I entered each of the codes onto the Lawline.com website and received forty-five (45) credit hours of CLE—all on April 12, 2012, and even though many of the courses had been viewed or started the day before.” (Exh. 12).

After receipt of the Accused’s correspondence, the Bar again contacted Lawline to discuss the “javascript error,” as well as seeking additional information concerning how the Accused could have completed the 48 credit hours in approximately two days’ time. (Exh. 13). In response, Mr. Joyce advised the Bar that the error message was likely the result of the Accused using an outdated version of the web browser software Mozilla Firefox. (Exh. 13).

On June 18, 2012, Martha Hicks, Assistant Disciplinary Counsel, wrote to the Accused, advising that the materials they had received concerning his MCLE Compliance Report raised concerns about his conduct, and that his conduct potentially implicated

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<sup>5</sup> Mr. Joyce was terminated by Lawline sometime after the events at issue in this matter. Ms. Richman testified that Mr. Joyce was terminated as a result of “unprofessionalism” in his job. At the hearing, the Accused sought to connect Mr. Joyce’s termination with Mr. Joyce’s handling of the questions raised by the Bar. The panel finds that no credible evidence of any kind was presented to in any way establish such a connection, or that Mr. Joyce acted in an inappropriate manner with regard to his responses to the Bar’s inquiries.

provisions of RPC 8.4(a)(3). (Exh. 14). In this correspondence, Ms. Hicks asked the Accused to provide additional information to essentially corroborate that he spent approximately “all day and all night reviewing CLE materials on April 11 and 12, 2012.” (Exh. 14). The Accused responded to Ms. Hicks by letter on July 7, 2012, to which he attached an “Affidavit of Joseph Sanchez,” setting forth additional facts regarding his completion of the CLE courses. (Exh. 15). In his affidavit, the Accused stated that he signed up for the “bundle” of courses on April 11, 2012 (¶ 7), that he had not previously used Lawline (¶ 7), and that he completed the entire bundle “either late on April 12, 2012, or at some point early on April 13, 2012” (¶ 14). He further stated that while he could not recall the exact allocation of hours, he “estimate roughly 12 hours of CLE on April 11, nearly 24 hours on April 12, and any balance early on April 13.” (¶ 15).

#### **Facts Established through Witnesses:**

Two witnesses testified, both of whom were initially called by the Bar. The first was the video-telephonic testimony of Michele Richman, an employee of Lawline. Ms. Richman testified regarding the manner in which computer records were generated when the Accused purchased his CLE courses. As relevant herein, the panel finds that Ms. Richman credibly testified to the following facts. She was familiar with the record keeping practices of Lawline, including changes to these practices that have been made by Lawline since 2012 concerning how CLE courses they offer can be viewed. She was familiar with the records maintained by Lawline in 2012, including those relating to his case. As regards the Lawline records at issue herein, Ms. Richman confirmed that the Accused purchased his “Oregon Bundle” at 10:51 am PST. She confirmed that each CLE course contains two verification codes, which are presented at random locations during the presentation for approximately 20 second intervals during which the presentation stops. She confirmed that these verification codes, along with a user’s individual affirmation that they watched the CLE, were required to obtain the Certificates of Completion. As to the “elapsed time,” “total time,” “start time,” and “end time” columns on the Lawline Course Tracking Sheet (Exh. 16), she explained that all times listed are Eastern Standard Time, and set out in military or 24-hour clock fashion. Importantly, she testified that an “end time” is only noted by the computer system if the user runs through the entire video program. On cross-examination, she testified that she only reviewed the computer records at Lawline pertaining to this case, and that while she could not state for a certainty that the records were accurate (since she did not prepare them), she has no reason to believe they are not accurate.

The second and final witness called by the Bar was the Accused. The Accused testified that he arrived in Oregon sometime around April 8 or 9, 2012, with one goal of his trip to complete his CLE requirements, which by his own admissions he had procrastinated on doing. During his stay, he stayed at his parent’s home located in Troutdale. He testified that he took the courses on April 11, 2012, and April 12, 2012, though later in his testimony he stated, for the first time in the course of these entire proceedings, that he may have begun

taking the courses as early as April 10, 2012, as opposed to completing them sometime early on April 13, 2012. He testified that he personally prepared the Compliance Report and entered all of the information contained therein. He also testified that on April 13, 2012, his mother drove him from her residence in Troutdale to the Bar offices in Tigard.

He was questioned regarding several writings he had prepared back in April and May 2012 when the concerns about the accuracy of the Compliance Report were first raised to him by the Bar, including that each of these writings indicated he had started his courses on April 11, 2012, and completed them on April 12, 2012 (*see* Exh. 7, 12, and 15), and none mentioned his beginning on April 10, 2012. His answers to these questions were, in the panel's view, evasive, incomplete, and/or untruthful. He continuously noted during his testimony that his letters and other written communications were responding to "specific" questions raised by the Bar concerning this matter, and did not require him to respond to the more "general" question at the heart of this case, which is how he could have viewed 48 hours of CLE courses in such a short period of time. This response the panel found to be without substance.

The Accused also sought to make much of his unilaterally taking a second set of CLE courses in May, totaling 36 hours, in an effort to show that he was capable of completing a large number of CLE courses in a compressed time frame. The panel finds the Accused's exercise of no relevance. In the first instance, the Accused acknowledged during his testimony that he took these courses with the hope that the Bar would let this matter drop. Second, the Lawline Course Tracking Sheets indicate that he took these courses over a period of four days, May 12–15, 2012. In other words, the Accused's motivation for taking the courses is suspect, and because he took fewer courses over a longer period of time, the panel finds whatever showing he sought to make was off the mark.

Finally, to the extent the Accused expressed some confusion concerning the information required to be filled in on the Compliance Report, the panel finds this also not to be credible. The Accused has been an attorney for almost fifteen years, and is licensed in three different states. It certainly is not the first time he has had to complete a compliance report for the Bar, and one obligation of attorneys licensed in multiple jurisdictions is to carefully and properly prepare all paperwork necessary to keep their good standing in each respective bar. As an experienced attorney in multiple jurisdictions, it strains credibility to argue that he made "a rookie mistake."

In total, the panel found the Accused's testimony to lack credibility. His testimony was inconsistent with his prior writings, including an affidavit he prepared and signed under oath in 2012. The testimony he provided at the hearing was inconsistent with the testimony he previously provided at his deposition in this matter on September 3, 2014, which was also provided under oath. The Accused presented facts during his testimony that he had never presented before, notwithstanding having had multiple opportunities to have done so during the course of the Bar's investigation. Put simply, the panel finds that the Accused's testimony

was untruthful. Lastly, the panel finds that the Accused made his misrepresentations knowingly and intentionally. The Accused was provided multiple opportunities to explain how he could have possibly fit 48 hours of work into a shorter (and potentially significantly shorter) period of time and each time he failed to do so. It is clear he changed the facts over time, added “explanations” when prior ones were not accepted, with each subsequent explanation less plausible than the prior.

After due consideration of the evidence presented, the panel determined, as discussed in more detail below, that the Accused is guilty of the charges asserted against him by the Bar.

### **DISCUSSION AND CONCLUSIONS OF LAW**

The Bar has the burden to prove the alleged misconduct of the Accused by clear and convincing evidence. BR 5.2. Clear and convincing evidence is evidence that establishes that the truth of the facts asserted is highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994). To the extent the Accused has asserted affirmative defenses, the Accused has the burden to prove the facts that would support the affirmative defense.<sup>6</sup>

The Oregon Evidence Code (“OEC”) does not apply to disciplinary proceedings. *In re Barber*, 322 Or 194, 904 P2d 620 (1995). Pursuant to BR 5.1(a), “Trial panels may admit and give effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Incompetent, irrelevant, immaterial, and unduly repetitious evidence should be excluded.”

The Bar has asserted that the Accused has violated RPC 8.1(a)(1) and RPC 8.4(a)(3). RPC 8.1(a)(1) provides, in pertinent part, that “a lawyer . . . in connection with a disciplinary matter, shall not: (1) knowingly make a false statement of material fact.” RPC 8.4(a)(3) provides, in pertinent part, that “it is professional misconduct for a lawyer to: (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” An attorney can be found to have engaged in “dishonesty” when the evidence demonstrates that he or she engaged in knowing or intentional conduct that indicates a disposition to lie, cheat, or defraud and/or that the attorney lacks integrity. *In re Carpenter*, 337 Or 226, 234, 95 P3d 203 (2004).

A lawyer engages in “misrepresentation” when the lawyer makes a representation that is affirmatively false or false by omission, and knowing it to be false and material such that it could significantly influence the decision making process of the party to whom the representation is made. *In re Gatti*, 356 Or 32, 53, 333 P3d 994 (2014).

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<sup>6</sup> During the hearing, the Accused did not submit any evidence nor elicit any testimony that supports his assertion that “any error in maintaining, tracking or reporting the continuing legal education credits completed by the Accused is due to the sole negligence of Lawline.com.” As a result, the panel found he had failed to establish his asserted “affirmative defense.”

### **Findings of Fact as Applied to the Law**

Based on the evidence presented, and the facts discussed above, the panel finds that it is undisputed that: 1) the Accused purchased 48 hours of CLE courses no earlier than 10:50 am PST on April 11, 2012 (Exh. 2 and 3); 2) the Accused submitted an MCLE Compliance Report to the Bar that was dated April 12, 2012, in which he indicated that he had completed all of his required CLE requirements by that date (Exh. 4); and 3) the Accused submitted the MCLE Compliance Report to the Bar at approximately 11:00 am PST on April 13, 2012. The panel finds that the Accused misrepresented to Lawline that he had completed all of the CLE courses he asserts he did, that such misrepresentation was intentional, and that the Accused knew the misrepresentations to be false when he made them.

As discussed above, Denise Cline, the Bar's MCLE Administrator, contacted the Accused shortly after receipt of his MCLE Compliance Report on April 13, 2012, asking the Accused to explain how he had completed 48 hours of CLE credits in approximately a day and a half. (Exh. 6). In response, the Accused advised Ms. Cline that he had begun viewing the CLE course on April 11, 2012, and that "according to Lawline.com, the date of completion is when [he] printed the certificates." (Exh. 7). There is no dispute that the Certificates of Completion submitted by the Accused were all printed between 8:43 am PST and 3:24 pm PST, a period of approximately seven (7) hours. That the date stamps on the Certificates indicate only when the Certificates were printed out answers the question posed by Ms. Cline regarding how the Accused watched the CLE courses in only "seven hours." It does not address the central issues of how the Accused completed the CLE courses between April 11 and 12, as he alleged he did. On that issue, the Bar's evidence is compelling and clearly and convincingly demonstrates that, in fact, the Accused could not do what he said he did.

As noted above, the evidence proffered and statements of the Accused throughout the investigative process and the hearing are conflicting and lacking in credibility. In a letter dated May 14, 2012, to the Bar, the Accused affirmatively wrote "[o]n April 12, 2102, after completing all of the courses, "I entered each of the codes onto the Lawline.com website and received forty-five (45) credit hours of CLE—all on April 12, 2012—even though many of the courses had been viewed or started the day before." (Exh. 12, pg. 1–2). In other words, in this letter to the Bar, even assuming that he had begun watching the CLE courses at 10:52 am PST, he represented to the Bar that he had completed 45 hours of CLE during a thirty-seven (37) hour period, a physical impossibility.<sup>7</sup>

When questioned during his September 4, 2012 telephonic deposition about his May 14, 2012 letter, the Accused expressly testified that "[b]ut I did—I did finish on the 12th, and

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<sup>7</sup> The 37-hour period is assuming the Accused used the remaining 13 hours on April 11, 2012, after purchasing his CLE course and the entire 24-hour period of April 12, 2012, to attend the CLE course without interruption of any kind.

I turned them (his MCLE Compliance Report) in on the 13th. So that for sure is true.” (Exh. 21, 53:25–54:2). Later in his deposition, the Accused backtracked a bit, testifying that perhaps he may have completed some of the courses on April 13, 2012, “[b]ecause, as I told you, it was very late when I finished, and it may have been the next day. I’m just not sure.” (Exh. 21, 85:16–18). This statement is simply inconsistent with statements made almost 2 years prior at a time when the Accused’s recollection of events should have been at its best.

During his testimony at the hearing, the Accused, for the first time, testified that perhaps he had begun watching the courses prior to April 11, 2012, perhaps as early as April 9 or 10. This testimony is contrary to his previously submitted affidavit and the testimony provided at his deposition. The panel finds there is no basis to believe the Accused’s statement, nor is there credible evidence to support his testimony that he may have begun viewing the CLE courses before April 11, 2012, or that he viewed any such courses prior to actually purchasing them at 10:51 am PST.

Even if the Accused did complete some courses on April 13, 2012 (and there is no credible evidence he did), this does little to help his case. It is undisputed that he submitted the Compliance Report at approximately 11:14 am on April 13, 2012, as the Bar acknowledged receipt of the Compliance Report at that time. (Exh. 5). Based on the evidence in the record, the total elapsed time between the time he purchased the Oregon Bundle and submitted the Compliance Report to the Bar was approximately 48 hours and 23 minutes. Assuming that it took the Accused some period of time to enter the information into the Compliance Report (e.g., 15–30 minutes), and the fact that it would have taken at least 25 minutes for the Accused to be driven by his mother from Troutdale to Tigard,<sup>8</sup> the panel finds that there simply were not 48 hours available to the Accused to view the approximately 48 hours of CLE courses he alleges to have viewed. In short, the panel finds that the Accused was being untruthful to the Bar when he represented that he completed his CLE courses.

### SANCTIONS

As noted in the *Standards*, the purpose of lawyer discipline “is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.” ABA *Standards for Imposing Lawyer Sanctions* (“*Standards*”), as amended February 1992, pg. 13. The trial panel is required to consider four factors when determining the appropriate sanction for violations of the rules of professional conduct: 1) the nature of the duty violated; 2) the mental state of the accused; 3) the actual or potential injury resulting from the conduct; and, 4) the existence of aggravating and mitigating circumstances. (*Standards*, p. 10); *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994); *In re*

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<sup>8</sup> The distance between Troutdale and Tigard is approximately 25 miles. Even if the Accused was able to travel that distance at a constant 60 mph (which is highly unlikely), it still would have taken the witness no less than 25 minutes to drive to the Oregon Bar offices to submit his Compliance Report.

*Spies*, 316 Or 530, 852 P2d 831 (1993). The panel’s consideration of the factors is also guided by Oregon case law that has interpreted and supplemented the *Standards*. “A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.” *Standards*, p. 14.

### **Duties Violated**

The Rules of Professional Conduct generally fall into four categories regarding the nature of the duties owed by an attorney: 1) duty to clients; 2) duty to the public; 3) duty to the legal system; and 4) duty to the legal profession. The Accused’s conduct involves violations of his duty to the public and his duty to the legal profession. The duty to the public exists because the public “expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice.” *Standards*, p. 10. The duty to the legal profession includes, among other things, the duty to maintain the integrity of the profession. *Standards*, p. 10.

Based on the evidence presented, the panel concludes that the Accused violated his duty to the public and to the legal profession when he intentionally and knowingly misrepresented to both Lawline and the Bar the fact that he had attended and successfully completed the 48 CLE courses he had purchased. Such conduct is “intentional conduct involving dishonesty, fraud, deceit, and/or misrepresentation that seriously adversely reflects on [his] ability to practice” (*Standards*, p. 20), and fails to live up to the “highest standards of honesty and integrity,” as required by both the duty to the public and the duty to the legal profession. *Standards*, p. 10.

### **Mental State**

The *Standards* set forth the following definitions regarding the mental state of an accused:

“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*, pg. 13.

In this matter, as noted above, the panel concludes that the evidence establishes that the Accused acted intentionally and knowingly in misrepresenting his attendance and successful completion of the CLE courses to both Lawline and the Bar.

### **Actual or Potential Injury**

As defined by the *Standards*, “potential injury,” is “harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.” *Standards*, p. 13. As a result, injury can be found even if there is no direct harm to a client, but rather can be found more generally if the conduct results in harm to the public or the legal profession.

As noted by the Bar, “[i]t is of primary importance to the members of the bar and to the public that attorneys continue their legal education after admission to the bar. Continuing legal education assists Oregon lawyers in maintaining and improving their competence and skills and in meeting their obligations to the profession.” OSB MCLE Rules, p. 1.

In addition, the “potential injury” arising from the Accused’s conduct can go beyond whatever skills can be obtained through CLE courses. The Accused’s pattern of dishonesty and lack of integrity can manifest in his practice. He has clearly shown, in the panel’s view, a willingness to lie and be less than candid when it appears to suit his purpose. In the panel’s view, it is not a stretch to believe the Accused would lie or act in a dishonest manner again in the future to a client or a court if circumstances presented themselves.

Lastly, the Accused’s conduct caused injury to the Bar, and impeded the disciplinary function of the Bar. This conduct undermines the public confidence in the Bar. *See In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996) (discussing former DR 1-103(c)).

### **Baseline Sanction**

Absent aggravating or mitigating circumstances, the *Standards* establish levels of sanctions that are appropriate based on the nature of the duty violated, the mental state of the accused, and the injury. As applicable to this case:

Disbarment is generally appropriate when “a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on that lawyer’s fitness to practice.” *Standards*, § 5.11(b); *Standards*, p. 20–21.

Suspension is generally appropriate “when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in *Standards*, § 5.11 and that seriously adversely reflects on the lawyer’s fitness to practice.” *Standards*, § 5.12; *Standards*, p. 21.

Reprimand is generally appropriate “when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer’s fitness to practice law.” *Standards*, § 5.13; *Standards*, p. 21.

Admonition is generally appropriate “when a lawyer engages in any other conduct that reflects adversely on the lawyer’s fitness to practice law.” *Standards*, § 5.14; *Standards*, p. 21.

In other words, absent mitigating factors, a lawyer that engages in knowing and intentional conduct involving dishonesty, fraud, deceit, and/or misrepresentation can be subject to disbarment or suspension.

### **Aggravating and Mitigating Factors**

Once misconduct has been found, the *Standards* set forth applicable aggravating and mitigating factors. *Standards*, § 9.1; *Standards*, p. 25. Aggravating factors provide a basis for increasing the degree of discipline imposed, while mitigating factors provide a basis for decreasing the degree of discipline imposed. *Standards*, §§ 9.21 and 9.31; *Standards*, pp. 25–27. There are approximately eleven aggravating factors, including prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, and the refusal to acknowledge the wrongful nature of the conduct. *Standards*, § 9.22(a)–(k); *Standards*, pp. 26–27. There are approximately thirteen mitigating factors, including the absence of prior disciplinary offenses, absence of dishonest or selfish motives, good faith efforts to rectify the consequences of misconduct, and full and free disclosure to the disciplinary board or cooperative attitude toward the proceedings. *Standards*, § 9.32(a)–(m); *Standards*, pp. 27–28. The panel finds the following aggravating or mitigating factors relevant:

- 1) presence or absence of dishonest or selfish motive, *Standards*, §§ 9.22(b) and 9.32(b);
- 2) presence or absence of a pattern of misconduct, *Standards*, § 9.22(c);
- 3) presence or absence of multiple offenses, *Standards*, §§ 9.22(d) and 9.32(a); and,
- 4) presence or absence of willingness to acknowledge the wrongful nature of the conduct and full and free disclosure to the disciplinary board, *Standards*, §§ 9.22(g) and 9.32(e).

It can certainly be said that the Accused had a selfish motive for his actions, namely, to be deemed to have complied with his mandatory CLE requirements and to keep his bar membership in good standing. Further, the panel believes that the Accused has never acknowledged the wrongful nature of his conduct, and finds that he was not candid during this proceeding, and as a result has not engaged in full and free disclosure to the disciplinary board. The panel acknowledges that this is his first disciplinary offense, and that the “matter” only involves misrepresenting that he completed his CLE obligations, and does not involve dishonesty to a client or a court. However, the Accused made his misrepresentations to both Lawline and the Bar, and did so repeatedly. Further, the facts clearly demonstrate that the Accused continued throughout to embellish the lie, and continued to “add” facts in a misguided effort to shift the blame for his misconduct to others. In short, the panel finds that there are no mitigating factors, and to the contrary, the aggravating factors provide a basis for potentially increasing the degree of discipline to be applied.

The Bar has requested that the Accused be suspended from the practice of law for a period of not less than nine (9) months. The Accused presented no evidence to warrant mitigation of any potential penalty. The Bar provided authority supporting the imposition of suspensions from 120 days (e.g., *In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (involving a case with no actual violation of a rule, but punishing a failure to cooperate with disciplinary authorities)) up to one year (e.g., *In re O'Connor*, SC S53260, 20 DB Rptr 42 (2006) (involving an attorney that tampered with and lied about a urine sample collected during her application for a position as a deputy district attorney)). Having considered the authority cited by the Bar, and because of his repeated pattern of dishonesty, raising extreme concern that the Accused would engage in similar conduct in the future, the panel believes that a suspension from the practice of law for a period of one year is warranted.

**ORDER**

For the foregoing reasons, and having found by clear and convincing evidence that the Accused violated RPC 8.4(a)(3) and RPC 8.1(a)(1), IT IS HEREBY ORDERED that the Accused, Joseph R. Sanchez, be suspended from the practice of law in the State of Oregon for a period of one year.

Dated: January 27, 2015

/s/ David A. Rabbino  
David A. Rabbino (OSB # 106348)  
Trial Panel Chairperson

/s/ Courtney Dippel  
Courtney Dippel  
Trial Panel Member

/s/ JoAnn Jackson  
JoAnn Jackson  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-04  
)  
ROSEMARY FOSTER, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: David J. Elkanich  
Disciplinary Board: None  
Disposition: Violations of RPC 5.5(b)(2), RPC 7.1(a)(1), and RPC  
8.1(a)(1). Stipulation for Discipline. 30-day suspension.  
Effective Date of Order: April 20, 2015

**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 April 1, 2015, or the date approved by the Disciplinary Board, whichever is later, for violations of RPC 5.5(b)(2), RPC 7.1(a)(1), and RPC 8.1(a)(1).

DATED this 20th day of April, 2015.

/s/ Nancy Cooper  
Nancy Cooper  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Rosemary Foster, attorney at law (“Foster”), and the Oregon State Bar (“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.

Foster was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 8, 2010, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

Foster 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 18, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Foster for alleged violations of RPC 5.5(b)(2) (falsely holding self out as admitted to practice), RPC 7.1(a)(1) (advertisement containing material misrepresentation), and RPC 8.1(a)(1) (misrepresentation in response to disciplinary inquiry) 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 July 2012, Foster was already administratively suspended when Disciplinary Counsel’s Office (“DCO”) filed a formal complaint against her for multiple violations of the Rules of Professional Conduct. In June 2013, a trial panel found Foster violated multiple Rules of Professional Conduct, including the unlawful practice of law, and suspended her for 30 days. The suspension was to have taken effect August 17, 2013.

6.

In 2013, after the trial panel decision and while still administratively suspended, Foster held herself out to the public in both a FOX television and internet advertisement as an attorney at law, and otherwise expressed or implied to the public that she was authorized to practice law in this state.

7.

When DCO asked Foster about the content of the ads and to explain whether the ads were removed, she represented to the Bar that the ads had been removed and that she had been unaware the ads described her as an attorney at law. Her representations to DCO about the status of the advertisement and whether the ad described her as an attorney were knowing, material, and inaccurate disclosures.

### Violations

8.

Foster admits that, by engaging in the practice of law in Oregon and holding herself out in advertisements as an Oregon attorney at a time when she was administratively suspended, she acted contrary to the regulation of the legal profession in violation of RPC 5.5(b)(2) and RPC 7.1(a)(1).

Foster further admits that her response to DCO regarding the removal status and content of her advertisement, specifically, whether the advertisement included a statement that she was an attorney at law, constituted a misrepresentation of material facts in connection with a disciplinary matter in violation of RPC 8.1(a)(1).

### Sanction

9.

Foster 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* (“*Standards*”). The *Standards* require that Foster’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.** Foster violated her duties to the profession to refrain from unauthorized practice and to respond appropriately in disciplinary investigations. *Standards*, § 7.0.
- b. **Mental State.** Foster acted negligently by failing to cease all advertisements and avoid holding herself out as an Oregon lawyer while she was administratively suspended from the practice of law. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 9.

Foster’s misrepresentations were knowing. She knew the content of the ads because she made the recordings. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 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 injury to the public in that Foster was practicing law without malpractice insurance. There was potential harm to the profession: to the extent that Foster continued to hold herself out as an attorney while she was suspended, the public may have viewed her conduct as defiance of the disciplinary rules. Foster's misrepresentations caused actual harm to the DCO investigation by causing delay in the Disciplinary Counsel's Office investigation of her conduct. *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Submission of false statements during the disciplinary process. *Standards*, § 9.22(f).
  2. Prior discipline for similar conduct. In 2013, Foster was suspended from the practice of law for thirty (30) days for violation of RPC 5.5(a), RPC 5.4(b), RPC 5.4(d), and ORS 9.160. *In re Foster*, 27 DB Rptr 163 (2013). *Standards*, § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Remorse. *Standards*, § 9.32(l).
  2. Absence of selfish motive. *Standards*, § 9.32(b).
  3. Timely good faith effort to rectify the consequences of her misconduct. The current offense occurred at about the same time as the conduct *In re Foster*, 27 DB Rptr 163 (2013), and is substantially related to the conduct in that proceeding. *Standards*, § 9.32(d).

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.

10.

Oregon case law also supports the imposition of a suspension. *See, e.g., In re Barker*, 24 DB Rptr 246 (2010) (stipulated 60-day suspension when attorney, practicing law in Idaho, represented a client in an Oregon court at a time when he was suspended from practice in Oregon for MCLE noncompliance. In response to a bar inquiry, attorney falsely stated that he was only tangentially involved in the Oregon case); *In re Boehmer*, 23 DB Rptr 19 (2009)

(stipulated 60-day suspension when, in response to a bar request, attorney falsely represented that she had mailed copies of her trust account client ledger cards to the bar).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Foster shall be suspended 30 days for violation of RPC 5.5(b)(2), RPC 7.1(a)(1), and RPC 8.1(a)(1), the sanction to be effective April 1, 2015, or the date approved by the Disciplinary Board, whichever is later.

12.

Foster 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, Foster represents that she has no current files that will need attention during the period of her suspension.

13.

Foster 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. Foster 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.

14.

Foster acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

15.

Foster represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Foster is admitted: Washington D.C. Bar Association and the Alaska Bar Association.

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.

Cite as *In re Foster*, 29 DB Rptr 35 (2015)

EXECUTED this 18th day of March, 2015.

/s/ Rosemary Foster

Rosemary Foster

OSB No. 103033

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. 12-129 and 12-172  
)  
ROBERT H. SHEASBY, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Paul B. Heatherman, Chairperson  
John E. Laherty  
William J. Olsen, Public Member  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.15-1(a),  
RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.1(a)(2).  
Trial Panel Opinion. 4-year suspension.  
Effective Date of Opinion: April 21, 2015

**TRIAL PANEL OPINION**

This matter came before a trial panel of the Disciplinary Board consisting of Paul B. Heatherman, Chair, John E. Laherty, Member, and William Olsen, Public Member, on February 9, 2015. The Oregon State Bar (“Bar”) is represented by Kellie F. Johnson, Assistant Disciplinary Counsel. Robert H. Sheasby (“Accused”) is not represented and did not respond to the Formal Complaint. An Order of Default was entered against the Accused on March 10, 2014. The Accused was given the opportunity to provide written evidence or arguments regarding sanction, but did not do so. Therefore, the trial panel considered the pleadings and memoranda filed by the Bar. Based on the findings and conclusions made below, we find that the Accused has violated RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.3, RPC 1.4(a), and RPC 8.1(a)(2).

**INTRODUCTION**

The Bar filed its Formal Complaint against the Accused on January 15, 2013. The Accused was served with the Formal Complaint on January 18, 2014, but failed to appear within the time provided by the Bar Rules of Procedure. The Bar filed a motion for order of

default, and an Order of Default was granted on March 10, 2014, by Carl W. Hopp, Jr., the Region 1 Disciplinary Board Chairperson. Pursuant to BR 5.8(a), the allegations of the Bar's Formal Complaint are deemed true, and the sole issue before the trial panel is the issue of sanctions for the misconduct. The Bar's Formal Complaint stated allegations against the Accused in representing a Karl Findling, but did not address these allegations in its Memorandum Re: Sanction. Therefore, we do not address it.

## **FACTS & FINDINGS**

At all relevant times, the Accused, Robert H. Sheasby, was an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar.

### **FIRST CASE**

#### **(Dickinson Matter—No. 12-129)**

On or about February 23, 2012, Robert Dickinson ("Dickinson") hired the Accused to help secure a patent. On February 27, 2012, the parties entered into a written agreement and Dickinson paid the Accused a \$2000 retainer and a \$300 consultation fee. The Accused deposited the entire \$2300 into his lawyer trust account on March 1, 2012. On March 27, 2012, the Accused paid himself \$100 from Dickinson's funds for his initial research.

After his initial meeting with Dickinson, the Accused briefly reviewed information on similar patents and sent one email to Dickinson on March 6, 2012. The Accused took no further action on Dickinson's patent. After making multiple requests for status and receiving no response, Dickinson terminated the Accused's representation and demanded a refund of his \$2300.

The Accused failed to refund Dickinson's fees or provide an accounting for five months. When he refunded the \$2300, the Accused took the entire amount from his lawyer trust account. As he had previously withdrawn \$100 for services, the lawyer trust account only contained \$2200 of Dickinson's funds. The additional \$100 refunded to Dickinson actually belonged to another client.

The Accused neglected a legal matter in violation of RPC 1.3 and failed to adequately communicate with a client in violation of RPC 1.4(a). In addition, the Accused failed to properly maintain client funds in a trust account and failed to deliver client property or provide an accounting in violation of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d).

On or about May 3, 2012, Dickinson complained to the Bar about the Accused's conduct. The Oregon State Bar Client Assistance Office ("CAO") requested a response from the Accused to Dickinson's complaint. The Accused did not respond, and failed to respond to three additional requests for responses. On June 18, 2012, the matter was referred to the Disciplinary Counsel's Office ("DCO"). When the Accused failed to respond to the DCO,

the matter was referred to the Region 1 Local Professional Responsibility Committee (“LPRC”) for further investigation. William H. Sumerfield, an LPRC member, requested a response from the Accused. The Accused failed to respond. Mr. Sumerfield subsequently contacted the Accused by telephone and requested specific documents relating to Dickinson’s complaint. The Accused promised to provide the documents, but failed to do so. On October 15, 2012, a subpoena was issued directing the Accused to appear on October 26, 2012, and to provide a sworn statement.

The Accused’s knowing failure to respond to lawful demands for information from a disciplinary authority is a violation of RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct.

## SECOND CASE

### (Leber Matter—No. 12-172)

In early 2012, Mike Custard (“Custard”) hired the Accused to secure a patent. The Accused agreed to represent Custard, but failed to take any steps to secure the patent. Custard attempted to contact the Accused multiple times over a period of several weeks, but the Accused failed to respond. Due to the lack of response from the Accused, Custard contacted attorney Celia H. Leber (“Leber”) to assist him with the patent. Leber also attempted to contact the Accused. When she did not receive a response, she reported Custard’s matter to the Bar.

The Accused neglected a legal matter in violation of RPC 1.3 and failed to adequately communicate with a client in violation of RPC 1.4(a).

## SANCTIONS

In Oregon, the ABA *Standards for Imposing Lawyer Sanctions* (“Standards”) are considered in determining the appropriate sanctions. 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 and potential injury; and (4) the existence of aggravating and mitigating circumstances.

Applying those *Standards* in this case, we find:

1. The Accused violated duties to his clients, the public, and the profession.
2. The Accused’s conduct demonstrates both intent and knowledge. He accepted payments from clients, but failed to provide any services to the clients. He refused to respond to multiple status inquiries from clients. He failed to promptly refund client funds, and failed to properly account for funds in his lawyer trust account.
3. As a result of the Accused’s actions, the Accused’s clients may have failed to meet patent deadlines. In addition, the profession was injured in that the

profession is judged by the conduct of its members. *See, e.g., In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993); *In re Holm*, 285 Or 189, 194, 590 P2d 233 (1979) (court noting lawyers' misconduct as examples of why the public holds members of the Bar in disrespect).

4. There are aggravating factors in this case. The Accused demonstrated a pattern of misconduct. *Standards*, § 9.22(c). He committed multiple offenses. *Standards*, § 9.22(d). The Accused demonstrated bad faith obstruction of the disciplinary proceeding by failing to respond to the Bar's requests. *Standards*, § 9.22(e). The Accused also has substantial experience in the practice of law, having been licensed since 1993. *Standards*, § 9.22(i). A mitigating factor is that the Accused has no prior history of disciplinary actions.

### **CONCLUSION / SANCTIONS IMPOSED**

The purpose of sanctions is "to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public and the legal system and the legal profession." *Standards*, § 1.1; *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). The trial panel, in deciding the present case, has relied on the court's decision in *In re Parker*, 330 Or 541, 9 P3d 107 (2000), which closely parallels the facts in this case. In *Parker*, the lawyer failed to respond to multiple client inquiries and take appropriate action on their behalfs. The lawyer also failed to respond to multiple inquiries from the Bar. The court suspended Mr. Parker from the practice law for a period of four years.

In the present case, the aggravating factors are serious. However, the Accused does not have a history of prior disciplinary actions. The trial panel is also unable to determine whether the incorrect refund amount paid to Dickinson from the Accused's lawyer trust account was corrected in a timely manner.

In light of the precedent set in *Parker*, together with its analogous posture, the trial panel unanimously concludes that in order to protect the public and the Oregon State Bar, the Accused should be suspended from the practice of law for a period of four (4) years.

DATED this 18th day of February, 2015.

/s/ Paul B. Heatherman

Paul B. Heatherman  
Trial Panel Chairperson

/s/ John E. Laherty

John E. Laherty  
Trial Panel Member

/s/William J. Olsen

William J. Olsen  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-19
	)	SC S063042
SAMANTHA N. DANG,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violations of RPC 8.4(a)(2), RPC 8.4(a)(3), and RPC 8.4(a)(4). Stipulation for Discipline. 3-year suspension.
Effective Date of Order:	April 23, 2015

**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 April 23, 2015.

/s/ Thomas A. Balmer  
4/23/2015                      5:41:00 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

Samantha N. Dang, attorney at law (“Dang”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Dang was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 19, 2002, and has been a member of the Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

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

4.

On April 12, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Dang. On August 29, 2014, a Formal Complaint was filed against Dang pursuant to the authorization of the State Professional Responsibility Board, alleging violation of RPC 8.4(a)(2) (committing a criminal act that reflects adversely upon honesty, trustworthiness of fitness as a lawyer: 18 USC § 152); RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and RPC 8.4(a)(4) (engaging in conduct prejudicial to the administration of justice) 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.

Under 18 USC § 152, in a bankruptcy proceeding it is unlawful for a person to knowingly and fraudulently (1) conceal from a trustee (and others) any property belonging to the estate of the debtor; (2) make a false oath or account in relation to a bankruptcy matter; or (3) make a false declaration or statement under penalty of perjury.

6.

Bankruptcy attorney Dang filed her own voluntary Chapter 7 petition, schedules, and statements under penalty of perjury on March 23, 2012.

7.

In Dang’s sworn petition and its attachments and at subsequent creditors’ meetings where she testified under oath, she knowingly made numerous false statements to the bankruptcy trustee including the following:

- a. (Property) Dang misrepresented that she owned a 2006 Mercedes subject to a December 31, 2010 lien in favor of her mother to secure a loan. However, in a May 10, 2012 amended filing, Dang reported for the first time that she had assigned the title of the Mercedes to her mother in exchange for \$18,800.

Subsequently, at May 11, 2011 creditors meeting, she represented that three months prior to her initial petition she had transferred title to the Mercedes to her mother.

- b. (Income) In her Bankruptcy Petition, Dang represented that her income in 2010 was a negative \$18,976. She omitted any mention of income in 2011, and only disclosed \$5,000 income paid from the Law Office of Samantha Dang from January 2012 through March 2012. In her Second Amended Petition she represented that her income totaled \$31,860 in 2011 and \$30,587.70 between January and March 2012. However, deposits into Dang's personal bank account totaled \$156,377 in 2010, \$163,448.42 in 2011, and \$30,587.70 from January through March 2012.
- c. (Business Ownership) In Dang's initial Petition she represented that she had no interest in any businesses in the six years prior to her bankruptcy matter. In Dang's Second Amended Petition, she disclosed that she had ownership interest in the Law Office of Samantha Dang but denied that she had ownership in any other business. When questioned in her creditors' meeting, she admitted she had an ownership interest in Superior Team Construction Company, Inc., up until about 2009 and with Luxx International, Inc. ("Luxx"). Dang claimed the company (Luxx) closed a year after it started and dissolved in 2009, but records revealed that between 2010 and 2011, she received proceeds from Luxx that totaled \$4,800. Furthermore, just four years before her bankruptcy, Dang was the incorporator and secretary of 82nd Ave. Mobile Home Park, Inc., until 2009. In 2010, she received payments from the Mobile Home Park of at least \$12,500.
- d. (Transfers of property) Dang's Bankruptcy Petition listed only one real estate transfer in the two years before her petition was filed. She stated that she owned no other real property in the four years prior to her bankruptcy. Upon further inquiry, Dang acknowledged that she had been on the title to a Mobile Home Park at 6933 SE 82nd Ave. in Portland, OR, and that in December 2011 she quitclaimed her interest in the property to her husband for no consideration. In her initial petition she failed to disclose any transfer of vehicles. In her Amended Petition she disclosed transfers of a 2009 Kawasaki motorcycle, a Ford Expedition, a 2005 Honda CRV, a 1996 Toyota, and a 2008 motorcycle, all to a third party.
- e. (Spouse's Income) In her Petition, Dang reported that her spouse's monthly income totaled \$875. In her Third Amended Petition, Dang represented that her spouse's monthly income was only \$434.31. Subsequent to filing her Petition, Dang acknowledged that her spouse received additional rental

income from a mobile home park, his billboard rental business, and his process serving business.

- f. (Personal Income) Dang failed to disclose her 2011 income and her income earned between January and March 2012.

8.

Based upon inconsistent statements in Dang's financial schedules, amended schedules, statement of financial affairs, and sworn testimony at her creditors' meetings, the US Trustee concluded that Dang had concealed property both before and after filing her petition, made false statements in her petition, and offered false testimony at the first meeting of creditors.

### Violations

9.

Dang admits that by engaging in conduct described in paragraphs 5 through 8 she violated RPC 8.4(a)(2), RPC 8.4(a)(3), and RPC 8.4 (a)(4).

### Sanction

10.

Dang 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* ("Standards"). The *Standards* require that Dang'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 providing a material misrepresentation to the Bankruptcy Trustee Dang violated her duty to refrain from committing criminal acts that reflect on her fitness as a lawyer and her duty to the public by failing to maintain her personal integrity. Dang also violated her duty to the legal system to avoid false statements, fraud, and misrepresentation, as well as abuse of the legal process. *Standards*, §§ 6.2, 7.0.
- b. **Mental State.** The *Standards*, p.7, recognize three types of mental state:

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

Dang's conduct in filing her Bankruptcy Petition with incomplete and inaccurate information arguably began as negligent but became knowing after the Bankruptcy Trustee brought concerns about the petition to her attention. Her subsequent misrepresentations and submissions of inaccurate information were knowing.

- c. **Injury.** Injury can be either actual or potential. *Standards*, p. 7. The judicial system was actually injured by Dang's submissions of inaccurate information during her bankruptcy proceeding, as was the public. At a minimum, Dang's criminal acts caused actual or potential harm to the legal profession in that her behavior undermined the public's confidence in the integrity of the law. *See, e.g., In re Davenport*, 334 Or 298, 319, 49 P3d 91 (2002). Both the legal profession and the public are actually injured where attorney conduct delays or disrupts the orderly operation of the court process. In this case, the Bankruptcy Trustee had to hold a rarely granted follow-up creditors' meeting to correct Dang's misrepresentations in her petition.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Dang, having been admitted to practice in 2002, had substantial experience in the practice of law at the time of her misconduct. *Standards*, § 9.22(i)
  2. Dang has a prior record of discipline. *Standards*, § 9.22(a). Dang was reprimanded in 2008 for a violation of DR1-102(A)(3) (conduct involving dishonesty). *In re Dang*, 22 DB Rptr 91 (2008).
  3. Illegal conduct. *Standards*, § 9.22(k).
  4. Selfish motive. *Standards*, § 9.22(b).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Remorse. *Standards*, § 9.32(m).

11.

Under the ABA *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 proceedings. *Standards*, § 6.12. 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

12.

Like the *Standards*, in Oregon lengthy suspensions have been imposed on lawyers who have engaged in conduct somewhat similar to the conduct at issue in the present proceeding. Misrepresentations to the court and others for the lawyer's benefit have yielded long-term suspensions. *See, e.g., In re Davenport* 334 Or 298, 49 P3d 91 (2002) (lawyer suspended for 2 years for knowingly giving false testimony under oath during bankruptcy examination). *See also In re Claussen*, 322 Or 466, 909 P2d 862 (1996) (lawyer, without prior disciplinary history, suspended for 1 year for making material misrepresentations to bankruptcy court, failing to disclose connection to creditor or adverse interest and settlement of claims against debtor); *In re Sundstrom*, 250 Or 404, 442 P2d 604 (1968) (lawyer suspended 5 years for willfully deceitful testimony before the trial committee, unavailable to clients and the public, misappropriation of client funds, and issuance of insufficient funds bank checks).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Dang shall be suspended for three years for violation of RPC 8.4(a)(2), RPC 8.4(a)(3), and RPC 8.4(a)(4), the sanction to be effective March 31, 2015, or upon approval by the Oregon Supreme Court, whichever is later.

14.

Dang 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 his suspension. In this regard, Dang represents that she has no clients in Oregon. She further represents that she is not in possession of any Oregon client files.

15.

Dang 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. Dang 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.

16.

Dang acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

17.

Dang represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Dang is admitted: none.

18.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 March, 2015.

/s/ Samantha N. Dang

Samantha N. Dang

OSB No. 962270

EXECUTED this 9th day of March, 2015.

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. 13-122, 13-123, 13-124,
	)	13-125, 13-126, 13-127, 13-129,
KELLY E. IRELAND,	)	and 14-45
	)	SC S063062
Accused.	)	

Counsel for the Bar: Dawn Miller Evans

Counsel for the Accused: F. Jason Seibert

Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.16(d), RPC 3.3(a)(1), RPC 8.1(a)(2), and RPC 8.4(a)(4). Stipulation for Discipline. 8-month suspension.

Effective Date of Order: June 22, 2015

**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 eight months, effective 60 days from the date of this order.

/s/ Thomas A. Balmer  
4/23/2015 6:46:07 AM  
Thomas A. Balmer  
Chief Justice Supreme Court

**STIPULATON FOR DISCIPLINE**

Kelly E. Ireland, attorney at law (“Ireland”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Ireland was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 20, 2010, and has been a member of the Bar continuously since that time. Ireland is not presently maintaining an office and place of business in Oregon. At all times material, Ireland had her office and place of business in Marion County, Oregon.

3.

Ireland 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 1, 2014, a Formal Complaint was filed against Ireland pursuant to the authorization of the State Professional Responsibility Board (“SPRB”) alleging violations of RPC 1.3 (neglecting a legal matter entrusted to the lawyer); RPC 1.4(a) (failing to keep a client reasonably informed of 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 reasonably necessary to permit the client to make informed decisions); RPC 1.16(d) (failing to properly withdraw); RPC 3.3(a)(1) (knowingly making a false statement of fact to a tribunal); RPC 8.1(a)(2) (knowingly failing to respond to lawful requests for information from a disciplinary authority); and RPC 8.4(a)(3) (dishonest 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.

**Case No. 13-122**

**(Scharer Matter)**

**Facts**

5.

Ireland was retained by Eric Scharer (“Scharer”) in January 2013 to represent him in a dissolution of marriage action that he had initiated pro se, for which she was paid \$700. After entering an appearance, Ireland failed to respond to numerous requests for information from Scharer and opposing counsel.

6.

On May 20, 2013, Ireland appeared at a status conference in which Scharer's case was set for trial. Following the status conference, Ireland did not tell Scharer about the trial setting and failed to respond to Scharer's attempts to contact her. After learning of the trial setting on his own, Scharer terminated Ireland's services and sought a return of his file and a refund of the \$700 he had paid. Ireland did not return Scharer's file or refund any portion of his fee.

7.

Ireland did not respond to letters sent by Disciplinary Counsel's Office in June and July of 2013 requesting a written response to the complaint Scharer filed regarding Ireland's conduct.

### **Violations**

8.

Ireland admits that, by failing to tell Scharer about the trial setting or respond to his numerous requests for information, she failed to adequately communicate with her client, in violation of RPC 1.4(a). Ireland acknowledges that her failure after termination to return Scharer's file or refund any portion of the fee violated RPC 1.16(d), and that her subsequent failure to respond to Disciplinary Counsel's requests for a response to Scharer's complaint violated RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charge of Ireland's alleged violation of RPC 3.3(a)(1) should be and, upon the approval of this stipulation, is dismissed.

### **Case No. 13-123**

#### **(Day Matter)**

#### **Facts**

9.

Ireland was retained by Shannon Day ("Day") in May 2012 to represent her in defending a domestic relations modification proceeding that sought to alter custody and child support. Under the original domestic relations order, Day was awarded custody of her child and child support.

10.

After notifying the court of her representation, Ireland began receiving communications generated by the court pertaining to the case and Day was reliant upon Ireland to notify her of any such communications. Ireland failed to file a response to the motion to modify custody and child support.

11.

Several months later, when contacted by opposing counsel about accepting service of a show cause order in lieu of service on Day, Ireland asserted that she had not been retained by Day. As a result of Ireland's representation, opposing counsel secured personal service on Day and, when no response was filed within the appropriate time, filed a motion for an order of default and supplemental judgment—which was subsequently granted—awarding custody to Day's ex-husband and ordering Day to pay child support.

12.

Day learned of the default order when the opposing counsel took steps to obtain physical custody of the child and to garnish Day's wages in order to collect the child support. In response, Ireland filed a motion to set aside the default and supplemental judgment, which was granted. However, Ireland thereafter took no steps to secure entry of an order setting aside the default, and Day's wages continued to be garnished. Ireland also failed to attend scheduling conferences and failed to respond to requests for information about the status of her matter from Day, leading Day to terminate her services.

13.

Upon termination, Day demanded the return of her file and an accounting of her retainer. Ireland did not return Day's file or render an accounting.

14.

Ireland did not respond to letters sent by Disciplinary Counsel's Office in July and August of 2013 requesting a written response to the complaint Day filed regarding Ireland's conduct.

### **Violations**

15.

Ireland admits that, by failing to secure entry of an order setting aside the order of default and supplemental judgment and failing to attend scheduling conferences prompted by the failure to submit the order setting aside the order of default and supplemental judgment, she engaged in a course of negligent conduct that violated RPC 1.3. Ireland also admits that her failure to respond to requests for information about the status of her matter from Day was a violation of RPC 1.4(a). Ireland acknowledges that her failure after termination to return Day's file or render an accounting violated RPC 1.16(d). Ireland also admits that her election not to respond to Disciplinary Counsel's requests for information about Day's complaint violated RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charge of Ireland's alleged violation of RPC 1.4(b) should be and, upon the approval of this stipulation, is dismissed.

**Case Nos. 13-124, 13-125, 13-126, and 13-127  
(Oregon State Bar Matters)**

**Facts**

16.

In May 2013, checks in the amounts of \$36, \$46, \$288.66, and \$25 presented for payment against Ireland's lawyer trust account were dishonored by reason of insufficient funds on deposit.

17.

Ireland did not respond to letters sent in April, May, June, and August 2013 by Disciplinary Counsel's Office requesting a written explanation of the overdrafts and documentation including relevant trust account statements.

**Violations**

18.

Ireland admits that, by failing to respond to Disciplinary Counsel's lawful demands for information about her lawyer trust account, she violated RPC 8.1(a)(2).

**Case No. 13-129  
(Pedro Matter)**

**Facts**

19.

Ireland was retained by Robert Pedro ("Pedro") in March 2012 to secure return of his file from his court-appointed attorney of record in a post-conviction relief proceeding. After obtaining the file, Ireland was retained by Pedro to represent him in the post-conviction matter, substituting in as attorney of record in May 2012.

20.

Ireland met with Pedro in September 2012 and filed an amended petition in December 2012. On numerous occasions, Ireland set up times to visit telephonically with Pedro and either cancelled or did not answer at the appointed time. Shortly before a scheduled hearing on the post-conviction relief motion, without notice to Pedro, Ireland filed a motion to withdraw which was denied.

21.

When Pedro learned on his own of Ireland's attempt to withdraw, he requested that Ireland be permitted to withdraw so that he could obtain another lawyer. In June 2013, the court permitted Robert Klahn ("Klahn") to substitute for Ireland. Following substitution,

Ireland did not respond to Klahn's request for Pedro's file or for an accounting for the funds Ireland had received from Pedro.

22.

Ireland did not respond to letters sent by Disciplinary Counsel's Office in May and June 2013, requesting a written response to the complaint Pedro filed regarding Ireland's conduct.

### **Violations**

23.

Ireland admits that, by repeatedly making herself unavailable to consult with Pedro at scheduled times, she failed to keep her client reasonably informed about the status of his matter and to promptly comply with reasonable requests for information, in violation of RPC 1.4(a). Further, Ireland admits that her failure after withdrawal to return Pedro's file or render an accounting for the funds received from Pedro violated RPC 1.16(d). Ireland also acknowledges that her failure to respond to Disciplinary Counsel's requests for a response to Pedro's complaint violated RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charge of Ireland's alleged violation of RPC 1.4(b) should be and, upon the approval of this stipulation, is dismissed.

### **Case No. 14-45**

### **(Guardado Matter)**

### **Facts**

24.

Ireland was retained by Ivonne T. Guardado ("Guardado") in October 2012 to initiate a paternity proceeding. Ireland was paid a \$300 retainer in March 2013. Thereafter, Ireland took no substantive action on Guardado's legal matter, including filing the paternity petition. She did not respond to Guardado's numerous requests for updates about the status of her legal matter.

25.

In July 2013, Guardado terminated Ireland's services, requested a return of her documents and an accounting of the monies paid, and demanded a refund of any unused fees. Ireland failed to return Guardado's documents, provide an accounting, or refund any portion of the fees.

26.

Ireland did not respond to letters sent by Disciplinary Counsel's Office in November 2013 and April 2014 requesting a written response to the complaint Guardado filed regarding Ireland's conduct.

### Violations

27.

Ireland admits that her prolonged failure to file the paternity petition was a course of negligent conduct that violated RPC 1.3. Ireland also admits that her failure to inform Guardado that she had not filed the petition and her failure to respond to Guardado's numerous requests for updates about the status of her legal matter constituted failures to adequately communicate with her client, in violation of RPC 1.4(a) and (b). Ireland acknowledges that her failure upon termination to return Guardado's documents, render an accounting of the monies paid, and refund any unearned fees violated RPC 1.16(d). Finally, Ireland admits that her failure to respond to Disciplinary Counsel's requests for a response to Guardado's complaint violated RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charge of Ireland's alleged violation of RPC 8.4(a)(3) should be and, upon the approval of this stipulation, is dismissed.

### Sanction

28.

Ireland 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* ("Standards"). The *Standards* require that Ireland's conduct be analyzed by considering the following factors: (1) the ethical duties violated; (2) the attorney's mental state; (3) the actual or potential injuries; and (4) the existence of aggravating and mitigating circumstances.

- a. **Duties Violated.** Ireland's failure to communicate with her clients Scharer, Day, Pedro, and Guardado and her neglect of the Day and Guardado matters violated her duty to diligently represent her clients. *Standards*, § 4.4. Ireland's failure to return files or render an accounting as to Scharer, Day, Pedro, and Guardado violated a duty owed as a professional to properly withdraw from representation. *Standards*, § 7.0. Ireland's failure to respond to numerous requests for information from Disciplinary Counsel pertaining to the Scharer, Day, Oregon State Bar, Pedro, and Guardado matters violated her duty as a professional to cooperate with disciplinary proceedings. *Standards*, § 7.0.
- b. **Mental State.** Setting aside the circumstances that caused Ireland's trust account checks to be dishonored, Ireland's conduct in neglecting legal matters, failing to communicate, and failing to properly withdraw was com-

mitted knowingly. Knowledge is defined 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*, p. 9.

- c. **Injury.** “Because the purpose of professional discipline is to protect the public, an injury need not be actual, but only potential, in order to support the imposition of a sanction.” *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992).

Ireland’s neglect in the Day matter resulted in actual injury by reason of the entry of a default and supplemental order granting custody to Day’s ex-husband and ordering Day to pay child support, which was not remedied when Ireland failed to secure entry of an order memorializing the court’s set aside of the default. Ireland’s neglect to file the paternity petition in the Guardado matter resulted in actual injury to Guardado caused by the failure to obtain the relief sought.

Ireland’s failures to provide client files and failures 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*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).

Ireland’s failure to cooperate with the Bar’s investigation of her conduct caused actual injury to both the legal profession and to the public. *In re Schaffner* 325 Or 421, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 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, when a lawyer persisted in his failure to respond to the Bar’s inquiries, the Bar was prejudiced 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 pattern of misconduct. *Standards*, § 9.22(c). Ireland’s conduct in neglecting client matters, failing to communicate, and failing to properly withdraw occurred as to multiple clients, establishing a pattern of misconduct. *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
  2. Multiple offenses. *Standards*, § 9.22(d). Ireland engaged in several distinct acts, each of which constituted a separate violation of the

disciplinary rules rather than one bad act charged under several rules. *In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).

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

1. Personal or emotional problems. *Standards*, § 9.22(c). Ireland was experiencing significant mental health and substance use issues during a portion of the relevant time period in these matters, in addition to significant stress associated with working as a solo practitioner with little legal experience.
2. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
3. Absence of a dishonest motive. *Standards*, § 9.32(c).
4. Remorse. *Standards*, § 9.32(1).

29.

f. **Presumptive Sanction.**

Under the ABA *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 engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. 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. 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.

When considered in conjunction with the applicable aggravating and mitigating factors, the *Standards* provide that a suspension is appropriate for Ireland's conduct in these matters.

30.

Case law suggests that a period of suspension is the appropriate resolution of this case. Generally, the court has imposed suspensions ranging from 30 days to one year when a lawyer has either neglected a client's legal matter or failed to adequately communicate with a client. A longer period of suspension has been deemed appropriate when multiple clients are involved or when the neglect is coupled with misrepresentations to the client, a failure to refund unearned fees or return client property, or a failure to respond to Bar inquiries regarding the complaint. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (2000) (four-year suspension for knowing neglect, including failing to respond to client messages, and knowing failure to respond to Bar inquiries in four matters); *In re Schaffner*, 325 Or 421, 939 P2d 39

(1997) (two-year suspension for neglect, failing to return client property, and failing to fully respond to the Bar); *In re Bourcier*, 322 Or 561, 909 P2d 1234 (1996) (three-year suspension for neglect and failing to respond to the Bar, as well as misrepresentations and dishonesty); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (two-year suspension for neglect of five client matters, three instances of failing to return client property, and substantially refusing to cooperate with Bar authorities).

In light of Ireland's mitigating factors, an eight-month term of suspension is appropriate.

31.

Consistent with the *Standards* and Oregon case law, the parties agree that Ireland shall be suspended for eight months for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(d), and RPC 8.1(a)(2), the sanction to be effective 60 days after the stipulation is approved.

32.

Ireland represents that she has no existing clients who will be affected by the term of suspension and, for that reason, has not made arrangements for an active member of the Bar to either take possession of or have ongoing access to client files and serve as the contact person for clients in need of the files during the term of her suspension.

Ireland 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. Ireland 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.

Ireland acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

33.

Ireland represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Ireland is admitted: none.

34.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

EXECUTED this 11th day of March, 2015.

/s/ Kelly E. Ireland

Kelly E. Ireland

OSB No. 106134

EXECUTED this 16th day of March, 2015.

OREGON STATE BAR

By: /s/ Dawn Miller Evans

Dawn Miller Evans

OSB No. 141821

Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 14-126  
 )  
DAVID P. MEYER, )  
 )  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: Christopher R. Hardman  
Disciplinary Board: None  
Disposition: Violations of RPC 1.5(a) and RPC 1.16(d). Stipulation  
for Discipline. Public reprimand.  
Effective Date of Order: April 24, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by David P. Meyer (“Meyer”) and the Oregon State Bar (“Bar”), and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Meyer is publicly reprimanded for violations of RPC 1.5(a) and RPC 1.16(d).

DATED this 24th day of April, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

David P. Meyer, attorney at law (“Meyer”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Meyer was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 14, 1989, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Meyer 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 22, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Meyer for alleged violations of RPC 1.5(a) (clearly excessive fee) and RPC 1.16(d) (failure to perform duties upon termination of representation) 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 2013, Mohammad Farhad (“Farhad”) was injured in a motor vehicle collision. Farhad engaged Meyer to represent him and seek damages against the at-fault driver. Farhad signed a contingency fee agreement under which Meyer would receive 40% of the gross amount of “any settlement ... or court award obtained.” Approximately one month later, Farhad fired Meyer and hired another attorney, Hala Gores (“Gores”).

6.

On July 31, 2013, Gores requested Farhad’s file from Meyer. He refused to provide the file until Farhad paid him \$900 for the three hours that he already worked on the case. The next day, Meyer increased his demand to \$1,320 for 4.4 hours he said he spent on Farhad’s case. Gores told Meyer that he would be paid when the case was resolved.

7.

On August 8, 2013, Gores again asked Meyer to forward his file. Meyer again refused, asserting a possessory lien under ORS 87.430.

8.

On September 17, 2013, Gores again requested Farhad's file. On September 20, 2013, Meyer responded to Gores and emailed her a copy of the electronic file, along with a cover letter in which he increased his demand for fees to \$8,320. In that letter, Meyer represented that on or about July 24, 2013, the at-fault driver's insurance company, American Family, had offered \$25,000 (the policy limits) to settle Farhad's claim. Meyer claimed he was therefore entitled to a contingency fee of 33 1/3% unless Farhad rejected the offer and sued the at-fault driver, in which case Meyer's fee was \$1,320.

9.

In November 2013, Gores called American Family, which denied making any offer to settle Farhad's claim, and confirmed as much in a letter to Gores on November 11, 2013.

10.

On March 10, 2014, Meyer emailed Gores, attaching a draft complaint that he proposed to file against Farhad in Multnomah County Circuit Court. The complaint alleged that Farhad had breached his contract to pay Meyer \$8,332, with interest calculated from July 31, 2013. That same day, Gores responded to Meyer's email with a copy of the November 11, 2013 American Family letter.

### **Violations**

11.

Meyer admits that by asserting that Farhad owed him fees based on a contingent fee basis, in spite of his mistaken belief that a settlement offer had been extended by American Family, he charged a clearly excessive fee in violation of RPC 1.5(a) of the Oregon Rules of Professional Conduct. Meyer further admits that by refusing to release Farhad's file to his new attorney for almost two months, he failed to take reasonable steps to protect his client's interests following termination, including surrendering papers and property to which his client was entitled, in violation of RPC 1.16(d).

### **Sanction**

12.

Meyer 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* ("Standards"). The *Standards* require that Meyer'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.** Meyer violated his duties to the profession regarding fees and proper procedures following withdrawal from representation. *Standards*, § 7.0. 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.

- b. **Mental State.** “Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards*, p. 9. Meyer negligently pursued an excessive fee and withheld Farhad’s file from Farhad’s new counsel for almost two months.
- c. **Injury and Potential Injury.** The *Standards* define “injury” as “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct.” *Standards*, p. 9. “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. *Id.*

Meyer caused actual and potential injury. The file was not provided to Gores in a timely fashion, which had the potential to injure Farhad’s underlying claim. The conduct also caused actual injury in terms of anxiety and frustration both at Meyer’s failure to act (in providing the file) and his affirmative acts (in sending a draft complaint to Gores threatening to sue Farhad for attorney fees). See *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of attorney inaction can constitute actual injury under the *Standards*.); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Substantial experience in the practice of law. *Standards*, § 9.22(i). Meyer was admitted in Oregon in 1989.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  - 2. Cooperation with disciplinary proceedings. *Standards*, § 9.32(e).

13.

Under the ABA *Standards*, reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes actual or potential injury to a client, the public, or the legal system. *Standards*, § 7.3.

14.

A reprimand is also consistent with prior case law. See e.g. *In re Cain*, 26 DB Rptr 55 (2012) (attorney reprimanded for charging an excessive fee when she filed an application for

interim compensation in a bankruptcy proceeding, claiming compensation at her hourly rate for work done by a non-lawyer in her firm); *In re Grimes*, 25 DB Rptr 242 (2011) (attorney reprimanded when, in a dissolution of marriage matter, she entered into an oral, flat fee agreement with the client, but thereafter charged and sought to collect additional fees that the client had not agreed to pay); *In re Unfred*, 22 DB Rptr 276 (2008) (attorney reprimanded after he and client signed a fee agreement under which the client was to receive a discounted hourly rate through an employee assistance contract. Thereafter, attorney billed and collected at his normal, undiscounted rate).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Meyer shall be reprimanded for violation of RPC 1.5(a) (clearly excessive fee) and RPC 1.16(d) (failure to perform duties upon termination of representation), the sanction to be effective upon approval by the Disciplinary Board.

16.

Meyer acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

17.

Meyer represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Meyer is admitted: Washington.

18.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 31st day of March, 2015.

/s/ David P. Meyer

David P. Meyer

OSB No. 890923

EXECUTED this 9th day of April, 2015.

OREGON STATE BAR

By: /s/ Angela W. Bennett

Angela W. Bennett,

OSB No. 092818

Assistant Disciplinary Counsel

**Cite full opinion as 357 Or 295 (2015)**

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of )  
 )  
JAMES C. JAGGER, )  
 )  
Accused. )

(OSB 11-103, 13-53, 13-54; SC S061978)

En Banc

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

Argued and submitted January 13, 2015.

John C. Fisher, Eugene, argued the cause and filed the briefs for the accused.

Susan Roedl Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

In this lawyer disciplinary proceeding, the Oregon State Bar (“Bar”) alleged and the trial panel found that, in the course of representing a criminal defendant (Fan matter) on charges which included several counts of contempt for violating a Family Abuse Prevention Act (“FAPA”) restraining order, the accused violated Rule of Professional Conduct (“RPC”) 1.1 (failure to provide—client with competent representation) and RPC 1.2(c) (counseling or assisting client to engage in conduct the accused knows to be illegal or fraudulent). The trial panel concluded that the appropriate sanction was a 90–day suspension from the practice of law. The accused sought review by this court under Bar Rule of Procedure (BR) 10.3.

On review, the Bar asks this court to affirm the above findings and, in addition, to find that the accused violated RPC 8.1(a)(2) (knowing failure to respond to lawful demand for information from a disciplinary authority) in the Fan matter and that the accused violated RPC 1.15–1(d) (failure to promptly return client property) in the course of his representation of another client (Cheney matter).

We review de novo. ORS 9.536(2); BR 10.6. Based on our review of the record, we conclude that the accused violated RPC 1.1 and RPC 1.2(c) in the Fan matter; we conclude that the accused did not violate RPC 8.1(a)(2) in the Fan matter and did not violate RPC 1.15–1(d) in the Cheney matter.

**Cite full opinion as 357 Or 273 (2015)**

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of )  
 )  
DAVID HERMAN, )  
 )  
Accused. )

(OSB 12-111; SC S061840)

En Banc

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

Argued and submitted September 16, 2014.

Lawrence W. Erwin, Bend, 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

In this lawyer disciplinary proceeding, the Oregon State Bar (“Bar”) charged the accused with violating Rule of Professional Conduct (RPC) 8.4(a)(3) (dishonesty and misrepresentation reflecting adversely on the accused’s fitness to practice law), arising from a failed corporate venture involving the accused and two business associates. A trial panel of the Disciplinary Board determined that the Bar proved that the accused violated that rule and that he should be disbarred. The accused now seeks review of that decision, which we review *de novo*. ORS 9.536(2); Bar Rule of Procedure (BR) 10.6. For the reasons that follow, we agree with the trial panel that the Bar proved by clear and convincing evidence that the accused violated RPC 8.4(a)(3) and that disbarment is the appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-88
	)	
JOHN C. MOORE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Angela W. Bennett
Counsel for the Accused:	Bradley F. Tellam
Disciplinary Board:	None
Disposition:	Violations of RPC 3.4(b) and RPC 8.4(a)(4). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	May 14, 2015

**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 3.4(b) and RPC 8.4(a)(4).

DATED this 14th day of May, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kelly L. Harpster  
Kelly L. Harpster, Region 7  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

John C. Moore, attorney at law (“Moore”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Moore was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 23, 1992, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Moore 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 22, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Moore for alleged violations of RPC 3.4(b) (offering witness improper inducement) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). 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.

Moore represented Kenneth Ross (“Husband”) in a divorce proceeding against his wife, Michelle (“Wife”). On June 7, 2013, the couple argued over their impending divorce. During the argument, Husband allegedly forced his way through a bedroom door and knocked Wife backward, injuring her back and finger.

6.

In mid-June 2013, Husband was indicted in Multnomah County Circuit Court for Harassment and Assault IV arising out of the June 7, 2013 incident with Wife. Moore represented Husband in both his criminal and civil matters. Although Wife was unrepresented, Moore received authorization from the court to communicate directly with her. Wife was the key witness for the prosecution.

7.

Between the June 7, 2013, incident and the scheduled trial, Moore communicated with Wife several times about the divorce settlement and the criminal charges. According to Moore, Wife represented to him on more than one occasion, including in the Stipulated General Judgment of Legal Separation that Moore drafted, that she was receiving advice

from unnamed counsel. Moore was never contacted by an attorney on Wife's behalf. In the course of his communications with Wife, Moore offered that Wife could have the marital residence in exchange for her facilitation of the dismissal of the criminal charges. Moore further asserted that the offer for Wife to keep the marital residence was contingent on Wife getting the criminal charges against Husband dropped. Following these communications, Wife communicated to the District Attorney's Office ("DA") her desire to have the assault case dismissed, and Wife began resisting the DA's efforts to have Wife testify or participate in the criminal proceeding. Wife did not appear for trial, and the case was dismissed.

### **Violations**

8.

Moore admits that, by conditioning the settlement of the civil matter on ensuring the dismissal of the criminal proceeding, he offered an improper inducement, in violation of RPC 3.4(b), and engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct.

### **Sanction**

9.

Moore 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* ("*Standards*"). The *Standards* require that Moore'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.** Moore violated his duties to the legal system by engaging in conduct prejudicial to the administration of justice and in offering an improper inducement to a witness. *Standards*, §§ 6.1, 6.3
- b. **Mental State.** The *Standards* recognize three types of mental state:

"Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 9.

Moore's conduct was negligent in determining whether his communications with Wife were improper; however, his conduct was knowing, insofar as he made statements and written communications to Wife urging her to get the criminal case dismissed.

- c. **Injury.** Both actual and potential injury are relevant to determining the sanction in a disciplinary case. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Moore’s conduct caused actual injury to the judicial system and the bar including: the DA’s time (who prepared the case, and showed up in court, ready to try the case), the two police officer witnesses (who showed up for court, pursuant to subpoena), and the court. In addition, there was potential injury insofar as the DA was compelled to dismiss a criminal case that he did not otherwise believe was appropriate for dismissal.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior disciplinary offenses. *Standards*, § 9.22(a). See *In re Moore*, 20 DB Rptr 150 (2006) (reprimand for notarizing his client’s signature on an affidavit without witnessing the signing, instead relying on a telephone confirmation of the signature by the client); *In re Moore*, 10 DB Rptr 187 (1996) (suspended for 60 days for unilaterally increasing his fee, charging an excessive fee given his inexperience, and filing an unwarranted (and subsequently dismissed) suit against the guarantors when the client and guarantors refused to pay the balance of his bill).  
  
In this case, Moore’s prior disciplinary offenses carry some, but not substantial, weight. See *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997)<sup>1</sup>. Under the *Jones* criteria, Moore’s prior offenses are sufficiently remote in time and unrelated in type that they contribute only modest weight as an aggravating factor in this case.
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). Moore was admitted in Oregon in 1992 and practiced predominantly family law for a majority of that time.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  2. Cooperation with disciplinary proceedings. *Standards*, § 9.32(e).

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<sup>1</sup> The *Jones* analysis established that “prior offenses” includes any that have been adjudicated prior to the imposition of the sanction in the case at issue and also sets forth the criteria for evaluating the weight or significance given to such prior offenses. The *Jones* court stated that considerations include: “(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.”

3. Remorse. *Standards*, § 9.32(l).
4. Remoteness of prior offenses. *Standards*, § 9.32(m).

10.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.33. Suspension is generally appropriate when a lawyer offers an improper inducement to a witness and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.32. While the *Standards* suggest that a suspension may be warranted, in light of the applicable aggravating and mitigating circumstances, and their comparative number and weight, a reprimand is the correct sanction in this instance.

11.

A reprimand is also consistent with prior case law. *See In re Lafky*, 11 DB Rptr 9 (1997) (trial panel reprimanded a lawyer for offering to pay witnesses contingent upon their testifying in favor of a reduction in his client's sentence and to pay additional money if the client's sentence was reduced); *In re Wolf*, 27 DB Rptr 208 (2013) (attorney reprimanded for misconduct involving the attorney's agreement to settle a claim brought by his former client that conditioned the payment of money to the client on her signing an affidavit, drafted by the attorney, that negated an allegation of her complaint. The attorney then used the affidavit in a different but related lawsuit). *See also, In re Hartfield*, 349 Or 108, 239 P3d 992 (2010); *In re Taylor*, 23 DB Rptr 151 (2009); *In re Gordon*, 23 DB Rptr 51 (2009); *In re Fitch*, 21 DB Rptr 311 (2007); *In re Bean*, 20 DB Rptr 157 (2006); *In re Foley*, 19 DB Rptr 205 (2005) (all of whom were reprimanded for violations including conduct prejudicial to the administration of justice).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Moore shall be reprimanded for violations of RPC 3.4(b) and RPC 8.4(a)(4), effective upon approval by the Disciplinary Board.

13.

Moore acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

14.

Moore represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Moore is admitted: Washington.

15.

This Stipulation for Discipline has been approved in substance by the SPRB and is subject to review by Disciplinary Counsel of the Bar. 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 April, 2015.

/s/ John C. Moore  
John C. Moore  
OSB No. 920998

EXECUTED this 4th day of May, 2015.

OREGON STATE BAR  
By: /s/ Angela W. Bennett  
Angela W. Bennett  
OSB No. 092818  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-17
	)	
MARK O. COTTLE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	David J. Elkanich
Disposition:	Violations of RPC 1.15-1(b), RPC 1.15-1(c), and RPC 5.3(a). Stipulation for Discipline. 60-day suspension, all stayed, 2-year probation.
Effective Date of Order:	June 1, 2015

**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, all stayed pending successful completion of a 2-year period of probation, effective the first day of the month following entry of this order for violation of RPC 1.15-1(b), RPC 1.15-1(c), and RPC 5.3(a).

DATED this 28th day of May, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Mark O. Cottle, attorney at law (“Cottle”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Cottle 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 Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Cottle 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 April 2, 2015, a Formal Complaint was filed against Cottle pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.15-1(b) (duty to refrain from the deposit of personal funds into a lawyer trust account for a purpose other than paying bank service charges or meeting minimum balance requirements), RPC 1.15-1(c) (duty to deposit and maintain client funds in trust), and RPC 5.3(a) (duty to supervise non-lawyer employees) of the 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.

At all relevant times herein, Cottle was the managing shareholder of Mark O. Cottle PC (“law firm” or “firm”) and had control and custody over the firm’s lawyer trust account maintained at J.P. Morgan Chase & Co. (“Chase Bank”). As managing shareholder, Cottle oversaw law firm operations, was responsible for the manner in which the law firm handled firm and client money, and had direct supervisory authority over the non-lawyer staff employed by the firm.

6.

At some time prior to October 17, 2014, Cottle undertook to represent a client in matters that included the sale of a home and received a settlement check from the title

company for \$36,931.16. On or about October 17, 2014, Cottle directed law firm staff to deposit the client's check, along with checks from two other clients, into his lawyer trust account at Chase Bank ("intended deposit"). The total to be deposited was \$40,831.16. Law firm staff did not complete the deposit. Between October 17, and November 3, 2014, Cottle did not verify that the deposit had been completed.

7.

On October 30, 2014, Cottle wrote a check from the firm's lawyer trust account at Chase Bank to his firm business account for \$15,497.48, representing attorney fees for legal work on behalf of the client whose funds were included in the intended deposit. On October 30, 2014, there were not sufficient funds in the firm's lawyer trust account to cover the \$15,497.48 check. Chase Bank returned the check for insufficient funds on November 3, 2014.

8.

On November 4, 2014, Cottle transferred approximately \$41,000 of his own funds into the firm's lawyer trust account to correct the depositing error.

### **Violations**

9.

Cottle admits that his failure to properly deposit client funds into trust violated RPC 1.15-1(c). In addition, Cottle acknowledges that, by failing to ensure that the deposit was properly deposited in accordance with his instructions before attempting to access the subject funds, he failed to adequately supervise a non-lawyer employee, in violation of RPC 5.3(a).

Cottle further admits that the deposit of his own funds into trust, notwithstanding his well-meaning attempt to mitigate and rectify the depositing error, violated RPC 1.15-1(b).

### **Sanction**

10.

Cottle 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* ("*Standards*"). The *Standards* require that Cottle'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.** Cottle violated his duty to preserve client property by protecting client funds. *Standards*, § 4.1. The *Standards* provide that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, p. 5. Cottle also violated his duty as a professional to properly supervise his non-lawyer staff. *Standards*, § 7.0.

- b. **Mental State.** Cottle's actions were negligent, in that despite his knowledge of the correct procedures and precautions for handling client funds, he failed to heed a substantial risk that circumstances exist 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*, p. 9.
- c. **Injury.** Injury can be potential or actual. *Standards*, § 3.0. Although there was no actual injury, there was significant potential injury to the funds of other clients. However, that potential injury was short-lived, primarily because Cottle immediately deposited his own funds into the lawyer trust account to cover the overdraft.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior discipline. *Standards*, § 9.22(a). Cottle accepted a 30-day suspension in 2013 for violations of RPC 1.3 (neglect); RPC 1.4(a) (failure to adequately communicate with a client); RPC 1.5(a) (charging a clearly excessive fee); RPC 1.15-1(a) (failure to deposit and safeguard client funds); RPC 1.15-1(c) (failure to deposit and maintain client funds in trust); RPC 1.15-1(d) (failure to promptly return client property); and RPC 8.1(a)(2) (failure to respond to lawful demands for information from a disciplinary authority), in connection with two client matters. *In re Cottle*, 27 DB Rptr 22 (2013).
  2. A pattern of misconduct. In connection with his prior discipline, Cottle's actions in this matter establish a pattern of careless trust account practices and management.
  3. Multiple offenses. *Standards*, § 9.22(d).
  4. Substantial experience in the practice of law. *Standards*, § 9.22(i). Cottle has been a lawyer in Oregon since 1989.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a dishonest motive. *Standards*, § 9.32(b).
  2. Timely good faith effort to rectify the consequences of his misconduct. *Standards*, § 9.32(d). As mentioned previously, Cottle immediately deposited funds into trust to mitigate any damage caused by the overdraft.
  3. Cooperation in these proceedings. *Standards*, § 9.32(e). Cottle promptly complied with the investigation by and requests of Disciplinary Counsel's Office.

4. Remorse. *Standards*, § 9.32(1). Mr. Cottle expressed regret over the lapse and acted promptly to correct it.

11.

Under the ABA *Standards*, absent consideration of aggravating and mitigating factors, suspension is generally appropriate when a lawyer should know that he is dealing improperly with client property and causes injury or potential injury to a client. *Standards*, § 4.12. 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, 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. The application of applicable aggravating and mitigating factors, particularly Cottle’s prior similar discipline, provide that some period of suspension is warranted. *Standards*, § 8.2.

12.

Oregon case law reaches the same conclusion for experienced lawyers who mishandle client funds. *See, e.g., In re Peterson*, 348 Or 325, 232 P3d 940 (2010); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (court imposed 60-day suspensions on experienced lawyers for conduct including mistaken removal of funds from trust or poor record-keeping, where mitigating factors did not outweigh aggravating factors).

13.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed in whole or part pending the successful completion of a probation. *See also, Standards*, § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). A period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system in this instance.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Cottle shall be suspended for 60 days for his violations of RPC 1.15-1(b), RPC 1.15-1(c), and RPC 5.3(a), effective on the first day of the month following approval by the Disciplinary Board (“effective date”). However, all of the suspension period shall be stayed pending Cottle’s successful completion of a 2-year period of probation commencing on the effective date and ending on the day prior to the two-year anniversary date of the effective date (“period of probation”), during which, Cottle shall abide by the following terms and conditions:

- (a) Within 7 days of the effective date, Cottle shall contact the Professional Liability Fund (“PLF”) and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain

practice management advice. Cottle shall schedule the first available appointment with the PLF and notify Disciplinary Counsel's Office ("DCO") of the time and date of the appointment.

- (b) Cottle shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for properly handling client funds. No later than 30 days after recommendations are made by the PLF, Cottle shall adopt and implement those recommendations.
- (c) No later than 60 days after recommendations are made by the PLF, Cottle shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (d) Launa Helton shall serve as Cottle's probation supervisor ("Supervisor"). Cottle shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Cottle's clients, the profession, the legal system, and the public.
- (e) Beginning with the first month of the period of probation, Cottle shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Cottle's handling of client funds. Each month during the period of probation, Supervisor shall review Cottle's trust records and conduct a random audit of approximately 10% of trust transactions to determine whether Cottle is properly handling client funds.
- (f) During the period of probation, Cottle shall attend not less than four (4) MCLE accredited programs, for a total of twelve (12) hours, which shall emphasize law practice management and trust account practices. These credit hours shall be in addition to those MCLE credit hours required of Cottle for his normal MCLE reporting period.
- (g) Each month during the period of probation, Cottle shall review and reconcile all bank statements related to his law practice, and verify them against client ledgers to ensure that he is properly handling client funds.
- (h) On a quarterly basis, on dates to be established by DCO beginning no later than 90 days after the effective date, Cottle shall submit to DCO a written "Compliance Report," approved as to substance by Supervisor, advising whether Cottle is in compliance with the terms of this agreement. In the event

that Cottle has not complied with any term of the agreement, the Compliance Report shall describe any noncompliance and the reason for it.

- (i) Cottle authorizes Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Cottle's compliance.
- (j) Cottle is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (k) Cottle's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (l) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (m) A decision by the SPRB to bring a formal complaint against Cottle for unethical conduct that occurs or continues during the period of probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

15.

Cottle acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

16.

Cottle represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Cottle is admitted: none.

17.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

Cite as *In re Cottle*, 29 DB Rptr 79 (2015)

EXECUTED this 4th day of May, 2015.

/s/ Mark O. Cottle

Mark O. Cottle

OSB No. 892201

EXECUTED this 18th day of May, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-33  
)  
DREW A. HUMPHREY, )  
)  
Accused. )

Counsel for the Bar: Susan Roedl Cournoyer  
Counsel for the Accused: Andrew C. Brandsness  
Disciplinary Board: None  
Disposition: Violation of RPC 4.2. Stipulation for Discipline. Public reprimand.  
Effective Date of Order: June 12, 2015

**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 4.2.

DATED this 12th day of June, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ John E. "Jack" Davis  
John E. "Jack" Davis, Region 3  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Drew A. Humphrey, attorney at law ("Humphrey"), and the Oregon State Bar ("Bar") hereby stipulate to the following matters pursuant to 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.

Humphrey was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 28, 2007, and has been a member of the Bar continuously since that time, having his office and place of business in Klamath County, Oregon.

3.

Humphrey 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 April 18, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Humphrey for an alleged violation of RPC 4.2 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.

Humphrey was the petitioner in his marital dissolution proceeding and was represented by attorney Valerie B. Hedrick. Humphrey’s wife (“Wife”) was represented in the proceeding by attorney Rebecca Whitney-Smith. As of March 2014, with the consent of their respective attorneys, Humphrey and Wife engaged in direct communication through mediation relating to custody and parenting time issues. Humphrey and Wife had not entered mediation to resolve financial issues such as child support, spousal support, property division (including real property and retirement benefits), responsibility for debts and attorney fees (collectively, “financial issues”). Although Wife told Humphrey that her attorney had encouraged her to discuss financial issues with Humphrey, Humphrey failed to take steps to determine whether Wife’s statement on this point was accurate or to obtain her attorney’s consent. In fact, Wife’s attorney did not agree to Humphrey’s direct communication with Wife on financial issues.

6.

In March and April 2014, Humphrey met alone with Wife three times to discuss financial issues. Humphrey and Wife negotiated a resolution on all financial issues and Humphrey prepared a Marital Settlement Agreement (“MSA”), which Wife signed at his law

office in April 2014. Humphrey prepared a general judgment on paper he had created to look like his attorney Hedrick's pleading paper and delivered the judgment and signed MSA to Hedrick's office. Humphrey believed that Hedrick would review the documents before they were filed, but, due to a misunderstanding, Hedrick's assistant filed the judgment and MSA with the court without Hedrick's knowledge or notice to Wife's attorney. The judgment was signed and entered thereafter, without notice to Wife's attorney.

7.

Wife's attorney discovered the entered judgment and MSA several weeks later and, on Wife's behalf, moved to set aside the judgment. Humphrey did not object. Eventually, the parties negotiated a resolution of financial issues and an amended judgment was entered.

8.

In relevant part, RPC 4.2 provides that, in representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless the lawyer has the prior consent of a lawyer representing such other person.

### **Violations**

9.

Humphrey admits that, by negotiating a resolution of financial issues with Wife, a person he knew to be represented by counsel on that subject, without the prior consent of Wife's counsel to his direct communication with Wife on financial issues, he violated RPC 4.2.

### **Sanction**

10.

Humphrey 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* (2005) ("*Standards*"). The *Standards* require that Humphrey'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.** Humphrey violated his duty to the profession to avoid improper communications with individuals in the legal system. *Standards*, § 6.3.
- b. **Mental State.** Humphrey acted negligently in that he failed to understand that he was acting as an attorney representing his own interests in negotiating the financial issues (and thereby subject to the communication limitations under the Rules of Professional Conduct) but instead considered himself to be

represented party who was not subject to such restrictions in the context of his own marital dissolution. Thus, Humphrey failed to heed a substantial risk that circumstances existed, which failure deviated from the standard of care he should have exercised. *Standards*, p. 9 (defining “negligence”).

- c. **Injury.** Wife experienced actual injury in that the MSA was filed and a general judgment was entered in the marital dissolution without the knowledge or advice of her counsel.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Selfish motive. *Standards*, § 9.22(b);
  - 2. Pattern of misconduct (Humphrey met with Wife multiple times without her counsel’s consent to negotiate and sign the MSA). *Standards*, § 9.22(c); and
  - 3. Vulnerability of Wife. *Standards*, § 9.22(h).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of prior discipline. *Standards*, § 9.32(a);
  - 2. Full and free disclosure and cooperate attitude in disciplinary proceedings. *Standards*, § 9.32(e).

11.

Under the *Standards*, a public reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to communicate with an individual and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.33. Oregon case law is in accord. *In re Newell*, 348 Or 396, 234 P3d 967 (2010) (public reprimand when attorney noticed represented person to a deposition and examined him on the record on issues related to the representation without the person’s attorney’s consent); *In re Schenck*, 320 Or 94, 879 P2d 863 (1994) (public reprimand when attorney mailed notice to produce directly to adverse party when he knew the party was represented). *See also, In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984) (although court suspended attorney for multiple rule violations arising from his contact with a represented party, a public reprimand would have sufficed if the matter involved only an improper communication with represented party).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Humphrey shall be publicly reprimanded for violation of RPC 4.2.

13.

Humphrey acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

14.

Humphrey represents that he is not admitted to practice law in any other state jurisdiction.

15.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 29th day of May, 2015.

/s/ Drew A. Humphrey  
Drew A. Humphrey  
OSB No. 074073

EXECUTED this 4th day of June, 2015.

OREGON STATE BAR  
By: /s/ Susan Roedl Cournoyer  
Susan Roedl Cournoyer  
OSB No. 863381  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-117  
)  
TAMI S. P. BEACH, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Calon Nye Russell  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and  
RPC 8.4(a)(3). Stipulation for Discipline. 6-month  
suspension.  
Effective Date of Order: July 15, 2015

**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 thirty days following the date of this order, or as otherwise directed by Disciplinary Board for violation of RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.4(a)(3).

DATED this 15th day of June, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Tami S. P. Beach, attorney at law (“Beach”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Beach was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1996, and has been a member of the Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

Beach 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 17, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Beach for alleged violations of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (failing to respond to client’s reasonable request for information); RPC 1.15-1(d) (failing to deliver client property upon request); and RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) 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 April 2013, Kathleen Wilson (“Wilson”) hired Beach to prepare a special needs trust (“SNT”). Wilson paid Beach a total of \$1,569 in October 2013. Wilson has multiple sclerosis and she sought to establish an SNT to protect her resources that were being depleted by the cost of in-home care.

6.

In preparation for the establishment of the SNT, Wilson and her accountant provided Beach with copies of Wilson’s financial documents. Between May 2013, and August 2013, Wilson made repeated phone calls and emails to Beach inquiring about the status of the SNT. Beach did not respond.

7.

On September 12, September 22, and September 23, 2013, Wilson wrote to Beach and told her that she was depleting her financial resources and unable to make important decisions regarding her health care and asked that Beach respond to her inquiries as to the status of the SNT.

8.

On September 24, 2013, Beach assured Wilson that the SNT would be completed on September 30, 2013. On September 30, 2013, however, Beach wrote Wilson and told her she would need more time. On October 19, and October 23, 2013, Wilson wrote to Beach again, describing her mounting financial concerns and asking when Beach would complete the SNT. Beach did not respond.

9.

On October 11, 2013, Beach met with Wilson and Wilson's mother to execute a last will and testament ("will"), a living trust agreement, an SNT, and an advance directive for health care ("directive"). There were no other persons present at the meeting.

10.

To be valid, Wilson's directive required declarations by two witnesses that they had personally witnessed Wilson sign the directive (or that Wilson had acknowledged her signature in their presence) and that Wilson appeared to be of sound mind and not under duress. When Wilson signed the directive, Beach was the only qualified person present to witness Wilson's signature. After the meeting, Beach directed her legal assistant, Katie Keene, who had not been present at the meeting, to sign the declaration and falsely state that Keene had personally witnessed Wilson sign the directive.

11.

To be valid, Wilson's will required signatures and attestations by two witnesses that they had personally and together witnessed Wilson acknowledge and sign the will ("affidavit of subscribing witness"). Wilson's mother signed the affidavit of subscribing witness. After the meeting, Beach directed Keene to sign the affidavit of subscribing witness and falsely state that she (Keene) had personally witnessed Wilson sign the will.

12.

Beach notarized Claire Wilson's and Keene's signatures on the affidavit of subscribing witness, the notarial jurat providing that the document had been subscribed, sworn to, and acknowledged before her by both witnesses. Wilson believed that her will and directive were fully and properly executed. The full and proper execution of both documents was a material but incorrect fact. Beach knowingly failed to disclose to Wilson that both

documents were not fully and properly executed. Beach knew that Keene's declaration on the directive and attestation on the will were material and false.

13.

On or between November 1, through November 7, 2013, Wilson's new counsel, Maret Thatcher Smith ("Smith"), wrote to Beach and requested Wilson's file and a full refund. Beach did not promptly provide the documents Wilson requested. Beach failed to provide Wilson with any documents, including the estate planning documents that Wilson had signed on October 11, 2013.

### **Violations**

14.

Beach admits that, by engaging in the above-described conduct, she violated RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.4(a)(3).

### **Sanction**

15.

Beach 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* ("*Standards*"). The *Standards* require that Beach'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.** Beach violated multiple duties to her client: to return client property, to act with diligence, to respond to her client's requests for information, and to act with candor. *Standards*, §§ 4.1, 4.4, 4.6. She also violated her duty to the public to maintain her personal integrity. *Standards*, § 5.1.
- b. **Mental State.** The evidence provided suggests that Beach acted knowingly, or with "conscious awareness of the nature or the attendant circumstances of her conduct but without the conscious objective or purpose to accomplish to a particular result." *Standards*, p. 7.
- c. **Injury.** Beach's actions caused actual injury to Wilson, who suffered anxiety, did not receive a fully and properly executed will and advance directive, and spent down her personal assets while waiting six months for the SNT to be completed.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. Beach was previously suspended for 120 days for failing to file or pay her withholding taxes. *Standards*, § 9.22(a)

2. Multiple offenses. *Standards*, § 9.22(d),
  3. Vulnerability of the victim. *Standards*, § 9.22(h); and
  4. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Personal or emotional problems. *Standards*, § 9.32(c),
  2. Remorse. *Standards*, § 9.32(l); and
  3. Good reputation and good character. *Standards*, § 9.32(g).

16.

The ABA *Standards* suggest that suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property and causes injury or potential injury to a client. Suspension is also appropriate when an attorney knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. Finally, suspension is generally appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to a client. *Standards*, §§ 4.12, 4.42(a), 4.62.

17.

Oregon case law suggests a minimum six-month suspension. *In re Benson*, 317 Or 164, 854 P2d 466 (1993) (six-month suspension for assisting a client in preparing and recording a fraudulent trust deed); *In re Brown*, 298 Or 285, 692 P2d 107 (1984) (two-year suspension for preparing a false affidavit).

Attorneys have been suspended solely for failing to communicate with a client over a period of time. *See, e.g., In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (30-day suspension for an attorney without prior discipline who failed to communicate with a client or return a client file upon request over a period of several months).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Beach shall be suspended for six months for violation of RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.4(a)(3), the sanction to be effective thirty days following the date of approval by the Disciplinary Board, or as otherwise directed by Disciplinary Board.

19.

Beach 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, Beach has arranged for Alan Thayer, Innovative Law Group, 1209 Pearl St., Eugene, Oregon 97401

(alan@thinkilg.com), an active member of the Bar, to either take possession of or have ongoing access to Beach's client files and serve as the contact person for clients in need of the files during the term of her suspension. Beach represents that Alan Thayer has agreed to accept this responsibility.

20.

Beach acknowledges that reinstatement is not automatic on expiration of the period of suspension. The parties stipulate that Beach is required to apply for reinstatement pursuant to Bar Rule of Procedure 8.1 ("Formal Application Required"). Beach also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until the Supreme Court has ordered her reinstated as an active member of the Bar.

21.

Beach acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

22.

Beach represents that, in addition to Oregon, she is not admitted to practice law in any other state jurisdiction.

23.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 June, 2015.

/s/ Tami S.P. Beach

Tami S. P. Beach

OSB No. 964738

EXECUTED this 5th day of June, 2015.

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. 15-36  
)  
DAVID R. AMBROSE, )  
)  
Accused. )

Counsel for the Bar: Dawn Miller Evans  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.7(a)(1). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: June 19, 2015

**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 1.7(a)(1).

DATED this 19th day of June, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

David R. Ambrose, attorney at law (“Ambrose”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Ambrose was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Ambrose enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek the advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On April 18, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Ambrose for alleged violation of RPC 1.7(a)(1) (current conflict of interest) 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.

Ambrose both managed and represented Cornerstone Park Funding Group, LLC (“CPFG 1”), an investment group of seven members that had loaned funds to construct a property known as Cornerstone Park (“Cornerstone”). One of the sources of collateral for CPFG 1’s loan to construct Cornerstone was a second lien trust deed on a property known as Huffman Street (“Huffman”). The first lien position on Huffman was held by Sonas Capital Group (“Sonas”).

6.

Sonas took steps to schedule a non-judicial foreclosure of Huffman. Cornerstone Park Funding Group 2, LLC (“CPFG 2”) was formed by four investor members who were also investors in CPFG 1 and a fifth investor, with the intent of acquiring the Sonas loan and protecting CPFG 1’s collateral in Huffman. Ambrose performed the legal work necessary to create CPFG 2, functioned as its non-member manager, and represented it on an ongoing basis.

7.

CPFG 2 purchased the Sonas loan, thereby stepping into the first lienholder position. After CPFG 2 purchased the Sonas loan, the debtors failed to meet the payment deadline and the late penalty became due as well. On behalf of CPFG 2, Ambrose maintained and continued to forbear the non-judicial foreclosure commenced by Sonas.

8.

After several months passed, Ambrose concluded that the debtors would likely file bankruptcy, endangering the interests of both CPFG 1 and CPFG 2. Ambrose represented CPFG 2 in completing the non-judicial foreclosure of Huffman. As a result, CPFG 2 obtained Huffman by bidding the amount of the first lien debt, thereby extinguishing CPFG 1's second lienholder position. Ambrose nonetheless continued to promote CPFG 1's interests by using Huffman as collateral through CPFG 2's ownership of it. To the extent that simultaneous representation of CPFG 1 and CPFG 2 could have been permitted through informed consent of each client, Ambrose did not obtain such consents.

### **Violations**

9.

Ambrose acknowledges that in foreclosing CPFG 2's interest in Huffman he was taking action directly adverse to CPFG 1's interests. By simultaneously representing CPFG 1 and CPFG 2 at a time when their interests were directly adverse, he engaged in a current-client conflict of interest, in violation of RPC 1.7(a)(1).

### **Sanction**

10.

Ambrose 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* ("*Standards*"). The *Standards* require that Ambrose'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.** Ambrose violated his duty to avoid conflicts of interest. *Standards*, § 4.3.
- b. **Mental State.** Ambrose acted negligently. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which result is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 12. In seeking to protect the interests of both companies in avoiding the consequences of the debtors' filing of bankruptcy, Ambrose relied upon CPFG 2's commitment to protect

the collateral of CPGF 1 and disregarded the conflict of interest between their positions as owner of Huffman and debtor.

- c. **Injury.** Ambrose’s negligence in not identifying and appropriately addressing the conflict of interest caused actual and potential injury to CPGF 1 and CPGF 2 by depriving each of legal advice that was exclusively allegiant to their respective interests.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. *Standards*, § 9.22(a). In 2012, Ambrose received a public reprimand for a conflict of interest between a current client and his personal interest, and for entering into an improper business transaction with a client, in violation of RPC 1.7(a)(2) and RPC 1.8(a). *In re Ambrose*, 26 DB Rptr 16 (2012) (“*Ambrose I*”). However, because the conduct at issue in this matter predated the disposition of *Ambrose I*, it is not afforded significant weight as an aggravating factor.<sup>1</sup>
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). Ambrose has been a lawyer in Oregon since 1979.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  2. Cooperative attitude toward the proceedings. *Standards*, § 9.32(e).

11.

Under the ABA *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.

12.

Reprimand is consistent with prior Oregon law pertaining to these types of conflicts of interests. *See, e.g., In re Moule*, 26 DB Rptr 271 (2012) (reprimand when attorney facilitated a loan from one client to another, represented both clients in the transaction

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<sup>1</sup> In determining the weight of prior disciplinary offenses, 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[s]; and (5) the timing of the current offense in relation to the prior offense and resulting sanction . . . [and] whether the lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar.” *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

despite the conflict, and later defended borrowing client charged with a crime that placed the lending client's security interest in jeopardy); *In re Leo*, 22 DB Rptr 261 (2008) (reprimand when attorney simultaneously represented two business clients that had a creditor-debtor relationship, assisted the debtor client in restructuring its business in a way that was potentially adverse to the creditor client, and later defended the debtor client against the creditor client's suit); *In re Dickerson*, 19 DB Rptr 363 (2005) (reprimand when, without proper disclosure and consent, attorney represented business entities in which he was part owner in negotiating the purchase of a restaurant and the lease of the business premises, while also representing the restaurant seller in attempts to evict a subtenant of the restaurant space); *In re Kahn*, 19 DB Rptr 351 (2005) (reprimand when attorney represented both lender and borrower in a loan transaction and, in another matter, represented one business entity as lender in a transaction while an associate in attorney's firm simultaneously represented the borrower on an unrelated matter).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Ambrose shall be reprimanded for his violation of RPC 1.7(a)(1), the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

14.

Ambrose acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

15.

Ambrose represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Ambrose is admitted: none.

16.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 1st day of June, 2015.

/s/ David R. Ambrose

David R. Ambrose

OSB No. 791440

EXECUTED this 3rd day of June, 2015.

OREGON STATE BAR

By: /s/ David Miller Evans

Dawn Miller Evans

OSB No. 141821

Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 14-56, 14-57, 14-58,  
) and 14-84  
JUSTIN E. THRONE, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott

Counsel for the Accused: None

Disciplinary Board: Penny Lee Austin, Chairperson  
William Francis  
Thomas W. Pyle, Public Member

Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC  
1.15-1(d), RPC 1.16(a)(1), RPC 1.16(d), RPC 4.3, RPC  
8.1(a)(2), and RCP 8.4(a)(4). Trial Panel Opinion.  
2-year suspension.

Effective Date of Opinion: June 19, 2015

**TRIAL PANEL OPINION**

This matter came before a Trial Panel of the Disciplinary Board upon an Order of Default entered against Justin E. Throne (“Accused”), on December 21, 2014. The Trial Panel consisted of Penny Lee Austin, Trial Chair, Thomas W. Pyle, Public Member, and William Francis, Attorney Member. The Bar was represented by Amber Bevacqua-Lynott, who filed the OSB’s Memorandum re Sanction on February 27, 2015. This disciplinary proceeding concerns eight causes of action arising from four different matters and alleges several violations of the Oregon Rules of Professional Conduct (“RPC”).

**Findings of Fact and Conclusions of Law**

The Accused was admitted to the Oregon State Bar (“Bar”) on January 4, 2002. The Bar filed its First Amended Formal Complaint against the accused on October 21, 2014, and he was personally served on November 6, 2014. The Accused failed to file an answer or otherwise appear. On December 21, 2014, an Order of Default was entered as to the First Amended Formal Complaint against the Accused after he failed to respond to a ten-day notice of intent to seek default. The entry of the Order of Default orders that the factual

allegations in the Bar's Complaint be deemed true. The Trial Panel is to determine whether those facts constitute violations of the disciplinary rules alleged by the Bar. Furthermore, the Trial Panel must determine if there are violations of the RPC, then what sanction or sanctions are appropriate.

### **Summary of Facts**

The matter in front of the Trial Panel addresses the Accused's conduct in four cases: 1) the DiIaconi matter (Case No. 14-56); 2) the Ganong matter (Case No. 14-57); 3) the Rudd and Fairclo matter (Case No. 14-58); and 4) the Fairclo matter (Case No. 14-84).

#### **DiIaconi Matter (Case No. 14-56)**

The Accused was part of a three-member arbitration panel that heard a dispute in a Buy/Sell matter involving Barbara DiIaconi's ("DiIaconi") client. A hearing was held in the matter in December, 2013 and the arbitration panel subsequently reached a quick resolution which was reduced to writing. Two of the arbitration panel members executed the written agreement. The decision was sent to the Accused for his signature. He failed to sign the same or respond to calls or letters from fellow arbitration panel members or from DiIaconi. In late February 2014, after numerous attempts to reach the Accused, it was agreed that the two arbitrators would release the decision without the Accused signing off.

#### **Ganong Matter (Case No. 14-57) and Fairclo Matter (Case No. 14-84)**

In early 2013, a Joint Prosecution Agreement was entered between the Klamath Irrigation District and a number of other water districts in southern Oregon. The purpose of this Agreement was to prosecute and defend water rights claims in the Klamath River Adjudication. The Accused represented six of the smaller districts in the Joint Prosecution Agreement and in the Klamath River Adjudication. Four other attorneys represented the remaining districts, including William Ganong who represented the Klamath Irrigation District. Between November 2013, and April 2014, the Accused took no substantive action on behalf of his water district clients with respect to their legal matters. He failed to complete and obtain his clients' signatures on an Amendment to the Joint Prosecution Agreement pertaining to certain claims and payment of costs for the litigation. Other attorneys involved in the Joint Prosecution Agreement made numerous email attempts requesting the Accused forward the Amendment to Agreement since some of the smaller water districts had already signed the same. The Accused did not respond and did not provide the Amendment to the Joint Prosecution Agreement to the other parties involved.

The Accused further failed to draft and file exceptions to the Klamath River Litigation, which were required to be filed by May 30, 2014. The exceptions needed be filed timely or they would be waived. The Accused had most of the information his water district clients needed to prepare the exceptions. Despite requests, he failed to provide the information to his clients.

The Trial Panel understands that the Accused was administratively suspended on January 16, 2014, for failure to pay his Professional Liability Fund (“PLF”) assessment. After that time, the Accused was not authorized to practice law. The Accused failed to notify his clients of his suspension and did not withdraw from representation.

Poe Valley Improvement District was one of the water districts that the Accused was initially retained to represent in the Joint Prosecution Agreement and the underlying Klamath River Adjudication. Between November 2013, and April 2014, the Accused took no substantive action on behalf of Poe Valley Improvement District with respect to these legal matters. In mid-April 2014, the Board of Directors for Poe Valley Improvement District terminated the Accused’s services and demanded return of their files to the District’s office. The Accused did not respond or comply. In mid-May 2014, Poe Valley Improvement District’s new attorney, Richard Fairclo (“Fairclo”), contacted the Accused and followed up on his termination and request for files. The Accused did not respond to Fairclo’s subsequent request for the files.

#### **Rudd and Fairclo Matter (Case No. 14-58)**

In September 2005, the Accused represented Michael Earnest (“Earnest”) in litigation brought by Earnest’s siblings against Earnest and Paul Arritola (“Arritola”). Earnest’s siblings were each one-third owners of a piece of real property. Arritola was not represented in the property litigation. After a successful trial wherein the Accused successfully defended Earnest’s interest, the Accused approached Arritola and asked him to purchase Earnest’s one-third share of the real property that was the subject of the litigation. The Accused assured Arritola that it would be a valid legal transfer. In order to help convince Arritola to purchase Earnest’s one-third share, the Accused offered to defend the transfer and Arritola’s rights for free if the transfer was challenged by Earnest’s siblings. Based on these representations, Arritola purchased Earnest’s one-third interest. When the transfer was challenged by Earnest’s siblings, it became necessary for the Accused to defend Arritola against the siblings.

The Accused did not bill for his services during the litigation. After successfully resolving the matter in 2010, the Accused filed an attorney lien against the real property involved in the litigation in an amount representing his total hourly fees for work performed. This was done in spite of his earlier promise that he would defend Arritola for free if the purchase resulted in litigation. The Accused thereafter attempted to collect the full amount from Arritola’s trust and estate.

#### **Other Facts and Bar Investigations Regarding All Four Cases**

On January 16, 2014, the Accused was suspended from active practice with the Bar for failing to pay his PLF malpractice assessment. After that time, the Accused was not authorized to practice law in Oregon. The Accused did not notify clients or relevant parties of this event or withdraw from representations. Furthermore, he did not cure his PLF obligation and has been administratively suspended on that basis since January 16, 2014.

On or about April 10, 2014, the Disciplinary Counsel's Office received the first of the complaints relevant to this matter from DiIaconi regarding the Accused's conduct and her client's arbitration. The Disciplinary Counsel's Office sent a letter by first-class mail to the Accused on April 11, 2014, and requested a response to the complaint on or before May 2, 2014. No response was received from the Accused. A second letter was sent on May 6, 2014, by both first-class and certified mail, return receipt requested. The first-class mail letter was not returned as undeliverable. The certified letter was returned unclaimed.

On April 15, 2014, the Disciplinary Counsel's Office received a complaint from William M. Ganong regarding the Accused's conduct in handling the water rights litigation. On April 21, 2014, the Disciplinary Counsel's Office received an additional complaint from Michael Rudd and Richard Fairclo about the Accused's conduct in these matters. The Disciplinary Counsel's Office sent letters dated April 22, 2014, by first-class mail to the Accused's address of record with the Bar. The letters requested a response by May 13, 2014, and were not returned as undeliverable. The Accused did not respond to either of these legal matters.

On May 15, 2014, the Disciplinary Counsel's Office staff spoke directly with the Accused by telephone. The Accused acknowledged receipt of all three complaints and requested additional time to respond to the investigations. A letter was sent on May 16, 2014, by first-class mail to the Accused's address of record extending the time to respond to May 30, 2014. No response was received from the Accused.

A subsequent complaint was received from Fairclo on June 12, 2014, regarding the Accused's conduct in representing one or more of the water districts. By letter dated June 17, 2014, the Disciplinary Counsel's Office requested a response to this complaint by July 8, 2014. The letter was sent first-class mail and was not returned as undeliverable. No response was received by the Disciplinary Counsel's Office. A subsequent letter dated July 14, 2014, was sent by both first-class and certified mail, return receipt requested, to the Accused. The certified letter was returned unclaimed, however, the letter sent by first-class mail was not returned as undeliverable. The Accused did not respond to the Disciplinary Counsel's Office's inquiries.

On August 20, 2014, the Disciplinary Counsel's Office petitioned the Disciplinary Board's State Chairperson for an order administratively suspending the Accused pursuant to BR 7.1 until he responded to the Disciplinary Counsel's Office's inquiries regarding the Fairclo complaint. The Disciplinary Board's State Chair entered the requested order administratively suspending the Accused on September 2, 2014. This administrative suspension is in addition to the prior administrative suspension entered on January 16, 2014.

The Accused was subsequently suspended for disciplinary reasons on October 27, 2014. In a prior disciplinary matter, the Accused was sanctioned with a one-year suspension, which was stayed on the condition that certain probationary terms would be met over a two-

year period of time. The probationary terms were not met by the Accused whereupon probation was revoked and the previously stayed one-year suspension was imposed.

### **Conclusions of Law**

#### **Neglect and Failure to Communicate**

*A lawyer shall not neglect a legal matter entrusted to the lawyer.* RPC 1.3.

*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(a).

*A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.* RPC 1.4(b).

With respect to the Ganong matter (Case No. 14-57) and the Fairclo matter (Case No. 14-84), the Trial Panel finds that from late 2013 to mid-2014, the Accused failed to take any action in furtherance of his clients' interests. This inaction demonstrated a course of conduct that violates RPC 1.3. Furthermore, in the DiIaconi matter (Case No. 14-56), the Trial Panel finds that the Accused's conduct in failing to complete his responsibilities as an arbitrator arises to neglect of a legal matter in violation of RPC 1.3. Additionally, throughout this same period of time in the Ganong matter (Case No. 14-57), the Accused failed to communicate with clients or respond to their attempts to communicate with him. He further failed to respond to his clients' requests for information. The Trial Panel finds that this conduct is a violation of RPC 1.4(a). Also in the Ganong matter (Case No. 14-57), the Accused failed to notify his clients that he had not taken action with respect to their legal issues and he did not advise them that his license had been suspended. This information was material to his representation of the water district clients. His failure to provide such information to his clients put them in a position of being unable to make informed decisions regarding their representation. The Trial Panel finds this conduct violates RPC 1.4(b).

#### **Advice to an Unrepresented Person**

*In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.* RPC 4.3.

With respect to the Rudd and Fairclo matter (Case No. 14-58), the Accused approached Arritola unsolicited and requested that he purchase property from his client. The Accused was aware that Arritola was not represented by counsel. The Accused provided legal advice to Arritola in stating it would be a valid legal transfer. The Accused's statement

to Arritola that he would defend the transfer should it be challenged by Earnest's siblings establishes that he knew or should reasonably have known that Arritola's interests were or could be in conflict with the interests of his client. The Trial Panel finds this conduct constitutes a violation of RPC 4.3.

### **Failure to Provide Client Property**

*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 any funds or other property that the client or third person is entitled to receive and, upon request by the client, shall promptly render a full accounting regarding such property.* RPC 1.15-1(d).

*Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.* RPC 1.16(d).

As pointed out in the brief filed by counsel for the Bar, the distinction between these two rules regarding the return on property hinges on the stage of the attorney-client relationship at the time the request is made. In reviewing the allegations referenced in the Ganong matter (Case No. 14-57), it appears that the Accused failed to forward the Amendment to the Joint Prosecution Agreement, which had already been signed by some of the smaller districts represented by other attorneys. Furthermore, the Accused possessed most of the information needed by his client, Poe Valley Improvement District, to file exceptions in the Klamath River Litigation. Despite requests from his client, this information was not provided. The Trial Panel finds that the Accused's conduct is a violation of RPC 1.15-1(d).

With respect to the Fairclo matter (Case No. 15-84), the Board of Directors for Poe Valley Improvement District terminated the Accused's services in mid-April 2014 and demanded a return of all files to the district's office. After termination, the Accused did not take steps to protect his client's interest such as forwarding the files to Poe Valley Improvement District's new attorney, Richard Fairclo. His failure to comply with those requests would be a violation of RPC 1.16(d). However, the Disciplinary Counsel's Office did not allege a violation of that provision in the complaint so the Trial Panel does not find a violation.

### **Failure to Withdraw**

*A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law.* RPC 1.16(a)(1).

Effective January 16, 2014, the Accused was suspended for failing to pay his Professional Liability Fund malpractice assessment. As of that date, the Accused was not authorized to practice law. RPC 1.16(a)(1) requires that the attorney withdraw from representation of a client if ongoing representation will result in a violation of the Rules of Professional Conduct. With respect to the Ganong matter (Case No. 14-57), the Trial Panel finds that the Accused failed to notify his water district clients that he had been suspended and did not withdraw from representation, a violation of RPC 1.16(a)(1).

### **Conduct Prejudicial to the Administration of Justice**

*It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.* RPC 8.4(a)(4).

The focus of this rule is on the effect or potential effect of the lawyer's conduct on the administration of justice, and not what the lawyer intended. *In re Claussen*, 322 Or 466, 482, 909 P2d 862 (1996). With respect to the DiIaconi matter (Case No. 14-56), the Accused failed in his role as an arbitrator to cooperate in the completion of the arbitration decision which delayed the outcome of the matter and adversely affected participants. The Trial Panel finds his actions resulted in professional misconduct prejudicial to the administration of justice under RPC 8.4(a)(4). Additionally, in the Ganong matter (Case No. 14-57), the Accused's failure to represent his clients and provide them with materials in his possession necessary for them to comply with court deadlines, potentially delayed litigation and could have adversely impacted their legal rights. The Trial Panel finds this conduct to be in violation of RPC 8.4(a)(4).

### **Failure to Respond to Disciplinary Counsel's Office**

*A lawyer in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 [client confidences].* RPC 8.1(a)(2).

The facts establish that the Accused did not cooperate and respond fully and truthfully to the Bar's reasonable requests. In the DiIaconi matter (Case No. 14-56), the Accused was notified of the complaint on two separate occasions, namely April 11, 2014, and May 6, 2014. With respect to the Ganong matter (Case No. 14-57) and the Rudd and Fairclo matter (Case No. 14-58), the Disciplinary Counsel's Office notified the Accused of the complaints on April 22, 2014, and May 16, 2014. All letters were sent by first-class mail to the address on file with the Bar and were not returned as undeliverable. On May 15, 2014, the Accused contacted the Disciplinary Counsel's Office and acknowledged receipt of all three complaints and requested additional time to respond to the complaints. By letter dated May 16, 2014, the Disciplinary Counsel's Office advised the Accused that he had until May 30, 2014, to respond to the complaints. No response was received. In the Fairclo matter (Case No. 14-84), the Disciplinary Counsel's Office notified the Accused on June 17, 2014, and

July 14, 2014, of the pending complaints by letters sent first-class mail. The letters were not returned as undeliverable and no response was received to this complaint. The Accused was given ample time to respond to each of these complaints and failed to respond to the Bar's inquiries. The Trial Panel finds that his conduct constitutes a knowing failure to respond to a lawful demand for information in a disciplinary matter in violation of RPC 8.1(a)(2).

### Sanctions

The ABA *Standards for Imposing Lawyer Sanctions* (“Standards”) are considered in determining the appropriate sanction together with Oregon case law. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994). According to the *Standards*, the following factors are suggested for assessing an appropriate sanction: 1) the ethical duty violated, 2) the attorney's mental state, 3) the actual or potential injury, and 4) the existence of aggravating or mitigating circumstances.

#### 1) Duty Violated.

The most important ethical duties are those obligations that a lawyer owes to clients. *Standards*, p. 5. In this case, the Trial Panel finds the Accused violated his duty to his clients to preserve and return their client property. *Standards*, § 4.1. He also violated his duty to act with reasonable diligence and promptness in representing clients, including the duty to adequately communicate with clients. *Standards*, § 4.4. The Accused violated his duties to the legal system to avoid abuse of the legal process and to refrain from improper communication with unrepresented persons. *Standards*, §§ 6.2, 6.3. Additionally, the Accused violated his duties to the profession in that he failed to refrain from charging improper fees and further failed to cooperate with disciplinary investigations. *Standards*, § 7.0.

#### 2) Mental State.

“Intent” is the conscious objective or purpose to accomplish a particular result. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

*Standards*, p. 9.

The Trial Panel must rely on facts alleged in the complaint to establish the mental state of the Accused. *In re Kluge*, 332 Or 251, 262, 27 P3d 102 (2001). In review of the complaint, the Trial Panel finds that the Accused acted knowingly and intentionally when prior to his suspension he elected not to participate in further arbitration in the DiIaconi matter (Case No. 14-56), he elected not to represent and communicate in his client's legal matters as alleged in the Ganong matter (Case No. 14-57) and the Rudd and Fairclo matter

(Case No. 14-58), and he elected to affirmatively pursue an excessive fee as established in the Rudd and Fairclo matter (Case No. 14-58).

The Trial Panel further finds that the Accused acted knowingly in failing to respond to Bar inquiries.

3) Injury.

For purposes of determining appropriate disciplinary sanctions, the Trial Panel considers actual and potential injury. *Standards*, § 6. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, the Trial Panel finds the Accused caused actual injury to his clients. In the DiIaconi matter (Case No. 14-56), the arbitration was delayed and his failure to respond and communicate required additional work for the other arbiters who were left to issue an opinion without his involvement. Additionally, in the water districts case, Ganong matter (Case No. 14-57) and Fairclo matter (Case No. 14-84), the clients were required to either recreate documents or incur legal expenses in retaining new counsel. In the Rudd and Fairclo matter (Case No. 14-58), the Accused's advice to Arritola caused both potential and actual injury in terms of additional litigation and potential financial exposure. Additionally, his later attempts to obtain attorney fees from Arritola's trust and estate is in itself an injury.

Lastly, the Accused's failure to cooperate with the Bar's investigation of his conduct caused actual injury to the legal profession, including the Bar, and to the public. The Bar was required to investigate these matters without the Accused's assistance and in a more time-consuming fashion. Additionally, the public respect for the Bar was diminished because the Bar could not provide timely and informed responses to complaints.

4) Presumptive Sanction.

Drawing together all the factors of duty, mental state, and injury, and absent aggravating or mitigating circumstances, the Bar points to the following *Standards* that it believes applies:

- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- 4.42 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.
- 6.22 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.

- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
- 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
- 7.2 Suspension is generally appropriate where 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.
- 5) Existence of Aggravating or Mitigating Circumstances.

The final criteria before imposing sanction are the existence of any aggravating or mitigating circumstances. In the instant action, the Trial Panel finds several aggravating factors to be present.

- A) Prior history of discipline. *Standards*, § 9.22(a). The Accused has a record of prior disciplinary offenses. In less than five years, the Accused has received prior discipline on three occasions:
- *In re Throne*, OSB Case No. 10-124 (Letter of Admonition) (11/2/10) for violations of RPC 1.3 (neglect) and RPC 1.4(a) (failure to keep a client reasonably informed). In that matter, the Accused was hired to initiate a small estate proceeding, which he initiated but did not complete prior to being terminated a year later. Furthermore, he failed to respond to the client's inquiries. (Exh. 3).
  - *In re Throne*, 25 DB Rptr 255 (2011) (30-day suspension) for violations of RPC 1.4(a) (failure to respond to a client's reasonable requests for information) and RPC 1.15-1(d) (failure to promptly account for and return client property). In that case, the Accused delayed forfeiture proceedings requested by a client for several months, despite numerous requests for updates from the client, and thereafter failed to account for or return unearned funds until the Bar was involved. (Exh. 4).
  - *In re Throne*, 28 DB Rptr 226 (2014) (1-year suspension) for violations of RPC 8.1(a)(2) (failure to respond to a request for information

from a disciplinary authority); RPC 8.4(a)(2) (criminal conduct reflecting adversely on a lawyer's fitness); RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit or misrepresentation). In this matter, the Accused failed to pay federal quarterly taxes despite representing to his employees that he had done so. Furthermore, he failed to respond to the Bar. (Exhs. 5 and 6).

- B) A dishonest or selfish motive. *Standards*, § 9.22(b). The Trial Panel finds that the Accused pursued an excessive fee against Arritola's estate and trust in the Rudd and Fairclo matter (Case No. 14-58) and that he was motivated by his own personal interests.
  - C) Pattern of misconduct. *Standards*, § 9.22(c). The Trial Panel finds that these four matters, taken together with the Accused's prior similar discipline, show a pattern of neglect, avoidance, and disregard for clients' matters. They also demonstrate a pattern of failing to cooperate with the Bar.
  - D) Multiple offenses. *Standards*, § 9.22(d). The Accused faces discipline for a third time.
  - E) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders. *Standards*, § 9.2(e). The Accused was aware of the Bar's investigation in all four of these matters and was served with these proceedings. His failure to cooperate or respond to any communications from the Bar violates this standard.
  - F) Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused had been engaged in the practice of law for more than ten years at the time of the violation. The Trial Panel finds that there are no mitigating circumstances.
- 6) Appropriateness of Probation.

The Trial Panel determines that probation is not an appropriate disciplinary sanction in this matter. *In re Throne*, 28 DB Rptr 105 (2014), the prior case in which the Accused was disciplined, supports the Trial Panel's decision. In that proceeding, the Trial Panel determined that the proper and fair sanction for the Accused was that he be suspended for one year. The one-year suspension was stayed upon the condition that he complete a two year probation with several terms and conditions. (Exh. 5). An Order Imposing Sanctions was executed on May 19, 2014. (Exh. 6). The Accused failed to comply with the probationary terms and was subsequently suspended for disciplinary reasons on October 27, 2014. *In re Throne*, 28 DB Rptr 226 (2014). The Accused's lack of communication and cooperation with the Bar and the Disciplinary Board also support the Trial Panel's decision that probation is not an appropriate sanction. Additionally, the Trial Panel finds that the aggravating factors

set forth justify an increase in the degree of presumptive discipline to be imposed. *Standards*, § 9.21.

7) Oregon Case Law.

Sanctions in disciplinary matters are not intended to penalize the accused lawyer, but instead are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d, 967 (1998). Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d, 206 (1992). The Trial Panel reviewed the brief filed by the Oregon State Bar regarding sanctions including the time frames suspension would be imposed for the various matters in this case, including neglect of a legal matter, failure to adequately communicate, excessive fee, advice to an unrepresented person, failure to provide client property, failure to withdraw and failure to respond to a disciplinary authority. In reviewing these matters, the Trial Panel accepts the recommendation of the Bar and finds that the Accused's collective misconduct warrants a suspension of his Oregon State Bar membership for twenty-four months.

**Conclusion**

The purpose of sanctions is to protect the public and administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties. *Standards*, § 1.1.

The Trial Panel has reviewed the documents submitted to it, including the complaint, the Accused's prior disciplinary history, and the authority cited in the Bar's Trial Memorandum. Upon review and discussion of the merits, the Trial Panel finds that the Accused's misconduct warrants a suspension of his Oregon State Bar membership for a period of two years, effective October 27, 2015, and to commence consecutively to his current one year suspension.

It is so ordered.

April 7, 2015.

/s/ Penny Lee Austin

Penny Lee Austin, Trial Panel Chairperson

/s/ William Francis

William Francis, Trial Panel Member

/s/ Thomas W. Pyle

Thomas W. Pyle, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-46  
)  
GARRETT MAASS, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Helga Kahr  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(4). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: June 25, 2015

**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 violation of RPC 8.4(a)(4).

DATED this 25th day of June 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

## STIPULATION FOR DISCIPLINE

Garrett Maass, attorney at law (“Maass”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Maass was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 6, 1998, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Maass 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 20, 2014, a Formal Complaint was filed against Maass pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 3.1 (knowingly bring or defend a frivolous action); RPC 4.2 (improper communication with a represented party); 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

#### a. FAPA Petition

5.

On October 14, 2011, Maass’s brother, Gregory Maass (“Gregory”), obtained a King County Washington anti-harassment order prohibiting Maass from contacting Gregory or his daughters. Instead of challenging that order in King County, Washington, Maass applied for and obtained a temporary Oregon Family Abuse Prevention Act (“FAPA”) restraining order against Gregory, claiming to be in imminent danger of physical abuse from Gregory. Although Maass disclosed, as required, the existence of other litigation between he and Gregory, he did not explain, as the application form did not specifically ask or provide a space to explain, that the order in the Washington case was *against* him. At a December 2011 hearing regarding the status of the temporary order, the court found Maass had not met his

burden of proof for a FAPA order. The temporary FAPA order Maass had obtained was not extended; the FAPA action was dismissed and attorney fees were awarded to Gregory.

**b. Defamation Action**

6.

In April 2012, Maass filed an Oregon defamation action against Gregory and another brother, Peter Maass (“Peter”). Although Phil Nelson (“Nelson”), Oregon counsel for Gregory and purported counsel for Peter, was in active communication with Maass about the insufficiency of the complaint, Maass demanded that the defendants file answers. Nelson filed responsive pleadings, but as to at least one of the defendants, the pleading was arguably filed late. Maass filed a motion for a default based on the lateness of the responsive pleadings, despite Nelson informing Maass that the court could not grant a default after a responsive pleading had been filed. The court denied the motion.

7.

After re-pleading his complaint, Maass did not file a more specific pleading in response to Oregon counsel’s Rule 21 motions. In June 2012, Maass voluntarily dismissed the case.

8.

Nelson sought an award of fees against Maass. The court ruled that it would not award attorney fees. Instead, the court found the defamation action was ill-advised and in the wrong venue, denied an award of attorney fees to Gregory, refused to impose ORCP Rule 17 sanction, but awarded enhanced prevailing party fees of \$5,000 to Gregory.

**c. Wrongful Use of Civil Proceedings Action**

9.

In January 2013, following Maass’ refusal to pay exorbitant legal fees Gregory claimed to have incurred, Gregory, represented by Nelson, sued Maass for wrongful use of civil proceedings and other causes of action. Maass notified Nelson that he intended to take the telephone deposition of Peter, who was residing in and located in New York. Nelson informed Maass that he represented Peter. Maass took the position that since Nelson was not admitted in New York and based on his interpretation of New York case law, Nelson could not represent Peter at the telephone deposition. Over Nelson’s objection, Maass repeatedly contacted Peter, urging him to obtain New York counsel. The wrongful use of civil proceedings lawsuit was subsequently dismissed pursuant to a settlement agreement.

**d. Motion to Vacate Washington Order of Protection-Harassment**

10.

In October 2013, Maass moved to vacate the Washington anti-harassment order that had been extended ex parte on Gregory's request over a year earlier. The court denied Maass' motion under Washington Civil Rule 60 to vacate. While the appeal of the denial of that order was pending, Gregory and Maass entered into a global settlement in which all appeals and civil suits were dismissed.

**Violations**

11.

Maass admits that, during the course of pursuing and defending the foregoing litigation with his brothers, he engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 3.1 and RPC 4.2 should be and, upon the approval of this stipulation, are dismissed.

**Sanction**

12.

Maass 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* ("*Standards*"). The *Standards* require that Maass'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.** Maass violated his duty to avoid abuse to the legal process. *Standards*, § 6.2.
- b. **Mental State.** "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of conduct 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, where that failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Standards*, p. 9.

Maass acted negligently in bringing the Oregon defamation action in the incorrect venue and negligently and knowingly when he engaged in impudent and fruitless litigation tactics.

- c. **Injury.** Injury can be potential or actual. *Standards*, § 3.0. Maass caused some actual and potential injury. While most of the litigation was initiated by

Gregory and not all of the actions Maass took were abusive, to the extent he took frivolous positions or otherwise misused the legal process, he caused some additional costs and fees to Gregory, and wasted judicial resources. Actions that were rejected by the court had the potential to increase the injury to both the parties and the court.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A pattern of misconduct in the litigation with Gregory. *Standards*, § 9.22(c).
  2. Substantial experience in the practice of law, although not in the civil litigation arena. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior discipline. *Standards*, § 9.32(a).
  2. Personal or emotional problems. *Standards*, § 9.32(c). Given the familial relationship and intensity of the subject litigation, Maass was experiencing significant personal and emotional distress at the time of the majority of his actions in this matter.

13.

Under the *ABA Standards*, a suspension is generally appropriate when a lawyer knows he 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. A reprimand is generally appropriate where the lawyer negligently causes such injury or potential injury. *Standards*, § 6.23.

14.

Reprimand for conduct prejudicial to the administration of justice is consistent with Oregon law, even when actual injury results, when it is unaccompanied by other more serious allegations. *See, e.g., In re Dugan*, 26 DB Rptr 277 (2012) (reprimand where lawyer filed and maintained a civil suit that did not have merit); *In re Jaspers*, 28 DB Rptr 211 (2014) (reprimand where lawyer filed an ex parte motion for relief that did not satisfy the statutory requirements for the order sought and failed to inform the court of all the material facts).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Maass shall be publicly reprimanded for his violation of RPC 8.4(a)(4), the sanction to be effective upon approval by the Disciplinary Board.

16.

Maass acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

17.

Maass represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Maass is admitted: none.

18.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 June, 2015.

/s/ Garrett Maass

Garrett Maass

OSB No. 980760

EXECUTED this 16th day of June, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-134
	)	
ERIC J. FJELSTAD,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 7.1. Stipulation for Discipline. Public reprimand.
Effective Date of Order:	June 29, 2015

**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 violation of RPC 7.1.

DATED this 29th day of June, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Eric J. Fjelstad, attorney at law (“Fjelstad”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Fjelstad was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 15, 1989, and, except as described below, has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Fjelstad enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On December 12, 2014, a Formal Complaint was filed against Fjelstad pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 7.1 (misleading advertising) 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.

Fjelstad was duly admitted to the practice of law in Washington in 1990 and, except as described below, was an active member of the Washington State Bar Association entitled to practice law in Washington.

6.

Prior to July 12, 2013, Fjelstad authorized the creation of an internet website that held Fjelstad out to the public as an active member of the Oregon and Washington state bars, qualified and entitled to practice law in Oregon and Washington.

7.

Effective July 12, 2013, Fjelstad’s membership in the Oregon State Bar was suspended by order of the Disciplinary Board, and he was prohibited by law from practicing law in Oregon or holding himself out as qualified to do so unless and until reinstated to active Oregon State Bar membership. Prior to the effective date of the suspension, Fjelstad received a letter from the Bar reminding him of professional duties during the period of his

suspension, including the duty to discontinue use of internet communications that identified him as a lawyer.

8.

After July 12, 2013, Fjelstad continued to hold himself out to the public, on the internet website described in paragraph 6 above, as an active member of the Oregon State Bar qualified and able to practice law in Oregon.

9.

On July 31, 2013, Fjelstad's membership in the Washington State Bar Association was suspended and he was prohibited from practicing law in Washington or holding himself out as entitled to do so unless and until reinstated to active membership in the Washington State Bar Association.

10.

In his internet advertising after July 31, 2013, Fjelstad continued to hold himself out to the public, on the internet website described in paragraph 6 above, as an active member of the Washington State Bar Association entitled and able to practice law in Washington.

11.

On August 12, 2013, Fjelstad was reinstated to active Oregon State Bar membership.

12.

On and after August 12, 2013, Fjelstad was not reinstated to active Washington State Bar Association membership and his Washington State Bar Association membership remained in suspended status. However, Fjelstad continued to hold himself out to the public as entitled and able to practice law in Washington.

### **Violations**

13.

Fjelstad admits that, by holding himself out to the public as able to practice law at times when he was suspended from the practice of law, he engaged in misleading advertising, in violation of RPC 7.1.

### **Sanction**

14.

Fjelstad 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* (2005) ("*Standards*"). The *Standards* require that Fjelstad's conduct be analyzed by considering the following factors: (a) the ethical duty violated; (b) the attorney's mental

state; (c) the actual or potential injury; and (d) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** Fjelstad’s misleading communications to the public about his services violated duties he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ‘Negligence’ is the failure of a lawyer 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.” *Standards*, p. 9. Fjelstad knew his bar memberships were suspended, but acted only negligently in failing to maintain accurate information on his internet site regarding his bar membership status.
- c. **Injury.** There is no evidence that Fjelstad’s failure to maintain accurate information on his internet site caused actual injury. The reputation of the profession suffered potential injury from the misleading communications made by one of its members. There was also the potential for injury for clients and potential clients who relied on Fjelstad’s representations about his licensure.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. *Standards*, § 9.22(a).<sup>1</sup> In July 2013, Fjelstad was suspended 30 days for misconduct that occurred between 2006 and 2010 in two client matters. *In re Fjelstad*, 27 DB Rptr 68 (2013). In the first matter, Fjelstad filed motions without providing notice or a copy of his motion to opposing counsel, in violation of RPC 3.5(b) (improper *ex parte* contact) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). In the second, Fjelstad failed for several months to timely inform his client that he had received settlement funds, failed to deposit the funds in a lawyer trust account, and failed to properly supervise his staff, in violation of RPC 1.4(a) (inadequate communication with a client), RPC 1.15-1(a) (failure to properly safeguard client funds), RPC 1.15-1(d) (failure to

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<sup>1</sup> In determining the weight of each prior offense as an aggravating factor, the court considers: “(1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the [present] offense . . . ; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) . . . 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 195, 200, 951 P2d 149 (1997).

deliver funds to which a client or third person is entitled) and RPC 5.3(a) (failure to supervise a non-lawyer assistant). Fjelstad has no other relevant disciplinary history.<sup>2</sup>

2. 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. Full and free disclosure and cooperative attitude toward proceedings. *Standards*, § 9.32(e).

15.

Under the ABA *Standards*, 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.

16.

Reprimand is appropriate in the present matter due to Fjelstad's course of conduct, his prior disciplinary history and the degree of his negligence. Reprimand is also in accord with prior action of the Disciplinary Board. *See, e.g., In re Reed*, 21 DB Rptr 222 (2007) (reprimand where sole practitioner lawyer used letterhead that suggested he had associates and signed client's name to release of claims without disclosing that he had signed for the client); *In re Kimmell*, 10 DB Rptr 175 (1996) (reprimand where attorney's letterhead communicated that he was eligible to practice law in California without noting his inactive status there and attorney improperly practiced law by filing legal documents in three California cases while on inactive status). *See also In re Kinney*, 26 DB Rptr 59 (2012); *In re Cain*, 26 DB Rptr 55 (2012) (both reprimanded for continued use of names of associate lawyers on firm's website after the associates left the firm).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that Fjelstad shall be reprimanded for violation of RPC 7.1, the sanction to be effective upon Disciplinary Board approval of this stipulation.

18.

Fjelstad acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

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<sup>2</sup> “[A] letter of admonition should be considered under ABA Standard 9.22(a), as evidence of past misconduct, [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).

19.

Fjelstad represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Fjelstad is admitted: Washington State (suspended).

20.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 16th day of June, 2015.

/s/ Eric J. Fjelstad

Eric J. Fjelstad

OSB No. 892383

EXECUTED this 24th day of June, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 14-131  
 )  
JAMES J. KOLSTOE, )  
 )  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.15-1(a). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: June 29, 2015

**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 1.15-1(a).

DATED this 29th day of June, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

James J. Kolstoe, attorney at law (“Kolstoe”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Kolstoe 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 Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

Kolstoe enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek the advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On November 22, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Kolstoe for alleged violations of RPC 1.15-1(a) 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.

Throughout 2014, Kolstoe maintained funds of multiple clients in a pooled lawyer trust account (“the pooled trust account”). On or about February 5, 2014, Kolstoe correctly deposited \$500 in earned fees he had received from a client (“the client”) into his business account, but mistakenly recorded the transaction in his own records as a deposit into the pooled trust account. The client had not advanced funds that were required to be maintained in the pooled trust account, and no funds of the client were maintained in the pooled trust account.

6.

On or about March 7, 2014, forgetting that he had already collected the earned fees from the client, Kolstoe mistakenly collected \$500 from the pooled trust account as fees earned for his efforts on behalf of the client. Since the client did not have funds in the pooled trust account, that \$500 was paid from the funds of other clients that were maintained in the

pooled trust account. Because Kolstoe was not reconciling his accounts on a monthly basis, he was not aware of the mistake described in paragraph 5 above until he was notified in May 2014 that the funds in the pooled trust account were not sufficient to pay a check he had issued on that account.

### Violations

7.

Kolstoe admits that by failing to maintain complete trust account records and safeguard client property he violated RPC 1.15-1(a).

### Sanction

8.

Kolstoe 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* (“*Standards*”). The *Standards* require that Kolstoe’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.** Kolstoe violated his duty to preserve client property. *Standards*, § 4.1.
- b. **Mental State.** Kolstoe acted negligently. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which result is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 9.
- c. **Injury.** Kolstoe’s negligence cause actual and potential injury by improperly drawing on the funds of one or more of his clients and endangering the funds of other clients.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses.<sup>1</sup> *Standards*, § 9.22(a). Kolstoe received a four year suspension for his failure to file federal personal income tax returns over a period of seven years, in violation of RPC 8.4(a)(2). *In re Kolstoe*, 21 DB Rptr 43 (2007). Kolstoe received a sixty day

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<sup>1</sup> In determining the weight of prior disciplinary offenses, 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 offenses; and (5) the timing of the current offense in relation to the prior offense and resulting sanction . . . [and] 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 195, 200, 951 P2d 149 (1997).

suspension for neglect of a legal matter entrusted to him, lawyer self-interest conflict, failure to withdraw from representation when required to do so, and misrepresentation. *In re Kolstoe*, 20 DBR 28 (2006).

2. Substantial experience in the practice of law. *Standards*, § 9.22(i).

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

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

2. Timely good faith effort to rectify the consequences. Upon being notified that an overdraft had occurred, Kolstoe reviewed his accounts and corrected his error. *Standards*, § 9.32(d).

3. Full and free disclosure to the disciplinary board. *Standards*, § 9.32(e).

9.

Under the ABA *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. Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client. *Standards*, § 4.14.

10.

Admonition might have been appropriate but for Kolstoe's prior disciplinary history. While that prior history is a significant aggravating factor, sanctions were imposed seven or more years ago and Kolstoe's negligent misconduct here is entirely different from those matters. Reprimand is consistent with prior Oregon case law regarding negligent accounting practices when admonition is not appropriate. *See, e.g., In re Welty*, 24 DB Rptr 92 (2010) (reprimand for attorney's failure to recognize disparity in payments received and distributed on a sales contract over several years due to bookkeeping errors); *In re Levie*, 20 DB Rptr 72 (2006) (reprimand where attorney failed to maintain complete records of client's settlement proceeds and could not document the disbursements reportedly made from those funds when called upon to do so); *In re Klahn*, 19 DB Rptr 1 (2005) (reprimanded for violations of DR 9-101(A) [RPC 1.15-1(a)] and DR 9-101(C)(3) [RPC 1.15-1(a)] where a trust account overdraft was caused by several bookkeeping errors, which were not discovered for years because the lawyer did not reconcile his bookkeeping records with his trust account bank statements).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Kolstoe shall be reprimanded for violation of RPC 1.15-1(a), the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

12.

Kolstoe acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

13.

Kolstoe represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Kolstoe is admitted: none.

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 10th day of April, 2015.

/s/ James J. Kolstoe

James J. Kolstoe

OSB No. 852586

EXECUTED this 22nd day of June, 2015.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 032221

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 14-61 and 14-91  
)  
W. BLAKE SIMMS, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: Courtney C. Dippel, Chairperson  
Frank J. Weiss  
Virginia Anne Symonds, Public Member  
Disposition: Violations of RPC 1.15-1(d) and RPC 1.16(d). Trial  
Panel Opinion. 120-day suspension.  
Effective Date of Opinion: July 8, 2015

**TRIAL PANEL OPINION**

This matter came regularly before a trial panel of the Disciplinary Board consisting of Courtney C. Dippel, Chair, Frank J. Weiss, Esq., and Virginia Anne Symonds, Public Member (“Trial Panel”) on April 10, 2015. Linn D. Davis represented the Oregon State Bar (“Bar”). William Blake Simms, Esq. (“Accused”) has made no appearance in this matter.

The Trial Panel has considered the factual allegations in the Complaint, the Bar’s Sanctions Memorandum and supporting exhibits, the Declaration of Linn D. Davis, and the Accused’s prior disciplinary history. Based on the findings and conclusions below, we find that the Accused violated Oregon Rules of Professional Conduct (“RPC”) 1.15-1(d) and 1.16(d). We further determine that the Accused should be suspended from the practice of law for a period of 120 days.

**INTRODUCTION**

**The Complaint:** A Formal Complaint (“Complaint”) was filed on September 17, 2014, against the Accused claiming violations of the RPCs. In its first Cause of Complaint, the Bar claimed that the Accused violated RPC 1.15-1(d) (safekeeping and returning client property) and 1.16(d) (protecting a client’s interests upon termination of representation) in

his representation of Ms. Cheryl Marsh (“Marsh”) in claims of employment discrimination. In its second Cause of Complaint, the Bar claimed that the Accused violated RPC 1.15-1(d) (safekeeping and returning client property) and 1.16(d) (protecting a client’s interests upon termination of representation) in his representation of Ms. Amy Craighead (“Craighead”) in claims of employment discrimination.

**The Bar’s Motion and Order for Default:** The Accused was personally served with a copy of the Complaint and Notice to Answer on November 19, 2014. After notice, the Accused failed to file an Answer. On December 24, 2014, the Bar moved for an Order of Default. On January 28, 2015, the Order of Default was signed by Mr. Ronald W. Atwood, the Region 5 Chairperson, and entered with the Disciplinary Clerk on January 30, 2015.

The Order of Default found the Accused in default for failure to file an answer or other appearance and deemed true the Complaint’s allegations.

**Sanctions Briefing:** Based upon the Order of Default, on March 20, 2015, the Trial Panel requested that the parties submit any arguments regarding appropriate sanctions to be made in writing by April 10, 2015, pursuant to BR 5.8(a) and 2.4(h).

The Bar submitted its Sanctions Memorandum on April 10, 2015, along with supporting exhibits, and the Declaration of Linn D. Davis. The Accused submitted nothing.

#### **FINDINGS OF FACT**

The Trial Panel makes the following findings of fact.

##### **The Marsh Matter—Case No. 14-91**

The Accused undertook the legal representation of Marsh on or about September 5, 2012, to pursue claims of employment discrimination for a contingent fee. Marsh advanced a \$1,000 retainer to the Accused for costs.

On or about March 13, 2013, the Accused settled Marsh’s claims and received settlement funds. This concluded the matter for which Marsh had hired him. Thereafter, Marsh repeatedly asked the Accused to send her the funds in his possession that she was entitled to receive. Despite Marsh’s repeated requests, the Accused failed to promptly forward the funds to her.

When the Accused refused to respond to her requests, Marsh turned to the Bar for assistance. The Client Assistance Office and Disciplinary Counsel’s Office both contacted the Accused repeatedly about Marsh’s funds. Despite those repeated requests, the Accused did not forward Marsh the funds to which she was entitled until August 21, 2013—six months after the Accused settled Marsh’s claims.

##### **The Craighead Matter—Case No. 14-61**

In September 2012, the Accused agreed to represent Craighead in claims of employment discrimination for a contingent fee. Craighead provided the Accused with \$500

for costs at that time and then provided him with an additional \$500 for costs on or about October 1, 2012.<sup>1</sup>

When the Accused agreed to represent Craighead, he maintained an office in Multnomah County, Oregon. On October 11, 2012, the Accused filed a civil action on Craighead's behalf in Multnomah County, *Craighead v. U.S. Bank, N.A.*, Multnomah County Circuit Court Case No. 1210-12765. Thereafter, the Accused closed his Multnomah County office and did not inform the Multnomah County Circuit Court that he had closed his office, nor did he provide the court with a change of address.

On or about December 7, 2012, the Accused informed Craighead that if she wished to pursue the civil action against U.S. Bank, she needed to advance additional costs. At that point, Craighead informed the Accused that she had decided not to pursue the action and terminated his representation. Craighead asked the Accused to account for the funds she had advanced and return the unused funds to which she was entitled.

The Accused failed to promptly account for the funds he had received from Craighead and he failed to forward to Craighead the funds to which she was entitled. Further, the Accused failed to notify the court that he no longer represented Craighead in the civil action.

In January 2013, Craighead again repeatedly demanded that the Accused forward the funds that she was entitled to receive. The Accused informed Craighead that he had estimated that he had spent about \$600 to file and serve papers, which left a balance of \$400 due to her. However, the Accused never further accounted to Craighead for the funds and did not forward any funds to her, even after Craighead contacted the Bar and the Client Assistance Office, and Disciplinary Counsel inquired of the Accused about the funds and an accounting.

To date, the Accused has never fully accounted for Craighead's funds or returned the funds to which she is entitled.

### **DISCUSSIONS AND CONCLUSIONS OF LAW**

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

The Bar's factual allegations against the Accused in the Complaint were deemed to be true by virtue of the Order of Default pursuant to BR 5.8(a). *In re Magar*, 337 Or 548,

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<sup>1</sup> Paragraph 12 of the Complaint alleges that the additional funds for costs were advanced on October 1, 2013. However, that has to be a typographical error given the timeline of the other events alleged. That typographical error has no impact on the Trial Panel's decision.

Cite as *In re Simms*, 29 DB Rptr 133 (2015)

551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). However, the Trial Panel still needed to decide whether the facts deemed true by virtue of the default constitute violations of the disciplinary rules, and if so, what sanctions may be appropriate. See *In re Koch*, 345 Or 444, 198 P3d 910 (2008); see also *In re Kluge*, *supra* (describing the two-step process).

We will discuss the causes of complaint in groups based on the RPCs that were the subject of the violation as follows.

### **The Accused Violated RPC 1.15-1(d) and 1.16(d) in Both the Marsh and Craighead Matters**

RPC 1.15-1(d) provides that once a lawyer receives funds or other property to which a client is entitled, the lawyer shall promptly notify the client and “[s]hall 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.”

RPC 1.16(d) provides that “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.”

The Trial Panel concluded that the Accused violated RPC 1.15-1(d) in both the Marsh and Craighead matters. In the Marsh matter, the Accused received settlement funds to which his client was entitled, yet failed to forward those funds to Marsh until three months later and only after Marsh engaged in substantial efforts that she should not have been required to make. The failure to promptly deliver funds to a client violates RPC 1.15-1(d). *In re Synder*, 348 Or 307, 318, 232 P3d 952 (2010) (lawyer violated RPC 1.15-1(d) when he failed to promptly deliver to the client, after the client had requested, property to which the client was entitled); *In re Koch*, 345 Or at 450 (Bar’s allegation in complaint that lawyer held client funds for protracted period after the representation concluded was sufficient to establish violation of RPC 1.15-1(d)).

The Accused also violated RPC 1.15-1(d) in the Craighead matter when he failed to promptly account for the funds that Craighead had advanced for costs and has never, in fact, accounted for such costs.

The Trial Panel concluded that the Accused violated RPC 1.16(d) in both matters also. In the Marsh matter, the Accused’s representation of Marsh ended when he settled and concluded her employment discrimination matter. In violation of RPC 1.16(d), the Accused failed to take reasonable steps after his representation concluded to protect Marsh in that he

did not surrender the settlement funds his client was entitled to receive. *In re Balocca*, 342 Or 279, 292, 151 P3d 154 (2007) (finding violation under former DR 2-110(A)(3) where lawyer failed to deliver refund to client promptly upon closing the client's file).

In the Craighead matter, the Accused violated the rule when he did not notify the court that he had closed his office in Multnomah County, failed to provide the court with a change of address, and did not refund Craighead's funds for costs that had not been incurred. *In re Fadeley*, 342 Or 403, 411, 153 P3d 682 (2007) (lawyer's failure to promptly refund unearned fees when the lawyer-client relationship ended violated former DR 2-110(A)(3)).

## SANCTION

In fashioning a sanction, the Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* (2005 ed.) ("*Standards*") and Oregon case law. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002); *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994).

### A. ABA Standards Applied to This Case

The *Standards* require an analysis of four factors by the Trial Panel: (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; *In re Jackson*, 347 Or 426, 440, 223 P3d 387 (2009); *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008). The Trial Panel analyzes the first three factors and reaches a presumptive sanction. That sanction can then be adjusted by the Trial Panel under the *Standards* based upon the presence of aggravating or mitigating circumstances. *In re Jackson*, 347 Or at 441. Finally, the Trial Panel evaluated whether the sanction is consistent with Oregon case law. *Id.*

1. **Duties Violated.** The most important ethical duties are those obligations that a lawyer owes a client. *Standards*, p. 5. The Accused violated his duty to deal with client property. *Standards*, § 4.1. The Accused also breached duties owed as a professional by failing after his employment was terminated to take reasonable steps to protect his clients. *Standards*, § 7.0
2. **Mental State.** The *Standards* recognize three mental states: intentional, knowing, and negligent. A lawyer acts intentionally by acting with the conscious objective or purpose of accomplishing a particular result. A lawyer acts knowingly by being consciously aware of the nature or circumstances but without having a conscious objective to accomplishing a particular result. A lawyer acts negligently by failing to heed a substantial risk that circumstances exist or a result will follow, in circumstances in which the failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, pp. 9, 10.

The Trial Panel finds that the Accused's conduct was at first, negligent, then knowing, and finally intentional. Initially, the Accused knew that he had

concluded the Marsh matter and that settlement funds were required to be forwarded to Marsh. The Accused acknowledged that he owed Craighead a refund of unearned funds that she had advanced and, therefore, that the funds were required to be forwarded to her. In each matter, the Accused was reminded of his obligations by numerous contacts from the clients and the Bar. The Accused was aware that he was not fulfilling his duties even if he did not intentionally fail to carry them out at the outset.

As time went on, the Accused's failure to act became knowing or intentional. As the court found in *Koch*, a lawyer acts knowingly when a client's repeated requests put the lawyer on notice that the lawyer is failing to carry out the lawyer's duties. *In re Koch*, 345 Or at 449. A lawyer's continued failure to act will eventually support the inference that the lawyer's failure is intentional. *In re Sousa*, 323 Or 137, 144, 915 P2d 408 (1996) ("A failure to act can be characterized as intentional, rather than attributed to mere neglect or procrastination, if the lawyer fails to act over a significant period of time, despite the urging of the client and the lawyer's knowledge of the professional duty to act") (citing *In re Loew*, 292 Or 806, 810–11, 642 P2d 1171 (1982), in which a one-year period was found sufficient to infer an intentional failure to act).

3. **Actual or Potential Injury.** Under the *Standards*, the injuries caused by a lawyer's professional misconduct may be either actual or potential. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992) ("[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction."); *Standards*, p. 6.

In this case, there is significant actual injury as the clients were deprived of their funds—in Marsh's case, for a substantial period of time. In Craighead's case, the client has never received the refund to which she is entitled from the Accused.

## **B. Presumptive Sanction**

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury to a client. *Standards*, § 4.12. Suspension is also generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury to a client, the public, or the legal system. *Standards*, § 7.2.

The Trial Panel next examines whether aggravating or mitigating circumstances justify an adjustment of the presumptive sanction.

### C. Aggravating Circumstances

1. Prior Disciplinary History—*Standards*, § 9.22(a)

In December 2013, the Accused was suspended for 60 days based on a finding of misconduct committed in Arizona, where he is also licensed. In that matter, like these, the Accused failed to properly account for client funds and failed to carry out his professional duties upon the termination of his employment. Because that sanction was imposed after the misconduct in the present matters, the Trial Panel gives it less weight.

2. Pattern of Misconduct—*Standards*, § 9.22(c)

The Arizona discipline and the present matters demonstrate a pattern by the Accused of disregarding duties to clients to properly account for and deliver client funds and to protect clients upon the termination of the Accused's employment.

3. Substantial Experience in the Practice of Law—*Standards*, § 9.22(i)

The Accused was admitted to the practice of law in Arizona in 2002. The Accused was admitted reciprocally in Oregon in 2011. Given that level of experience, the Accused's failure to comply with fundamental duties regarding client property is inexcusable.

The Trial Panel finds no mitigating circumstances.

### D. Oregon Case Law

In *In re Koch*, the court suspended a lawyer for 120 days for similar failures in two client matters, accompanied by a failure to communicate with the clients during the period of the lawyer's representation and a failure to respond to disciplinary inquiries. While the Accused is not charged with failing to communicate or respond to disciplinary inquiries, his violations of his duties regarding client funds and the termination of representation are egregious—he has never refunded the funds owed to Craighead. While significant mitigating factors existed in *Koch*, such factors are absent here.

Considering the Accused's conduct and the aggravating factors, the Trial Panel concludes that some period of suspension is appropriate.

Sanctions are intended to protect the public and uphold the dignity, respect, and integrity of the profession and are not designed to penalize the accused lawyer. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998); *In re Kimmell*, 332 Or 480, 488, 31 P3d 414 (2001). Appropriate discipline also deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

After evaluating the ABA *Standards*, the factors in this case, and Oregon case law, the Trial Panel concludes a suspension of 120 days was the appropriate sanction.

**DISPOSITION**

The Accused shall be suspended from the practice of law for a period of 120 days.

DATED this 6th day of May 2015.

/s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

Trial Panel Chairperson

/s/ Frank J. Weiss

Frank J. Weiss

OSB No. 991369

Trial Panel Member

/s/ Virginia Anne Symonds

Virginia Anne Symonds

Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-83
	)	
WILLIAM L. TUFTS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Hubert Duvall, Jr.
Disciplinary Board:	None
Disposition:	Violations of RPC 8.1(a)(2) and RPC 8.1(c). Stipulation for Discipline. 120-day suspension with BR 8.1 reinstatement.
Effective Date of Order:	July 13, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Tufts is suspended for 120 days, effective on the date this order is signed, for violation of RPC 8.1(a)(2) and RPC 8.1(c).

IT IS FURTHER ORDERED that Tufts shall be required to seek formal reinstatement pursuant to BR 8.1, at such time as he is eligible to seek reinstatement.

DATED this 17th day of July, 2015, *nunc pro tunc* July 13, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

William L. Tufts, attorney at law (“Tufts”), and the Oregon State Bar (“Bar”) hereby stipulate to the following matters pursuant to 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.

Tufts was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

Tufts 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 24, 2014, a Formal Complaint was filed against Tufts pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 8.1(a)(2) (duty to timely respond to a disciplinary authority) and RPC 8.1(c) (duty to cooperate with the State Lawyers Assistance Committee). 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 March 2012, Tufts entered into a Monitoring and Cooperation Agreement with the State Lawyers Assistance Committee (“SLAC Agreement”) to abstain from all alcohol and undergo treatment, as necessary. Vaden Francisco, Jr. (“Francisco”), was assigned to be Tufts’s monitor.

6.

Through January 2014, Tufts complied with the SLAC Agreement and regularly met with Francisco.

7.

Beginning in February 2014, Tufts failed to comply with the directives of Francisco and other terms of the SLAC Agreement.

8.

On May 29, 2014, Disciplinary Counsel’s Office (“DCO”) received a complaint from the State Lawyers Assistance Committee about Tufts’s noncompliance. By letter dated June 6, 2014, DCO requested Tufts’s response to this complaint.

9.

Between June and August 11, 2014, Tufts requested, and was granted, numerous extensions to respond to the Bar’s inquiry. However, Tufts did not provide any substantive response until September 4, 2014—after he was notified that DCO had filed a petition with the Disciplinary Board State Chairperson, pursuant to BR 7.1, seeking that Tufts be administratively suspended due to his noncooperation with DCO.

### **Violations**

10.

Tufts acknowledges that his failures to comply with aspects of his SLAC agreement violated RPC 8.1(c). Tufts further acknowledges that his failure to more timely respond to DCO violated RPC 8.1(a)(2).

### **Sanction**

11.

Tufts 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* (“Standards”). The *Standards* require that Tufts’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.** Tufts violated duties he owed to the profession when he failed to comply with the remedial program and failed to timely respond to the Bar’s inquiries into his conduct. *Standards*, § 7.0.
- b. **Mental State.** Tufts acted knowingly, but not intentionally. Knowledge is defined 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*, p. 9. Intent is the conscious objective or purpose to accomplish a particular result. *Id.*
- c. **Injury.** Francisco, the State Lawyer’s Assistance Committee, and the Bar all sustained actual injury as a result of Tufts’s conduct. Additional time and resources were spent trying to elicit his cooperation with the SLAC Agreement and his response to DCO.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). Tufts has been a lawyer in Oregon since 1979.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a dishonest motive. *Standards*, § 9.32(b).
  3. Personal or emotional problems. *Standards*, § 9.32(c). Tufts had been facing a number of personal challenges during parts of the relevant time period, including his own health concerns, the death of close nephew, and the diagnosis of terminal cancer of a cousin who had been more of a brother to Tufts, and who subsequently passed away.
  4. Good character and reputation. Members of the legal community would attest to Tufts's good character and reputation in the performance of legal services. *Standards*, § 9.32(g).

12.

Under the ABA *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.

13.

Oregon cases also support that lawyers who have not cooperated with the State Lawyer's Assistance Committee have been suspended. *See, e.g., In re Wyllie*, 326 Or 447, 952 P2d 550 (1998) (one-year suspension imposed on lawyer who appeared in court intoxicated on five separate occasions and who failed to cooperate with the State Lawyer's Assistance Committee); *In re Andersen*, 18 DB Rptr 172 (2004) (four-month suspension imposed on lawyer who failed to cooperate with State Lawyers Assistance Committee, among other things, with additional requirement that lawyer be required to seek formal reinstatement under BR 8.1). Tufts's misconduct is not as egregious as the misconduct present in *Wyllie*, because there is no evidence that Tufts's conduct affected any clients.

Oregon case law similarly supports that lawyers who have failed to cooperate with a disciplinary authority are typically suspended for 60 days. *See In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (lawyer who failed to respond to the Bar and the local investigating committee was suspended for 120 days, 60 each for failure to cooperate); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension imposed on lawyer, 60 days of which resulted from his failure to respond to the Bar).

Collectively, a suspension of 120 days plus a requirement of formal reinstatement per BR 8.1 is appropriate to address Tufts's conduct and to ensure his fitness before his resumption of practice. *See In re Bennett*, 23 DB Rptr 192 (2009) (imposing same result under similar facts and circumstances).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Tufts shall be suspended for 120 days for violation of RPC 8.1(a)(2) and RPC 8.1(c), the sanction to be effective on the day that this stipulation is approved by the Disciplinary Board. The parties further agree that Tufts shall be required to seek formal reinstatement pursuant to BR 8.1, at such time as he is eligible to seek reinstatement.

15.

Tufts 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, Tufts has not engaged in the practice of law since April 2014, and does not possess any client files.

16.

Tufts 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. Tufts 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.

Tufts acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

18.

Tufts represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Tufts is admitted: Federal District Court of Oregon.

19.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

Cite as *In re Tufts*, 29 DB Rptr 141 (2015)

EXECUTED this 2nd day of July, 2015.

/s/ William L. Tufts

William L. Tufts

OSB No. 794232

EXECUTED this 6th day of July, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-49
	)	
LOIS A. ALBRIGHT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Mary A. Cooper
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.6(a). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	July 29, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Lois A. Albright is publicly reprimanded for violation of RPC 1.6(a).

DATED this 29th day of July, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Lois A. Albright, attorney at law (“Albright”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Albright 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 Bar continuously since that time, having her office and place of business in Tillamook County, Oregon.

3.

Albright enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On May 30, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Albright for alleged violation of RPC 1.6(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.

Albright was retained in May 2013 to represent Shirley Laviolette (“Client”) in a divorce. In March 2014, several days before the date set for trial, Albright received a settlement offer from opposing counsel. Albright asked Client to come to her office the next day to discuss it. Client told Albright that she was unable to meet that day because she had a doctor’s appointment, that she had certain physical symptoms that made her concerned that a previous health problem had returned, and that she wanted to keep this information private.

6.

The next day, Albright wrote a letter to opposing counsel explaining why the settlement could not be finalized. Albright revealed that Client had a doctor’s appointment that day; that she expected to undergo further testing; that she was uncertain about the condition of her health; that she had not talked with anyone about her symptoms; and that she did not want anyone to know about them.

### Violation

7.

Albright admits that, by disclosing this information to opposing counsel, she revealed information relating the representation of a client without the client's informed consent, in violation of RPC 1.6(a).

### Sanction

8.

Albright 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* ("*Standards*"). The *Standards* require that Albright'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.** Albright violated her duty to maintain client confidences. *Standards*, § 4.0.
- b. **Mental State.** Albright's conduct was "knowing," which the *Standards* define as done with a conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 9.
- c. **Injury.** There was at least potential injury insofar as Client's medical condition could affect her settlement posture. *See Standards*, p. 7.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law. *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. Cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e).

9.

Under the *ABA Standards*, a public reprimand is generally appropriate when the lawyer's mental state is negligent and the disclosure causes injury or potential injury to the client. *Standards*, § 4.23. The *Standards* provide that a suspension is appropriate when the lawyer knowingly reveals information relating to the representation of a client, and the disclosure causes injury or potential injury to the client. *Standards*, § 4.22. Because of the mitigating circumstances in this case, a public reprimand is the appropriate sanction.

10.

In *In re Langford*, 19 DB Rptr 211 (2005), an attorney stipulated to a public reprimand for filing a motion to withdraw that disclosed confidential client communications and personal judgments about the client's honesty and the merits of the client's legal matter. *See also, In re Scannell*, 8 DB Rptr 99 (1994) (attorney reprimanded where his attachment of a strategy letter from co-counsel to his memorandum in opposition to motion to dismiss, without the consent of either co-counsel or the client, was an improper disclosure of client confidence); *In re Jayne*, 295 Or 16, 663 P2d 405 (1983) (attorney reprimanded for violating her ethical obligation to preserve confidences and secrets of client when she represented husband in dissolution proceeding after representing wife in various matters).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Albright shall be publicly reprimanded for violating RPC 1.6(a).

12.

Albright acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

13.

Albright represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Albright is admitted: None.

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 June, 2015.

/s/ Lois A. Albright

Lois A. Albright  
OSB No. 780121

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 Nos. 12-161, 13-83 and 14-136
	)	SC S063329
MARK G. OBERT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violations of RPC 1.7(a)(2), RPC 1.16(c), and RPC 1.16(d). Stipulation for Discipline. 9-month suspension, all but 90 days stayed, 3-year probation.
Effective Date of Order:	July 1, 2015

**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 nine months, effective July 1, 2015, as set out in the stipulation. Of the nine-month period, all but 90 days of the suspension are stayed pending the Accused’s successful completion of a three-year term of probation.

/s/ Rives Kistler  
7/30/2015                      10:35:17 AM  
Rives Kistler  
Presiding Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

Mark G. Obert, attorney at law (“Obert”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Obert 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 Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Obert enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On December 16, 2014, an Amended Formal Complaint was filed against Obert pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.7(a)(2) (conflict of interest), RPC 1.16(c) (duty to comply with court rules upon withdrawal), and RPC 1.16(d) (duty to take reasonable steps upon withdrawal to protect client interests). 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.

### **Shinault Matter**

### **Case No. 12-161**

### **Facts**

5.

In April 2010, Obert undertook to assist Lester Shinault (“Shinault”) in determining whether to seek review of an unfavorable order (“the order”) issued in *In re Lester Shinault*, OAH Case No. 901172. After investigating the facts and law, Obert reached the opinion that Shinault was unlikely to prevail on review. Obert notified Shinault of his opinion.

6.

Shinault asked Obert to file a petition for review to preserve Shinault’s ability to pursue review and to research an additional issue concerning the order. On May 7, 2010, Obert filed a petition for judicial review of the order (“the appeal”), paying the filing fee from his own funds. By doing so, Obert made an appearance in the matter as attorney of record for Shinault. Obert warned Shinault that if Shinault failed to reimburse by May 26,

2010, the filing fee Obert had advanced, Obert would take no further action except to withdraw from the representation of Shinault.

7.

Shinault failed to reimburse Obert. On May 27, 2010, Obert notified Shinault that Obert's employment was terminated.

8.

At all relevant times, ORAP 8.10(1) provided that during the pendency of an appeal, an attorney may not withdraw from or substitute new counsel in a case except on order of the appellate court, after a motion filed and served on the client and every other party to the appeal.

9.

Obert failed to file and serve a motion to withdraw from the *In re Shinault* appeal in accord with the requirements of ORAP 8.10(1).

10.

Obert failed to take other reasonable steps after the termination of his employment to protect Shinault's interests in the appeal such as: informing Shinault of the status of the appeal and the need to file an opening brief; seeking an extension of time for Shinault to file the opening brief; and forwarding to Shinault correspondence from the court regarding the appeal, including the court's 14-day notice of default pursuant to ORAP 1.20. The appeal was subsequently dismissed for failure to prosecute.

### **Violations**

11.

Obert admits that, by failing to properly withdraw from the representation of Shinault, he violated RPC 1.16(c) and RPC 1.16(d) of the Rules of Professional Conduct.

### **Cochran Matter**

#### **Case No. 13-83**

#### **Facts**

12.

In August 2008, Obert undertook to represent Kenneth Cochran ("Cochran") in Marion County Circuit Court Case No. 08C46681. At the time Obert began the representation, Cochran had already been convicted after a jury trial. Over the following months, Obert pursued a motion for a new trial, submitted mitigating information to the court, and represented Cochran in sentencing proceedings. The motion for a new trial was denied. In April 2009, Cochran was sentenced to a term of imprisonment.

13.

Cochran had viable issues that could reasonably have been raised on appeal. Obert filed notice of appeal on Cochran's behalf. However, based upon Obert's advice that post-conviction relief would achieve a quicker resolution, Cochran decided to immediately pursue post-conviction relief rather than pursuing the appeal and the appeal was abandoned.

14.

A petition for post-conviction relief may raise claims of ineffective assistance of counsel at the trial and appellate levels. Cochran had viable issues concerning the effectiveness of counsel at the trial and appellate levels, including potential claims that Obert's assistance as trial and appellate counsel was ineffective.

15.

At all times after Obert undertook to advise and represent Cochran regarding post-conviction relief, there existed a significant risk that Obert's representation of Cochran would be materially limited by Obert's personal interest in not exposing himself to a malpractice or other claim by Cochran by asserting his own ineffectiveness as trial or appellate counsel as a basis for relief. Although informed consent of the client, confirmed in writing, may have addressed the risk of impaired representation, Obert did not seek or obtain such consent.

16.

Obert timely pursued a petition for post-conviction relief regarding the alleged ineffective assistance of Cochran's prior counsel at trial. The post-conviction court denied Cochran's petition and noted that, in the post-conviction proceeding, Cochran had raised a viable issue that was required to be raised on direct appeal, which had not been done.

17.

In December 2013, other counsel assisted Cochran to enter into a stipulated agreement that granted relief with respect to the viable issue. As a result, Cochran's top count conviction was vacated and he was sentenced to a substantially reduced period of incarceration.

### **Violation**

18.

Obert admits that his representation of Cochran on the petition for post-conviction relief violated RPC 1.7(a)(2) of the Rules of Professional Conduct.

**Carrillo-Machain Matter**

**Case No. 14-136**

**Facts**

19.

In September 2011, Obert undertook to represent Jesus Carrillo-Machain (“Carrillo-Machain”) for a flat fee of \$5,000 to appeal the sentence in *State v. Carrillo-Machian*, Marion County Case No. 10C49093 (the “Carrillo-Machain appeal”). One of Carrillo-Machain’s family members promised to pay the flat fee, but it was never paid.

20.

Obert filed a notice of appeal on behalf of Carrillo-Machain. By doing so, Obert made an appearance in the matter as attorney of record for Carrillo-Machain. Obert obtained at his own expense ordered a transcript of the sentencing proceeding.

21.

In May 2012, Obert informed Carrillo-Machain that he must either pay Obert’s fee so that Obert would complete and file the opening brief, or obtain alternate counsel to do so. Carrillo-Machain did not pay Obert’s fees or obtain new counsel thereafter. Obert considered his appellate representation of Carrillo-Machain terminated.

22.

Obert failed to file and serve a motion to withdraw from the Carrillo-Machain appeal in accord with the requirements of ORAP 8.10(1).

23.

Obert failed to take other reasonable steps after the termination of his employment to protect Carrillo-Machain’s interests on appeal, including but not limited to: seeking an extension of time for Carrillo-Machain to find new counsel and file an opening brief (or file such a brief *pro se*); referring Carrillo-Machain to a public defender; or ensuring that Carrillo-Machain received future notices from the court regarding his appeal.

24.

Other counsel was able to get Carrillo-Machain’s appeal reinstated. In August 2014, the Oregon Court of Appeals affirmed the sentence in *State v. Carrillo-Machain*.

**Violations**

25.

Obert admits that his failure to properly withdraw from the representation of Carrillo-Machain violated RPC 1.16(c) and RPC 1.16(d) of the Rules of Professional Conduct.

## Sanction

26.

Obert 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*, 1992 Ed. (“Standards”). The *Standards* require that Obert’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.** Obert’s failure to properly withdraw from the representation of Shinault and Carrillo-Machain violated duties he owed as a professional. *Standards*, § 7.0. Obert’s representation of Cochran on the petition for post-conviction relief violated his duty to his clients to avoid a conflict of interest. *Standards*, § 4.3.
- b. **Mental State.** “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 7. Obert acted negligently in failing to properly withdraw from the representation of Shinault and Carrillo-Machain. Obert also acted negligently in failing to recognize and appropriately address his conflict of interest in the Cochran matter.
- c. **Injury.** Obert’s failure to recognize that his representation of Cochran preceding the petition for post-conviction relief was required to be a subject of inspection in a petition for post-conviction relief, and his related failure to recognize how he might have failed to adequately represent Cochran, had the potential to cause great injury to Cochran. Obert’s failure to properly withdraw from the representation of Shinault may have contributed to Shinault’s failure to timely pursue an appeal. Obert’s failure to properly withdraw from the representation of Carrillo-Machain caused potential harm to Carrillo-Machain’s ability to appeal.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. *Standards*, § 9.22(a).<sup>1</sup> *In re Obert II*, 352 Or 231, 282 P3d 825 (2012) (six-month suspension for misconduct in

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<sup>1</sup> In determining the weight of prior disciplinary offenses, 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[s]; and (5) the timing of the current offense in relation to the prior offense and resulting sanction . . . [and] whether the accused lawyer had been

two matters, in violation of RPC 1.1, RPC 1.5(a), RPC 1.15-1(a), (c), (d), RPC 3.1, and RPC 8.1(a)(2)); *In re Obert I*, 336 Or 640, 89 P3d 1173 (2004) (30-day suspension for misconduct in three matters, in violation of former DRs 6–101(B), 5–105(E), 1–102(A)(3), and 9–101(C)(4)). Obert’s misconduct in the present matters is not similar to the misconduct in those prior matters and, except in the Carrillo-Machain matter, occurred prior to the sanction in *Obert II*. The offenses in *Obert I* are not recent.

2. A pattern of misconduct. *Standards*, § 9.22(c). Obert’s failure to carry out his professional duties upon the termination of his employment in the Shinault and Carrillo-Machain matters shows a pattern of misconduct.
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*, § 9.32(b).
2. Full and free disclosure and cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e).
3. Remorse. *Standards*, § 9.32(l).

27.

Under the ABA *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 will adversely affect another client, and causes injury or potential injury to a client. *Standards*, § 4.33. A suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards*, § 4.32. Reprimand is also 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.

28.

In the absence of a prior disciplinary history, Obert’s present misconduct might warrant short-term suspension. *See, e.g., In re Clarke*, 22 DB Rptr 320 (2008). Clarke decided a client’s appeal was without merit and permitted it to be dismissed. She did not tell

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sanctioned for the prior offense before engaging in the offense in the case at bar.” *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

her client about her decision or the subsequent dismissal of the appeal. She also failed to properly account for the client's retainer. After the client discovered the case was dismissed, rather than withdraw from further representation, Clarke agreed to re-evaluate the merits of the appeal at a time when her prior inaction reasonably would affect her judgment. Clarke, who had no prior disciplinary history, was suspended for 60 days for misrepresentation, conflict of interest, failure to withdraw, and failure to account. Obert's failures in these matters are not as pronounced as Clarke's were. In *In re Wilkerson*, 17 DB Rptr 79 (2003), a lawyer with no prior disciplinary history badly neglected a civil case, resulting in an award of prevailing party fees to the opposing party. He then drew up an agreement to settle the client's potential malpractice claim against him. For violations of lack of competence, neglect, and conflict of interest, he was suspended for 30 days. Again, Obert's failures are not as pronounced. However, since there are three matters, and Obert's prior disciplinary history is a significant aggravating factor, a longer term suspension is more appropriate.

29.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also, Standards*, § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

30.

Consistent with the *Standards* and Oregon case law, the parties agree that Obert shall be suspended 9 months for violation of RPC 1.7(a)(2), RPC 1.16(c), and RPC 1.16(d), with all but 90 days of the suspension stayed pending Obert's successful completion of a 3-year term of probation, the sanction to be effective July 1, 2015.

31.

Obert's license to practice law shall be suspended for a period of 90 days beginning July 1, 2015, and ending September 29, 2015, assuming all conditions have been met. Obert understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain the status of active practice with the Oregon State Bar. During the period of actual suspension, including any period of time between September 29, 2015, and the date upon which Obert re-attains the status of active practice with the Oregon State Bar, Obert shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

32.

Probation shall commence on the date Obert's license is reinstated to active practice status and continue for a period of 3 years, ending on the day prior to the third year anniversary of the commencement date (the "period of probation"). During the period of probation, Obert shall abide by the following conditions:

- (a) Within 7 days of his reinstatement to active practice, Obert shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with a PLF practice management advisor in order to obtain practice management advice. Obert shall notify the Bar of the time and date of the appointment.
- (b) Obert shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than 30 days after recommendations are made by the PLF practice management advisor, Obert shall adopt and implement those recommendations.
- (c) No later than 60 days after recommendations are made by the PLF practice management advisor, Obert shall provide Disciplinary Counsel's Office with a copy of the office practice assessment from the PLF and file with Disciplinary Counsel's Office a report: stating the date of his consultation(s) with the PLF practice management advisor; identifying the recommendations that he has adopted and implemented; and identifying any recommendations he has not adopted or an explanation as to why they have not been adopted or implemented.
- (d) Scott Howell shall serve as Obert's probation supervisor ("Supervisor"). Obert shall cooperate and comply with all reasonable requests made by his Supervisor that the Supervisor, in the Supervisor's sole discretion, determines are designed to achieve the purpose of the probation and the protection of Obert's clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Obert shall meet with his Supervisor in person at least once a month for the purpose of reviewing the status of Obert's law practice and performance of legal services on the behalf of clients. Each month during the period of probation, Obert's Supervisor shall conduct a random audit of 10% of Obert's open or recently closed files, or ten of Obert's open or recently closed files, whichever number is greater, to ensure that Obert is timely attending to matters and taking reasonably practicable steps to protect his clients' interests upon the termination of his employment.

- (e) During the period of probation, Obert shall attend not less than 6 MCLE accredited programs, for a total of 30 hours, which shall emphasize law practice management and time management. These credit hours shall be in addition to those MCLE credit hours required of Obert for his normal MCLE reporting period.
- (f) Each month during the period of probation, Obert shall review all client files to ensure that he is timely attending to the clients' matters; that he is maintaining adequate communication with clients, the court, and opposing counsel; and that he is taking reasonably practicable steps to protect his clients' interests upon the termination of his employment.
- (g) On a quarterly basis, on dates to be established by Disciplinary Counsel beginning no later than 30 days after the term of probation commences, Obert shall submit to Disciplinary Counsel's Office a written report, approved as to substance by his Supervisor, advising whether he is in compliance with the terms of this agreement. In the event that Obert has not complied with any term of the agreement, the quarterly report shall describe the non compliance and the reason for it.
- (h) Throughout the term of probation, Obert shall attend to client matters, including diligently pursuing them and adequately communicating with clients regarding them. Obert shall take reasonably practicable steps to protect his clients' interests upon the termination of his employment.
- (i) Obert authorizes his Supervisor to communicate with Disciplinary Counsel regarding his compliance or noncompliance with the terms of this agreement, and to release to Disciplinary Counsel any information necessary to permit Disciplinary Counsel to assess his compliance.
- (j) Obert is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (k) Obert's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to Disciplinary Counsel's Office, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension. A compliance report is timely if it is emailed, mailed, faxed, or delivered on or before its due date. A decision by the SPRB to prosecute Obert for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

33.

Obert 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, Obert has arranged for Scott Howell, an active member of the Bar, to either take possession of or have ongoing access to Obert's client files and serve as the contact person for clients in need of the files during the term of his suspension. Obert represents that Scott Howell has agreed to accept this responsibility. Obert further agrees no later than June 22, 2015, to notify all clients with whom he has active matters as of the commencement date of his suspension of the fact that he will not be able to practice law during the period of active suspension and of the name of the active member of the Bar who has agreed to take possession or have ongoing access to Obert's client files. Obert shall on or before the commencement date of the period of active suspension take reasonable steps necessary to notify courts in which he has current active matters of his inability to practice law by either filing notices of withdrawal or acquiescing in motions to substitute being filed by another lawyer seeking to enter an appearance on behalf of a client of Obert's.

34.

Obert 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. Obert 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.

35.

Obert acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

36.

Obert represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Obert is admitted: Washington.

37.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

Cite as *In re Obert*, 29 DB Rptr 151 (2015)

EXECUTED this 9th day of June, 2015.

/s/ Mark G. Obert

Mark G. Obert

OSB No. 963800

EXECUTED this 18th day of June, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-77
	)	
JOHN V. MCVEA,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 8.4(a)(3). Stipulation for Discipline. 6-month suspension.
Effective Date of Order:	August 10, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and John V. McVea is suspended for six months, effective upon approval of the Disciplinary Board for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 8.4(a)(3).

DATED this 10th day of August, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

John V. McVea, attorney at law (“McVea”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

McVea was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 27, 2005, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

McVea enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 19, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against McVea for alleged violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 8.4(a)(3) 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.

On December 2, 2014, a Formal Complaint was filed against McVea pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 8.4(a)(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.

Between March 2010, and September 2012, Patricia Bartch (“Bartch”) hired McVea to represent her on a personal injury claim that arose from a slip and fall accident that occurred on the walkway at the marina where her houseboat was docked.

6.

McVea filed a complaint in Multnomah County Circuit Court on September 19, 2012. Bartch was deposed in February 2013, and understood that all was proceeding well with the

lawsuit. However, in late 2012 or early 2013, McVea told her that he had received an expert opinion from Ducks Marine Construction that disproved her claim that the dock was negligently built/maintained. Bartch told McVea that she would find another expert.

7.

In an email dated March 25, 2013, McVea asked Bartch whether she had been able to obtain another, more favorable, expert opinion regarding the dock. Such an opinion was “imperative” (he said) because the “other side has asked for a hearing and without a report we are unable to proceed.” He also said that the hearing was scheduled for April 12, 2013, at 9:30 a.m. Although he would be leaving town on April 1, 2013, he promised to be back in time for the hearing.

8.

Bartch arranged and paid for three inspections of the dock and gave the reports of these inspections to McVea, along with the name of an engineer who was willing to examine the dock upon McVea’s request.

9.

On April 12, 2013, at 10:10 a.m., McVea telephoned Bartch with bad news: the judge had just dismissed her case based on the unfavorable Ducks Marine Construction report. There could be no appeal, he said, and her lawsuit was dead. Over the next several months, Bartch asked McVea several times for a copy of the judge’s dismissal order but he never provided it. He told her that the court had never sent it to him but that he would try to obtain it; he suspected that the court must have misfiled it.

10.

Around October 14, 2013, Bartch went to the court herself and obtained a copy of her file. She learned that there was never any hearing on April 12, 2013. Rather, the court dismissed her case at a hearing on April 1, 2013—which *McVea did not attend*. Further, the dismissal was not on the merits; the case was dismissed as a sanction for Bartch’s failure to comply with a discovery order that she did not even know about.

11.

McVea had misrepresented the status of her case and had:

- (a) failed to inform Bartch that the defendant had requested discovery;
- (b) failed to inform Bartch that the defendant had filed, and the court had granted, a motion to compel discovery;
- (c) failed to inform Bartch that the defendant’s motion to dismiss for failure to comply with the court’s order compelling discovery was set for hearing on April 1, 2013;

- (d) failed to inform Bartch that she was subject to sanction and an award of attorney fees at the April 1, 2013 hearing;
- (e) failed to respond to defendant's motion to dismiss;
- (f) failed to appear at the April 1, 2013 hearing;
- (g) failed to inform Bartch that the court had not dismissed her case on the merits;
- (h) failed to inform Bartch that her case had been dismissed as a sanction for McVea's failure to comply with a discovery order;
- (i) failed to obtain the dismissal order and provide it to Bartch;
- (j) failed to respond to defendant's Statement of Attorney Fees or advise Bartch that defendant was requesting an award of attorney fees;
- (k) failed to file an objection to defendant's Statement of Attorney Fees;
- (l) failed to inform Bartch when a supplemental judgment for fees in the amount of \$5,673.75 was entered against her; and
- (m) failed to respond to Adventist Hospital's request for a copy of the dismissal order.

#### **Violations**

12.

McVea admits that, by engaging in the conduct described in paragraphs 1 through 11, he violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 8.4(a)(3).

#### **Sanction**

13.

McVea 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* ("Standards"). The *Standards* require that McVea'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.** McVea violated duties he owed to Bartch to be candid with her, to communicate with her, and to diligently pursue her legal matter. *Standards*, §§ 4.4 and 4.6. McVea also violated his duty to avoid improper conflicts of interest. *Standards*, § 4.3.
- b. **Mental State.** "'Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Standards*, p. 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 or care that a reasonable lawyer would exercise in the situation.” *Standards*, p. 9. Although McVea’s neglect of his client’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, his failure to transmit certain information to his client or communicate with her about the status of the case may have initially been negligent. However, it became knowing when his client continued to make inquiries asking for information. McVea knowingly misrepresented the status of the case to his client and knowingly misrepresented the reasons for the dismissal of Bartch’s case.

- c. **Injury.** Bartch sustained actual injury in that she lost the opportunity to litigate her claim. *See In re Snyder*, 348 Or 307, 232 P3d 952 (2010); *In re Bourcier*, 322 Or 561, 569, 909 P2d 1234 (1996). Bartch also experienced frustration when McVea failed to pursue her legal matter and respond to her inquiries. *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004). Bartch was also injured when the court imposed sanctions on her because McVea failed to respond to the discovery request and the attorney cost bill.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. McVea committed multiple offenses. *Standards*, § 9.22(d).
  - 2. McVea had substantial experience in the practice of law at the time of his misconduct. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. McVea has no prior disciplinary record. *Standards*, § 9.32(a).
  - 2. McVea made full and free disclosure and showed a cooperative attitude in the disciplinary proceeding. *Standards*, § 9.32(e).
  - 3. McVea has expressed remorse. *Standards*, § 9.32 (l).

14.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Under the ABA *Standards*, suspension is generally appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Finally, suspension is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes injury or potential injury to the client. *Standards*, § 4.32, § 4.42(b), § 4.62.

15.

The court has stated that the presumptive sanction for engaging in a “patent” conflict of interest is a thirty-day suspension. See *In re Hockett*, 303 Or 150, 164, 734 P2d 877 (1987) (where a lawyer simultaneously represented two husbands with respect to their business interests and represent their wives in dissolution proceedings against them). *In re Purvis*, 306 Or 522, 760 P2d 254 (1988) provides authority for the imposition of a six-month suspension where, among other things, a lawyer fails to pursue a single client’s legal matter. In *Purvis*, a lawyer with no 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.

16.

Consistent with the *Standards* and Oregon case law, the parties agree that McVea shall be suspended for six months for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 8.4(a)(3), the sanction to be effective upon approval by the Disciplinary Board.

17.

McVea 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, McVea has arranged for Kyle S. Clark, an active member of the Bar, to either take possession of or have ongoing access to McVea’s client files and serve as the contact person for clients in need of the files during the term of his suspension. McVea represents that Kyle S. Clark has agreed to accept this responsibility.

18.

McVea 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. McVea 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.

McVea acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

20.

McVea represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or

suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which McVea is admitted: None.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 29th day of July, 2015.

/s/ John V. McVea

John V. McVea

OSB No. 050775

EXECUTED this 4th day of August, 2015.

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. 14-80  
)  
ANDREW J. LOPATA, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.5(a), and  
RPC 8.1(a)(2). Stipulation for Discipline. 90-day  
suspension, all stayed, 2-year probation.  
Effective Date of Order: September 1, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Andrew J. Lopata is suspended for 90 days, all 90 days stayed pending successful completion of a 2-year probation, effective this first day of the first month following approval by the Disciplinary Board for violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), and RPC 8.1(a)(2).

DATED this 10th day of August, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Andrew J. Lopata, attorney at law (“Lopata”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Lopata was admitted by the Oregon Supreme Court to the practice of law in Oregon on December 19, 2003, and has been a member of the Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

Lopata enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On September 22, 2014, a Formal Complaint was filed against Lopata pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (duty to keep a client reasonably informed and respond to reasonable requests for information); RPC 1.5(a) (charge or collect an excessive fee); RPC 8.1(a)(2) (failure to respond to a disciplinary authority); and RPC 8.4(a)(3) (conduct involving dishonesty or misrepresentation) of the Oregon Rules of Professional Conduct. The parties intend that this Stipulation for Discipline sets forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

Renee Swartz (“Swartz”) retained Lopata in March 2012 to file a trademark application for a product she had created.

6.

As per the written fee agreement, Swartz sent Lopata a check for \$475, representing the US Patent and Trademark Office (“USPTO”) application fee of \$325, and his attorney fee of \$150. Lopata deposited Swartz’s check into his lawyer trust account.

7.

Lopata filled out the trademark application fully and then sent instructions to Swartz on how to log in and electronically sign the application. She notified him soon after that she had done so. Lopata's remaining step was to pay the filing fee and submit the application. Lopata failed to complete this step.

8.

When, after the normal amount of processing time elapsed and Lopata did not receive anything from the USPTO, he did not notice the lack of communication or inquire as to the application's status.

9.

In late 2012, Swartz began to wonder about the status of her application. Upon inquiry, Swartz learned that the USPTO had no record of an application for a trademark on Swartz's behalf. She tried a number of times to contact Lopata but he did not return her telephone calls or emails. Lopata did not immediately return Swartz's fee upon learning that he had failed to file the application.

10.

In May 2014, Disciplinary Counsel's Office ("DCO") received a complaint from Swartz about Lopata's conduct. In June 2014, DCO requested that Lopata respond to Swartz's allegations that he failed to file her trademark application and failed to respond to her.

11.

During June and July 2014, DCO sent two letters of inquiry to Lopata at the address then on record with the Bar by first-class mail and/or certified mail. The letters were not returned undelivered, but Lopata did not respond to them. Nor did he respond to a subsequent notice that he would be suspended pursuant to BR 7.1 if he did not cooperate with DCO's requests for information. In mid-August 2014, Lopata was administratively suspended due to his lack of cooperation.

### **Violations**

12.

Lopata admits that his failure to file and follow up on the status of Swartz's trademark application constituted neglect of a legal matter, in violation of RPC 1.3. He further admits that his failure to respond to Swartz's attempts to communicate with him violated RPC 1.4(a). Lopata admits that, by not returning Swartz's fee when he became aware that he had not completed her representation, he violated RPC 1.5(a).

Lopata acknowledges that his failures to respond to DCO in its investigation of Swartz's complaint constituted a knowing failure to respond to a lawful demand from a disciplinary authority, in violation of RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.4(a)(3) should be and, upon the approval of this stipulation, is dismissed.

### Sanction

#### 13.

Lopata 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* ("*Standards*"). The *Standards* require that Lopata'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. *Standards*, § 3.0. In determining the appropriate sanction, the court also examines the conduct of the accused attorney in light of the court's prior case law. *In re Garvey*, 325 Or 34, 932 P2d 549 (1997).

- a. **Duty Violated.** Lopata violated his duty of diligence to his client when he neglected Swartz's matter and failed to adequately communicate with her. *Standards*, § 4.4. The *Standards* provide that the most important ethical duties are those which lawyers owe to clients. *Standards*, p. 5. Lopata violated his duties to the profession by collecting an excessive fee and failing to cooperate with disciplinary authorities. *Standards*, § 7.0.
- b. **Mental State.** "Intent' is the conscious objective or purpose to accomplish a particular result." *Standards*, p. 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." *Id.* "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." *Id.* Lopata initially acted negligently when he neglected to complete Swartz's trademark application, failed to communicate with Swartz, and collected a clearly excessive fee, having failed to complete her matter but retaining the entire fee. Lopata's mental state became knowing after he received, and failed to respond to, telephone and email messages from Swartz requesting updates on her trademark application. Lopata also acted knowingly when he failed to timely respond to DCO's request for information when he knew a complaint was pending against him.

- c. **Injury.** Both actual and potential injury are relevant to determining the sanction in a disciplinary case. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Lopata caused actual and potential harm to his client when he failed to complete Swartz’s trademark application and failed to communicate with her regarding the status of her application. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of attorney neglect can constitute actual injury under the *Standards*); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997). Lopata’s failure to complete the filing of the trademark application also caused potential injury to Swartz in that she could have lost her place as the first to file and the corresponding rights that position granted her in the trademark process. Finally, Lopata’s failure to timely return her fee deprived her of use of her funds. *See In re Obert*, 352 Or 231, 282 P2d 825 (2012) (where court found that excessive fee resulted in actual financial harm to client). Following the Bar’s involvement, Lopata has since returned \$475 to Swartz. Lopata’s failure to cooperate with the Bar’s investigation of his conduct caused actual harm to both the legal profession and to the public because he delayed the Bar’s investigation and, consequently, the resolution of the complaint against him. *In re Schaffner*, 325 Or at 427; *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. Lopata had been practicing in Oregon for approximately nine years at the time of the misconduct at issue. *Standards*, § 9.22 (i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of relevant prior disciplinary record.<sup>1</sup> *Standards*, § 9.32(a).
  2. Absence of a dishonest motive. *Standards*, § 9.32(b).
  3. Personal and emotional problems. *Standards*, § 9.32(c). At the time Lopata’s misconduct occurred, he was suffering from major depression, ADHD, anxiety, and migraines, all of which were exacerbated by the sudden dissolution of his marriage and related stressful events. The additional stress under these circumstances manifested itself by

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<sup>1</sup> Lopata was admonished in 2013 for a violation of RPC 4.2 (improper communication with a represented party—his former spouse). This is not considered prior discipline for purposes of aggravation in this circumstance because it was not for the same or similar conduct. *In re Cohen*, 330 Or at 500.

causing Lopata to become distracted, forgetful, and prone to procrastinate and avoid unpleasant tasks and situations.

4. Remorse. *Standards*, § 9.32(1).

14.

Under the ABA *Standards*, a period of suspension is generally appropriate when a lawyer either 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 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*, §7.0. A reprimand is generally appropriate when a lawyer negligently engages in such conduct. *Standards*, §§ 7.2, 7.3. Considering the totality of Lopata's conduct, a suspension is appropriate.

15.

Oregon cases support a suspension of 60 days to 6 months or more for similar collective misconduct.

The court has emphasized a no-tolerance approach to noncooperation with the Bar. *See, e.g., In re Obert*, 352 Or 231, 282 P2d 825 (2012) (attorney suspended for six months where he failed to respond to numerous requests from the Bar about an ethics complaint until subpoenaed to do so); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *mod on recon* 345 Or 652 (2009) (attorney who refused to respond to questions posed by the bar concerning an allegation that attorney obtained a loan from an elderly client was suspended for one year); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (120-day suspension for failing to respond to the bar where no substantive charges were brought); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension; 60 days each for neglect and failing to cooperate with the bar).

Lopata's neglect of client matters and failure to communicate with his client alone warrants at least a short suspension. *See, e.g., In re Koch*, 345 Or 444, 198 P3d 910 (2008) (attorney suspended for 120 days when 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 the 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) (attorney's serious neglect of a child support arrearage matter for a client warranted a 60-day suspension, despite the lawyer's lack of prior discipline).

Consistent with the *Standards* and Oregon case law, the parties agree that Lopata shall be suspended for 90 days for violations of RPC 1.3, RPC 1.4(a), RPC 1.5(a), and RPC 8.1(a)(2), the sanction to be effective on the first day of the first month following approval by the Disciplinary Board, or as otherwise directed by the Disciplinary Board. However, all 90

days of the suspension shall be stayed pending Lopata's successful completion of a two-year term of probation on the conditions described below.

16.

Probation shall commence on the first day of the first month following approval by the Disciplinary Board and shall continue for a period of two years, ending on the day prior to the two-year anniversary of the commencement date ("period of probation"). During the period of probation, Lopata shall abide by the following conditions:

#### **General Provisions**

- (a) Lopata 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) Any subsequent finding by the SPRB that there is probable cause that Lopata violated a provision of the Oregon Rules of Professional Conduct or ORS Chapter 9 in a matter unrelated to the subject of this diversion, including for conduct that occurred or continued during the period of this probation, shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.
- (c) Lopata is responsible for any costs required under the terms of this stipulation and the terms of probation.

#### **SLAC Provisions**

- (d) Within seven (7) days of the commencement of the period of probation, Lopata shall contact the State Lawyers Assistance Committee ("SLAC"). Lopata agrees to enter into a "Monitoring Agreement" with SLAC, and to comply with all of the terms of that agreement and any subsequent modifications to that agreement.
- (e) Lopata shall not consume any controlled substances or prescription medications, except as prescribed by a licensed physician. Lopata shall consume any prescribed substance only as prescribed.
- (f) Designee of SLAC shall serve as Lopata's monitor ("Monitor"). Lopata agrees to cooperate and comply with all reasonable requests made by his Monitor that SLAC or his Monitor, in his/her sole discretion, determines are designed to achieve the purpose of the diversion and the protection of Lopata's clients, the profession, the legal system, and the public. Lopata shall meet with his Monitor in person on a regular basis, as determined by SLAC and/or the Monitor, for the purpose of monitoring Lopata's treatment progress.

- (g) Lopata shall continue his mental health treatment and shall not terminate his mental health treatment or reduce the frequency of his treatment sessions without first submitting to DCO and his Monitor a written recommendation from his primary treatment provider that Lopata's treatment sessions should be reduced in frequency or terminated and Lopata undergoes an independent mental health evaluation by a mental health professional acceptable to DCO, which evaluation confirms Lopata's mental fitness.
- (h) Lopata authorizes his Monitor to communicate with DCO regarding Lopata's compliance or noncompliance with the terms of this agreement and to release to DCO any information DCO deems necessary to permit it to assess Lopata's compliance.
- (i) Lopata shall attend mental health treatment as determined and approved by SLAC to be appropriate, including any aftercare and therapy recommended by SLAC or Lopata's treatment provider. Lopata shall comply with all terms and recommendations of the treatment provider for the duration of his treatment program.
- (j) Lopata waives any privilege or right of confidentiality to the extent necessary to permit disclosure by SLAC, his Supervising Attorney, or any other mental health treatment providers of Lopata's compliance or noncompliance with this stipulation and their treatment recommendations to SLAC and DCO. Lopata agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (k) In the event Lopata fails to comply with any condition of his probation, DCO may initiate proceedings to revoke Lopata'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.
- (l) In the event Lopata fails to comply with any condition of this stipulation, Lopata shall immediately notify SLAC and DCO in writing.
- (m) Lopata's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Monitor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.

17.

Lopata acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

18.

Lopata represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Lopata is admitted: none.

19.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 July, 2015.

/s/ Andrew J. Lopata

Andrew J. Lopata

OSB No. 036149

EXECUTED this 27th day of July, 2015.

OREGON STATE BAR

By: /s/ Angela W. Bennett

Angela W. Bennett

OSB No. 092818

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 14-16 and 14-137
	)	
SIOVHAN SHERIDAN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	David J. Elkanich
Disciplinary Board:	None
Disposition:	Violations of RPC 1.1, RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(c)(3), RPC 8.1(c)(4), and RPC 8.4(a)(4). Stipulation for Discipline. 60-day suspension, all stayed, 3-year probation.
Effective Date of Order:	August 27, 2015

**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 sixty (60) days, all stayed pending successful completion of a three 3-year probation, effective 08/27/2015 for violation of RPC 1.1, RPC 1.16(a)(2), RPC 1.16(d), RPC 8.4(a)(4), RPC 8.1(c)(4), and RPC 8.1(c)(3) of the Oregon Rules of Professional Conduct.

DATED this 27th day of August, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Siovhan Sheridan, attorney at law (“Sheridan”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Sheridan was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 27, 2007, and has been a member of the Bar continuously since that time, having her office and place of business in the County of Multnomah, State of Oregon, from approximately November 7, 2012, to January 22, 2014, and in the County of Pima, State of Arizona, from approximately January 23, 2014, to the present.

3.

Sheridan 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 22, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Sheridan for alleged violations of RPC 1.1, RPC 1.16(a)(2), RPC 1.16(d), RPC 8.4(a)(4), RPC 8.1(c)(4), and RPC 8.1(c)(3) 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.

On June 2, 2015, a Formal Complaint was filed against Sheridan pursuant to the authorization of the ,SPRB, alleging violation of RPC 1.1, RPC 1.16(a)(2), RPC 1.16(d), RPC 8.4(a)(4), RPC 8.1(c)(4), and RPC 8.1(c)(3) 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**

#### **Arreola Matter:**

5.

Since she was first admitted to practice law in Washington in 2003, Sheridan’s practice has focused on matters of United States (“U.S.”) immigration and citizenship.

Although immigration matters require some familiarity with criminal law, Sheridan had minimal experience as a criminal defense attorney.

6.

About July 2013, Sheridan agreed to assist Miguel Avila Arreola (“Arreola”) in immigration and criminal defense matters. Arreola is a Mexican national who had never been admitted to the U.S. nor had any legal status in the U.S.

7.

Arreola had been removed from the U.S. about January 2012, following his March 2010 conviction, in Washington County Circuit Court Case No. C90970CR, for felony Assault in the Second Degree, in violation of ORS 163.175, for which Arreola was sentenced to a 36-month term of incarceration, and additional felonies of Assault in the Third Degree, Unlawful Use of a Weapon, and Riot, for which Arreola was sentenced to concurrent 6-month terms of incarceration.

8.

Arreola subsequently illegally re-entered the U.S. and in July 2013 was charged in U.S. District Court for the District of Oregon with Illegal Reentry in violation of 8 USC 1326(a), Case No. 3:13-cr-00345-KI (the “illegal reentry case”). Pursuant to 8 USC 1326(b)(2), an alien found to have committed the crime of Illegal Reentry who had previously been removed subsequent to a conviction for a crime defined as an aggravated felony under federal immigration law faced up to 20 years imprisonment. Arreola’s March 2010 conviction for Assault in the Second Degree qualified as an aggravated felony under federal immigration law. An attorney from the Federal Public Defender’s Office was appointed to represent Arreola in the illegal reentry case. Arreola was offered a 5-year prison sentence if he pleaded guilty to the charge of Illegal Reentry.

9.

Arreola’s family paid Sheridan legal fees totaling \$6,400: \$1,400 for consulting with Arreola regarding his immigration situation (including travel to and from Portland, Oregon to Tacoma, Washington for the consultation); and \$5,000 to defend Arreola in the criminal case, including filing and pursuing a petition for post-conviction relief challenging Arreola’s March 2010 Oregon conviction that was considered to be an aggravated felony under federal immigration law. Sheridan has since returned those fees to the Arreola family.

10.

On August 27, 2013, Sheridan filed notice of her appearance as Arreola’s attorney in the illegal reentry case. Sheridan appeared before the court on Arreola’s behalf on September 24, 2013, cancelled a plea hearing that had been scheduled, demanded a jury trial, requested a continuance to prepare for trial and waived Arreola’s rights under the Speedy Trial Act for

that purpose. The court set over the case for trial as requested and the court ordered Sheridan to file by October 15, 2013, a declaration or affidavit that she had spoken with Arreola, he understood her rights under the Speedy Trial Act, and he agreed to waive them. If no such declaration or affidavit was filed by October 15, 2013, the court required Sheridan to appear before the court with her client on October 23, 2013, to waive those rights.

11.

Sheridan failed to timely file a declaration or affidavit as ordered, and failed to appear before the court on October 23, 2013. The court ordered Sheridan to appear October 29, 2013, and show cause why she should not be removed from representing Arreola in the illegal reentry case.

12.

On October 29, 2013, Sheridan filed a motion to dismiss the illegal entry case on the basis that: (1) Arreola's speedy trial rights had been violated; (2) the crime of Illegal Reentry was unconstitutional; (3) the underlying removal order was defective; (4) the criminal charges that formed the basis for the removal order were "in question"; and (5) the indictment was factually inaccurate. Sheridan's assertions that Arreola's speedy trial rights had been violated and that the indictment must be dismissed for a factual error were entirely without merit.

13.

On October 29, 2013, the court permitted Sheridan to remain as Arreola's counsel in the illegal reentry case but appointed criminal defense attorney Bear Wilner-Nugent to co-counsel with Sheridan on the case. Sheridan did not cooperate with Wilner-Nugent. On October 30, 2013, the court appointed criminal defense attorney Matthew Schindler to co-counsel with Sheridan on the case. Sheridan, thereafter, filed a motion demanding that the court recuse itself from the Deportation proceedings. On December 3, 2013, the court removed Sheridan from representing Arreola.

14.

During the course of her representation of Arreola, Sheridan: (1) filed a petition for post conviction relief that was without basis in law or fact; (2) did not timely file Arreola's post-conviction relief petition; (3) filed one or more motions in the illegal reentry case that were without basis in law or fact; (4) was late to or failed to appear for hearings in the illegal reentry case; (5) failed to acquire the knowledge, skill, thoroughness or preparation reasonably necessary to represent Arreola in the post-conviction matter; (6) failed to acquire the knowledge, skill, thoroughness or preparation reasonably necessary to represent Arreola in the illegal reentry case; (7) failed to cooperate with co-counsel appointed by the U. S. District Court to assist her in defending the illegal reentry case; (8) rendered legal advice to Arreola in the course of the illegal reentry case that was without basis in law or fact; and (9)

file an unfounded motion to recuse U.S. District Court Judge Garr M. King in the illegal reentry case.

**SLAC Matter:**

15.

On or before August 5, 2013, Sheridan was referred to the State Lawyer's Assistance Committee ("SLAC") for an initial inquiry to determine whether SLAC would assert jurisdiction to establish a remedial program for her. On or about September 30, 2013, SLAC determined that Sheridan was appropriately under its jurisdiction. Pursuant to RPC 8.1(c), Sheridan was required to cooperate with SLAC.

16.

In September 2013, two members of SLAC, one of them a doctor of psychology, met with Sheridan. They asked Sheridan to undergo a mental health evaluation so they could work on a remedial plan and Sheridan even signed a release for her medical records. Despite Sheridan's initial cooperation, she immediately began to renege, questioning the authority of SLAC and its members, and promising to take her concerns to "appropriate parties." SLAC reminded Sheridan that if she did not cooperate she would be referred to the bar's disciplinary counsel.

17.

Sheridan ceased responding, despite several additional emails from SLAC representatives reminding her of her duty to cooperate. SLAC notified Sheridan that a member would visit Sheridan at her office the morning of November 22, 2013. In response, Sheridan threatened to file a bar complaint and seek a restraining order against the SLAC member. Sheridan said she would communicate with Amber Hollister, a former law school classmate who happened to serve as assistant general counsel for the Bar and SLAC's liaison to bar staff.

18.

Sheridan filed a Bar complaint against the SLAC volunteer. After Hollister contacted Sheridan, Sheridan filed a Bar complaint against Hollister. Helen Hirschbiel, the Bar's general counsel, made additional efforts to persuade Sheridan to voluntarily cooperate with SLAC. Sheridan maintained that she was fine, her practice was not impaired, and SLAC had no authority to require her cooperation. Sheridan told Hirschbiel that she was an "offensive person." By the end of January 2014, Sheridan had disconnected her office phone and changed her contact to an address and phone number in Tucson, Arizona.

### Violations

19.

Sheridan admits that, by engaging in the conduct described in paragraphs 5–18 above, she violated RPC 1.1, RPC 1.16(a)(2), RPC 1.16(d), RPC 8.4(a)(4), RPC 8.1(c)(3), and RPC 8.1(c)(4).

### Sanction

20.

Sheridan 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* (“*Standards*”). The *Standards* require that Sheridan’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.** Sheridan violated her duties to her client to provide competent representation. *Standards*, §4.4. The *Standards* assume that the most important ethical duties are those obligations which a lawyer owes to clients. Sheridan also violated her duty to the legal system to avoid abuse of the legal process. *Standards*, § 6.2. Sheridan violated her duty to the profession when she failed to properly withdraw from representing a client and cooperate with SLAC. *Standards*, § 7.0.
- b. **Mental State.** “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards*, p.7.

Sheridan acted knowingly when she failed to provide Arreola with competent representation. Sheridan also acted knowingly when she failed to cooperate with SLAC. She acted negligently when she failed to properly withdraw from representing Arreola and engaged in conduct prejudicial to the administration of justice.

- c. **Injury.** Sheridan’s conduct caused both actual and potential injury to her client by rendering legal advice to her client that was without basis in law or fact, filing an untimely petition for post-conviction relief that was without basis in law. By failing to participate in the creation of or comply with a remedial program established by SLAC, additional time and resources were spent trying to gain her compliance. Sheridan also caused actual injury to the administration of justice insofar as her conduct necessitated several hearings

that resulted in the appointment of two different co-counsel and ultimately her removal from the case.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple Offenses. *Standards*, § 9.22(d).
  2. Sheridan has been licensed to practice law in Oregon since 2007. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior disciplinary history. *Standards*, § 9.32(a).
  2. Personal or emotional problems. *Standards*, § 9.32(c). During the period in which the conduct in these matters occurred, Sheridan was hampered by a mental disability that may have contributed to or exacerbated her misconduct.
  3. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  4. Character and reputation. *Standards*, § 9.32(g).
  5. Good faith effort to make restitution. *Standards*, § 9.32(d).

21.

Under the ABA *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. Suspension is also 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 to a client. *Standards*, § 4.52. Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and caused injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

22.

Lawyers who have failed to provide competent representation for a client have also been suspended. *In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (60-day suspension imposed on experienced lawyer who failed to provide competent representation to a client); *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (91-day suspension imposed on an inexperienced lawyer who failed to provide competent representation to a client over the course of three years).

Lawyers who have not cooperated with SLAC have been suspended. *In re Wyllie*, 326 Or 447, 952 P2d 550 (1998) (one-year suspension imposed on lawyer who appeared in court intoxicated on five separate occasions and who failed to cooperate with SLAC).

23.

Consistent with the *Standards* and Oregon case law, the parties agree that Sheridan shall be suspended for a period of 60 days, all stayed pending successful completion of a 3-year probation for violation of RPC 1.1, RPC 1.16(a)(2), RPC 1.16(d), RPC 8.4(a)(4), RPC 8.1(c)(4), and RPC 8.1(c)(3) of the Oregon Rules of Professional Conduct, the sanction to be effective the day this stipulation is approved.

24.

Probation is a sanction that can be imposed when a lawyer's right to practice law needs to be monitored or limited. *Standards*, § 2.7. However, the probationary conditions must make sense in light of the misconduct at issue. *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

25.

In this case, probation is appropriate because, since the conduct at issue in this matter, Sheridan has taken some steps to address her personal problems and has sought treatment, she has taken some steps to better educate herself on practice management and there have been no further complaints concerning her conduct. Probation is intended to assist Sheridan in maintain her current course and to monitor her practice over a period of time.

26.

During the period of suspension and probation, Sheridan shall comply with the following conditions:

- (a) Sheridan shall maintain and participate monthly (or as otherwise prescribed by her treating counselor) in her mental health treatment, and shall refrain from consuming marijuana, or any controlled substances not prescribed by a physician. Any prescribed medications shall be taken only as prescribed. This agreement requires Sheridan to meet with her mental health provider or counselor monthly, or as otherwise provided or prescribed by her counselor. Sheridan is required to meet with her practice supervisor quarterly.
- (b) Sheridan shall have a supervising attorney. The supervising attorney approved by DCO in writing shall supervise Sheridan's probation ("Supervising Attorney"). Sheridan currently is working with a mental health provider on treatment and relapse prevention. Sheridan shall immediately notify SLAC (or its Arizona equivalent) of this Stipulation for Discipline when it is approved by the Disciplinary Board and discuss with SLAC (or its Arizona equivalent) whether and how to modify her current treatment plan to best accomplish the objectives of Sheridan's probation.

- (c) Sheridan shall continue monthly mental health treatment as determined by her mental health treatment providers, including any aftercare and education and therapy recommended by her mental health treatment providers, and shall meet quarterly with her Supervising Attorney for the purpose of reviewing Sheridan's compliance with the terms of the probation. Sheridan shall cooperate and shall comply with all reasonable requests of SLAC (or its Arizona equivalent), including submitting to random urinalysis, and DCO that will allow SLAC (or its Arizona equivalent) and DCO to evaluate Sheridan's compliance with the terms of this stipulation for discipline;
- (d) To the extent that SLAC (or its Arizona equivalent) or Sheridan's mental health treatment providers recommend that Sheridan attend OAAP (or its Arizona equivalent), AA, NA or equivalent meetings, Sheridan agrees to obtain, upon SLAC's (or its Arizona equivalent) or the mental health treatment providers' request, verification of attendance at such meetings.
- (e) Sheridan shall report to SLAC (or its Arizona equivalent) or her Supervising Attorney and to DCO 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 Sheridan has possessed or consumed marijuana or other controlled substances not prescribed by a physician.
- (f) In the event Sheridan fails to comply with any condition of this stipulation, Sheridan shall immediately notify her Supervising Attorney, SLAC (or its Arizona equivalent) and DCO in writing.
- (g) At least quarterly, and by such dates as established by DCO, Sheridan shall submit a written report to DCO, approved in substance by her Supervising Attorney, advising whether she is in compliance or noncompliance with the terms of her stipulation and the recommendations of her treatment providers. Sheridan's report shall also identify: the dates and purpose of the Sheridan's meetings with her Supervising Attorney and the dates of meetings and other consultations between the Sheridan and all mental health professionals during the reporting period. In the event Sheridan has not complied with any term of probation in this disciplinary case, the report shall also describe the noncompliance and the reason for it, and when and what steps have been taken to correct the noncompliance.
- (h) Sheridan is responsible for the cost of all professional services required under the terms of her stipulation and the terms of probation.
- (i) In the event Sheridan fails to comply with any condition of her probation, DCO may initiate proceedings to revoke Sheridan'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.

### **Practice Management**

- (j) No later than December 1, 2016, Sheridan shall attend not less than 3 MCLE accredited programs, for a total of 12 hours, which shall emphasize law office management and administration. These credit hours shall be in addition to those MCLE credit hours required of Sheridan for her normal MCLE reporting period.
- (k) Upon completion of the MCLE programs described in paragraph (j) above, and no later than January 1, 2017, Sheridan shall submit an Affidavit of Compliance to DCO.
- (l) On or before October 1, 2015, Sheridan shall meet with office management consultants from the Professional Liability Fund (“PLF”) (or its Arizona equivalent) for an evaluation of whether she would benefit from changes to her office practices or management. When Sheridan receives recommendations from the PLF (or its Arizona equivalent) regarding her office practices or management, she shall notify DCO of the PLF’s recommendations in her first quarterly report described below. Sheridan shall implement all recommended changes, to the extent reasonably possible, and participate in at least one follow-up review by the PLF (or its Arizona equivalent) on or before March 1, 2016. Sheridan shall promptly report implementation of recommendations to her Supervising Attorney.
- (m) Every month for the term of this agreement, Sheridan shall review all client files to ensure that she is timely attending to the clients’ matters and that she is maintaining adequate communication with clients, the court, and opposing counsel.
- (n) Claudia Arevalo is appointed as Sheridan’s Supervising Attorney. Sheridan agrees to cooperate and comply with all reasonable requests made by her Supervising Attorney or that her Supervising Attorney, in her sole discretion determines are designed to achieve the purpose of the terms of this agreement and the protection of Sheridan’s clients, the profession, the legal system, and the public.
- (o) Sheridan shall meet with her Supervising Attorney in person at least once on or before September 1, 2015, for the purpose of reviewing the status of Sheridan’s law practice and her performance of legal services on the behalf of clients, and quarterly at least once on or before the 15th day thereafter.

- (p) Sheridan authorizes her Supervising Attorney to communicate with DCO regarding Sheridan's compliance or noncompliance with the terms of this agreement and to release to DCO any information DCO deems necessary to permit it to assess Sheridan's compliance.

### **Quarterly Reporting Requirements**

On or before September 1, 2015, and on or before the 20th day quarterly thereafter, Sheridan shall submit to DCO a written report, approved as to substance by her Supervising Attorney, verifying that:

- (1) Sheridan has reviewed her client files and ensured the pleadings fit the facts and circumstances applicable to each matter;
- (2) The Supervising Attorney has performed an audit of Sheridan's files and found them to be in order;
- (3) In Sheridan's quarterly report to DCO, she shall notify the Bar of the PLF's or its Arizona equivalent, recommended changes in her office management.
- (4) Sheridan has implemented the PLF's or its Arizona equivalent, recommended changes to her office management or advise DCO why the changes have not been implemented.
- (5) Sheridan is otherwise in compliance with the terms of this agreement relating to her practice management.
- (6) If Sheridan has not complied with any term of this agreement, she shall notify DCO of the reasons for noncompliance in the monthly report next due following the noncompliance.

### **WAIVERS**

27.

- (a) Sheridan hereby waives any privilege or right of confidentiality to permit the disclosure by her mental health treatment provider or counselor of any privileged information concerning compliance or noncompliance with this agreement, and any recommendations by any treatment provider. Sheridan agrees to sign any releases necessary to effectuate the provisions of her probation.
- (b) Sheridan acknowledges that her Supervising Attorney will report violations of this agreement to DCO.
- (c) Sheridan authorizes her Supervising Attorney to communicate with DCO regarding Sheridan's compliance or noncompliance with the terms of this agreement, and to release to DCO any information that Disciplinary Counsel

deems necessary for it to assess Sheridan's compliance. Any information the Bar may obtain from Sheridan's treatment provider(s) will remain confidential and not subject to public disclosure except in proceedings to enforce or revoke this agreement. In the event of such proceedings, the Bar agrees to consent to a protective order that will limit the disclosure of such information to the State Professional Responsibility Board, any trier of fact, and to the Oregon Supreme Court.

- (d) Sheridan has been represented in this proceeding by David J. Elkanich. Sheridan and Elkanich hereby authorize direct communication between Sheridan and Disciplinary Counsel's Office after the date this probation agreement is signed by both parties, for the purposes of administering this agreement and monitoring Sheridan's compliance.

28.

Sheridan 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, Sheridan has arranged for Claudia Arevalo, an active member of the New Mexico Bar, to either take possession of or have ongoing access to Sheridan's client files and serve as the contact person for clients in need of the files during the term of her suspension. Sheridan represents that Claudia Arevalo has agreed to accept this responsibility.

29.

Sheridan acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

30.

Sheridan represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Sheridan is admitted: Arizona and Washington.

31.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 31st day of July, 2015.

/s/ Siovhan Sheridan

Siovhan Sheridan

OSB No. 070844

EXECUTED this 12th day of August, 2015.

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. 14-90  
)  
JOB VALVERDE, )  
)  
Accused. )

Counsel for the Bar: Susan Roedl Cournoyer  
Counsel for the Accused: Lawrence Matasar  
Disciplinary Board: None  
Disposition: Violation of RPC 1.6(a). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: August 31, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Job Valverde is publicly reprimanded for violation of RPC 1.6(a).

DATED this 31st day of August, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ James C. Edmonds  
James C. Edmonds, Region 6  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Job Valverde, attorney at law (“Valverde”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Valverde 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 Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Valverde 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 22, 2014, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Valverde for alleged violations of RPC 1.6(a) and RPC 1.6(c) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violation and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

For many years, Valverde was employed full-time as a civil rights investigator with the Oregon Bureau of Labor and Industry (“BOLI”). During some of his time as a BOLI employee, Valverde also operated a private law practice in which he represented individuals on immigration matters. For purposes of his private law practice, Valverde maintained a separate office (outside of BOLI) where he met with clients in the evenings and on weekends. However, from 2004 through February 2013, Valverde stored over 1,250 documents relating to his clients’ legal matters on the state-owned computer located in his BOLI office. These documents reflected communications between Valverde and his clients or their agents and contained information relating to the representation of his clients (“client information”).

6.

The client information Valverde stored on BOLI’s computer was not adequately password-protected. Under Oregon law, data stored on state-owned information assets is the property of the state of Oregon, subject to its sole control. *See* Oregon Department of Administrative Services Statewide Policy Number 107-004-110. For purposes of Valverde’s

private clients, the state had no duty to preserve the confidentiality of the client information Valverde stored on BOLI's computer.

7.

After Valverde left employment with BOLI in February 2013, all of the client information he had stored on BOLI's computers was accessed and compiled by his BOLI supervisor.

8.

Valverde did not obtain informed consent from his clients to store information relating to their representation on a state-owned computer and to thereby make that client information the property of the state of Oregon.

### **Violation**

9.

Valverde admits that, by storing information relating to the representation of his clients on a computer owned by the state and thereby making that information state property, he revealed information relating to the representation of his clients without their informed consent in violation of RPC 1.6(a).

The charge of Valverde's alleged violation of RPC 1.6(c) is withdrawn, as that rule was not in effect at the time of the conduct at issue.

### **Sanction**

10.

Valverde 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* ("Standards"). The *Standards* require that Valverde'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 storing information relating to the representation of his clients on a state-owned computer, Valverde violated his duty to preserve his clients' confidences.
- b. **Mental State.** Valverde acted negligently (i.e., he failed to heed a substantial risk that circumstances existed or that a result would follow, which failure deviated from the standard of care a reasonable lawyer would exercise in the situation) when he stored clients' information on a state-owned computer system.
- c. **Injury.** While there is no evidence that any client was actually prejudiced by the unauthorized disclosure of confidential information, Valverde's clients

were injured in that their information became property of the state and thus accessible by his BOLI supervisors and other state employees. This disclosure and potential disclosure is injury. *In re Balocca*, 342 Or 279, 151 P3d 154 (2007). Valverde's clients were also potentially injured to the extent that they were exposed to possible embarrassment or prejudice in their legal matters. *In re Huffman*, 328 Or 567, 588, 983 P2d 534 (1999).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Valverde acted with a selfish motive in using state property to store information relating to the representation of his clients. *Standards*, § 9.22(b)
  2. Valverde engaged in a pattern of misconduct over the course of several years. *Standards*, § 9.22(c)
  3. Valverde has substantial experience in the practice of law. *Standards*, § 9.22(i)
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Valverde has no prior discipline. *Standards*, § 9.32(a).

11.

Under the *ABA Standards*, absent aggravating and mitigating factors, a public reprimand is generally appropriate when an attorney negligently reveals client information and the disclosure causes injury or potential injury to a client. *Standards*, § 4.23.

12.

Oregon case law supports a reprimand for conduct including the negligent disclosure of information relating to the representation of client. *See In re Langford*, 19 DB Rptr 211 (2005) (attorney reprimanded when, after termination by a client, she filed a motion to withdraw in which she disclosed confidential communications and the attorney's personal judgments about the client's honesty and the merits of the legal matter); *In re Scannell*, 8 DB Rptr 99 (1994) (attorney reprimanded for violations of DR 4-101(B) (*current RPC 1.6*) for his attachment of a strategy letter from co-counsel to his memorandum in opposition to motion to dismiss, without the consent of either co-counsel or the client); *In re Jayne*, 295 Or 16, 663 P2d 405 (1983) (attorney reprimanded after filing a divorce, having previously counseled both husband and wife, jointly and individually, on a number of matters that may have been relevant to issues in the divorce).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Valverde shall be publicly reprimanded for violation of RPC 1.6(a), the reprimand to be effective on the Disciplinary Board's approval of this stipulation.

14.

Valverde acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

15.

Valverde represents that he is not admitted to practice law in any other state jurisdiction.

16.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 23rd day of July, 2015.

/s/ Job Valverde  
Job Valverde  
OSB No. 824171

OREGON STATE BAR

By: /s/ Susan R. Cournoyer  
Susan R. Cournoyer  
OSB No. 863381  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-11
	)	
ANDY MILLAR,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violations of DR 1-102(A)(2), DR 1-102(A)(3), RPC 8.4(a)(2), and RPC 8.4(a)(3). Stipulation for Discipline. 6-month suspension.
Effective Date of Order:	November 1, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Millar is suspended for 6 months, effective November 1, 2015, for violation of DR 1-102(A)(2), DR 1-102(A)(3), RPC 8.4(a)(2), and RPC 8.4(a)(3).

DATED this 25th day of September, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
Carl W. Hopp, Jr., Region 1  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Andy Millar, attorney at law (“Millar”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Millar was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 14, 1989, and has been a member of the Bar continuously since that time, having his office and place of business in Umatilla County, Oregon.

3.

Millar enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On August 4, 2014, an Amended Formal Complaint was filed against Millar pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of DR 1-102(A)(2) and RPC 8.4(a)(2) (criminal conduct reflecting adversely on honesty, trustworthiness or fitness to practice); and DR 1-102(A)(3) 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.

Under 26 USC § 7202, it is unlawful for a person who is required to collect, account for, and pay over any tax to willfully fail to collect or truthfully account for and pay over such tax.

6.

Under 26 USC § 7203, it is unlawful for a person to willfully fail to make a tax return otherwise required by law.

7.

Between approximately 2000 and 2009, Millar, acting in his individual capacity or through his professional corporation, employed one or more individuals and was required to

deduct and withhold from employee wages federal income, social security, and Medicare taxes, and to pay to the government the amounts withheld each quarter. Millar was also required to file federal Form 941 on a quarterly basis to report employee wages in the amount of payroll taxes withheld from those wages.

8.

In the following tax periods, Millar willfully failed to pay over the amounts deducted and withheld from employee wages at the time said amounts were due, in violation of 26 USC § 7202: Second Quarter 2000; First Quarter 2001; First, Second, Third, and Fourth Quarters 2002; First Quarter 2003; First, Second, Third, and Fourth Quarters 2005; First, Second, Third, and Fourth Quarters 2006; First, Second, Third, and Fourth Quarters 2007; First, Second, Third, and Fourth Quarters 2008; and First, Second, Third, and Fourth Quarters 2009 (collectively, “the relevant tax periods”).

9.

For the relevant tax periods, Millar also willfully failed to file federal Form 941 on a quarterly basis, in violation of 28 USC § 7203.

10.

In paystubs, paychecks, and year-end wage and tax statements provided to his employees for the relevant tax periods, Millar falsely represented that a portion of their gross wages had been withheld and paid over to the State of Oregon and the Internal Revenue Service on their behalf for income, social security and Medicare taxes.

### **Violations**

11.

Millar admits his failures to ensure he complied with his obligations to file and pay over taxes constituted criminal acts which reflected adversely on his fitness to practice law, in violation of DR 1-102(A)(2) of the Oregon Code of Professional Responsibility (for conduct through December 31, 2004) and RPC 8.4(a)(2) of the Oregon Rules of Professional Conduct (for conduct occurring on or after January 1, 2005).

Millar further admits that the misrepresentations contained in paystubs, paychecks, and year-end wage and tax statements provided to his employees violated DR 1-102(A)(3) of the Oregon Code of Professional Responsibility (for conduct through December 31, 2004) and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct (for conduct occurring on or after January 1, 2005).

## Sanction

12.

Millar 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* (“*Standards*”). The *Standards* require that Millar’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.** Millar violated his duty to the public to maintain his personal integrity. *Standards*, § 5.1.
- b. **Mental State.** Millar acted knowingly, but not intentionally. “‘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 accomplish a particular result.” *Standards*, p. 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 actual injury to the taxing authorities as a result of Millar’s elections not to file and timely pay his obligations. There was not actual or potential injury to Millar’s employee(s) because the tax authorities do not hold employees responsible for such withholdings. Rather, the employees are permitted to seek refunds as if the amounts were actually received. In addition, Millar has reportedly fully satisfied the IRS tax liens (totaling approximately \$124,000) through property sales prior to Bar involvement, which mitigated the actual injury to the taxing authorities.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A selfish motive. *Standards*, § 9.22(b). Millar’s failures to file or pay were the result of financial considerations. Millar was advised by bookkeepers that he needed to timely file and pay his payroll and income taxes, however, he disregarded their warnings, and justified his election not to timely report and pay.
  2. A pattern of misconduct. *Standards*, § 9.22(c). Millar failed to timely file and pay taxes for 27 quarters over a period of nine years.
  3. Multiple offenses. *Standards*, § 9.22(d). Although they are the same charges, each election by Millar to forego filing or paying constituted a separate violation of the rule. Similarly, each misrepresentation to his employee(s) was its own violation.

4. Substantial experience in the practice of law. *Standards*, § 9.22(i). Millar has been a lawyer in Oregon since 1989.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of relevant prior discipline. *Standards*, § 9.32(a).
  2. Personal or emotional problems. *Standards*, § 9.32(c). In addition to financial troubles that interfered with Millar's ability to pay his tax obligations when due, during portions of the relevant time periods Millar lost family and close individuals in accidents and to illnesses; he also was injured in an assault.
  3. Imposition of other penalties or sanctions. *Standards*, § 9.32(k). Millar has lost real and personal property to pay his tax obligations.
  4. Remorse. *Standards*, § 9.32(l)

13.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on the lawyer's fitness to practice. *Standards*, § 5.12. The *Standards* also provide that where a suspension is warranted, it should generally be for "a period of time equal to or greater than six months." *Standards*, § 2.3. The aggravating and mitigating factors in equipoise support the presumptive sanction as the appropriate result in this matter.

14.

Oregon cases also support a suspension of at least six months for prolonged misconduct under similar circumstances. *See, e.g., In re Steves*, 26 DB Rptr 283 (2012) (attorney was suspended for one-year suspension for several matters, including willfully failing to file federal income tax returns timely or pay the tax due for three years, where aggravating factors, including prior disciplinary offenses, substantially outweighed those in mitigation); *In re Street*, 24 DB Rptr 258 (2010) (attorney suspended for one year, partially stayed pending a two-year probation for failing to file personal income tax returns for several years or pay the taxes due. Taxes remained unpaid at time of stipulation. Probation required payment plans with IRS and Oregon DOR); *In re Bowman*, 24 DB Rptr 144 (2010) (attorney suspended for one year, partially stayed pending a two-year probation for willful failure to file income tax returns, or pay income tax due, over a three-year period. Aggravating factors included initially obstructing the disciplinary process); *In re Kolstoe*, 21 DB Rptr 43 (2007) (finding that knowing and willful failure to file income tax returns over a several-year period was criminal conduct reflecting adversely on honesty, trustworthiness or fitness to practice law, trial panel suspended lawyer for four years); *In re Bowles*, 19 DB Rptr 140 (2005) (attorney suspended for one year where he failed to file income tax returns over a period of several years). *But, c.f., In re Kolego*, 28 DB Rptr 289 (2014) (where there was no

misrepresentation associated with attorney's criminal conduct in failing to withhold and pay taxes over a nine-year period, and there was compelling and significant mitigation, attorney was suspended for 90 days); *In re Carroll*, 16 DB Rptr 306 (2002) (attorney suspended for 120 days where she failed to file income tax returns for two years, but there was no misrepresentation associated with the failures and all returns filed and taxes were paid before she reported herself to the Bar).

Millar's conduct is most similar to that in *Steves, Street, and Bowman*, but Millar's efforts in fully satisfying the tax liens supports a downward departure from the year imposed in each of those matters.

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Millar shall be suspended for 6 months for violations of DR 1-102(A)(2), DR 1-102(A)(3), RPC 8.4(a)(2), and RPC 8.4(a)(3); the sanction to be effective November 1, 2015.

16.

In addition, on or before April 1, 2016, Millar shall pay to the Bar its reasonable and necessary costs in the amount of \$708.55, incurred for the deposition of Millar and copies of the deposition transcript. Should Millar fail to pay \$708.55 in full by April 1, 2016, the Bar may thereafter, without further notice to him, obtain a judgment against Millar for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

17.

Millar 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, Millar has arranged for Patrick J. Galloway ("Galloway"), an active member of the Bar, to either take possession of or have ongoing access to Millar's client files and serve as the contact person for clients in need of the files during the term of his suspension. Millar represents that Galloway has agreed to accept this responsibility.

18.

Millar 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. Millar 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.

Millar acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

20.

Millar represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Millar is admitted: US District Court for the District of Oregon.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 15th day of September, 2015.

/s/ Andy Millar

Andy Millar

OSB No. 890962

EXECUTED this 17th day of September, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 14-27  
 )  
JAMES BAKER, )  
 )  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: Rebecca L. Chiao  
Disciplinary Board: None  
Disposition: Violations of RPC 1.16(c) and RPC 8.4(a)(4).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: October 5, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and James Baker is publicly reprimanded, effective upon approval by the Disciplinary Board for violation of RPC 1.16(c) and RPC 8.4(a)(4).

DATED this 5th day of October, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

James Baker (“Baker”), and the Oregon State Bar (“Bar”), stipulate to the following matters pursuant to Bar Rule of Procedure (“BR”) 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.

Baker was admitted by the Oregon Supreme Court to the practice of law in Oregon on November 4, 1991, and has been a member of the Bar continuously since that time. At all relevant times, Baker’s office and place of business was in Multnomah County, Oregon.

3.

Baker enters into this Stipulation for Discipline freely, voluntarily, and with the advice of counsel. This Stipulation for Discipline is made under the restrictions of BR 3.6(h).

4.

On August 27, 2014, a Formal Complaint was filed against Baker pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.16(c) (duty to obtain court permission when terminating representation), 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

5.

Baker made numerous appearances on behalf of the defendants in *RW Hayes dba Hays Oil Co, et al, v. National Naft Corporation, et al*, (“the Hayes Case”) Case No. 12-5530-L3, in Jackson County Circuit Court as an attorney with the Law Office of John J. Humphrey.

6.

Trial of the Hayes Case was set for September 10, 2013. At a pre-trial conference before trial judge Ron Grensky on September 3, 2013, Baker asked for a continuance. In response to Judge Grensky’s denial of the requested continuance, Baker reasserted arguments made in a motion for reconsideration that certain earlier rulings by Judge Grensky established that neither Baker, nor the Law Office of John J. Humphrey, was defendants’ attorney of record and therefore not obligated to appear at trial. Judge Grensky disagreed

with Baker's assertion and notified Baker that he should appear for trial on September 10, 2013.

7.

Thereafter, Baker did not file either a consent to withdraw or a motion to withdraw pursuant to ORS 9.380(1), UTCR 3.140, and RPC 1.16.

8.

On September 10, 2013, the parties appeared for trial in the Hayes Case but Baker did not. Because defendants were unrepresented, trial could not proceed. Judge Grensky ordered Baker to appear in court the next day.

9.

On September 11, 2013, as ordered, Baker appeared before Judge Grensky. He reiterated the position that neither he, nor the Law Office of John J. Humphrey, was defendants' attorney of record. Judge Grensky continued the trial to allow defendants time to retain new counsel. A motion to withdraw was later filed on behalf of Baker and the Law Office of John J. Humphrey, and it was granted.

### **Violations**

10.

Baker admits that he failed to file a motion or consent to withdraw and did not follow the court's order regarding terminating his representation of his clients, which was contrary to RPC 1.16(c). That, combined with Baker's failure to appear at trial, interfered with the procedural functioning of the court and wasted court resources, and constitutes conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct.

### **Sanction**

11.

Baker 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* ("*Standards*"). The *Standards* require that Baker'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.** Baker violated his duty to the legal system by engaging in conduct prejudicial to the administration of justice. *Standards*, § 6.2. Baker violated his duty as a professional by improperly withdrawing from his clients' representation. *Standards*, § 7.2.

- b. **Mental State.** The *Standards* recognize three types of mental state: “‘Intent’ is the conscious objective or purpose to accomplish a particular result. ‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards*, p. 9.

Baker’s conduct was negligent in determining whether he had properly withdrawn from his clients’ representation; however, his conduct was knowing when he chose not to appear for trial.

- c. **Injury.** Both actual and potential injury are relevant to determining the sanction in a disciplinary case. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Baker’s conduct caused actual injury to the judicial system including: the opposing party (who prepared their case and showed up to court, ready to try it); the witnesses (who showed up for court); and the court itself (who was forced to reschedule a multi-day trial, wasting both time and resources).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). Baker was admitted to practice in Oregon in 1991.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).

12.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer negligently improperly withdraws from representation, or violates a court rule, and causes injury or potential injury to a party or interference or potential interference with a legal proceeding. *Standards*, §§ 7.3, 6.22.

A suspension is generally appropriate when a lawyer knows that he is improperly withdrawing from representation, or violating a court rule, and causes interference or potential interference with a legal proceeding. *Standards*, §§ 7.3, 6.22. While the *Standards* suggest that a suspension may be warranted, in light of the applicable aggravating and mitigating circumstances, and their comparative weight, a reprimand is sufficient in this instance.

13.

A reprimand is also consistent with prior case law. *See, e.g., In re Hartfield*, 349 Or 108, 239 P3d 992 (2010). In *Hartfield*, the attorney was reprimanded when, while representing a conservator, the attorney repeatedly failed to appear for scheduled court hearings and failed to file an inventory or an accounting, resulting in removal of the conservator and attorney and additional attorney fees to the estate. *See also, In re Carini*, 354 Or 47, 308 P3d 197 (2013) (court suspended attorney for 30 days for his repeated failure to appear at court hearings in different matters); *In re Carini*, 24 DB Rptr 75 (2010) (trial panel suspended attorney for 30 days, all stayed pending probation, for attorney's failure to appear for a jury trial in a client matter due to a scheduling conflict with other cases, where attorney had done nothing to resolve the scheduling conflict until the last minute).

While the lawyer in *Carini* received a short suspension, his conduct was for multiple occurrences and, by the time he was suspended by the court, had had prior similar misconduct. In this case, Baker's conduct is in connection with a single failure to appear and he has no similar prior misconduct. *See also, In re Taylor*, 23 DB Rptr 151 (2009); *In re Gordon*, 23 DB Rptr 51 (2009); *In re Fitch*, 21 DB Rptr 311 (2007); *In re Bean*, 20 DB Rptr 157 (2006); *In re Foley*, 19 DB Rptr 205 (2005) (all of whom were reprimanded for violations including conduct prejudicial to the administration of justice).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Baker shall be reprimanded for violation of RPC 1.16(c) and RPC 8.4(a)(4), the sanction to be effective upon approval by the Disciplinary Board.

15.

In addition, at or prior to the time of his application for reinstatement Baker shall pay to the Bar a portion of its reasonable and necessary costs in the amount of \$575.27, incurred for service of process and court reporter fees. Baker acknowledges that he will not be entitled to be reinstated without payment of these costs, in addition to other fees required by the applicable reinstatement rule.

16.

Baker acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

17.

Baker represents that, in addition to Oregon, he also is admitted to practice law in the U.S. Patent Bar and additional jurisdictions identified to the Bar, whether his current status is

active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding.

18.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Bar. The parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 10th day of September, 2015.

/s/ James Baker

James Baker

OSB No. 915144

EXECUTED this 16th day of September, 2015.

OREGON STATE BAR

By: /s/ Angela W. Bennett

Angela W. Bennett

OSB No. 092818

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-105, 15-81, 15-82,  
) and 15-83  
M.CHRISTIAN BOTTOMS, ) SC S063513  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Wayne Mackeson  
Disciplinary Board: None  
Disposition: Violations of RPC 1.5(c)(3), RPC 1.7(a), RPC 8.1(c),  
and RPC 8.4(a)(2). Stipulation for Discipline. 2-year  
suspension, 1 year stayed, 2-year probation.  
Effective Date of Order: December 7, 2015

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline according to the terms set out therein. The Accused is suspended from the practice of law in the State of Oregon for a period of two years. One year of the suspension is effective 60 days from the date of this order. The remaining one year will be stayed pending a two-year probationary period. The Accused must adhere to all terms as set out in the stipulation.

/s/ Thomas A. Balmer  
10/08/2015 9:26 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

M. Christian Bottoms, attorney at law (“Bottoms”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Bottoms 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 Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Bottoms 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 6, 2013, a Formal Complaint was filed against Bottoms pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.7(a)(2), RPC 8.4(a)(2) and ORS 9.527(2). On August 22, 2015, the SPRB authorized formal proceedings in Case Nos. 15-81, 15-82, and 15-83, alleging violations of RPC 1.5(c)(3) in Case No. 15-81, RPC 8.1(c) in Case No. 15-82, and RPC 8.4(a)(2) in Case No. 15-83. 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**

#### **Farver Matter—Case No. 13-105**

5.

On or about October 12, 2012, Shane Farver (“Farver”) was charged in Multnomah County Circuit Court Case No. CR12-01588 with having committed crimes of Coercion, Attempted Assault 4, and Harassment against Tina Draheim (“*State v. Farver*”). Farver was later released on bail with the condition that he obey the court’s order that he have no contact with Draheim (“the no contact order”). The no contact order also prohibited Farver from contacting Draheim through another.

6.

Bottoms and his wife had been friends with Draheim for years before the *State v. Farver* case. On November 2, 2012, Farver hired Bottoms to defend him in the *State v. Farver* case.

7.

At all relevant times herein, there was a significant risk that Bottoms's personal interests regarding Draheim would materially limit his representation of Farver.

8.

Bottoms moved on Farver's behalf to vacate the no contact order. On November 15, 2012, Bottoms represented Farver at a hearing to vacate the no contact order and called Draheim as a witness. The court denied the motion.

9.

On December 27, 2012, the Multnomah County District Attorney requested that Farver's release on bail be revoked for Farver's violation of the no contact order, and the court revoked Farver's bail.

10.

On December 28, 2012, Bottoms went to Draheim's apartment because he believed she asked him to contact her at her apartment. While visiting her apartment, Bottoms, who according to Draheim appeared intoxicated, inappropriately expressed a romantic interest in Draheim, and she claimed that he attempted to touch her in an inappropriate way. Draheim called the police. Bottoms was arrested by the responding police officer and found to be in possession of cocaine.

11.

On January 2, 2013, Bottoms withdrew from his representation of Farver in *State v. Farver*.

12.

On February 28, 2013, Bottoms was convicted of Unlawful Possession of Cocaine, in violation of ORS 475.884, a Class C felony, in connection with his arrest and possession of cocaine on December 28, 2012, however, pursuant to his plea agreement, upon the successful completion of probation, the court would reduce his felony conviction to a Class A misdemeanor.

13.

On December 5, 2013, the court entered an Amended Judgement that reduced Bottoms's conviction of felony possession of cocaine to a Class A misdemeanor and terminated the probation based upon a finding that Bottoms had completed drug treatment and a period of successful probation.

**Stokes Matter—Case No. 15-81**

14.

On May 9, 2013, pursuant to a written agreement, Bottoms undertook to represent Kevin Stokes (“Stokes”) to file a civil complaint for damages against Treatment Services Northwest (“TSNW”). This written fee agreement called for a nonrefundable retainer, but failed to advise Stokes that his retainer would not be deposited into Bottoms’s lawyer trust account or that Stokes could discharge Bottoms at any time and would be entitled to a refund of all or part of the retainer if the services for which the retainer was paid were not completed.

15.

On October 28, 2013, pursuant to a second written agreement, Bottoms accepted a second nonrefundable retainer of \$1,000 for services to be rendered in the TSNW litigation through discovery. This written fee agreement called for a nonrefundable retainer, but failed to advise Stokes that he could discharge Bottoms at any time and would be entitled to a refund of all or part of the retainer if the services for which the retainer was paid were not completed.

16.

On September 22, 2013, pursuant to a written agreement, Bottoms undertook to represent Kevin Stokes (“Stokes”) in a criminal probation violation matter. This written fee agreement called for a nonrefundable retainer, but failed to advise Stokes that he could discharge Bottoms at any time and would be entitled to a refund of all or part of the retainer if the services for which the retainer was paid were not completed.

**State Lawyers Assistance Committee Matter—Case No. 15-82**

17.

In 2012, Disciplinary Counsel’s Office referred Bottoms to the State Lawyers Assistance Committee (“SLAC”). In October 2012, SLAC determined that Bottoms was within its jurisdiction and entered into a monitoring agreement with Bottoms. Bottoms failed to attend meetings of Alcoholics Anonymous or an equivalent substance abuse counseling program as required by his monitoring agreement, failed to report the results of a urinalysis required by SLAC, failed to meet with his SLAC supervisor as required by his monitoring agreement, failed to obtain a hair follicle test as required by SLAC, and failed to provide a HIPPA release as requested by his SLAC monitor.

### Concealed Weapons Matter—Case No. 15-83

18.

On or about April 28, 2015, upon a plea of guilty, Bottoms was convicted of Carrying a Concealed Weapon, a class A misdemeanor. At the time of his arrest, Bottoms knew that his permit to carry a concealed weapon had been revoked in or around February 28, 2013. At the time of his arrest, Bottoms was in a public place and knew that the weapon he carried concealed on his person was loaded.

#### Violations

19.

Bottoms admits that by representing Farver when there was a significant risk his personal interests would materially impair the representation, he violated RPC 1.7(a)(2). Upon further factual inquiry, the parties agree that the charges of alleged violation of ORS 9.527(2) (conviction of a felony) and RPC 8.4(a)(2) (criminal conduct reflecting adversely on fitness to practice law) should be and, upon the approval of this stipulation, are dismissed.

Bottoms further admits that the three fee agreements into which he entered with Kevin Stokes violated RPC 1.5(c)(3).

Bottoms further admits that he failed to cooperate with SLAC in violation of RPC 8.1(c).

Finally, Bottoms admits that possessing a loaded concealed weapon in public and carrying a concealed weapon without a permit to do so are a criminal acts reflecting adversely on his fitness to practice law in violation of RPC 8.4(a)(2).

#### Sanction

20.

Bottoms 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* (“*Standards*”). The *Standards* require that Bottoms’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.** Bottoms violated his duty to his client (Farver) to avoid conflicts of interest. *Standards*, § 4.3. Bottoms also violated his duty to the public to abide by the law (*Standards*, § 5.12) and his duties he owed as a professional. *Standards*, § 7.1.
- b. **Mental State.** With respect to the Farver conflict of interest, his fee agreements in the Stokes matter, and his failure to cooperate with SLAC, Bottoms acted knowingly in that he was consciously aware of the nature and attendant

circumstances of his conduct but without the conscious objective to engage in a prohibited conflict of interest. *See Standards*, p. 7. In possessing a controlled substance, engaging in inappropriate contact with Draheim, and carrying a loaded concealed weapon, Bottoms acted intentionally, i.e., with a conscious objective or purpose to accomplish a particular result. *See Standards*, p. 7.

- c. **Injury.** As a result of Bottoms's inappropriate contact, Draheim suffered fear and anxiety. Although Bottoms refunded the entire attorney fee, Farver was required to obtain new defense counsel. Prior to obtaining new counsel, there was a potential that Farver's defense was adversely affected by Bottoms's personal interests. There was potential injury to Stokes in Bottoms's failure to advise Stokes of his right to a refund of fees paid in advance and to the people near him when he carried a loaded gun in public.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. *Standards*, § 9.22(a). In January 2009, Bottoms was publicly reprimanded for violations of RPC 1.4(a) and (b), and RPC 1.16(a)(2). Bottoms failed to withdraw from the representation of a criminal client although Bottoms's chemical dependency rendered it unreasonably difficult for him to carry out the representation. Bottoms also failed to communicate with his client or appear at court events, including trial. *In re Bottoms*, 23 DB Rptr 13 (2009).
  2. Selfish motive. *Standards*, § 9.22(b).
  3. Bottoms has displayed a pattern of misconduct and has committed multiple disciplinary offenses. *Standards*, § 9.22(c) and (d).
  4. Substantial experience in the practice of law. *Standards*, § 9.22(i). Bottoms was admitted to the practice of law in 1996 and has practiced in criminal defense matters since that time.
- e. **Mitigating Circumstances.** No mitigating circumstances apply.

21.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards*, § 4.32. Suspension is also appropriate when a lawyer knowingly engages in criminal conduct that seriously reflects on the lawyer's fitness to practice. *Standards*, § 5.12.

22.

Oregon case law supports the proposed sanction. A violation of a conflict of interest rule, by itself, warrants a 30-day suspension. *In re Hostetter*, 11 DB Rptr 195 (1997). The court has imposed higher lengths of suspensions for similar misconduct where a lawyer knowingly engaged in an improper conflict and the aggravating circumstances, including prior discipline, outweigh the mitigating circumstances. *In re Schenck*, 345 Or 350, 194 P3d 804 (2008) (1-year suspension of lawyer who violated DR 5-101(A)(1), DR 5-101(B), DR 5-104(A), DR 5-105(E), and RPC 8.1(a)(2), in connection with his representation of two sisters.) Unlike in this proceeding, the lawyer in *Schenck* knowingly failed to respond to the Bar. The court found that these two factors plus the lawyers knowing mental state compounded the seriousness of the violations. *See also, In re Wolf*, 312 Or 655, 826 P2d 628 (1992) (18-month suspension without stay where the lawyer was found to have engaged in a personal interest conflict of interest arising from an inappropriate intimate relationship with a client that reflected adversely on the lawyer's fitness to practice law). Here, Bottoms was not convicted of any criminal sexual misconduct, but his improper romantic interest in the alleged victim in the *State v. Farver* matter created a more aggravated conflict of interest between his interests and the interests of his defendant client. Furthermore, Bottoms has a prior history of professional misconduct.

23.

Consistent with the *Standards* and Oregon case law, the parties agree that Bottoms shall be suspended two years for violation of RPC 1.7(a)(2), the sanction to be effective 60 days after this stipulation is approved by the Oregon Supreme Court. All but one year of the suspension shall be stayed pending Bottoms's successful completion of a two-year period of probation with the following conditions:

- (a) Bottoms shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (b) Bottoms shall not possess or consume any alcoholic beverages, controlled substances, drug paraphernalia, prescription medications, except as prescribed by a licensed physician. Bottoms shall consume any prescribed substance only as prescribed.
- (c) Bottoms shall comply with all laws.
- (d) On or before 30 days from the date this agreement is approved by the State Professional Responsibility Board ("SPRB"), Bottoms shall enter into an agreement with the State Lawyers Assistance Committee ("SLAC") to monitor him for chemical dependency issues, possession of firearms and violations of the law. In Bottoms's first monthly report to Disciplinary Counsel's Office following that agreement with SLAC, he shall provide a

copy of the agreement to Disciplinary Counsel's Office. Bottoms shall comply with all of the terms of that agreement and any subsequent modifications to that agreement.

- (e) Within 60 days from the date this agreement is approved by the SPRB, Bottoms shall obtain through SLAC, a psychological evaluation that will evaluate him for any psychological issues related to the underlying conduct he was indicted for in Clackamas County Case No. CR-1300096 and shall be required to follow, subject to SLAC monitoring, any resulting treatment recommendations. Bottoms will be responsible for providing the psychologist or treatment provider with a copy of the police report associated with his Clackamas County Case No. CR-1300096. Within 30 days of the psychological evaluation, Bottoms shall provide to Disciplinary Counsel's Office a copy of the evaluation and written treatment recommendations signed by the treatment provider (including any recommendation that treatment is unnecessary) to Disciplinary Counsel's Office.
- (f) A designee of SLAC shall serve as Bottoms's probation supervisor ("Supervisor"). Bottoms agrees to cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Bottoms's clients, the profession, the legal system, and the public. Bottoms shall meet with Supervisor in person twice a month for the purpose of monitoring Bottoms's sobriety and compliance with the terms of this stipulation for discipline.
- (g) Bottoms authorizes Supervisor to communicate with Disciplinary Counsel's Office regarding Bottoms'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 Bottoms's compliance.
- (h) In the event Bottoms possesses or consumes alcoholic beverages or controlled substances, except medications prescribed by a licensed physician, Bottoms shall immediately notify Supervisor.
- (i) Bottoms shall report to Supervisor and Disciplinary Counsel's Office within seven (7) days of the occurrence of any civil, criminal or traffic action or proceeding initiated by complaint, citation, warrant or arrest, or any incident not resulting in complaint, citation, warrant or arrest, in which it is alleged that he has consumed alcohol or any controlled substance.
- (j) Bottoms shall immediately report to Supervisor what firearms he owns and if he should obtain a permit to carry a concealed weapon.

- (k) Bottoms shall submit to random urinalysis tests at a facility designated by the Bar and that is licensed or accredited to perform such tests, and shall submit to such tests within eight (8) hours of the Bar's requests that he do so;
- (l) On or before the 15th day of the month after this stipulation is approved by the SPRB and on the 15th day of each month thereafter, until his probation ends, Bottoms shall submit to Disciplinary Counsel's Office a written report, approved in writing as to substance by Supervisor, verifying that:
  - (1) Bottoms has maintained his sobriety during the relevant timeframe and has not engaged in any incidents involving alcohol, controlled substances or firearms;
  - (2) Bottoms has participated in and complied with the terms of treatment and supervision as directed by SLAC;
  - (3) Bottoms has cooperated and complied with all reasonable requests made by SLAC and Supervisor;
  - (4) Bottoms has participated in and complied with any treatment plan that arises from the psychological evaluation described in paragraph 23(e) above; and
  - (5) Bottoms is otherwise in compliance with the terms of this agreement.
- (m) Bottoms hereby waives any privilege or right of confidentiality to permit the disclosure by Supervisor to Disciplinary Counsel's Office of any privileged information concerning compliance or noncompliance with this agreement, and any recommendations by any treatment provider.
- (n) Bottoms hereby authorizes his Supervisor, his personal health care professionals, SLAC, Alcoholics Anonymous, and other medical, mental health, and drug and alcohol treatment providers, and each of their respective representatives, to communicate with and release information otherwise protected from disclosure by state or federal law to Disciplinary Counsel's Office and Supervisor, to the extent necessary to disclose Bottoms' participation, compliance and noncompliance with the terms of this agreement. Bottoms agrees to sign any releases required by his treatment providers to permit them to communicate with Disciplinary Counsel's Office and Supervisor.
- (o) Bottoms acknowledges that Supervisor will report violations of this agreement to Disciplinary Counsel's Office.
- (p) Bottoms authorizes Supervisor to communicate with Disciplinary Counsel's Office regarding Bottoms's compliance or noncompliance with the terms of

this agreement, and to release to Disciplinary Counsel's Office any information, including information from SLAC, that Disciplinary Counsel deems necessary for it to assess Bottoms's compliance.

- (q) Bottoms has been represented in this proceeding by Wayne Mackeson ("Mackeson"). Bottoms and Mackeson hereby authorize direct communication between Bottoms and Disciplinary Counsel's Office after the date this agreement is signed by both parties, for the purposes of administering this agreement and monitoring Bottoms' compliance.
- (r) If Bottoms has not complied with any term of this agreement, he shall notify Disciplinary Counsel's Office of his noncompliance and the reasons for noncompliance in the monthly report next due following the noncompliance.
- (s) Bottoms is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation.
- (t) In the event Bottoms fails to comply with any conditions of his probation, Disciplinary Counsel's Office may initiate proceedings to revoke Bottoms's probation pursuant to BR 6.2(d), and impose the stayed portion of the suspension. In such event, the probation and its terms shall be continued until resolution of the revocation proceedings.

24.

Bottoms acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement. Bottoms also acknowledges that he will be required to apply and qualify for reinstatement to membership in the Oregon State Bar under BR 8.1.

25.

Bottoms represents that, in addition to Oregon, he is not admitted to practice law in any other jurisdiction, whether his current status is active, inactive, or suspended.

26.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 Bottoms*, 29 DB Rptr 210 (2015)

EXECUTED this 31st day of August, 2015.

/s/ M. Christian Bottoms

M. Christian Bottoms

OSB No. 962270

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. 15-03
	)	
RAYLYNNA J. PETERSON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	Xin Xu
Disciplinary Board:	None
Disposition:	Violations of RPC 1.3 and RPC 1.4(a). Stipulation for Discipline. 60-day suspension, all stayed, 2-year probation.
Effective Date of Order:	October 15, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Raylynna J. Peterson is suspended for 60-days, all stayed, pending successful completion of a 2-year probation, effective the date approved by the Disciplinary Board for violation of RPC 1.3 and RPC 1.4(b).

DATED this 15th day of October, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Raylynn Peterson, attorney at law (“Peterson”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Peterson was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 23, 2002, and has been a member of the Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

Peterson 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 April 16, 2015, a Formal Complaint was filed against Peterson pursuant to the authorization of the State Professional Responsibility Board (“SPRB”) alleging violations of RPC 1.3 (neglect of a legal matter) and RPC 1.4(b) (Failure to explain a matter to the extent necessary to permit client to make informed decisions regarding the representation) 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 October 2012, Cherie Thompson paid Peterson a \$3,000 retainer to assist her in the legal adoption of her two grandsons. Peterson’s office assured Thompson that the adoption was a simple process and would take about four months.

6.

In preparation for the adoption, the Thompsons promptly provided Peterson with all the relevant documents and information necessary to initiate the adoption petition.

7.

For the first two and a half months after Thompson paid her retainer, she heard nothing from Peterson, despite placing several telephone calls requesting an update on the

status of the case. During that time, Peterson did not advance Thompson's adoption except for instructing her paralegal to find the birth father of the two boys.

8.

In January 2013, Thompson contacted Peterson's firm and demanded her money back. Thompson was informed that the case had been put on the "back burner," but that Peterson would handle the matter.

9.

From January 2013 to September 2013, Thompson attempted to contact Peterson by telephone. Peterson only returned one telephone call on or between February 14 and 16, 2013.

10.

In between October and November 2013, Peterson's firm informed Thompson that the work was complete and to pick up the completed documents. Thompson retrieved some documents from Peterson but, Peterson did not provide her with the new birth certificates or any documents that reflected the change of status for the two boys.

11.

Due to Peterson's lack of response, Thompson contacted Oregon Vital Statistics ("OVS") to obtain the newly revised birth certificates. Because Peterson did not request and obtain the revised birth certificates for her two grandsons, Thompson made the request on her own.

12.

Between June 2013 and August 2013, the department of Human Services ("DHS") approved the Thompsons' adoption. Nonetheless, it took another two and a half months before Peterson submitted the judgment of adoption to the court. Peterson failed to timely inform Thompson that DHS had approved the adoption or explain that she would be unable for the next several months to devote the time necessary to finalize the adoption.

### **Violations**

13.

Raylyнна J. Peterson admits that, by engaging in the conduct described above in paragraphs 5 through 12, she violated RPC 1.3 and RPC 1.4(b).

### **Sanction**

14.

Raylyнна J. Peterson 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* (“*Standards*”). The *Standards* require that Peterson’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.** Peterson knowingly violated her duty to provide diligent representation and communicate with her client. *Standards*, §4.4
- b. **Mental State.** Peterson’s conduct was knowing.
- c. **Injury.** Thompson suffered anxiety and frustration as a result of Peterson’s inaction. Thompson also paid additional costs to obtain her judgment of adoption and lost the opportunity to obtain social security benefits for the care of her oldest grandson. In *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000), the court found that client anxiety and frustration as a result of the attorney neglect can constitute actual injury under the *Standards*. The court has also held that there is actual injury to the client where an attorney fails actively to pursue his or her case. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Peterson has one prior disciplinary offense for similar violations. In September 2009, Peterson was disciplined for violations of RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (failure to keep a client reasonably informed of the status of a case). Case No. 09-85. *Standards*, § 9.22(a).
  2. Peterson has substantial experience in the law she was licensed in 2002. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of dishonest or selfish motive. *Standards*, § 9.32 (b).
  2. Peterson was having personal problems. *Standards*, § 9.32 (c).
  3. She is remorseful about her conduct. *Standards*, §9.32(l).

Under the ABA *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 a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42.

Case law suggests that the circumstances of this case warrant suspension of at least 60 days. In *In re Meyer*, 328 Or 220, 970 P2d 647 (1999), a lawyer with similar prior disciplinary history was suspended for one year for failing to maintain contact with his client in a domestic relations matter over a 60-day period, failing to respond to a notice from the

court that the matter would be dismissed and after dismissal failing to seek to have the matter reinstated. *See also, In re Redden*, 342 Or 393, 153 P3d 113 (2007) ((60-day suspension for violation of DR 6-101(B)); *In re Stevens*, 24 DB Rptr 38 (2010) (60-day suspension for violation of RPC 1.3 and RPC 1.4(a)); *In re Vernon*, 27 DB Rptr 184 (2013) (90-day suspension for violation of RPC 1.3 and RPC 1.4(a)).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Peterson shall be suspended for 60 days, all stayed, pending successful completion of a 2-year probation for violation of RPC 1.3 and RPC 1.4(b), the sanction to be effective the date approved by the Disciplinary Board.

16.

Probation is a sanction that can be imposed when a lawyer's right to practice law needs to be monitored or limited. *Standards*, § 2.7. However, the probationary conditions must make sense in light of the misconduct at issue. *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

17.

In this case, probation is appropriate because, since the conduct at issue in this matter, Peterson has taken some steps to address her personal problems and she has taken some steps to better educate herself on practice management and there have been no further complaints concerning her conduct. Probation is intended to assist Peterson in maintain her current course and to monitor her practice over a period of time.

18.

During the period of suspension and probation, Peterson shall comply with the following conditions:

- (a) Peterson is required to meet with her practice supervisor quarterly.
- (b) Peterson shall have a supervising attorney. The supervising attorney approved by DCO in writing shall supervise Peterson's probation ("Supervising Attorney").

#### **Practice Management**

- (j) No later than December 1, 2016, Peterson shall attend not less than 15 MCLE accredited programs, for a total of 20 hours, which shall emphasize law office management and administration. These credit hours shall be in addition to those MCLE credit hours required of Peterson for her normal MCLE reporting period.

- (k) Upon completion of the MCLE programs described in paragraph (j) above, and no later than March 1, 2017, Peterson shall submit an Affidavit of Compliance to DCO.
- (l) On or before December 1, 2015, Peterson shall meet with office management consultants from the Professional Liability Fund (“PLF”) for an evaluation of whether she would benefit from changes to her office practices or management. When Peterson receives recommendations from the PLF regarding her office practices or management, she shall notify DCO of the PLF’s recommendations in her first quarterly report described below. Peterson shall implement all recommended changes, to the extent reasonably possible, and participate in at least one follow-up review by the PLF on or before March 1, 2016. Peterson shall promptly report implementation of recommendations to her Supervising Attorney.
- (m) Every month for the term of this agreement, Peterson shall review all client files to ensure that she is timely attending to the clients’ matters and that she is maintaining adequate communication with clients, the court, and opposing counsel.
- (n) Leigh Hudson is appointed as Peterson’s Supervising Attorney. Peterson agrees to cooperate and comply with all reasonable requests made by her Supervising Attorney or that her Supervising Attorney, in her sole discretion determines are designed to achieve the purpose of the terms of this agreement and the protection of Peterson’s clients, the profession, the legal system, and the public.
- (o) Peterson shall meet with her Supervising Attorney in person at least once on or before December 1, 2015, for the purpose of reviewing the status of Peterson’s law practice and her performance of legal services on the behalf of clients, and quarterly at least once on or before the 15th day thereafter.

#### **Quarterly Reporting Requirements**

On or before December 1, 2015, and on or before the 20th day quarterly thereafter, Peterson shall submit to DCO a written report, approved as to substance by her Supervising Attorney, verifying that:

- (1) Peterson has reviewed her client files and ensured the pleadings fit the facts and circumstances applicable to each matter;
- (2) The Supervising Attorney has performed an audit of Peterson’s files and found them to be in order;
- (3) In Peterson’s quarterly report to DCO, she shall notify the Bar of the PLF’s recommended changes in her office management.

- (4) Peterson has implemented the PLF's recommended changes to her office management or advise DCO why the changes have not been implemented.
- (5) Peterson is otherwise in compliance with the terms of this agreement relating to her practice management.
- (6) If Peterson has not complied with any term of this agreement, she shall notify DCO of the reasons for noncompliance in the monthly report next due following the noncompliance.

#### WAIVERS

19.

- (a) Peterson hereby waives any privilege or right of confidentiality to permit the disclosure of any privileged information concerning compliance or non-compliance with this agreement. Peterson agrees to sign any releases necessary to effectuate the provisions of her probation.
- (b) Peterson acknowledges that her Supervising Attorney will report violations of this agreement to DCO.
- (c) Peterson authorizes her Supervising Attorney to communicate with DCO regarding Peterson's compliance or noncompliance with the terms of this agreement, and to release to DCO any information that Disciplinary Counsel deems necessary for it to assess Peterson's compliance.
- (d) Peterson has been represented in this proceeding by Xin Xu. Peterson and Xin Xu hereby authorize direct communication between Peterson and Disciplinary Counsel's Office after the date this probation agreement is signed by both parties, for the purposes of administering this agreement and monitoring Peterson's compliance.

20.

Peterson acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

21.

Peterson represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Peterson is admitted: California (Bar# 187770).

22.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 September, 2015.

/s/ Raylyнна J. Peterson

Raylyнна J. Peterson

OSB No. 021433

EXECUTED this 6th day of October, 2015.

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson

OSB No. 97-0688

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-77
	)	
MARK AUSTIN CROSS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.4(a). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	October 15, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Mark Austin Cross is publicly reprimanded, for violation of RPC 1.4(a).

DATED this 15th day of October, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kelly L. Harpster  
Kelly L. Harpster, Region 7  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Mark Austin Cross, attorney at law (“Cross”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Cross was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Cross enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 11, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Cross 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.

On or about January 27, 2014, Delainie Baker (“Baker”) retained Cross to modify the parenting provisions of her judgment of dissolution of marriage because she would be moving out of the country in May 2014. Between January 27, 2014, and February 22, 2014, Cross adequately attended to Baker’s matter.

6.

After February 22, 2014, and until April 22, 2014, when Baker terminated his employment, Cross was out of his office because he or his children were ill. During this time, Cross failed to take any action on Baker’s legal matter, failed to notify Baker that he was unable to do so, and failed to read or respond to his email correspondence from Baker.

#### **Violations**

7.

Cross admits that, by engaging in the conduct described in paragraphs 5 and 6 above, he violated RPC 1.4(a).

## Sanction

8.

Cross 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* (“*Standards*”). The *Standards* require that Cross’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.** Cross violated his duty to his client to communicate with her regarding the status of her legal matter. *Standards*, § 4.4.
- b. **Mental State.** Cross negligently failed to communicate with Baker, i.e., he failed to heed the substantial risk that Baker would be unable to timely modify her judgment of dissolution if he failed to communicate his inability to render the legal services he had undertaken to perform. *Standards*, p. 7.
- c. **Injury.** Baker was actually injured in that she was unable to modify the parenting time provisions of her judgment of dissolution of marriage before she left the country, and she experienced anxiety and frustration in being unable to communicate with Cross.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Cross has substantial experience in the practice of law, having been admitted to the Oregon State Bar in 1979. *Standards*, § 9.22(i).
  2. Cross has a previous admonition for neglect of a legal matter (former DR 6-101(B)). *In re Baker*, Case No. 96-79. Although this admonition may be considered a prior disciplinary offense under *In re Jones*, 326 Or 195, 951 P2d 149 (1997), it is remote in time, which diminishes the weight accorded to it.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Cross made full and free disclosure to the Bar and displayed a cooperative attitude toward its investigation. *Standards*, § 9.32(e).
  2. Cross’s prior disciplinary offense is remote in time. *Standards*, § 9.32(m).

9.

Under the ABA *Standards*, reprimand is generally appropriate when the lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury. *Standards*, § 4.43.

10.

Oregon case law is in accord. See *In re Malco*, 27 DB Rptr 88 (2013) (lawyer received a public reprimand for failing to communicate with a client for four months); *In re Deal*, 25 DB Rptr 251 (2011) (lawyer who had a previous admonition for similar conduct was reprimanded for failure to communicate with his client for three months).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Cross shall be reprimanded for violation of RPC 1.4(a).

12.

Cross acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

13.

Cross represents that, in addition to Oregon, he also is admitted to practice law in Wisconsin, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding.

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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, 2015.

/s/ Mark Austin Cross

Mark Austin Cross

OSB No. 791994

EXECUTED this 7th day of October, 2015.

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks

OSB No. 741674

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-132 and 13-133  
)  
ROBERT H. SHEASBY, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: John E. Laherty, Chairperson  
Jennifer F. Kimble  
Steven P. Bjerke, Public Member  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.1(a)(2), RPC 8.1(c), and RPC 8.4(a)(3). Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: October 20, 2015

**TRIAL PANEL OPINION**

On February 11, 2015, Region 1 Disciplinary Board Chairperson Carl W. Hopp entered an Order of Default in the above-captioned cases (collectively, the “Cases”) deeming the allegations of the Bar’s December 2, 2014 Formal Complaint to be true. The Cases were then referred to a Trial Panel of the Disciplinary Board for determination of sanctions. The Trial Panel consisted of John E. Laherty, Chair; Jennifer Kimble, Attorney Member; and Steve Bjerke, Public Member.

Pursuant to BR 5.8(a), the Trial Panel determined that the issue of sanctions should be decided upon submission of written memoranda. On May 26, 2015, the Trial Panel Chair provided written notice to the Office of Disciplinary Counsel and the Accused, Robert H. Sheasby (“Sheasby”), of their respective deadlines for submitting such memoranda. On July 1, 2015, the Office of Disciplinary Counsel, through Assistant Disciplinary Counsel Martha M. Hicks, timely submitted a memorandum entitled “Oregon State Bar’s Trial Memorandum Re: Sanction.” Sheasby did not submit a memorandum or any other written material prior to his August 3, 2015, deadline for doing so.

## FINDINGS OF FACT

1. In light of Sheasby's default and entry of an Order of Default against him, and for the purpose of determining sanctions, the Trial Panel deems true all of the factual allegations of the December 2, 2104 Formal Complaint and adopts those allegations as its Findings of Fact in this matter.

2. By reason of entry of the Order of Default, Sheasby has been deemed to have violated the following Oregon Rules of Professional Conduct: RPC 1.3(a), RPC 1.4(a), RPC 1.4(b), RPC 8.1(a)(2), RPC 8.1(c), and RPC 8.4(a)(3).

3. At no time has Sheasby, either personally or through legal counsel, responded to correspondence sent to him by the Trial Panel or otherwise communicated with the Trial Panel.

## CONCLUSIONS OF LAW

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* (the "*Standards*"), in addition to its own case law, for guidance in determining the appropriate sanctions for lawyer misconduct.

### 1. *ABA Standards*

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer's mental state; and the actual or potential injury caused by the conduct. Once these factors are analyzed, the court makes a preliminary determination of sanctions, after which it adjusts the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances. *See, e.g., In re Wyllie*, 326 Or 447, 952 P2d 550 (1998).

### 2. **Duty Violated**

Sheasby violated his duty to act with reasonable diligence and promptness in representing his clients. *Standards*, §4.4. Sheasby also knowingly violated his duty to the profession when he failed to cooperate with SLAC and when he failed to cooperate with the disciplinary investigation. *Standards*, §7.0.

### 3. **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. 9. "A failure to act can be characterized as intentional, rather than attributed to mere neglect or procrastination, if the lawyer fails to act over a significant period of time, despite the urging of the client and the lawyer's knowledge of the professional duty to act." *In re Sousa*, 323 Or 137, 144, 915 P2d 408 (1996); *In re*

*Loew*, 292 Or 806, 810–11, 642 P2d 1171 (1982). With regard to mental state, the Trial Panel concludes as follows:

- (a) With regard to Case No. 13-132, Sheasby’s neglect of Mr. Findling’s matter may initially have merely been knowing—*i.e.*, he was aware that he was not paying even minimal attention to the matter and was doing nothing to pursue his client’s interests. However, as time went on and Sheasby continued to wholly disregard the matter despite urging from his client to take action, his misconduct became intentional.
- (b) With regard to Case No. 13-133, Sheasby failure to respond to the State Lawyers Assistance Committee (“SLAC”) referral notice or cooperate with SLAC despite (a) acknowledging receipt of the referral notice, and (b) being reminded by DCO on several occasions of his duty to respond, constituted intentional misconduct.
- (c) Sheasby’s repeated disregard of DCO’s reasonable requests for information in both Case Nos. 13-132 and 13-133 was intentional. He knew that the Bar was investigating these matters and was informed of his duty to respond to DCO’s requests for information, yet he failed to do so.

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

For the purposes of determining an appropriate disciplinary sanction, the Trial Panel may take into account both actual and potential injury. *Standards*, §3.0; *In re Williams*, 314 Or 530, 547, 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 misconduct.” *Standards* at Article III (“Definitions”).

Sheasby’s failure to act and communicate with his client caused actual and potential injury. Specifically, his failure to provide Findling with diligent representation meant that Findling was unable to obtain patents during the four-year period that Sheasby represented him, despite Findling paying Sheasby some \$13,000. It also jeopardized Findling’s ability to ultimately secure patents for his inventions. Sheasby’s failure to cooperate with SLAC’s efforts to evaluate his condition caused injury to that program by frustrating SLAC’s efforts to assist him, and caused injury to the legal system by failing to prevent the continuation of his misconduct. *In re Wyllie*, 326 Or at 455.. Sheasby’s failure to respond to DCO’s disciplinary inquiries caused actual and potential injury to both the legal profession and the public, by undermining and unnecessarily consuming the Bar’s time and delaying the investigation and resolution of the discipline matters. *See In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996); *In re Gastineau*, 317 Or 545, 555–56, 857 P2d 136 (1993).

## 5. Preliminary Sanction

“Disbarment is generally appropriate when a lawyer: \*\*\* (a) abandons the practice and causes serious or potentially serious injury to a client or (b) a lawyer knowingly fails to perform services for a client 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 causes injury or potential injury to a client.” *Standards*, § 4.42.

The Trial Panel concludes that, without consideration of any mitigating or aggravating circumstances, the *Standards* call for a sanction of disbarment or suspension in this case.

## 6. Aggravating and Mitigating Circumstances

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

- A. A prior record of discipline. *Standards*, § 9.22(a). Pursuant to the trial panel opinion in Case Nos. 12-129 and 12-172 dated February 18, 2015, which was not appealed; as of April 21, 2015, Sheasby was suspended from the practice of law for a period of four (4) years for failure to hold client property separate from his own property; failure to deposit and maintain client funds in a lawyer trust account until earned; failure to promptly render a full accounting or promptly deliver property a client is entitled to receive, neglect of a legal matter entrusted to him; failure to keep a client reasonably informed of the status of a case or promptly respond to requests for information, and knowingly failing to respond to a lawful demand for information from a disciplinary authority, in violation of RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.3, RPC 1.4(a), and RPC 8.1(a)(2).<sup>1</sup>
- B. Pattern of misconduct. *Standards*, § 9.22(c). Sheasby’s actions demonstrate a pattern of knowing and intentional misconduct.

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<sup>1</sup> The ABA *Standards* provide that absent aggravating or mitigating circumstances:

Disbarment is generally appropriate when a lawyer has been suspended for the same or similar misconduct, and intentionally or knowingly 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*, § 8.1(b).

Suspension is 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*, § 8.2.

- C. Multiple offenses. *Standards*, § 9.22(d). Sheasby violated multiple rules involving different duties owed to his client and the profession.
- D. Substantial experience in the practice of law. *Standards*, § 9.22(i). Sheasby was licensed in Oregon on October 4, 1993.

There are no mitigating factors. The aggravating factors justify an increase in the degree of discipline to be imposed. *Standards*, § 9.21. Under the *Standards*, disbarment is the appropriate sanction.

#### 7. Oregon Case Law

A lawyer who, like Sheasby, engages in multiple instances of misconduct *and* fails to cooperate with disciplinary authorities is recognized as a threat to the profession and the public and his conduct warrants a significant sanction. *In re Bourcier (II)*, 325 Or 429, 436, 939 P2d 604 (1997). In light of the number and nature of Sheasby's violations, his history of prior misconduct, and his failure to cooperate with, or respond to, SLAC's or DCO's reasonable inquiries, Oregon law supports a sanction of disbarment. *See, e.g., In re Thies*, 305 Or 104, 750 P2d 490 (1988); *In re Dixon*, 305 Or 83, 750 P2d 157 (1988).

#### CONCLUSION

For the foregoing reasons, the Trial Panel unanimously concludes and directs that Sheasby shall be, and hereby is, disbarred from the practice of law in accordance with BR 6-3.

DATED this 17th day of August, 2015.

/s/ John E. Laherty

John E. Laherty, Trial Panel Chairperson

/s/ Jennifer F. Kimble

Jennifer F. Kimble, Trial Panel Member

/s/ Steven P. Bjerke

Steven P. Bjerke, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-62  
)  
DIARMUID YAPHET HOUSTON, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: David W. Hercher, Chairperson  
Dylan M. Cernitz  
Michael Wallis, Public Member  
Disposition: Violations of RPC 1.4(a), RPC 1.15-1(d), RPC  
1.16(a)(1), RPC 1.16(d), and RPC 8.1(a)(2). Trial Panel  
Opinion. 150-day suspension with formal  
reinstatement.  
Effective Date of Opinion: October 20, 2015

**TRIAL PANEL OPINION**

The matter came before a trial panel of the Disciplinary Board consisting of David W. Hercher, chair, Dylan Cernitz, and Michael Wallis, public member. Amber Bevacqua-Lynott represented the Oregon State Bar. The accused, Diarmuid Yaphet Houston, was not represented.

We have considered the factual allegations in the formal complaint, the default order entered on the formal complaint, and the bar’s sanction memorandum. Based on our findings and conclusions below, we hold that Houston violated Oregon Rules of Professional Conduct 1.4(a), 1.15-1(d), 1.16(a)(1) and (d), and 8.1(a)(2). We further determine that he should be suspended from the practice of law for 150 days and that he should be required to formally apply for reinstatement if he wishes to return to the practice of law in Oregon. Also, as a condition to his formal reinstatement, he should be required to account to his former client, Lynn Fitch, for the retainer that she paid him and return documents that she gave him and pay her any unearned portion of the retainer.

## 1. PROCEDURAL STATUS

A formal complaint was filed on July 30, 2014, against Houston, claiming violations of the RPCs. In its first cause of complaint, the bar claimed that Houston violated the following four RPCs in connection with his representation of Fitch, who had hired him to pursue a potential claim against her former employer: RPC 1.3 (neglect of legal matter), RPC 1.4(a) (failure to keep client reasonably informed of status of a matter or respond to reasonable requests for information), RPC 1.15-1(d) (failure to account for client funds and promptly deliver to client funds or property that client is entitled to receive), and RPC 1.16(a)(1) (failure to withdraw when continued representation will result in violation of RPCs). In its second cause of complaint, the bar claimed that Houston violated RPC 8.1(a)(2) (knowing failure to respond to a lawful demand for information from a disciplinary authority) by failing to respond in 2013 and 2014 to the requests for information by the Disciplinary Counsel's Office (the "DCO").

Houston did not file an answer to the formal complaint. On January 13, 2015, the trial panel chair signed and mailed to the disciplinary board clerk an order of default based on Houston's failure to appear (to answer the formal complaint) within the period provided by the RPCs. As a result of the default order, we take the factual allegations in the formal complaint to be established as true.

On January 23, 2015, the chair wrote to the parties, offering them the opportunity to request, by February 6, 2015, a hearing and to submit argument regarding whether the charges of the formal complaint constitute violations of the RPCs and evidence and argument regarding the appropriate sanction. Houston did not respond to that inquiry and has submitted nothing to the trial panel. The bar timely responded and timely submitted to the trial panel a sanction memorandum.

## 2. FINDINGS OF FACT

### 2.1 Findings based on formal-complaint allegations

The following facts were alleged in the formal complaint, and we find them to be facts because Houston did not respond to the formal complaint.

In or around September 2013, Fitch hired Houston to pursue a potential claim against her former employer. She provided him with a number of documents to support her claim and paid him a \$2,500 retainer.<sup>1</sup>

Houston sent a demand letter on or about September 27, 2013, but he took no other substantive action on behalf of Fitch and failed to update her on communications from her

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<sup>1</sup> Complaint ¶ 3.

former employer or to respond to at least nine e-mails from Fitch between October 2013 and February 2014 inquiring about the status of her case.<sup>2</sup>

On or about October 16, 2013, Houston was suspended from active practice for failing to pay his Professional Liability Fund obligation. He did not notify Fitch of this event or withdraw from her representation.<sup>3</sup>

In February 2014, Fitch terminated Houston's services, demanded an accounting of her retainer, and requested the return of her documents. Houston did not respond or provide the requested accounting. He did not refund any portion of Fitch's retainer.<sup>4</sup>

On or about February 20, 2014, the bar's Client Assistance Office (the "CAO") received a formal complaint from Fitch about Houston's conduct. By letter dated February 25, 2014, by first-class mail to his mailing address on file with the bar (the "record address"), the CAO requested his response to her complaint by March 18, 2014.<sup>5</sup>

The CAO sent a follow-up letter dated March 21, 2014, by both first-class and certified mail to the record address, again seeking Houston's response to Fitch's complaint. On March 27 and 31, 2014, both forms of the CAO's March 21 letter were returned as undeliverable. On April 1, 2014, the CAO's February 25 letter to the record address was likewise returned as undeliverable.<sup>6</sup>

On April 2, 2014, the CAO referred the matter to the DCO in light of the difficulties with Houston's record address. The DCO investigator used search services available to the bar to attempt to locate a valid address for Houston. Using a search service, the investigator located an address for Houston at 1411 N.E. 16<sup>th</sup> Avenue, Apartment 201, Portland, Oregon 97232.<sup>7</sup>

By letter dated April 10, 2014, sent by first-class mail to the 16<sup>th</sup> Avenue address, the DCO requested Houston's response to Fitch's complaint. When this letter was also returned undelivered, on April 15, 2014, it was scanned, along with all prior correspondence, and transmitted by e-mail to Houston's e-mail address on file with the bar (the "record e-mail"). That communication also requested that Houston provide the DCO with a current mailing address.<sup>8</sup>

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<sup>2</sup> Complaint ¶ 4.

<sup>3</sup> Complaint ¶ 5.

<sup>4</sup> Complaint ¶ 6.

<sup>5</sup> Complaint ¶ 9.

<sup>6</sup> Complaint ¶ 11.

<sup>7</sup> Complaint ¶ 12.

<sup>8</sup> Complaint ¶ 13.

The April 15 e-mail was not returned as undeliverable, and Houston did not respond to it.<sup>9</sup>

By letter dated May 27, 2014, sent to the record e-mail, the DCO again requested Houston's response to Fitch's complaint. That e-mail was not returned as undeliverable, and Houston did not respond to it.<sup>10</sup>

## **2.2 Other facts allegations by the bar, not in the formal complaint**

### **2.2(a) Affidavit of Lynn Bey-Roode**

The following allegations, among others, were made in an affidavit dated September 8, 2014, by Lynn Bey-Roode, a DCO investigator, but not in the formal complaint.

Houston was admitted via reciprocal admission on December 31, 2012. Since his admission, the only address that he has given the bar is Houston Law Group PC, 1231 N.E. MLK Jr. #601, Portland, Oregon 97232.<sup>11</sup>

Effective October 16, 2013, Houston was suspended for failing to pay his Professional Liability Fund assessment. He had not been reinstated as of the date of the affidavit.<sup>12</sup>

In late July 2014, in conjunction with attempts to personally serve Houston with the formal complaint, the bar's investigator confirmed with the Oregon Motor Vehicles Division that Houston's 16th Avenue address, where the bar had sent numerous mailings in this matter, was still his address on record with the DMV. In fact, it had been updated as recently as July 3, 2014.<sup>13</sup>

On August 6, 2014, the bar's investigator visited the 16th Avenue address and attempted to locate Houston. She could hear a telephone ringing as she buzzed the apartment identified as belonging to Houston. No one answered, but the voicemail stated that she had reached "Diarmuid Houston, Attorney at Law." The investigator left Houston two messages, and followed up with another call to the telephone number associated with the 16th Avenue address.<sup>14</sup>

### **2.2(b) Bar's sanction memorandum**

On June 23, 2014, the DCO petitioned the Disciplinary Board State Chairperson for an order administratively suspending Houston until he responded to the DCO's inquiries. The

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<sup>9</sup> Complaint ¶ 15.

<sup>10</sup> Complaint ¶ 16.

<sup>11</sup> Bey-Roode Aff. at 1, ¶ 2.

<sup>12</sup> Bey-Roode Aff. at 1, ¶ 3.

<sup>13</sup> Bey-Roode Aff. at 2, ¶ 6.

<sup>14</sup> Bey-Roode Aff. at 3, ¶¶ 10–11.

state chair entered the requested order on July 3, 2014. Houston has been administratively (not disciplinarily) suspended since then and through the date of the sanction memorandum, February 20, 2015.<sup>15</sup> He remains administratively suspended as of the date of this opinion.

Houston did not respond to any of the bar's attempts to contact him, and the bar was forced to seek permission to serve him by publication.<sup>16</sup> Doing so took significant time and expense. The bar moved to permit service by publication in early September 2014, which was allowed in late October. The notice was published for four consecutive weeks throughout the month of November, with proof of service by publication in early December 2014.<sup>17</sup>

### 3. DISCUSSION AND CONCLUSIONS OF LAW

The bar has the burden of establishing Houston's misconduct by clear and convincing evidence.<sup>18</sup> Evidence is clear and convincing if the truth of the facts asserted is highly probable.<sup>19</sup>

The bar's factual assertions against Houston in the formal complaint are deemed to be true by virtue of the default order.<sup>20</sup> Nonetheless, we still must decide whether the deemed-true facts constitute the disciplinary rule violations for which the bar contends and, if so, what sanctions are appropriate.<sup>21</sup> The parties were permitted to submit written materials in order to allow evidence that would be relevant to these decisions.

Below, we consider separately whether the formal complaint's allegations suffice to constitute clear and convincing evidence that Houston violated RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(a)(1) and (d), and RPC 8.1(a)(2). We conclude that the formal complaint constitutes clear and convincing evidence that he violated RPC 1.4(a), RPC 1.15-1(d) (for one of two charged instances), RPC 1.16(a) and (d), and RPC 8.1(a)(2), but not RPC 1.3.

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<sup>15</sup> Sanction Memorandum at 4:15–19.

<sup>16</sup> Sanction Memorandum at 5:6-14.

<sup>17</sup> Sanction Memorandum at 5:15–19.

<sup>18</sup> BR 5.2.

<sup>19</sup> *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

<sup>20</sup> *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001).

<sup>21</sup> See *In re Koch*, 345 Or 444, 198 P3d 910 (2008); see also, *In re Kluge*, 332 Or 251 (describing two-step process).

**3.1 The bar has not proved beyond a reasonable doubt that Houston violated RPC 1.3, prohibiting neglect of a legal matter.**

The Disciplinary Rules, in effect through December 31, 2004, included *former* DR 6-101(B), which prohibited neglect of a legal matter entrusted to a lawyer. The supreme court interpreted that rule also to imply a requirement that a lawyer keep a client informed about the status of a matter and comply with reasonable requests for information.<sup>22</sup> RPC 1.3 prohibits neglect of a legal matter entrusted to the lawyer, as did *former* DR 6-101(B). RPC 1.4(a), which has no express counterpart in the Disciplinary Rules, requires that a lawyer keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. It makes express the requirement implied in *former* DR 6-101(B).

RPC 1.3 and RPC 1.4(a) thus address separate issues: the manner in which a lawyer advances a legal matter entrusted to the lawyer (RPC 1.3) and the manner in which the lawyer communicates with the client about the representation (RPC 1.4(a)). Since adoption of the RPCs in 2005, the supreme court has discussed the communication requirement as one imposed by RPC 1.4(a), not RPC 1.3. Thus, by failing to comply with the communication requirements of RPC 1.4(a), a lawyer does not necessarily also neglect the legal matter entrusted to the lawyer in violation of RPC 1.3, and vice versa.

According to the formal complaint, Fitch hired Houston in September 2013, to pursue a potential claim against Fitch’s former employer; on September 27, 2013, he sent the former employer a demand letter; and he took no further “substantive” action on behalf of Fitch to advance the claim. By alleging that Houston “failed to update her on communications from Fitch’s former employer,” the bar implies that the former employer communicated with Houston in response to his demand letter.

In its memorandum, the bar articulates its neglect contention as follows:

“Houston accepted Fitch’s matter in September 2013 and collected \$2,500 of her funds. Beyond sending an initial demand, he failed to take any action in furtherance of her interests. He did nothing through the time of his suspension in mid-October, or thereafter, in spite of having heard from the employer and being prompted by Fitch’s inquiries. This inexplicable inaction demonstrated a course of conduct that violated RPC 1.3”<sup>23</sup>

Without knowing the substance of the former employer’s communications to Houston, we cannot determine that more remained for Houston to do to further Fitch’s interests after Houston received the employer’s communications. To reach that conclusion, we would need to be able—based on the complaint’s allegations—to find that the employer’s

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<sup>22</sup> *In re Snyder*, 348 Or 307, 315, 232 P3d 952 (2010).

<sup>23</sup> Sanction Memorandum at 6–7.

communications to Houston left open the possibility that the employer was liable to Fitch, which would have been the case if, for example, the employer conceded liability, made a settlement offer, or requested additional information from Fitch.<sup>24</sup> But it is also possible that the employer's communications made clear to Houston that there was no factual or legal basis for Fitch's claim, which would have been the case if, for example, he had previously sued the employer unsuccessfully for the same claim or previously settled the claim. In the latter scenario, nothing would have remained for Houston to do to advance Fitch's claim against the employer. Nothing in the formal complaint states what the employer told Houston or anything else about any resolution of the claim from which we could infer whether the employer's communications to Houston left open the possibility that the employer was liable to Fitch.

The formal complaint's allegations do not constitute clear and convincing evidence that Houston neglected the legal matter that Fitch entrusted to him.

### **3.2 Houston violated RPC 1.4(a) by failing to keep Fitch reasonably informed of the status of her matter and to respond to her requests for information.**

RPC 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer is obligated to keep the client reasonably informed regardless of the merits of the client's claim or position.<sup>25</sup>

By failing to communicate with Fitch at all after sending the demand letter, including by failing to discuss with her the former employer's communications and to respond to her inquiries, Houston violated RPC 1.4(a).

We recognize that if Houston had complied with RPC 1.4(a), the bar would be able to determine whether, in fact, anything remained for Houston to do to advance Fitch's interests after receiving the former employer's communications and thus whether Houston neglected the matter in violation of RPC 1.3. We consider that fact in part 4.4(a) below in determining the appropriate sanction for his violation of RPC 1.4(a).

### **3.3 Houston violated RPC 1.15-1(d) by failing to account for the retainer and promptly return Fitch's documents, but the bar has not proved by clear and convincing evidence that he violated that rule by failing to return any portion of Fitch's retainer.**

RPC 1.15-1(d) requires that a lawyer promptly deliver to the client any funds or other property that the client is entitled to receive and, upon the client's request, promptly render a full accounting of the funds or other property.

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<sup>24</sup> See, e.g., *In re Snyder*, 348 Or at 314 (lawyer violated RPC 1.4 by failing to inform client that potential defendant's claim department had sent lawyer three requests for information about client's claim).

<sup>25</sup> *In re Groom*, 350 Or 113, 124, 249 P3d 976 (2011).

In February 2014, Fitch terminated Houston’s services, demanded an accounting of her retainer, and requested the return of her documents. He did not respond or provide the requested accounting, nor did he return any portion of the retainer.

Houston violated RPC 1.15-1(d) by failing to provide an accounting of Fitch’s retainer and to return her documents. But we do not agree that he did so by failing to return the retainer.

Because the bar alleges that Houston sent the former employer a demand letter on a particular date and that he failed to update Fitch on communications from the employer, we infer that the bar has seen the letter and is at least aware of the general nature, if not the content, of the communications; the bar does not allege otherwise. With that information, the bar could have determined whether a lawyer of ordinary prudence would be left with a definite and firm conviction that \$2,500 exceeds a reasonable fee for that work, and if that is the case, the bar could have included in the formal complaint an allegation that Houston charged a clearly excessive fee in violation of RPC 1.5(a). But the bar did not do so. If Houston had properly prepared the letter (and the bar does not contend otherwise), he would have had to do almost the same amount of factual investigation, legal research, and drafting that he would have had to do to prepare a complaint for court. The \$2,500 amount of the retainer is not so large that it seems obvious to us that he could not have earned all of it.

In support of its argument that Houston did not earn the entire retainer, the bar also argues that “Houston knew—in keeping Fitch’s entire retainer—that he had not completed Fitch’s matter.”<sup>26</sup> That argument suggests that he could earn the entire retainer only by completing “the matter.” That would be the case only if they had entered into an agreement for him to receive \$2,500 as an “earned-on-receipt” fee governed by RPC 1.5(c)(3). The formal complaint does not allege the existence of such an agreement. Moreover, the complaint’s reference to the \$2,500 as a retainer is inconsistent with an earned-on-receipt fee agreement.

Thus, we cannot find from the allegations of the formal complaint that Houston should have returned some portion of the retainer to Fitch.

We do not mean to diminish the seriousness of Houston’s violation for failing to account to Fitch for her retainer. We recognize that an accounting by Houston would have specified the amount that he had earned, at least according to his records, and thus established whether, according to his records, any portion of the retainer should have been returned to Fitch. Our disposition of this proceeding includes an order that he not be reinstated after his period of suspension without first applying for reinstatement and that, as a condition to reinstatement, he demonstrate that he has given her the accounting, her documents, and any unearned portion of her retainer.

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<sup>26</sup> Sanction Memorandum at 16:18–20.

### **3.4 Houston violated RPC 1.16(a)(1) by failing to withdraw upon his suspension.**

Under RPC 1.16(a)(1), except as provided in RPC 1.16(c), a lawyer must withdraw from representation of a client if continued representation would violate any RPC or other law. Houston has been administratively suspended since October 16, 2013.

The bar cites four supreme court cases that addressed whether a lawyer failed to withdraw when continued representation would violate the rules. In each of the four cases, the representation from which the lawyer failed to withdraw was pending litigation, which was not the case here. Nonetheless, the RPC 1.16(a)(1) withdrawal requirement is not expressly limited to litigation matters. In a non-litigation matter involving communications with third parties, such as Houston's communications with Fitch's former employer, we believe that to withdraw from the matter, the lawyer must notify the third parties of the withdrawal in order to permit them to communicate directly with the client or any successor lawyer for the client. If a withdrawing lawyer were to fail to give notice of withdrawal to the third parties, but instead simply ceased to communicate with them, the fact of the withdrawal would be hidden from the third parties, and the client could be prejudiced at least by delaying resolution of the matter.

Here, because the formal complaint alleges that Houston failed to withdraw from his representation of Fitch, we find that he failed to give notice of his withdrawal to the former employer (even though the complaint does not expressly so allege). We thus find that he violated RPC 1.16(a)(1).

### **3.5 Houston violated RPC 1.16(d) by failing to give Fitch notice of his administrative suspension.**

A lawyer may not practice law in Oregon while suspended.<sup>27</sup>

In the formal complaint, the bar accuses Houston of failing to notify Fitch of his suspension or to withdraw from the representation upon his suspension. In the complaint, the bar cited RPC 1.16(a)(1), which requires withdrawal from a representation when the representation would result in violation of any RPC or other law. The bar did not cite RPC 1.16(d), which requires that upon termination of representation, a lawyer give reasonable notice to the client, but we do not believe that the omission of that citation in the formal complaint bars prosecution for a violation of that notification requirement.

Houston was obligated to notify Fitch of his suspension if he represented her on October 16, 2013, the suspension date. Because the commencement of a lawyer-client relationship turns on the reasonable belief of the would-be client,<sup>28</sup> whether and when the

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<sup>27</sup> ORS 9.200(1), ORS 9.160; RPC 5.5(a), (b).

<sup>28</sup> *The Ethical Oregon Lawyer* § 6.3 (Oregon CLE 1991), quoted with approval in *In re Spencer*, 335 Or 71, 84, 58 P3d 228 (2002).

relationship terminates should also turn on the client’s reasonable belief. Houston’s administrative suspension occurred less than three weeks after he sent the demand letter. Because Fitch sent him inquiry e-mails between October 2013 and February 2014, and he failed to communicate with her after September 27, 2013, it would have been reasonable for her to believe that the representation continued as of October 16, 2013, and therefore he was bound to act accordingly.

Houston’s failure to give Fitch notice of the suspension violated RPC 1.16(d).

**3.6 Houston violated RPC 8.1(a)(2) by knowingly failing to respond to a lawful demand for information from a disciplinary authority.**

RPC 8.1(a)(2) prohibits a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority.

Houston violated RPC 8.1(a)(2) by failing to respond to the DCO’s requests for information.

#### **4. SANCTIONS**

In fashioning sanctions, the American Bar Association *Standards for Imposing Lawyer Sanctions* (Feb. 1986, amended Feb. 1992) (“*Standards*”) and Oregon case law are considered.<sup>29</sup>

**4.1 Factors considered for application of the *Standards***

The *Standards* require analysis of four factors to determine a sanction: (1) the ethical duty violated, (2) the lawyer’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.<sup>30</sup> The presumptive sanction under the *Standards* should be adjusted based on the presence of aggravating or mitigating circumstances.<sup>31</sup> Finally, the sanction must be consistent with Oregon case law.<sup>32</sup>

**4.1(a) Ethical duties that Houston violated**

Under the *Standards*, the “generally appropriate” sanction for violation of an ethical duty, before consideration of aggravating and mitigating factors, turns in part on whether the

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<sup>29</sup> *In re Herman*, 357 Or 273, 289, 348 P3d 1125 (2015).

<sup>30</sup> *Standards*, § 3.0; *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008).

<sup>31</sup> *In re Jackson*, 347 Or 426, 441, 223 P3d 387 (2009).

<sup>32</sup> *Id.*

duty is one categorized by the *Standards* as being owed to clients,<sup>33</sup> the public,<sup>34</sup> the legal system,<sup>35</sup> or the legal profession.<sup>36</sup>

a. Duties owed to Fitch

The duties to clients that Houston violated are the duties to “preserve and return their client property,”<sup>37</sup> addressed by *Standards*, § 4.1, and to “act with reasonable diligence and promptness in representing a client,” which “includes the duty to adequately communicate with clients.”<sup>38</sup> addressed by *Standards*, § 4.4.

*Standards*, § 4.0 addresses violations of duties owed to clients. Houston failed to keep Fitch informed and to account for her retainer and return her documents. Those duties are also not specifically addressed in *Standards*, § 4.0, but they are most analogous to the duty to preserve client property, which is addressed in *Standards*, § 4.1. The duty to keep a client informed is not specifically addressed in *Standards*, § 4.0, but it is most analogous to the duty to act with reasonable diligence and promptness, which is addressed in *Standards*, § 4.4.

b. Duty owed to the public and the legal profession

The duty to the public and the legal profession that Houston violated is the duty to cooperate with disciplinary investigations.<sup>39</sup>

*Standards*, § 7.0 addresses violations of duties owed as a professional. Houston failed to withdraw and notify Fitch upon his suspension (RPC 1.16(a) and (d)), and he failed to cooperate with the bar’s investigation (RPC 8.1(a)(2)).

Violation of the duties to withdraw and notify a client upon suspension are addressed in *Standards*, § 7.0 as unauthorized practice of law and improper withdrawal from representation. Houston’s failure to cooperate with the disciplinary investigation against him, violating RPC 8.1(a)(2), is addressed by *Standards*, § 7.0.<sup>40</sup>

**4.1(b) Houston’s mental state**

The *Standards* define “intent” as “the conscious objective or purpose to accomplish a particular result” and “knowledge” as “the conscious awareness of the nature or attendant

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<sup>33</sup> *Standards*, § 4.0.

<sup>34</sup> *Standards*, § 5.0.

<sup>35</sup> *Standards*, § 6.0.

<sup>36</sup> *Standards*, § 7.0.

<sup>37</sup> Sanction Memorandum at 10:10–12.

<sup>38</sup> Sanction Memorandum at 10:13–14.

<sup>39</sup> Sanction Memorandum at 10:16–17.

<sup>40</sup> *In re Schaffner* (“*Schaffner F*”), 323 Or 472, 479, 918 P2d 803 (1996).

circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.”<sup>41</sup>

The bar contends that Houston acted knowingly and intentionally when he decided to keep the entirety of the retainer provided to him by Fitch, knowing that he was not going to complete her representation,<sup>42</sup> and when he failed to respond to bar inquiries.<sup>43</sup> In part 3.3 above, we declined to find that Houston violated RPC 1.15-1(d) by failing to return any portion of Fitch’s retainer. We do not agree that he acted intentionally by failing to respond to bar inquiries in violation of RPC 8.1(a)(2), but we agree that he acted knowingly.<sup>44</sup>

The bar contends that Houston “might have been merely” negligent in failing to communicate with Fitch (his violation of RPC 1.4(a)) or attend to her matter (his alleged violation of RPC 1.3, which we have rejected), but that his failure to act in the face of her repeated e-mails was knowing. We agree that in doing so Houston acted knowingly in his violation of RPC 1.4(a).<sup>45</sup>

The bar does not address Houston’s mental state with respect to his violation of RPC 1.15-1(d), which we have found that he violated by failing to account to Fitch for her retainer and to return her documents. We find that he acted knowingly in committing those violations.<sup>46</sup>

#### **4.1(c) Injury caused by Houston’s violations**

Under the *Standards*, the injuries caused by a lawyer’s professional misconduct may be either actual or potential.<sup>47</sup>

a. Houston injured Fitch.

The bar contends that Houston caused actual injury to Fitch by (1) delaying resolution of her matter by his inaction and by failing to return any portion of her retainer, which she could have used to employ other counsel or fully pursue her legal remedies, and (2) causing

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<sup>41</sup> *Standards*, pt II (Definitions).

<sup>42</sup> Sanction Memorandum at 11:6–9.

<sup>43</sup> Sanction Memorandum at 11:10–11.

<sup>44</sup> See *In re Crist*, 327 Or 609, 615–16, 965 P2d 1023 (1998) (lawyer’s failure to respond to bar communications not willful).

<sup>45</sup> Sanction Memorandum at 11:21–24.

<sup>46</sup> See, e.g., *In re Snyder*, 348 Or at 320 (lawyer acted knowingly, but not intentionally, in failing to return records to client).

<sup>47</sup> See *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992) (“[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction.”).

her to suffer anxiety and frustration.<sup>48</sup> The bar also contends that his failure to cooperate with its investigation caused actual injury to the legal profession and the public.<sup>49</sup>

Houston violated RPC 1.15-1(d) by failing to account to Fitch for her retainer and to return her documents. Because we have not found that he should have returned some or all of the retainer to her, we find that his failure to account for the retainer exposed Fitch to potential serious injury from the loss of or delayed access to any unearned portion of the retainer. Also, because the formal complaint contains no allegation regarding the nature or value of the documents that Houston has not returned to Fitch, including whether they are original or the only copies of documents or otherwise have particular value to Fitch, we find that his failure to return the documents also exposed her to potential, but not actual, injury.

Houston violated RPC 1.16(a)(1) and (d) by failing to withdraw from this matter and give Fitch notice upon his suspension, both of which delayed Fitch's ability to engage substitute counsel for this matter. The bar did not allege in the complaint that she suffered actual injury from those violations, but we find that the delays exposed Fitch to potential injury.

Were we to apply the *Standards* without regard to Oregon case law, we would hold that an RPC violation causes a client to suffer actual injury, including anxiety and aggravation, only if there is evidence, or a formal-complaint allegation to which the lawyer does not respond, that the client actually suffered the injury. But supreme court decisions appear to presume that a rule violation causes the client to suffer actual anxiety and frustration. For example, in 2008, the court held in *In re Koch*<sup>50</sup> that a lawyer's repeated failure to respond to clients' reasonable requests resulted in injuries measured in terms of time, anxiety, and aggravation and in attempting to coax cooperation from the lawyer, even though the court did not refer to evidence or admissions supporting that holding. We thus hold that Houston's failure to communicate with Fitch, to provide an accounting of her retainer and her documents, and to withdraw and give her notice upon his suspension caused her actual injury in the form of anxiety and frustration.

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<sup>48</sup> Sanction Memorandum at 12:5–10.

<sup>49</sup> Sanction Memorandum at 12:11–12.

<sup>50</sup> 345 Or at 456. *See also In re Schaffner* (“*Schaffner II*”), 325 Or 421, 426–27, 939 P2d 39 (1997) (because accused failed to act in client's behalf and resisted her repeated attempts to contact him, court concludes that client suffered actual injury in the form of anxiety and frustration); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989) (lawyer's retention of military-discharge documents injured client “in terms of time, anxiety, and aggravation, in attempting to coax cooperation from the accused”).

- b. Houston's failure to cooperate with the bar's investigation injured the public and the legal profession.

The supreme court has described a lawyer's failure to cooperate with a bar investigation as causing injury to the public as well as to the legal profession.<sup>51</sup>

Houston's failure to cooperate with the bar's investigation, especially in light of the extensive efforts the bar undertook to elicit any response from him, caused actual injury to the public and the legal profession.

#### **4.2 Determination of generally appropriate sanction before considering aggravation or mitigation**

The *Standards* specify four types of generally appropriate sanctions: disbarment, suspension, reprimand, and admonition. In Oregon, available disciplinary sanctions include a public reprimand but not an admonition.<sup>52</sup>

The type of sanction generally appropriate for a violation (before consideration of aggravation or mitigation) turns on the ethical duty violated, the lawyer's mental state, and the actual or potential injury—the three factors discussed in part 4.1 above.

##### **4.2(a) Violation of RPC 1.4(a)**

Houston's violation of RPC 1.4(a) by failing to keep Fitch informed and respond to her inquiries violated a duty to a client; he acted knowingly in failing to perform those duties; and those violations resulted in actual injury to her.

Applying *Standards*, § 4.42 by analogy, suspension is the generally appropriate sanction for Houston's violation of RPC 8.1(a)(2) because he acted knowingly and caused actual or potential injury to a client.

##### **4.2(b) Violation of RPC 1.15-1(d)**

Houston's violation of RPC 1.15-1(d) by failing to account to Fitch for her retainer and to return her documents violated a duty to a client; he acted knowingly in failing to perform those duties; and those violations resulted in actual injury to Fitch.

Applying *Standards*, § 4.12, suspension is the generally appropriate sanction for Houston's violation of RPC 1.15-1(d) because he acted knowingly and caused actual or potential injury to a client.

##### **4.2(c) Violation of RPC 8.1(a)(2)**

Houston's violation of RPC 8.1(a)(2) by failing to cooperate with the bar's investigation is not expressly addressed by the *Standards*. We nonetheless find that he

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<sup>51</sup> *Schaffner II*, 325 Or at 427; *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996).

<sup>52</sup> BR 6.1(a)(ii).

violated a duty to the public and the legal profession; he acted knowingly in failing to perform that duty; and the violation resulted in actual injury to the public and the profession.

Applying *Standards*, § 7.2 by analogy, suspension is the generally appropriate sanction for Houston’s violation of RPC 8.1(a)(2) because he acted knowingly and caused actual or potential injury to a client, the public, or the legal system.

### **4.3 Aggravating and mitigating circumstances**

After the generally applicable sanction under the *Standards* has been determined, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.<sup>53</sup>

The bar urges five aggravating factors and concedes one “possibly mitigating” factor. The bar’s aggravating factors are: (1) a dishonest or selfish motive, (2) multiple offenses, (3) bad-faith obstruction of a disciplinary proceeding by intentionally failing to comply with rules or orders, (4) substantial experience in the practice of law, and (5) indifference to making restitution.<sup>54</sup> The one possibly mitigating factor is the absence of a prior disciplinary record.<sup>55</sup>

#### **4.3(a) Houston did not act with a dishonest or selfish motive.**

A lawyer’s “dishonest or selfish motive” in committing a violation may be considered in aggravation.<sup>56</sup>

According to the bar, Houston “was motivated by his own personal circumstances to accept Fitch’s advance payment for fees and then abandon her case,” which it contends “is evidenced by his failure to subsequently return the funds when he did not complete the services for which they were paid.”<sup>57</sup>

Because the bar has not proved by clear and convincing evidence that Houston did not earn the entire retainer or that he neglected the matter, we cannot find that he acted with any improper motive in accepting the retainer or that he did not complete the services for which he was paid.

#### **4.3(b) Houston committed multiple offenses.**

Under *Standards*, § 9.22(d), that a lawyer has committed multiple disciplinary offenses may be considered in aggravation.

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<sup>53</sup> *Standards*, § 9.1.

<sup>54</sup> Sanction Memorandum at 13.

<sup>55</sup> Sanction Memorandum at 14.

<sup>56</sup> *Standards*, § 9.22(b).

<sup>57</sup> Sanction Memorandum at 13:11–14.

We have found that Houston violated RPC 1.4(a) for failing to communicate with Fitch, RPC 1.15-1(d) for failing to account for her retainer and return her records, RPC 1.16(a) and (d) for failing to withdraw from the matter and to give her notice upon his administrative suspension, and RPC 8.1(a)(2) for failing to cooperate with the bar's investigation. Because he engaged in several distinct acts, each of which constituted a separate violation of the rules, rather than one act charged under several rules, the multiple violations constitute the aggravating factor of multiple offenses.<sup>58</sup>

**4.3(c) Houston did not obstruct this proceeding.**

Under *Standards*, § 9.22(e), a lawyer's bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency may be considered in aggravation.

The bar contends that Houston's failure to "cooperate with service attempts or respond to any communications from the Bar or the Disciplinary Board" constitutes the aggravating factor of bad-faith obstruction.<sup>59</sup>

We disagree for three reasons. First, the bar identifies no rules or orders with which Houston failed to comply, other than the obligation under RPC 8.1(a)(2) to cooperate with the bar's inquiries. To treat a lawyer's violation of RPC 8.1(a)(2), without more, as an aggravating factor in determining the sanction for that violation would mean that every violation of that rule would constitute its own aggravating factor. Second, in each of the supreme court cases of which we are aware that have applied *Standards*, § 9.22(e), the lawyer undertook affirmative acts that obstructed the proceeding;<sup>60</sup> Houston did not. Third, *Standards*, § 9.22(e) applies only if the lawyer's obstruction is intentional and in bad faith. We have found that Houston acted knowingly, but not intentionally, in failing to cooperate with the bar's inquiries.

Houston's refusal to cooperate with the bar's investigation after multiple attempts by the bar to communicate with him is not an aggravating factor. Nonetheless, in part 4.4(d) below, in determining the appropriate sanction for his failure to cooperate with the investigation, we follow the supreme court's 1996 decision in *In re Miles*,<sup>61</sup> in which the court emphasized the seriousness with which it views a lawyer's failure to cooperate, without addressing *Standards*, § 9.22(e).

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<sup>58</sup> See *In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).

<sup>59</sup> Sanction Memorandum at 13:16–19.

<sup>60</sup> *In re Paulson*, 346 Or 676, 687, 216 P3d 859 (2009), *adhered to on recons*, 347 Or 529 (2010); *In re Skagen*, 342 Or 183, 192–95, 149 P3d 1171 (2006).

<sup>61</sup> 324 Or 218.

**4.3(d) Houston did not have substantial experience in the practice of law.**

A lawyer's substantial experience in the practice of law may be considered in aggravation.<sup>62</sup>

The bar asserts that Houston was admitted to practice in Oregon in 2012 and had been admitted to practice in New York in 2006.<sup>63</sup> The bar asks us to infer from only those facts that Houston had substantial experience in the practice of law.

We do not agree with the bar that Houston had had substantial experience in the practice of law when he represented Fitch in 2013 and 2014. The passage of approximately seven years since a lawyer was first admitted to practice is not always evidence of experience in the practice of law. The bar has not cited any court decision addressing any minimum period of time that constitutes substantial experience in law practice, and in our research, lawyers whom the supreme court has found to have had substantial experience in law practice have had substantially more than seven years of experience. And other than the fact of his admission in New York in 2006, there is no evidence of the existence or nature of any legal practice in which Houston engaged before coming to Oregon in 2012. The record does include evidence (the bar's evidence of service attempts) that he was a solo practitioner in Oregon, at least from and after the time of his representation of Fitch, and thus he had fewer opportunities to gain practice experience than he would have had had he practiced with others. We are particularly disinclined to find that Houston's particular seven years of bar membership constitutes substantial experience in law practice; they included the 19 months of the Great Recession from December 2007 through June 2009.<sup>64</sup>

Houston did not have substantial experience in the practice of law.

**4.3(e) Failure to pay restitution is not an aggravating factor in this proceeding.**

A lawyer's indifference to making restitution may be considered in aggravation.<sup>65</sup>

The bar contends that Houston "has made no effort to return any money to Fitch in these proceedings."<sup>66</sup>

We held in part 3.3 above that the bar has not proved by clear and convincing evidence that Houston did not earn Fitch's entire retainer. We thus cannot hold that failure to pay restitution is an aggravating factor.

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<sup>62</sup> *Standards*, § 9.22(i).

<sup>63</sup> Sanction Memorandum at 1:20–24, 13:20–21.

<sup>64</sup> US Business Cycle Expansions and Contractions, National Bureau of Economic Research, <http://www.nber.org/cycles.html>, last viewed on August 5, 2015.

<sup>65</sup> *Standards*, § 9.22(j).

<sup>66</sup> Sanction Memorandum at 13:22–23.

**4.3(f) Houston has no prior disciplinary record.**

The bar concedes, as a mitigating factor, the absence of a prior disciplinary record.<sup>67</sup>

**4.3(g) Houston is inexperienced in the practice of law.**

Inexperience in the practice of law is a factor that may be considered in mitigation.<sup>68</sup>

In part 4.3(d) above, we explain our rejection of the bar's contention that Houston had substantial experience in law practice, an aggravating factor. Although the opinion of another trial panel is not binding on us, we note with interest the 2012 trial-panel opinion in *In re Kocurek*,<sup>69</sup> in which the panel stated that "Accused had five years of experience in the legal field but there is no evidence that she was particularly well mentored or worked with any substantive firm for any length of time. This mitigating factor is not completely inapplicable."

For the same reasons that we have held that the seven-year period between Houston's first admission and the events at issue here did not constitute the aggravating factor of substantial experience, he was inexperienced in law practice.

**4.3(h) Effect of aggravating and mitigating factors**

Considering Houston's conduct and the aggravating and mitigating factors, we conclude that some period of suspension is appropriate.

**4.4 Applying Oregon case law to determine final sanction**

Although the *Standards* guide the decision whether to impose suspension or a more or less lenient sanction, they do not address the length of any suspension, other than *Standards*, § 2.3's definition of suspension to be generally be at least six months. Oregon case law has not recognized that six-month minimum, and in many cases the supreme court has imposed suspensions of less than six months.

**4.4(a) Sanction for failure to communicate**

The bar cites three supreme court cases regarding sanctions for failure to communicate: the court's decisions in *In re Snyder*<sup>70</sup> in 2010, *In re Koch* in 2008,<sup>71</sup> and *In re Coyner*<sup>72</sup> in 2006.

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<sup>67</sup> *Standards*, § 9.32(a).

<sup>68</sup> *Standards*, § 9.32(f).

<sup>69</sup> 26 DB Rptr 225, 239 (2012).

<sup>70</sup> 348 Or 307.

<sup>71</sup> 345 Or 444.

<sup>72</sup> 342 Or 104, 149 P3d 1118 (2006).

In *In re Snyder*, the court suspended the lawyer for 30 days for failing to communicate and two other violations: failing to return the client's file materials, including records, and to explain the matter to the extent reasonably necessary to permit the client to make informed decisions.

In *In re Koch*, the court suspended the lawyer for 120 days for several violations, including the failure to promptly return a retainer (the lawyer conceded that not all of it was earned) and the failure to cooperate fully with the bar's investigation (the lawyer partially cooperated).

In *In re Coyner*, the court suspended the lawyer for three months and required the lawyer to seek formal reinstatement after the lawyer accepted assignment of an appeal but took no action, leading to dismissal of the appeal, and then failed to disclose the dismissal to the client.

The bar states that if Houston's only violation were his failure to adequately communicate with Fitch, the bar would request a suspension of at least 30 days.<sup>73</sup>

Among the three cases that the bar has cited, this proceeding is most similar to *In re Snyder*, in which the lawyer was suspended for 30 days for failing to communicate, to return records, and to explain the matter to the client. Here, because Houston's failure to communicate has prevented Fitch and the bar from determining, at least from his records, whether anything remained for him to do to advance her interests after he received communications from the former employer and thus whether Houston neglected Fitch's matter, we hold that the appropriate period of suspension for his failure to account for the retainer and to return her documents, standing alone, is 60 days.

#### **4.4(b) Sanction for failure to account for retainer and return documents**

As authority for the period of suspension for failure to provide client property, the bar cites the court's decisions in *In re Obert*<sup>74</sup> in 2012, *In re Lopez*<sup>75</sup> in 2011, *In re Eakin*<sup>76</sup> in 2002, and *In re Chandler*<sup>77</sup> in 1987.

In *Obert*, the lawyer was suspended for six months for violating RPC 1.1 by failing to represent a client competently, RPC 1.4(a) by failing to keep a client informed, RPC 1.5(a) by collecting an excessive fee, RPC 1.15-1 by depositing client funds in his general bank account, RPC 3.1 by taking frivolous positions, and RPC 8.1(a)(2) by failing to respond to

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<sup>73</sup> Sanction Memorandum at 16:1-2.

<sup>74</sup> 352 Or 231, 282 P3d 825 (2012).

<sup>75</sup> 350 Or 192, 252 P3d 312 (2011).

<sup>76</sup> 334 Or 238, 48 P3d 147 (2002).

<sup>77</sup> 303 Or 290, 735 P2d 1220 (1987).

bar inquiries. The violations arose out of the lawyer's representation of two clients. As aggravating factors, the lawyer had a history of prior disciplinary offenses, and his current violations evidenced a pattern of misconduct. As mitigation, the lawyer disclosed all information to the Disciplinary Board and cooperated with the investigation in one of the matters but not the other. Also, the lawyer presented evidence of his good reputation in the community.

In *In re Lopez*, a reciprocal-discipline matter arising from discipline in California, the lawyer was suspended for nine months for violations in eight matters, including delaying distributions of settlement proceeds to a client, payment of fees from settlement proceeds without court approval, charging an excessive fee, failure to explain a matter to a client, failure to notify a client of a settlement offer, failure to pay medical liens from a settlement, failure to obtain court approval of settlements, and making a communication likely to create a false or misleading expectation about the result that the lawyer can achieve. The lawyer conceded that all but one of the violations was willful under California law and thus knowing under the *ABA Standards*. As aggravating factors, the lawyer had prior discipline, the current violations constituted multiple offenses and a pattern of misconduct, the lawyer had substantial experience in law practice, and the lawyer's misleading advertisement was directed at non-English-speaking clients, a vulnerable client group.

In *In re Eakin*, the lawyer was suspended for 60 days when she should have known that the amount she deducted from her trust account in reimbursement for an expense she incurred exceeded the amount of the expense. The supreme court held that the lawyer's substantial experience in the practice of law was an aggravating factor that weighed heavily against her in the determination of a sanction and outweighed two mitigating factors (the lawyer was cooperative, and there was a delay in the disciplinary proceeding).

In *In re Chandler*, the lawyer was suspended for 63 days for his failure, despite repeated requests, to return a client's retainer in violation of *former* DR 9-102(B)(4) (the lawyer agreed that he had not earned the retainer) and violations of two other rules: *former* DR 1-103(C) for failing to disclose information to disciplinary authorities and *former* DR 6-101(A)(3) for failing to act competently. Less than a year earlier, the lawyer had been suspended by the Disciplinary Board for 30 days for violating the same disciplinary rules that the court found he violated in the current case.<sup>78</sup> The lawyer waited until after the trial-panel hearing in the previous proceeding and the filing of the formal complaint in the current case to return the retainer due to his client. His misconduct thus continued beyond the time involved in his previous proceeding.<sup>79</sup>

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<sup>78</sup> *In re Chandler*, 303 Or at 295.

<sup>79</sup> 303 Or at 296.

The bar states that if failing to return client property were Houston's only violation, the bar would request suspension for at least 60 days. The client property that the bar addresses is Fitch's retainer, but we have declined to find Houston guilty of failing to return any portion of the retainer to Fitch. The bar does not discuss Houston's failure to account for the retainer or to return her documents.

None of the four cases that the bar cites involves failure to account for a retainer or to return documents or other nonmonetary property of a client. The supreme court has distinguished violations resulting in monetary loss or lost opportunity to the client from those resulting in neither type of loss.<sup>80</sup> In the absence of an allegation that Houston charged a clearly excessive fee or that the non-returned documents were originals or otherwise had independent value, we believe that Houston's failure to account for the retainer or return the documents is less serious than and deserves a shorter period of suspension than would be warranted for withholding of money due to a client.

We thus conclude that the appropriate period of suspension for a lawyer's failure to account for a retainer and return documents to a client, standing alone, would be 60 days. Here, because Houston's failure to account for the retainer has prevented Fitch and the bar from determining, at least from his records, whether he earned all of the retainer and thus whether he should be required to pay restitution, we hold that the appropriate period of suspension for his failure to account for her retainer and to return her documents, standing alone, is 90 days.

#### **4.4(c) Sanction for failure to withdraw and notify Fitch upon his suspension**

As authority for sanctions for failure to withdraw, the bar cites the supreme court's decisions in *In re Paulson*<sup>81</sup> in 2009, *In re Worth*<sup>82</sup> in 2003, and *In re Donovan*<sup>83</sup> in 1998.

In *In re Paulson*, the lawyer was disbarred for 13 violations. In addition to violating RPC 1.16(a)(1), the lawyer was found guilty of engaging in conduct prejudicial to the administration of justice, charging a clearly excessive fee, failing to take steps to protect a client's interest after termination of representation, knowingly making a false statement of law or fact to a tribunal, unauthorized practice of law, and failure to respond to lawful requests of disciplinary authority, conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on a lawyer's fitness to practice law.<sup>84</sup> The lawyer's defense to the charges of failing to withdraw was only that the actions he took while

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<sup>80</sup> *In re Koch*, 345 Or at 458.

<sup>81</sup> 346 Or 676.

<sup>82</sup> 336 Or 256, 82 P3d 605 (2003).

<sup>83</sup> 327 Or 76, 957 P2d 575 (1998).

<sup>84</sup> *In re Paulson*, 346 Or at 678.

suspended did not constitute the practice of law; the trial panel and court rejected that defense.<sup>85</sup>

In *In re Worth*, the lawyer was suspended for 90 days for violations involving four client matters. In addition to violating *former* DR 2-110(B) by failing to withdraw from representing a prisoner in one matter when it was obvious that the lawyer could not pursue the client's objectives diligently and that continued representation would result in rule violations, the court also found the lawyer guilty of violating *former* DR 6-101(B) (neglect of legal matter), DR 1-102(A)(4) (conduct prejudicial to administration of justice), DR 9-101(C)(4) (failure to return client property), DR 1-102(A)(3) (conduct involving deceit or misrepresentation), and DR 1-103(C) (noncooperation with disciplinary investigation). The court found significant the lawyer's extensive experience practicing law (38 years), his pattern of misconduct, and the number of violations that he committed. As mitigating factors, the court considered the lack of a prior disciplinary record and his good reputation.

In *In re Donovan*, the lawyer was disbarred for failing to complete work that he had agreed to perform in 27 matters, mishandling client funds, failing to return fees, failing to respond to client requests for information, and failing to return client files upon request. Although the court affirmed the trial panel's findings of violations, including of *former* DR 2-110(B) for failing to withdraw, the court's opinion does not discuss the circumstances of the failure to withdraw. The court found that disbarment was warranted without specifically discussing the lawyer's failure to withdraw, placing primary emphasis on the lawyer's multiple acts of intentional and dishonest appropriation of client trust funds.<sup>86</sup>

The bar states that if failure to withdraw were Houston's only violation, the bar would request suspension for 30 days.

Each of the three cases that the bar cites includes a violation for failing to withdraw, but none separately analyzes the appropriate sanction for that violation alone, and each involved many violations that, in the aggregate, exceed the harm caused by Houston's violations in this proceeding.

We thus hold that the appropriate period of suspension for Houston's failure to withdraw and notify Fitch upon his suspension, standing alone, would be 30 days.

#### **4.4(d) Sanction for failure to respond to disciplinary authority**

As authority for sanctions for failure to provide client property, the bar cites the supreme court's decisions in *In re Miles*<sup>87</sup> and *Schaffner I* in 1996<sup>88</sup> and *In re Arbuckle*<sup>89</sup> in 1989.

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<sup>85</sup> 346 Or at 696.

<sup>86</sup> *In re Donovan*, 327 Or at 80.

<sup>87</sup> 324 Or at 222–23.

In *In re Miles*, although no substantive charges were brought, the lawyer was suspended for 120 days for failure to cooperate with the bar’s investigation, including an investigation by a local professional responsibility review committee, of two separate client complaints. The court found the aggravating factors of a pattern of misconduct (the bar was investigating two separate complaints) and substantial experience in the practice of law.<sup>90</sup> The court emphasized the seriousness with which it views the failure of a lawyer to cooperate with a disciplinary investigation.<sup>91</sup> The court listed two important factors to consider in determining the length of suspension for failure to cooperate: (1) the extent of noncooperation by the accused and (2) whether multiple violations of the rule had occurred: “In most cases, either a single, significant failure to cooperate with a disciplinary investigation or lesser, multiple failures to cooperate warrant a lengthy suspension from the practice of law.”<sup>92</sup> In *In re Miles*, the lawyer violated the cooperation requirement in *former* DR 1-103(C) in two investigations, and the extent of the failure to cooperate was “severe.”

In *Schaffner I*, the lawyer was suspended for 120 days, 60 each for neglect of a matter and failure to cooperate with the bar. In addition to one aggravating factor present here (multiple offenses), the *Schaffner I* court found four aggravating factors not present (or at least not urged by the bar) here: a pattern of misconduct, bad-faith obstruction of the proceeding, refusal to acknowledge wrongful nature of conduct, and indifference to making restitution. In addition, although the court found one mitigating factor present here (absence of prior disciplinary record), the court did not find the additional mitigating factor present here: inexperience in the practice of law.

In *In re Arbuckle*, the supreme court suspended a lawyer for two years for failing to return to his client original documents that the client needed to pursue an upgrade to his military discharge and for failing to respond to the bar. The lawyer had no prior disciplinary record.

The bar states that if failure to respond to its investigation were Houston’s only violation, it would request suspension for at least 60 days.

Among the three cases that the bar cites, *In re Miles*, in which the lawyer was suspended for 120 days for failing to cooperate with the bar’s investigation, has the most

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<sup>88</sup> 323 Or 472.

<sup>89</sup> 308 Or 135.

<sup>90</sup> *In re Miles*, 324 Or at 222.

<sup>91</sup> 324 Or at 222–23.

<sup>92</sup> 324 Or at 223.

similar facts and is otherwise the most instructive. The length of the suspension in *In re Miles* resulted in part from the lawyer's failure to cooperate in two separate investigations.

Because Houston's failure to cooperate occurred in connection with only one investigation, we hold that the appropriate period of suspension for Houston's failure to cooperate with the bar's investigation, standing alone, would be 90 days.

#### **4.4(e) Collective conduct**

In addressing multiple charges of misconduct, the *Standards* recommend that the ultimate sanction be at least consistent with the sanction for the most serious instance of misconduct among the several violations, and it "might well be and generally should be greater than the sanction for the most serious misconduct."<sup>93</sup>

The bar requests that Houston be suspended for at least eight months.<sup>94</sup> It justifies that request by suggesting that the sum of the periods of suspension that the bar would request for each of his separate violations is 240 days, or eight months.

The bar cites no case or other authority that the period of suspension for multiple violations should be the sum of the periods of suspension that would be imposed if the accused were sanctioned separately for each violation. Although in *Schaffner I* the supreme court appeared to total two 60-day suspensions for neglect and failure to cooperate in arriving at a 120-day suspension for the two violations,<sup>95</sup> the court has not articulated or generally engaged in a totaling process to determine the combined sanction for multiple violations.

We have held above that the appropriate periods of suspension for Houston's violations, standing alone, would be 60 days for failure to communicate (RPC 1.4(a)), 90 days for failure to account for the retainer and return documents (RPC 1.15-1(d)), 30 days for failure to withdraw and notify Fitch upon his suspension (RPC 1.16(a)(1) and (d)), and 90 days for his failure to cooperate with the bar's investigation (RPC 8.1(a)(2)). After evaluating the *Standards*, the facts of this proceeding, and Oregon case law, we conclude that the appropriate period of suspension is 150 days.

#### **4.5 Formal reinstatement**

Houston must formally apply for reinstatement after the period of his suspension if he wishes to return to the practice of law in Oregon. Formal reinstatement is an appropriate requirement when, as here, a lawyer fails to cooperate and fails to defend the formal complaint, because the trial panel has no information as to why the lawyer failed to

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<sup>93</sup> *Standards*, pt II (Theoretical Framework).

<sup>94</sup> Sanction Memorandum at 19:8–9.

<sup>95</sup> *Schaffner I*, 323 Or at 481.

cooperate.<sup>96</sup> In this proceeding, formal reinstatement is also necessary in order to ensure that Houston complies with his obligations under RPC 1.15-1(d) to account to Fitch for her retainer, return her documents, and pay her any unearned portion of the retainer before the bar may consider whether he should be readmitted to practice.

#### 4.6 Restitution

BR 6.1 permits a trial panel to require restitution of some or all of the money, property, or fees received by the accused in the representation of a client. The bar requests that we order Houston to make restitution to Fitch for \$2,500.

Because we do not find that Houston violated RPC 1.15-1(d) by failing to return any portion of the retainer, we do not order that he make present restitution to her of any amount. But in part 4.4(b) above, we determined the appropriate period of suspension for his failure to account for the retainer in part based on the effect of the absence of the retainer on the bar's inability to prove that, at least based on his records, he did not earn the entire retainer. Also, we require in our disposition below that as a condition to readmission to practice, he give Fitch any unearned portion of the retainer, as well as an accounting for the retainer and her documents.

### 5. DISPOSITION

We suspend Houston from the practice of law for 150 days, beginning immediately. He must make formal application for reinstatement to practice in Oregon under BR 8.1 after expiration of his term of suspension. He may not be reinstated unless and until he gives Fitch an accounting of her retainer, her records, and any unearned portion of her retainer.

DATED this 13th day of August, 2015.

/s/ David W. Hercher  
David W. Hercher, Trial Panel Chairperson

/s/ Dylan M. Cernitz  
Dylan M. Cernitz, Trial Panel Member

/s/ Michael Wallis  
Michael Wallis, Trial Panel Public Member

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<sup>96</sup> *In re Miles*, 324 Or at 224–25.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-58
	)	SC S063312
ZACHARY WAYNE LIGHT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Calon Nye Russell
Disciplinary Board:	None
Disposition:	Violations of RPC 8.4(a)(2) and ORS 9.527(2). Stipulation for Discipline. 7-month suspension, all but 30 days stayed, 3-year probation.
Effective Date of Order:	November 1, 2015

**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 seven months, effective November 1, 2015, as set out in the stipulation. Of the seven-month period, all but 30 days of the suspension are stayed pending the accused’s successful completion of a three-year term of probation.

/s/ Thomas A. Balmer  
 11/12/2015 9:54 AM  
 Thomas A. Balmer,  
 Chief Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

Zachary Wayne Light, attorney at law (“Light”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Light was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 31, 2003, and has been a member of the Bar continuously since that time, having his office and place of business in Jackson County, Oregon.

3.

Light 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 June 17, 2015, a Formal Complaint was filed against Light pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 8.4(a)(2) (criminal conduct reflecting adversely on fitness to practice) and ORS 9.527(2) (conviction of a misdemeanor involving moral turpitude). 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.

At all relevant times herein, ORS 163.700(1) provided, in part:

[A] person commits the crime of invasion of personal privacy if:

(a)(A) The person knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the person being recorded; and

(B) At the time the visual recording is made or recorded the person being recorded is in a place and circumstances where the person has a reasonable expectation of personal privacy.

6.

At all relevant times herein, ORS 163.700(2)(b) defined nudity as any part of the uncovered or less than opaquely covered: genitals; pubic area; or female breast below a point immediately above the top of the areola.

7.

In or around March 2014, Light placed a camera in his minor step-daughter's bedroom, with the intention of filming her without her knowledge or consent. The minor step-daughter, who had not consented to being filmed, located the camera, which contained footage of her in a state of undress that met the elements of ORS 163.700(2)(b).

8.

On or about October 8, 2014, Light was convicted of a violation of ORS 163.700, invasion of privacy, a Class A misdemeanor.

### **Violations**

9.

Light admits that he committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness in other respects, in violation of RPC 8.4(a)(2). Light further admits that his conviction was for a misdemeanor involving moral turpitude, in violation of ORS 9.527(2).

### **Sanction**

10.

Light 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* (“*Standards*”). The *Standards* require that Light'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.** Light's criminal conduct violated his duty to the public. *Standards*, § 5.1.
- b. **Mental State.** An element of the criminal conduct at issue requires a knowing mental state and the facts also support that Light acted with “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards*, p 9.
- c. **Injury.** There was both actual and potential injury to Light's step-daughter, the victim of his criminal conduct.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Dishonest and selfish motive. *Standards*, § 9.22(b).
  2. A vulnerable victim. *Standards*, § 9.22(h).

3. Substantial experience in the practice of law. *Standards*, § 9.22(i).
4. Illegal conduct. *Standards*, § 9.22(k).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Personal or emotional problems, including familial difficulties and issues stemming from chemical dependency during the time of the misconduct at issue. *Standards*, § 9.32(c).
  3. Full and free disclosure in these disciplinary proceedings, including Light's self-report of his conduct directly to the Bar. *Standards*, § 9.32(e).
  4. Imposition of other penalties or sanctions in the form of fines and other sentencing requirements related to Light's criminal case, including a 5-year term of probation. *Standards*, § 9.32(k).
  5. Light expressed that he is extremely remorseful for his conduct and for the harm it caused. He is dismayed at his behavior and the poor judgment he displayed. *Standards*, § 9.32(l).

11.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on the lawyer's fitness to practice law. *Standards*, § 5.12.

12.

There are numerous cases in which the Supreme Court has imposed substantial suspensions for criminal conduct or convictions. *See, e.g., In re McDonough*, 336 Or 36, 77 P3d 306 (2003) (18-month suspension where attorney repeatedly drove with a suspended license or while intoxicated); *In re Kimmell*, 332 Or 480, 31 P3d 414 (2001) (6-month suspension for shoplifting violation); *In re Allen*, 326 Or 107, 949 P2d 710 (1997) (1-year suspension for misdemeanor attempted possession of a controlled substance in assisting known addict in the purchase of narcotics); *In re Wolf*, 312 Or 655, 826 P2d 628 (1992) (18-month suspension for contributing to the sexual delinquency of a minor and giving alcohol to a minor despite criminal dismissals following completion of diversion); *In re White*, 311 Or 573, 815 P2d 1257 (1991) (3-year suspension for misdemeanor assault of a police officer). And, while stipulations for discipline have no precedential value, *In re Murdock*, 328 Or 18, 24, n 1, 968 P2d 1270 (1998), there are also numerous cases in which the court has approved significant stipulations for discipline involving criminal conduct or convictions, as here, pursuant to BR 3.6(d). *See, e.g., In re Gudger*, 11 DB Rptr 171 (1997) (7-month suspension for felony possession and use of cocaine); *In re Drew*, 11 DB Rptr 67 (1997) (2-year

suspension for three shoplifting incidents resulting in single misdemeanor conviction); *In re Joiner*, 9 DB Rptr 209 (1995) (24-month suspension following misdemeanor conviction for rape).

Considering that Light has no prior discipline or criminal record, and the fact that his mitigation outweighs aggravating factors in number and in weight, the Bar believes that a short period of actual suspension is sufficient to address the misconduct and protect the public interests, given that a more substantial period of suspension is stayed and will be imposed if Light engages in similar conduct in the foreseeable future or cannot maintain his sobriety.

13.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also, Standards*, § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Light shall be suspended for 7 months for violation of RPC 8.4(a)(2) and ORS 9.527(2), with all but 30 days of the suspension stayed, pending Light's successful completion of a 3-year term of probation. The sanction shall be effective November 1, 2015, or as otherwise directed by the court.

15.

Light's license to practice law shall be suspended for a period of 30 days beginning November 1, 2015, or as otherwise directed by the court ("actual suspension), assuming all conditions have been met. Light understands that reinstatement is not automatic and that he cannot resume the practice of law following his actual suspension until he has taken all steps necessary to re-attain the status of active practice with the Bar. During the period of actual suspension, and continuing through the date upon which Light re-attains the status of active practice with the Bar, Light shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

16.

Probation shall commence on the date Light's license is reinstated to active practice status and continue for a period of 3 years, ending on the day prior to the third year

anniversary of the commencement date (the “period of probation”). During the period of probation, Light shall abide by the following conditions:

- (a) Light shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (b) Light shall comply with the probationary terms contained in the October 2014 Judgment entered in *State v. Zachary Wayne Light*, Jackson County Case No. 14CR21725, and successfully complete that probation. Light shall also continue to abide by the terms of probation in Jackson County Case No. 14CR21725 for the duration of his period of probation with the Bar, regardless of whether the probation in Jackson County Case No. 14CR21725 is terminated early. Specifically, Light shall:
  - (1) Obey all laws
  - (2) Not represent children in a professional capacity.
  - (3) Not have contact with the victim without prior permission from the court.
  - (4) Not handle child sexual abuse or child pornography cases.
- (c) Light is currently subject to an agreement with the State Lawyers Assistance Committee (“SLAC”). He shall comply with all of the terms of that agreement and any subsequent modifications to that agreement, including, without limitation, evaluation(s), treatment, and therapy.
- (d) Rick Whitlock, or other designee of SLAC, shall serve as Light’s probation monitor (“Monitor”). Light agrees to cooperate and comply with all reasonable requests made by his Monitor that SLAC or the Monitor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Light’s clients, the profession, the legal system, and the public. Light shall meet with his Monitor in person on a regular basis, as determined by SLAC and/or the Monitor, and in no event less than monthly, for the purpose of monitoring Light’s sobriety and compliance with these terms of probation.
- (e) Within 10 days of the Court’s approval of this Stipulation for Discipline, Light shall notify his Monitor of the existence and contents of the Stipulation for Discipline; and consult with his Monitor as to whether and how to modify his current treatment plan to best accomplish the objectives of Light’s probation as set forth in the Stipulation for Discipline.

- (f) In the event Light fails to comply with any condition of this Stipulation for Discipline, Light shall promptly notify his Monitor, SLAC and Disciplinary Counsel's Office ("DCO") in writing.
- (g) Light shall not possess or consume any alcoholic beverages, marijuana, controlled substances, mind-altering drugs or prescription medications, except as prescribed by a licensed physician. Light shall consume any prescribed substance only as prescribed. At the first meeting held with the Monitor following approval of this Stipulation for Discipline, Light will notify his Monitor of the name of any drug(s) then prescribed, the name and telephone number of the prescribing physician, and the medical condition necessitating the prescription. Thereafter, if Light is prescribed any medication during the period of probation, Light will make a similar notification to the Monitor within 10 days following receipt of the prescription.
- (h) Light shall report to his Monitor and to DCO within 14 days of occurrence any civil, criminal, or traffic action or proceeding initiated by complaint, citation, warrant, or arrest, or any incident not resulting in complaint, citation, warrant, or arrest, in which it is alleged that Light has possessed or consumed any controlled substances not prescribed by a physician in kind or amount, or which raises concerns about his fitness.
- (i) Light shall work with an experienced sponsor (minimum 5 years of continuous sobriety) and will authorize the sponsor to periodically confirm—upon the request of his Monitor—that the sponsor is, in fact, currently working with Light.
- (j) Light authorizes his Monitor to communicate with DCO regarding Light's compliance or noncompliance with the terms of this agreement and to release to DCO any information DCO deems necessary to permit it to assess Light's compliance.
- (k) Light shall submit to random urinalysis tests at a facility designated by the Bar that is licensed or accredited to perform such tests within eight (8) hours of the DCO's requests that he do so, should DCO determine it is necessary and appropriate to assure Light's abstinence and compliance with any terms of this Stipulation for Discipline.
- (l) Light is currently undergoing regular counseling and treatment sessions. Prior to the start of the period of probation, Light shall notify DCO and his Monitor of the names of these counselors/treatment providers and disclose the frequency of his counseling/treatment sessions. Light shall continue to attend the counseling and treatment sessions at intervals deemed appropriate by the counselor(s) and treatment provider(s) for the entire period of probation.

- (m) Light shall not terminate or reduce the frequency of his counseling or treatment sessions without first submitting to DCO a written recommendation from the provider that such counseling or treatment sessions be reduced in frequency or terminated. Light understands that DCO reserves the right to require Light to undergo an independent evaluation by a professional acceptable to DCO to ascertain the appropriateness of the reduction or termination of the counseling or treatment sessions, as requested.
- (n) On or before the first business day of the third month following the commencement of the period of probation and on or before the first day of each third month thereafter, Light shall submit to DCO a written report, approved as to substance by his Monitor, verifying that:
  - (1) Light has maintained his sobriety during the quarter and has not engaged in any incidents involving alcohol or controlled substances.
  - (2) Light has participated in and complied with the terms of his agreement with SLAC.
  - (3) Light has cooperated and complied with all reasonable requests made by SLAC and/or his Monitor.
  - (4) Light is otherwise in compliance with the terms of this agreement applicable to his treatment for substance abuse and related issues.
  - (5) If Light has not complied with any requirement of this Stipulation for Discipline, a description the nature of the noncompliance and the reasons for it.
- (o) Light is responsible for the timely submission of all reports required by this agreement, including the reports required from third persons.
- (p) Light acknowledges that his Monitor will report violations of this Stipulation for Discipline to DCO.
- (q) Light authorizes his Monitor to communicate with DCO regarding Light's compliance or noncompliance with the terms of this agreement, and to release to DCO any information, including information from SLAC, that DCO deems necessary for it to assess Light's compliance.
- (r) Light is responsible for any costs required under the terms of this Stipulation for Discipline and the terms of probation.

Light's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Monitor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension. A compliance report is timely if it is emailed, mailed, faxed, or delivered on or

before its due date. A decision by the SPRB to file a formal proceeding against Light for unethical conduct that occurred or continued during the period of probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

17.

Light 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, Light has arranged for John Hamilton, an active member of the Bar, to either take possession of or have ongoing access to Light's client files and serve as the contact person for clients in need of the files during the term of his suspension. Light represents that John Hamilton has agreed to accept this responsibility. Light further agrees no later than October 15, 2015, to notify all clients with whom he has active matters as of the commencement date of his actual suspension of the fact that he will not be able to practice law during the period of active suspension and of the name of the active member of the Bar who has agreed to take possession or have ongoing access to Light's client files. Light shall on or before the commencement date of the period of active suspension take reasonable steps necessary to notify courts in which he has current active matters of his inability to practice law by either filing notices of withdrawal or acquiescing in motions to substitute being filed by another lawyer seeking to enter an appearance on behalf of a client of Light's.

18.

Light acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

19.

Light represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Light is admitted: none.

20.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 Light*, 29 DB Rptr 263 (2015)

EXECUTED this 2nd day of October, 2015.

/s/ Zachary Wayne Light  
Zachary Wayne Light  
OSB No. 035702

EXECUTED this 9th day of October, 2015.

OREGON STATE BAR  
By: /s/ Amber Bevacqua-Lynott  
Amber Bevacqua-Lynott  
OSB No. 990280  
Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 14-30 and 14-75  
)  
PAUL H. KRUEGER, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Lawrence Matasar; Allison D. Rhodes  
Disciplinary Board: None  
Disposition: Violations of RPC 1.5(a), RPC 1.6(a), RPC 1.8(g), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 3.3(a), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4).  
Stipulation for Discipline. 6-month suspension, 90 days stayed, 2-year probation.  
Effective Date of Order: December 1, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Krueger shall be suspended for 6 months for violations of RPC 1.5(a), RPC 1.6(a), RPC 1.8(g), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-2(c), RPC 1.15-1(d), RPC 3.3(a), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4), with 90 days of the suspension stayed, pending Krueger's successful completion of a 2-year term of probation. The sanction shall be effective December 1, 2015.

DATED this 9th day of November, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Ronald W. Atwood  
Ronald W. Atwood, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Paul H. Krueger, attorney at law (“Krueger”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

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

3.

Krueger 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 April 21 2015, an Amended Formal Complaint was filed against Krueger pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.5(a) (illegal fee); RPC 1.6(a) (revelation of information relating to the representation of a client asked be held inviolate or likely to be detrimental to the client); RPC 1.8(g) (participation in an aggregate settlement without the clients’ informed written consent); RPC 1.15-1(a) (failure to maintain in trust funds belonging to a client or third party); RPC 1.15-1(c) (withdrawal of funds from trust before fully earned); RPC 1.15-2(c) (failure to deposit into an interest-bearing trust account client funds that were capable of earning interest); RPC 1.15-1(d) (failure to notify clients of receipt of funds in which the clients have an interest); RPC 3.3(a) (misrepresentation to a tribunal); RPC 8.1(a)(1) (false statements in connection with a disciplinary investigation); RPC 8.4(a)(3) (misrepresenta-

tions and dishonesty reflecting adversely on fitness to practice); 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.

### **Struckman Matter**

#### **Case No. 14-30**

#### **Facts**

5.

Mark Struckman suffered personal injuries on January 17, 2006. He hired Krueger to sue Clackamas County and American Family Insurance Company in Multnomah County Circuit Court. In June 2008, Mark Struckman committed suicide. In July 2008, his mother, Kay Struckman, met with Krueger. It is disputed whether Kay Struckman signed a written contingency agreement to continue to pursue Mark Struckman's claims, but no such agreement has been located.

6.

Krueger dismissed the Mark Struckman personal injury action and refiled as a wrongful death action against the same defendants. Krueger filed a probate petition to name Kay Struckman as personal representative. The petition was deficient, and Krueger arranged for attorney William Henderson ("Henderson") to substitute into the proceeding as counsel for Kay Struckman. Henderson successfully had Kay Struckman appointed as personal representative of Mark Struckman's estate. The wrongful death civil claim was the estate's only asset.

7.

At a June 25, 2010 mediation, the parties agreed to settle for \$130,000. Each defendant drafted and presented a settlement agreement. The settlement agreement with defendant Clackamas County expressly required the settlement funds remain in trust until the settlement was approved by the probate court. It also recited that the civil case would be dismissed only after court approval.

8.

On June 29, 2010, Krueger reported to the Multnomah County Circuit Court that the litigation was settled. Soon afterwards, the case was dismissed.

9.

On July 12, 2010, Krueger's office received the \$30,000 portion of the settlement (from the insurer defendant) and deposited it into Krueger's IOLTA account.

10.

By a July 14, 2010 email copied to Krueger, Krueger's paralegal directed the firm's bookkeeper to transfer \$18,857 of the Struckman settlement proceeds from trust to general checking.

11.

On August 2, 2010, Krueger's office received the \$99,999 portion of the settlement (from defendant Clackamas County) and deposited into Krueger's IOLTA account.

12.

By an August 11, 2010 email copied to Krueger, Krueger's paralegal directed the firm's bookkeeper to transfer \$33,333.33 of the Struckman proceeds from trust to general checking.

13.

Unaware of the dismissal of the case, Henderson sent an email to Krueger in late July 2010, about the need to obtain probate court approval, and expressing his understanding that Krueger would be preparing the petition to do so. In response, Krueger sent Henderson a copy of the amended complaint and suggested that Henderson should seek the probate court's approval. There were subsequent communications between Henderson and Krueger or his staff about the need for someone to draft the petition seeking approval but nothing was filed in the year following the settlement.

14.

During the summer of 2011, Richard Weil ("Weil"), the attorney for Cougar Strategies—a litigation funding company that had advanced funds to Mark Struckman secured by his personal injury litigation—began asking for information about the settlement. On August 19, 2011, Weil moved the probate court to require Kay Struckman to account for the litigation proceeds and to disclose, among other things, "all subsequent transferee(s) of the payment and the dates, amounts, and purposes for any such transfer(s); and the last known location(s) of such payment."

15.

Following Weil's involvement, Henderson decided to file the request for court approval. In mid-August 2011, Henderson asked Krueger for information he needed to prepare the petition. When Krueger did not respond by August 24, 2011, Henderson filed a petition that attached unsigned copies of the settlement agreements, represented that the settlement funds were in Krueger's trust account, and asked the court to authorize distributions that included Krueger's claimed attorney fees (calculated on a contingency basis at \$43,333) and costs (\$9,457). Henderson promised that Krueger would submit separate documentation supporting the attorney fees/costs claim.

16.

Krueger filed an affidavit in support of Henderson's petition on September 9, 2011. The affidavit did not attach a copy of the fee agreement but asserted the existence of a written contingency fee agreement with Kay Struckman.

17.

On September 12, 2011, Weil objected to the petition to approve the settlement. He disputed that the litigation was a wrongful death action, a characterization that would eliminate Cougar Strategies' claim, and instead argued that it was a survival claim. After researching the issue, Henderson agreed. On September 29, 2011, he filed a new petition to approve settlement that asserted that the action was more appropriately characterized as a survival rather than a wrongful death claim. Henderson again told the court that all the settlement funds remained in Krueger's trust account but asked the court to approve a reduced attorney fees because Krueger was unable to produce a written contingent fee agreement as required by ORS 20.340.

18.

On October 13, 2011 (14 months after receipt of the Struckman settlement proceeds), Krueger realized that a portion of the Struckman settlement funds had been mistakenly removed from trust. On October 20, 2011, at Krueger's instruction, his staff set up a separate trust account and moved \$129,999 in Struckman settlement funds into that separate trust account.

19.

The court scheduled an annual accounting hearing for November 9, 2011. The hearing notice described the hearing as relating to an objection to mediation. As such, Krueger did not attend the hearing and the associate sent in his stead was not able to address whether the settlement funds were in an interest bearing account. The court set another hearing for December 14, 2011, and instructed that Krueger should appear and be prepared to state then how the funds were being kept.

20.

Two days before the December 14, 2011 hearing, Krueger filed two declarations. The first—his own—stated: that he believed Kay Struckman had signed an agreement; that his September 9, 2011 affidavit (asking for approval of the contingency fee) had reflected that belief; but that later after he was asked for a copy of the executed document, he learned that it was missing. The second declaration was by Krueger's paralegal. It confirmed her belief that Kay Struckman had signed a fee agreement and her surprise that it could not be located. The paralegal's declaration also addressed the handling of the settlement funds, and declared the following:

“As is this firm’s practice when receiving settlement checks, the settlement checks for this case were deposited in the firm’s regularly maintained attorney-client trust account when received from the defendants’ insurance representatives.

“Prior to preparing this declaration, I was requested to verify the amounts presently on deposit in the trust account maintained for this matter, and certify the amounts that would be available for distribution for the estate. At this time, the sum of \$129,999.99 remains in an attorney-client trust account created for this case.”

21.

At the hearing on December 14, 2011, before Judge Tennyson, Krueger testified that the settlement proceeds were first deposited into his regular IOLTA account (non-interest bearing) but were later—between August and October of 2011—transferred into an interest-bearing trust account. Krueger was not specifically asked and did not volunteer the occurrence of or an explanation regarding the previously mistaken removal of the funds representing his claims attorney fees and costs from trust more than a year before, or that funds had only recently been returned.

22.

On January 5, 2012, Judge Tennyson disallowed Krueger’s contingency claim, and awarded him a quantum meruit amount of approximately \$27,000 in fees and costs.

23.

Henderson thereafter complained to the Bar. Initially, Henderson’s complaint was unrelated to the handling of funds. Later, after Krueger had responded to Henderson’s initial complaint, Henderson raised concerns regarding funds in trust. In response to inquiries from Disciplinary Counsel’s Office (“DCO”), counsel for Krueger refuted Henderson’s speculation that Krueger might have prematurely removed sums representing attorney fees and costs from the Struckman settlement proceeds. Through counsel, Krueger represented that the funds were kept continuously in trust.

24.

DCO asked for Krueger’s trust account records to confirm Krueger’s claims regarding the disposition of the settlement funds. On November 2, 2012, Krueger provided three redacted bank statements and a summary that purported to recap his handling of the settlement proceeds. The summary omitted information about the July and August 2010 withdraw of settlement funds from trust.

25.

On February 20, 2013, in response to DCO's request for unredacted trust account records, in a letter expressly correcting the prior submission and pointing out the premature transfer of funds, Krueger produced additional records that disclosed the July and August 2010 removal of attorney fees and costs from trust shortly after their receipt. Krueger's counsel acknowledged that his previous representations regarding their continuous presence in trust were incorrect, and that funds had been taken and restored.

### **Violations**

26.

Krueger admits that, by prematurely removing a portion of the Struckman settlement funds from trust for his anticipated attorney fees prior to obtaining the statutorily required court approval, he collected an illegal fee, in violation of RPC 1.5, and failed to maintain client or third-party funds in trust, in violation of RPC 1.15-1(a). Krueger further admits that his failure to sooner place the Struckman settlement funds into trust, when they were capable of earning interest during the 18 months they were in his possession, violated his obligations under RPC 1.15-2(c).

27.

Krueger admits that his September 9, 2011 affidavit, his submission of his paralegal's declaration, his failure to correct statements made by his client (through Henderson), and his own testimony, caused the court to have incomplete information about the handling of the Struckman settlement funds, in violation of RPC 8.4(a)(3) and RPC 3.3(a).

28.

Krueger also admits that his correspondence, representations, and documentation to Disciplinary Counsel's Office during the course of its investigation of his conduct violated RPC 8.1(a)(1).

29.

Finally, Krueger admits that his representations to the court and the Bar, taking of fees and course of conduct related to the Struckman matter were acts that potentially harmed the administration of justice, in violation of RPC 8.4(a)(4).

**Rogers and Becker Matter**

**Case No. 14-75**

**Facts**

30.

On December 18, 2008, Kasey Rogers (adult son/driver) and Beverly Becker (mother/passenger) were injured in an automobile accident. Both Rogers and the at-fault driver were insured by Safeco Insurance/Liberty Mutual.

31.

Rogers and Becker hired Krueger in July 2009, and entered into separate fee agreements.

32.

Krueger provided Rogers and Becker with a list of doctors and instructed them to either use their own doctor, or select from one or more doctors on the list for treatment. Krueger received billings related to medical providers directly from the providers and did not share them with Rogers and Becker. Krueger assumed that Rogers and Becker were also receiving invoices directly from the medical providers.

33.

Rogers' injuries were less serious than Becker's; she required numerous serious operations and expensive medical procedures.

34.

The at-fault driver's policy limits were \$50,000 per person/\$100,000 per accident, not enough to pay Rogers's and Becker's combined medical expenses. However, Rogers also had a \$1 million underinsured motorist (UIM) policy.

35.

In January 2010, Becker's and Rogers's case was being primarily handled by a senior associate in Krueger's office over whom Krueger had direct supervisory authority. Krueger had limited actual involvement with the matter. The associate demanded, and Safeco acquiesced, to pay the entire \$100,000 policy limits on the at-fault driver's insurance. Safeco sent the associate at Krueger's office two releases to be signed by Rogers and Becker, and a confirmation letter stating that the settlement was contingent upon—and settlement funds should be kept in trust until—return of the signed releases.

36.

On January 19, 2010, Safeco tendered the funds, which Krueger's staff deposited into trust. Krueger's associate sent the releases to the clients the next day. On January 25, 2010,

prior to receipt of the releases or affirmative notice to his clients of his receipt of the at-fault driver settlement funds, Krueger's staff withdrew attorney fees and costs totaling approximately \$33,000.

37.

Becker was unhappy with some of the language in the releases, so they were revised and re-sent. Becker signed and returned her release on March 22, 2010. Rogers apparently lost his, so Krueger's associate sent him a second revised release that Rogers signed and returned on August 12, 2010.

38.

Throughout most of 2010, Becker contacted the associate and Krueger's staff numerous times, complaining about her pressing financial difficulties and inquiring about the status of her and Rogers's claims. Rogers and Becker did not recognize that Krueger's office had received the at-fault driver settlement funds until December 2010, from a source outside of Krueger's office.

39.

On December 9, 2010, Krueger disbursed \$25,000 each to Rogers and Becker, retaining the remaining proceeds to fund their continuing UIM claim.

40.

In February 2012, the parties mediated the UIM claim but no settlement was reached. Rogers and Becker apparently did not have an understanding of their total medical expenses. They were concerned about settling for an amount insufficient to satisfy their bills.

41.

A settlement of the UIM was reached at a second mediation in mid-May 2012 (a month before the trial date), whereby Safeco paid \$500,000 total, to settle both cases. Rogers and Becker continued to express concern about their outstanding medical expenses, but agreed to accept the settlement on their belief that Krueger would: (1) seek to negotiate with their medical care providers to greatly reduce their medical expenses; (2) provide them each with some amount of money beyond their medical expenses (the precise amount of which is in dispute); and (3) disburse the settlement proceeds within 10 days.

42.

Rogers and Becker signed a handwritten settlement agreement on May 17, 2012, and a formal settlement agreement on May 31, 2012, which provided that an aggregate amount was being paid to settle Rogers's and Becker's UIM claims. Krueger did not present Rogers and Becker with a written explanation of the risks of engaging in an aggregate settlement and they did not sign any form confirming their informed consent to the aggregate settlement.

43.

Safeco sent the funds to Krueger on May 21, 2012, which he deposited into trust on May 31, 2012.

44.

On June 12, 2012, Krueger sent Rogers and Becker a summary of the specific reduced amounts he proposed to offer their medical providers. He asked them to authorize settlements for those amounts. Rogers and Becker objected for various reasons and, on June 14, 2012, Becker wrote Krueger a letter stating the alternative amounts she and Rogers wanted him to offer each medical provider. In response, Krueger informed Rogers and Becker, if they did not approve his suggested figures and the previously agreed upon strategy for negotiating the medical debts, he would retain sufficient settlement funds in trust to pay those medical providers with liens—or to whom he had letters of protection—until the clients themselves resolved any disputes with the providers.

45.

Rogers and Becker demanded that Krueger release to them the funds held in trust for the claims of medical providers. Pursuant to RPC 1.15-1, Krueger refused. On July 3, 2012, Krueger offered to make a partial distribution to Rogers and Becker of the undisputed portion of the settlement proceeds, and then negotiate with the medical providers on their behalf. Instead, on July 5, 2012, Becker and Rogers notified Krueger in writing that they would be handling the negotiations with their providers themselves and affirmatively directing that Krueger and his office have no contact with them.

46.

Rogers also filed a Bar complaint, in which Becker later joined, in which they discussed the amount and nature of the UIM settlement.

47.

On July 17, 2012, Krueger distributed to Rogers and Becker the undisputed amount of the settlement funds. After conferring with counsel, he wrote one check (for \$120,037) made out to both clients and told them that he would continue to hold the remaining settlement funds (approximately \$214,000) in trust pending Rogers's and Becker's negotiations with the medical providers.

48.

Beginning in June 2012 (the scheduled trial date), North Coast Chiropractic Clinic (one of Rogers's protected medical providers), periodically contacted Krueger's office about payment. On October 10, 2012—erroneously believing that Rogers's and Becker's discussion of their settlement in the Bar proceeding waived any and all privilege or confidentiality related to that information—Krueger told a North Coast employee by telephone that he no

longer represented Rogers and had “more than enough money to pay [the North Coast] bill in his interest bearing trust account,” but that Rogers did not want any money paid to his health care providers.

49.

When North Coast’s attorney, Dan Van Thiel (“Van Thiel”), contacted Krueger in December 2012, Krueger confirmed that his office had dispersed all of the money other than the money to pay the medical practitioners. He also confirmed that there were more than ample funds to pay the medical bills.

50.

Van Thiel then demanded that Rogers instruct Krueger to release the full claimed amount of funds to North Coast, which he did on February 29, 2014.

### **Violations**

51.

Krueger admits that the withdrawal of a portion of the at-fault driver settlement proceeds from trust, months before his associate obtained signed releases from Rogers and Becker, constituted a failure to deposit and maintain third-party funds in trust, in violation of RPC 1.15-1(a) and (c). Krueger also admits that the failure to promptly and unambiguously notify Rogers and Becker of his receipt of the at-fault driver settlement proceeds—proceeds in which they had interest—violated RPC 1.15-1(d).

52.

Krueger acknowledges that his participation in the May 2012 aggregate settlement, without providing his clients with a written explanation of the risks and alternatives to such a settlement, and obtaining his clients’ signature on a letter confirming that they should seek independent legal advice, violated RPC 1.8(g).

53.

Finally, Krueger admits that his substantive communications and disclosures to North Coast exceeded that which he was ethically required or allowed to give providers with an interest in the settlement funds. Notwithstanding their disclosure of related information in another forum, Krueger now recognizes that in disclosing information he received during his representation of Rogers that Rogers specifically asked him to hold inviolate and that he knew could be detrimental to Rogers interests, he violated RPC 1.6(a).

### **Sanction**

54.

Krueger 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*

(“*Standards*”). The *Standards* require that Krueger’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

Krueger violated his duties to his clients to preserve client property; to preserve client secrets; to avoid conflicts of interest; and to be candid. *Standards*, §§ 4.1, 4.2, 4.3, 4.6. The *Standards* provide that the most important ethical duties are those which lawyers owe their clients. *Standards*, p. 5.

Krueger also violated his duties to the legal system to refrain from misrepresentations to the court and avoid conduct that abuses the legal process. *Standards*, §§ 6.1, 6.2.

Finally, Krueger violated his duties as a professional to refrain from charging improper fees; to be candid in communications with disciplinary authorities; and to not provide false information about his legal services. *Standards*, § 7.0.

b. Mental State

All of Krueger’s conduct was for his own benefit. Most of Krueger’s conduct was knowing. That is, performed with the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 9.

However, some of Krueger’s conduct was intentional. In the Struckman matter, he provided incomplete information to the court, his client, his client’s other lawyer, the estate’s creditor, and fabricated evidence to the Bar about his improper handling of estate funds.

c. Injury

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

With respect to the Struckman matter, Mark Struckman’s estate was potentially injured insofar as Krueger took an illegal fee (without court approval) and potentially could have been unable to refund all or part of it. Kay Struckman was potentially injured to the extent that she was exposed to liability for Krueger’s handling of the estate funds and subsequent actions. The estate was also potentially injured in the amount of the loss of interest caused by Krueger’s failure to sooner recognize the need to establish a interest-bearing account for those funds. This injury was subsequently addressed by the court disgorging the lost amount of interest from Krueger’s attorney fee.

The court’s ability to supervise the handling of probate matters was threatened by Krueger’s mishandling of estate assets and failure to volunteer the complete information about the handling of estate assets.

Krueger's submission of misinformation and false documentation during the Bar's investigation of his conduct caused actual injury to both the legal profession and to the public by wasting the Bar's time and resources, and caused potential injury in that had his misrepresentations and false evidence been accepted and believed, the Bar would have been unable to fulfill its responsibility to protect the public. *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990).

In the Rogers and Becker matter, Krueger's clients were potentially or actually injured by the delay in receiving (or being able to use for their benefit) any portion of the settlement funds his firm had received from the initial settlement (2010), receipt of which he failed to timely notify them. Krueger's failure to disclose his clients the disadvantages to them of accepting an aggregate settlement as opposed to individual settlements left his clients with a big problem that they were unable to resolve and that led to a family rift. Becker contends she ultimately recovered nothing of the negotiated \$500,000 UIM settlement.

**d. Aggravating Circumstances.** Aggravating circumstances include:

1. A dishonest or selfish motive. *Standards*, § 9.22(b). In the Struckman matter, Krueger misled the court, his client, and provided inaccurate or incomplete information to the Bar to avoid facing the consequences of his misconduct. He also failed to fully consider his client's interests before he gave North Coast information that made it impossible for them to negotiate a reduction of their bill.
2. A pattern of misconduct. *Standards*, § 9.22(c). Both the Struckman and the Rogers and Becker matter show processes and procedures that ensure that Krueger obtains his fees, even at times, putting their receipt (and maintenance) ahead of ethical duties owed to his clients, the court, and opposing parties.
3. Multiple offenses. *Standards*, § 9.22(d).
4. Deceptive practices during the disciplinary process. *Standards*, § 9.22(f). Krueger intentionally allowed misinformation to be conveyed to Disciplinary Counsel during the course of the investigation into his conduct in the Struckman matter.
5. Substantial experience in the practice of law. *Standards*, § 9.22(i). Krueger has been admitted in Oregon since 1980 and has practiced nearly exclusively in the area of personal injury litigation for the vast majority of that time.

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

1. Absence of a prior discipline history. *Standards*, § 9.32(a).

55.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client or when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. *Standards*, §§ 4.12, 4.22. Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client and when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. *Standards*, §§ 4.32, 4.62. 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 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*, §§ 6.21, 6.22. Finally, 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. The *Standards* indicate that a suspension should generally be for a period of time equal to or greater than six months. *Standards*, § 2.3.

56.

Oregon cases arrive at or near a similar result for charges similar to those at issue in these matters. *See, e.g., In re Gatti*, 356 Or 32, 333 P3d 994 (2014) (lawyer suspended for 90 days for his participation in an aggregate settlement); *In re Obert*, 352 Or 231, 282 P2d 825 (2012) (attorney took a credit card payment from a client and improperly deposited it directly into his business account without a written agreement allowing him to do so and before the fee was earned was suspended for 6 months); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (attorney was suspended for 120 days when he, while representing a client in a dissolution of marriage proceeding, falsely represented to the court that burglaries at his office were the reason he was unable to proceed with the case in a timely manner); *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006) (attorney suspended for 6 months where she falsely represented to opposing counsel that the court had postponed the trial of a domestic relations case set for the following day, and then falsely represented to the court, both orally and in a subsequent affidavit, that opposing counsel had withdrawn her objection to the reset); *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (attorney was suspended for 1-year, for failing to safeguard and adequately track client funds and for his repeated refusal to produce records or respond to questions in discovery, even after he was ordered to do so); *In re Paulson*, 341 Or 542, 145 P3d 171 (2006) (attorney who represented girlfriend connection with a charge that the client's boyfriend had sexually abused the girlfriend's daughter was suspended for 4 months when, at a hearing where attorney represented the client, attorney knowingly revealed information about

the boyfriend that he learned from his prior representation of the boyfriend and used that information to the boyfriend's disadvantage); *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004) (attorney's firm represented a client charged with domestic violence; attorney was not truthful or complete in her response to a bar complaint when she falsely denied contacting or giving legal advice to the victim, and failed to provide material facts that would have informed the bar's analysis of her conduct, and was suspended for 90 days); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (attorney made misrepresentations to the court regarding why he had not moved his client's civil case forward or complied with the court's order that an arbitration of the matter be set by a date certain; he was suspended for 120 days); *In re Worth*, 336 Or 256, 82 P3d 605 (2003) (in response to a client complaint, attorney misrepresented to the bar that he had obtained a trial transcript and used it to prepare an amended post-conviction relief petition for the client, resulting in a 90-day suspension).

57.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also, Standards*, § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

58.

Consistent with the *Standards* and Oregon case law, the parties agree that Krueger shall be suspended for 6 months for violations of RPC 1.5(a), RPC 1.6(a), RPC 1.8(g), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-2(c), RPC 1.15-1(d), RPC 3.3(a), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4), with 90 days of the suspension stayed, pending Krueger's successful completion of a 2-year term of probation. The sanction shall be effective December 1, 2015, or as otherwise directed by the Disciplinary Board.

59.

Krueger's license to practice law shall be suspended for a period of 90 days beginning December 1, 2015, or as otherwise directed by the Disciplinary Board ("actual suspension"), assuming all conditions have been met. Krueger understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Krueger re-attains his active membership status with the Bar, Krueger shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of active suspension.

60.

Probation shall commence upon the date Krueger is reinstated to active membership status and shall continue for a period of 2 years, ending on the day prior to the second year anniversary of the commencement date (the “period of probation”). During the period of probation, Krueger shall abide by the following conditions:

- (a) Krueger will 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 his probationary terms.
- (b) Krueger shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (c) During the period of probation, Krueger shall attend not less than six (6) MCLE accredited programs, for a total of twenty (20) hours, which shall emphasize law practice management, time management, and trust account practices. These credit hours shall be in addition to those MCLE credit hours required of Krueger for his normal MCLE reporting period.
- (d) Upon completion of the MCLE programs described in paragraph (c), and prior to the end of his period of probation, Krueger shall submit an Affidavit of Compliance to Disciplinary Counsel’s Office.
- (e) Every month for the period of probation, Krueger shall review all client files for which he is the responsible attorney to ensure that he is timely attending to the clients’ matters and that he is maintaining adequate communication with clients, the court, and opposing counsel.
- (f) Every month for the period of probation, Krueger shall: (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills; and (2) review his monthly trust account records and client ledgers and reconcile those records with his monthly lawyer trust account bank statements.
- (g) For the period of probation, Krueger will employ Heather Hudson, or a bookkeeper approved by Disciplinary Counsel’s Office, to assist in the monthly reconciliation of his lawyer trust account records and client ledger cards.
- (h) On or before the day prior to the first and second year anniversary of the commencement date, Krueger shall arrange for an accountant to conduct an audit of his lawyer trust account and to prepare a report of the audit for submission to Disciplinary Counsel’s Office within 30 days thereafter.

- (i) A person to be selected by Krueger prior to the beginning of the probationary period, and acceptable to Disciplinary Counsel, shall serve as Krueger's probation supervisor ("Supervisor"). Krueger shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Krueger's clients, the profession, the legal system, and the public.
- (j) Beginning with the first month of the period of probation and continuing on a monthly basis until such time as the Supervisor recommends a different frequency but not less than quarterly, Krueger shall meet with Supervisor in person at least once a month for the purpose of:
  - (1) Allowing his Supervisor to review the status of Krueger's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) files or 10% of his current caseload, whichever is less, to determine whether Krueger is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
  - (2) Permitting his Supervisor to inspect and review Krueger's accounting and record keeping systems to confirm that he is reviewing and reconciling his lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Krueger agrees that his Supervisor may contact all employees and independent contractors who assist Krueger in the review and reconciliation of his lawyer trust account records.
- (k) Krueger authorizes his Supervisor to communicate with Disciplinary Counsel's Office regarding Krueger's compliance or noncompliance with the terms of his probation and to release to Disciplinary Counsel's Office any information Disciplinary Counsel's Office deems necessary to permit it to assess Krueger's compliance.
- (l) On or before 7 days of his reinstatement date, Krueger shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice and for an evaluation of his trust accounting procedures. Krueger shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.

- (m) Krueger shall attend the appointment with the PLF practice management advisor. No later than 30 days after recommendations are made by the PLF, Krueger shall adopt and implement those recommendations. Krueger shall promptly report implementation of recommendations to his Supervisor.
- (n) No later than 60 days after recommendations are made by the PLF, Krueger shall provide a copy of the Office Practice Assessment from the PLF and file a report with Disciplinary Counsel's Office stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations. Krueger shall promptly report implementation of recommendations to his Supervisor.
- (o) On a quarterly basis, on dates to be established by Disciplinary Counsel beginning no later than 90 days after his reinstatement to active membership status, Krueger shall submit to Disciplinary Counsel's Office a written "Compliance Report," approved as to substance by Supervisor, advising whether Krueger is in compliance with the terms of this agreement. In the event that Krueger has not complied with any term of the agreement, the Compliance Report shall describe the noncompliance and the reason for it.
- (p) Krueger is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (q) Krueger's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to Disciplinary Counsel's Office, or with any reasonable request of Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (r) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (s) The SPRB's decision to bring a formal complaint against Krueger for unethical conduct that occurred or continued during the period of his probation shall also constitute a grounds that there has been a violation of the probation and a basis upon which Disciplinary Counsel may petition the Disciplinary Board to revoke the probation and impose the stayed portion of the suspension. In this event, Disciplinary Counsel must prove the allegation of unethical conduct pursuant to BR 6.2(d).

61.

Krueger 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, Krueger has arranged for Jason L. Jorgenson (“Jorgenson”), an active member of the Bar, to either take possession of or have ongoing access to Krueger’s client files and serve as the contact person for clients in need of the files during the term of his suspension. Krueger represents that Jorgenson has agreed to accept this responsibility.

62.

Krueger 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. Krueger 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.

63.

Krueger acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

64.

Krueger represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Krueger is admitted: US District Court for Oregon and Ninth Circuit.

65.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

Cite as *In re Krueger*, 29 DB Rptr 273 (2015)

EXECUTED this 16th day of October, 2015.

/s/ Paul H. Krueger

Paul H. Krueger

OSB No. 802929

APPROVED AS TO FORM AND CONTENT:

/s/ Allison D. Rhodes

Allison D. Rhodes

OSB No. 000817

/s/ Lawrence Matasar

Lawrence Matasar

OSB No. 742092

EXECUTED this 2nd day of November, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-30 and 13-62  
)  
JOHN P. ECKREM, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Order revoking probation and imposing stayed  
suspension. 60-day suspension.  
Effective Date of Order: November 19, 2015

**ORDER REVOKING PROBATION**

Pursuant to BR 6.2(d), this matter came on before Nancy M. Cooper, State Chairperson of the Disciplinary Board of the Oregon State Bar, upon the Bar's Petition to Revoke Probation, John P. Eckrem's Response to Oregon State Bar's Petition to Revoke Probation, and the Oregon State Bar's Reply to Eckrem's Response to Petition to Revoke Probation. The State Chairperson being fully advised in the premises, now therefore;

IT IS HEREBY ORDERED that John P. Eckrem's probation is revoked and the 90-day suspension (less 30 days already served) is imposed effective ten days from the date of this order.

EXECUTED this 9th day of November, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 15-107  
 )  
DAVID C. NOREN, )  
 )  
Accused. )

Counsel for the Bar: Martha M. Hicks  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3 and RPC 8.4(a)(4). Stipulation  
for Discipline. 30-day suspension.  
Effective Date of Order: November 14, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and David C. Noren is suspended for 30 days beginning on November 14, 2015, or 30 days after this stipulation is approved by the Disciplinary Board, whichever is later, effective the date approved by the Disciplinary Board for violation of RPC 1.3 and RPC 8.4(a)(4).

DATED this 12th day of November, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

## STIPULATION FOR DISCIPLINE

David C. Noren, attorney at law (“Noren”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Noren 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 Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Noren enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 3, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Noren for alleged violations of RPC 1.3 (neglect of a legal matter) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice) 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

In October 2010, Noren agreed to act as the hearing officer for an enforcement proceeding brought by Hood River County Health Department against Palate Pleasers, Inc., and Carol Drennen (“the defendants”). Shortly thereafter, a discovery dispute arose between the parties, who briefed their positions by November 23, 2010.

5.

Thereafter, Noren took no further action in the proceeding, except to write a June 15, 2011 letter requesting that the parties provide dates for a hearing, because he became concerned about his jurisdiction to hear the matter. Noren’s attempts to determine his jurisdiction were unsuccessful, but he did not advise the parties of his concerns, take further action to resolve these concerns, or withdraw from the proceeding. In June 2012, the defendants moved to dismiss the matter. Hood River County Health Department did not oppose the motion.

## Violations

6.

Noren admits that, by failing to take action to resolve the enforcement proceeding or resign as the hearing officer, he neglected a legal matter entrusted to him, in violation of RPC 1.3 and engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

## Sanction

7.

Noren 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* (“Standards”). The *Standards* require that Noren’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.** Noren violated his duty to the legal system to avoid interfering with a legal process. *Standards*, § 6.0.
- b. **Mental State.** In failing to resolve his dilemma about his jurisdiction to act or resigning from hearing the matter, Noren 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, i.e., he acted negligently.
- c. **Injury.** The parties to the matter were actually injured in that they were denied their day in court and suffered frustration and anxiety as a result of Noren’s inaction. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (anxiety and frustration as a result of the attorney neglect can constitute actual injury under the *Standards*).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Noren had substantial experience in the practice of law. *Standards*, § 9.22.
- 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. Cooperative attitude toward the Bar’s investigation. *Standards*, § 9.32(e).
  4. Noren is remorseful for his conduct. *Standards*, § 9.32(1).

Under the ABA *Standards*, suspension is generally appropriate when a lawyer interferes directly with the legal process. *Standards*, § 6.22.

8.

Oregon case law is in accord. See *In re Redden*, 342 Or 393, 153 P3d 113 (2007); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (attorney suspended 30 days when he failed to pursue a client's adoption matter when he could not locate the birth father and did not know how to proceed); *In re Dugger*, 299 Or 21, 697 P2d 973 (1985).

9.

Consistent with the *Standards* and Oregon case law, the parties agree that Noren shall be suspended for 30 days beginning on November 14, 2015, or 30 days after this stipulation is approved by the Disciplinary Board, whichever is later, for violation of RPC 1.3 and RPC 8.4(a)(4), the sanction to be effective the date approved by the Disciplinary Board.

10.

Noren 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, Noren has arranged for Matthew H. Kehoe, an active member of the Bar, to either take possession of or have ongoing access to Noren's client files and serve as the contact person for clients in need of the files during the term of his suspension. Noren represents that Matthew H. Kehoe has agreed to accept this responsibility.

11.

Noren 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. Noren 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.

12.

Noren acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

13.

Noren represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Noren is admitted: None.

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 November, 2015.

/s/ David C. Noren

David C. Noren

OSB No. 852959

EXECUTED this 5th day of November, 2015.

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks

OSB No. 741674

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-19  
)  
MILTON E. GIFFORD, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violations of RPC 1.1, RPC 3.3(a), and RPC 8.4(a)(3).  
Stipulation for Discipline. 60-day suspension.  
Effective Date of Order: December 1, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Milton E. Gifford is suspended for 60 days, effective December 1, 2015, or 10 days following approval by the Disciplinary Board, whichever is later, for violation of RPC 1.1, RPC 3.3(a), and RPC 8.4(a)(3).

DATED this 16th day of November, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Milton E. Gifford, attorney at law (“Gifford”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Gifford was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 25, 1986, and has been a member of the Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

Gifford enters into this Stipulation for Discipline freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On June 8, 2015, a Formal Complaint was filed against Gifford pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.1 (lack of competence), RPC 3.3(a) (misrepresentation to a tribunal or failing to correct a misrepresentation previously made), and RPC 8.4(a)(3) (conduct involving misrepresentation) 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 February 2014, Floyd Black (“Black”) died intestate, unmarried, and childless, with no surviving parents or siblings. Upon his death, he had six surviving nieces and nephews who were his sole heirs. By operation of law, Black’s estate passed to the six nieces and nephews in equal proportion. ORS 112.045(3).

6.

In or around July 2014, one of the heirs, Cindy Kendall (“Kendall”) sought appointment as the personal representative for Black’s estate and retained Gifford to help her administer the estate.

7.

Gifford was aware that there were six surviving nieces and nephews as early as July 2014, and originally prepared court documents so reflecting, which Kendall signed before a notary. However, before these documents were drafted and signed, Gifford learned that one of the heirs may be in jail, and another may be transient. Without reviewing Oregon's statutes relating to missing heirs, Gifford revised portions of the documents Kendall had signed which, by their alteration, represented that there were only four heirs ("the four located heirs"), rather than the six known heirs. Gifford left unchanged the portion of the documents that stated that Kendall had made "reasonable efforts to identify and locate" all of the heirs which, in light of his knowledge that there were actually six heirs, was a misstatement to the court. Gifford filed the altered documents with the probate court.

8.

Later, Gifford sent a Consent to Bond Waiver ("Consent") to the four located heirs and instructed them to sign it before a notary and return it to him for filing with the probate court. The Consent stated that the four located heirs were Black's heirs at law, and that "there are no other heirs." At this time, Gifford knew that there were six heirs, and that by his omission of two heirs, he was failing to provide accurate information to the court.

9.

In or around October 2014, based on her continuing concerns that it was inappropriate to exclude two of the heirs from the probate process, one of the four located heirs, Debra Hoffman ("Hoffman") filed a Motion to Revoke Consent that Bond be Waived. She accompanied the motion with a declaration stating that the consent she had signed earlier had incorrectly stated that there were only four heirs when in fact there were six.

10.

Gifford thereafter prepared an affidavit for Kendall to sign, in her capacity as personal representative, supporting Hoffman's Motion to Revoke Consent that Bond be Waived. Gifford also filed an Amended Petition for Administration of Estate and an Amended Information. These documents identified the two omitted heirs and listed possible addresses for them. The court then ordered that the personal representative obtain a bond. The estate proceeded with the six known heirs, and the two originally omitted heirs were located and able to participate in the probate proceeding.

### **Violations**

11.

Gifford admits his failure to review the Oregon statutes relating to missing heirs, and file appropriate pleadings and documentation with the court in accord with those statutes, amounted to a lack of competence, in violation of RPC 1.1. Gifford further admits that his

alteration of the originally prepared court filings and subsequent representations to the court about the true number of heirs, violated RPC 3.3(a) and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

### Sanction

12.

Gifford 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* (“*Standards*”). The *Standards* require that Gifford’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.** Gifford violated his duty to provide his client with competent representation. *Standards*, § 4.5. The *Standards* presume that the most important duties a lawyer owes are those owed to clients. *Standards*, p. 5. Gifford also violated duties to the legal system to avoid false statements, and misrepresentation, which are abusive of the legal process. *Standards*, §§ 6.1, 6.2.
- 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*, p. 9. Gifford’s competence issues were negligent, while misrepresentations made to the court and actions taken in the course of the Black probate were knowing, but not intentional.
- 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*, p. 9. There was potential injury to Gifford’s client in the form of delay and additional fees. There was substantial potential injury to the two initially omitted heirs. In addition, the court suffered some actual injury as a result of Gifford’s initial filings and the subsequent corrective proceedings.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. Gifford had been a lawyer in Oregon for 28 years at the time of the misconduct. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior relevant disciplinary record. *Standards*, § 9.32(a).
  2. Personal or emotional problems. Gifford was reportedly experiencing stress, burn-out, and medical issues during some of time when his misconduct occurred. *Standards*, § 9.32(c).
  3. Good faith effort to rectify consequences of his misconduct. Gifford immediately amended the court documents when the omission came to light, and later offered to return any extra fees his client may have paid to him due to this misconduct. *Standards*, § 9.32(d).
  4. Full and free disclosure or cooperative attitude toward the disciplinary proceedings. *Standards*, § 9.32(e).
  5. Remorse. *Standards*, § 9.32(l).

13.

Under the ABA *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. Similarly, a suspension is generally appropriate when a lawyer knows that he is not complying with court rules, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. *Standards*, §§ 6.12, 6.22. A reprimand is generally appropriate when a lawyer demonstrates a failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or 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(a) and (b).

14.

Oregon case law also suggests that a short suspension is appropriate for Gifford's conduct. *See, e.g., In re Bettis*, 342 Or 232, 149 P3d 1194 (2006) (attorney suspended for 30 days where he failed to provide competent services to a criminal defense client when he sought and obtained his client's waiver of the right to a jury trial without first reviewing any discovery or conducting any factual or legal investigation into the issues in the case); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (attorney suspended for 120 days when, while

representing a client in a dissolution of marriage proceeding, attorney falsely represented to the court that burglaries at his office were the reason he was unable to proceed with the case in a timely manner); *In re Tank*, 28 DB Rptr 35 (2014) (attorney was suspended for 90 days for her misrepresentations to the court regarding corporate records of her client); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (attorney suspended for 120 days for, in part, misrepresentations to the court regarding why he had not moved his client's case forward or complied with the court's order regarding setting an arbitration date).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Gifford shall be suspended for 60 days for violations of RPC 1.1, RPC 3.3(a), and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct, the sanction to be effective December 1, 2015, or 10 days following approval by the Disciplinary Board, whichever is later.

16.

In addition, on or before December 10, 2015, Gifford shall pay to the Bar its reasonable and necessary costs in the amount of \$646.35, incurred for deposition costs and transcripts. Should Gifford fail to pay \$646.35 in full by December 10, 2015, the Bar may thereafter, without further notice to him, obtain a judgment against Gifford for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

17.

Gifford 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, Gifford has arranged for Ryan M. Gifford, P.O. Box 247, Cottage Grove, Oregon 97424, an active member of the Oregon State Bar, to either take possession of or have ongoing access to Gifford's client files and serve as the contact person for clients in need of the files during the term of his suspension. Gifford represents that Ryan M. Gifford has agreed to accept this responsibility.

18.

Gifford 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. Gifford 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.

Gifford acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

20.

Gifford represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Gifford is admitted: none.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 16th day of October, 2015.

/s/ Milton E. Gifford

Milton E. Gifford

OSB No. 860391

EXECUTED this 20th day of October, 2015.

OREGON STATE BAR

By: /s/ Angela W. Bennett

Angela W. Bennett

OSB No. 092818

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case Nos. 14-26, 14-139, and 14-140  
 )  
NICK MERRILL, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Richard G. Helzer  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(d), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.1(a)(2). Stipulation for Discipline. 120-day suspension, all but 30 days stayed, 2-year probation.  
Effective Date of Order: December 14, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Merrill is suspended for 120 days for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(d), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.1(a)(2), with all but 30 days of the suspension stayed pending Merrill’s successful completion of a 2-year term of probation. The sanction shall be effective December 14, 2015, or 10 days after approval by the Disciplinary Board, whichever is later.

DATED this 18th day of November, 2015.

/s/ Nancy M. Cooper

Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor

Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Nick Merrill, attorney at law (“Merrill”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Merrill was admitted by the Oregon Supreme Court to the practice of law in Oregon on June 29, 2007, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Merrill 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 27, 2015, a Formal Complaint was filed against Merrill pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (duty to keep a client reasonably informed about the status of a matter); RPC 1.4 (b) (duty to explain a matter to enable a client to make informed decisions regarding the representation); RPC 1.15-1(a) (duty to keep complete records of client funds); RPC 1.15-1(d) (duty to promptly deliver property the client is entitled to receive); RPC 1.16(a)(2) (duty to withdraw from representation when lawyer’s condition renders unable to continue); RPC 1.16(d) (duty to protect a client’s interests on termination of representation); and RPC 8.1(a)(2) (duty to respond to lawful inquiries by a disciplinary authority). 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.

### **Eve Sulier Matter**

#### **Case No. 14-139**

#### **Facts**

5.

On July 16, 2012, Eve Sulier (“Sulier”) consulted with Merrill in connection with a dispute she had with a neighbor. Sulier wanted Merrill to write a demand letter to the neighbor, and follow up with other legal action, if necessary. Merrill accepted the representation and Sulier advanced \$1,000 for Merrill’s fees.

6.

Prior to writing a letter to the neighbor or performing any other substantial legal work on Sulier’s behalf, Merrill reached the opinion that Sulier did not have any claim that could successfully be pursued against the neighbor. However, Merrill delayed in conveying his opinion to Sulier.

7.

Between September 2012, and January 2013, Sulier tried to reach Merrill on a number of occasions regarding the status of her legal matter and Merrill’s efforts on her behalf. Merrill did not respond to Sulier’s messages until the end of January 2013. As a result of this late-January conversation, Sulier believed that Merrill would soon be sending a demand letter to her neighbor. Merrill did not send the letter or thereafter contact Sulier.

8.

On February 21, 2013, Sulier terminated Merrill’s employment. Sulier also demanded a refund of her unearned retainer and copies of any documents Merrill had prepared.

9.

On March 3, 2013, Merrill returned \$1,000 to Sulier but provided no documents to Sulier.

#### **Violations**

10.

Merrill admits that his failure to timely attend to Sulier’s matter constituted neglect of a legal matter, in violation of RPC 1.3. Merrill further admits that his failure to sooner explain to Sulier that her case lacked merit left her without sufficient information to make informed decisions about his continued representation, in violation of RPC 1.4(b). Merrill

also admits that his failure to keep Sulier informed of the status of her legal matter and respond to her reasonable requests for information violated RPC 1.4(a).

**Joanne Ford Matter**

**Case No. 14-26**

**Facts**

11.

In February 2013, Joanne Ford's ("Ford") mobile home and possessions in Pine Ridge Park were damaged when a Pine Ridge Park sewer line flooded her home with sewage. Pine Ridge Park removed some of Ford's possessions to a portable storage unit (the "portable storage unit").

12.

In April 2013, Ford hired Merrill to represent her in connection with claims for damages to her home and possessions caused by the sewage flood. Ford understood that the representation would include a demand letter and/or settlement meeting and negotiations with Pine Ridge Park. Ford paid Merrill a \$1,500 flat fee for the representation.

13.

Around May 2013, Merrill telephoned Paul Galm ("Galm"), a lawyer representing Pine Ridge Park, and notified Galm that Ford had retained him. Although Merrill did not make a formal demand or enter into settlement negotiations with Galm at that time or thereafter, he did speak with Galm's law partner on at least one occasion regarding possible settlement, and made a verbal demand for the value of Ford's mobile home. However, the call with Galm's law partner produced no recovery or any other relief for Ford.

14.

On June 27, 2013, Galm notified Merrill by letter that Pine Ridge Park would cease paying costs for the portable storage unit and Pine Ridge Park demanded that Ford make further arrangements for the storage of her possessions or the portable storage unit would be removed and the possessions stored at Ford's expense. Galm requested a response from Merrill on behalf of Ford. Merrill did not respond to Galm. Merrill did not inform Ford of Pine Ridge Park's demands, including the demand that she arrange for storage of her possessions. Without confirming or communicating with Ford, Merrill understood that she had no interest in her possessions, and he saw no legal reason to respond to the notice and demands.

15.

On July 11, 2013, Pine Ridge Park sent Ford an invoice for monthly portable storage unit fees, plus late fees, and a letter of Abandonment Notice stating that her mobile home and

possessions were considered to be abandoned property and must be claimed and removed no later than August 26, 2013. Although Ford informed Merrill of the Abandonment Notice, Merrill took no action in response, understanding, without confirming, that the client had no interest in her personal property, and seeing no legal reason to respond to the invoice, the legal notice, and the demands

16.

After July 11, 2013, Merrill began experiencing personal issues that impaired his ability to timely or competently attend to Ford's matter. However, he did not thereafter withdraw from her representation or notify Ford of his impairment.

17.

On September 3, 2013, Pine Ridge Park sent Ford legal notice that her mobile home and possessions were deemed abandoned and would be advertised for bid in the following weeks. Although Ford informed Merrill of the notice, Merrill took no action in response, still believing, without confirming, that the client had no interest in claiming her personal property, and seeing no legal reason to respond to the notice.

18.

On December 9, 2013, Ford complained to the Bar about Merrill's inaction on her behalf and demanded a refund of the fees she paid. In reply, Merrill promised Ford that he would pursue a plan of action including the filing of a lawsuit, but he delayed the plan of action, and did not refund any fees to Ford. Merrill has since resumed his representation of Ford and, days before the statute of limitations, filed a complaint in Washington County Circuit Court on Ford's behalf.

### **Violations**

19.

Merrill admits that his failure to more timely attend to Ford's matter was neglect of a legal matter, in violation of RPC 1.3. Merrill also admits that he failed to keep Ford adequately apprised of the status of her matter, in violation of RPC 1.4(a).

20.

Merrill admits that his failure to withdraw from Ford's representation, when he recognized that his mental condition was materially limiting his ability to represent her, violated RPC 1.16(a)(2).

**Jeanne LaJoie Matter**

**Case No. 14-140**

**Facts**

21.

On May 13, 2013, Jeanne LaJoie (“LaJoie”) hired Merrill to assist her in a rent dispute with her landlord. LaJoie paid Merrill a \$1,000 retainer toward his fees. Merrill failed to make and maintain records regarding LaJoie’s funds.

22.

On June 11, 2013, one month after retaining Merrill during which time he had failed to make noticeable progress on her behalf, LaJoie complained to the Bar that Merrill was not adequately communicating with her. Within a couple weeks, LaJoie also requested an accounting of her funds and the refund of her retainer.

23.

After LaJoie complained to the Bar, Merrill promised to take action for LaJoie. Merrill thereafter obtained a copy of and read LaJoie’s lease and reached the opinion that LaJoie did not have any claim that could successfully be pursued against her landlord. However, Merrill delayed in conveying his opinion to LaJoie, and took no other substantive action that would assist LaJoie in the rent dispute.

24.

On September 17, 2013, Disciplinary Counsel’s Office (“DCO”) requested by October 8, 2013, information from Merrill concerning his representation of LaJoie, including a complete copy of the file he maintained in her matter, notes and records of all communications in her matter, and records fully accounting for her \$1,000 retainer. Although Merrill requested additional time in October and November 2013 to provide the requested information, he thereafter failed to provide a complete copy of LaJoie’s file. Merrill did not provide records for or an accounting of LaJoie’s \$1,000 retainer.

25.

In March 2014, Merrill learned that LaJoie had died. Merrill made some efforts to determine if there was an estate filed naming a personal representative, a claiming successor, or an heir at law. However, when Merrill was unable to confirm to his satisfaction who LaJoie’s successor in interest was, he discontinued efforts. Accordingly, the unearned retainer has not been distributed to any legal representative of the deceased and therefore, not promptly delivered.

26.

On March 6, 2014, Merrill was informed that DCO would seek his immediate administrative suspension for failing to provide information responsive to its requests. On March 13, 2014, Merrill apologized for his failures and agreed to fully cooperate. However, Merrill still did not provide a copy of his file or an accounting for LaJoie's retainer.

27.

On March 17, 2014, DCO requested that Merrill provide, by March 27, 2014, a copy of LaJoie's file, all records of communications in LaJoie's legal matter, and time and billing records for LaJoie's legal matter. Merrill did not respond with any of the requested information until August 2014, when he produced only a copy of LaJoie's client file.

### **Violations**

28.

Merrill admits that his failure to more timely attend to LaJoie's legal matter was neglect of a legal matter, in violation of RPC 1.3. Merrill further admits that his failure to respond to LaJoie's inquiries, prior to Bar involvement, violated RPC 1.4(a).

29.

Merrill admits that his failure to make and maintain records regarding LaJoie's funds violated RPC 1.15-1(a), and his failure to account for and promptly remit them to her, or someone lawfully in her stead, violated RPC 1.15-1(d) and RPC 1.16(d).

30.

Finally, Merrill acknowledges that his failure to timely and completely respond to DCO's requests for information amounted to a failure to respond to a lawful demand from a disciplinary authority, in violation of RPC 8.1(a)(2).

### **Sanction**

31.

Merrill 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* ("*Standards*"). The *Standards* require that Merrill'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.** Merrill violated duties owed to his clients: to act with reasonable diligence and promptness in representing them. *Standards*, § 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards*, p. 5. Merrill violated his duty to the profession by failing to withdraw from representation of multiple clients at a time when his

mental condition impaired his ability to represent those clients. Further, Merrill's extended failures to cooperate with the Bar's investigations in these three different matters violated his duties as a professional. *Standards*, §§ 7.0, 7.2.

- b. **Mental State.** Of the mental states recognized under the *Standards*, Merrill's conduct was primarily knowing. That is, he had the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 9. Merrill knew his clients hired him and paid him to meet certain critical objectives; over extended periods of time he knew that his clients requested updates and some action on their behalf; it was his legal opinion that his clients' (Lajoie and Sulier) cases lacked any merit; and yet he elected not to respond to their inquiries. Similarly, Merrill knew that the Bar was investigating his conduct in these three matters; he knew that the Bar was requesting information from him; and yet he did little to substantively cooperate.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). All three clients were actually injured to the extent that they paid for services that did not benefit them; to the extent that their matters were delayed; and Ford to the extent that the pleading of the complaint filed by Merrill, just days before the expiration of the statute of limitations, raises new concerns of potential injury to the client. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000).

The Oregon Supreme Court has held that both the legal profession and the public are actually injured where attorney conduct delays Bar investigations and, consequently, the resolution of Bar complaints. *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 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, 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 pattern of misconduct. *Standards*, § 9.22(c).
  - 2. Multiple offenses. *Standards*, § 9.22(d).
  - 3. Vulnerable victims. *Standards*, § 9.22(h).

4. Substantial experience in the practice of law. *Standards*, § 9.22(i). Merrill was admitted to practice in Oregon in 2007 and Arizona in 2002.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior record of discipline. *Standards*, § 9.32(a).
  2. Personal or emotional problems. *Standards*, § 9.32(c). Merrill was experiencing personal and family issues at the time of some of the events in these matters.
  3. Remorse. *Standards*, § 9.32 (l). Merrill has expressed remorse for his conduct in these matters.

32.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. *Standards*, § 4.12. Suspension is also generally appropriate when a lawyer 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 injury or potential injury to a client. *Standards*, § 4.42. Finally, 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.

33.

Oregon cases similarly find that a suspension is appropriate for similar misconduct. *See, e.g., In re Koch*, 345 Or 444, 198 P3d 910 (2008) (120-day suspension where attorney 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) (court suspended a lawyer with no prior discipline for 60 days for his failure to complete one client's legal matter); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007) (court imposed 90-day suspension, in part for attorney's failure to return unearned client funds after closing his file); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (attorney was suspended for 60 days for knowing neglect of his client's tort claim that resulted in its dismissal, and for not informing his client of the dismissal and avoiding client's calls); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (120-day suspension where lawyer failed to cooperate with the Bar even though no other substantive charges were brought); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (court suspended attorney for 120 days—60 days each for failing to cooperate with the Bar and knowingly neglecting clients' cases for several months by failing to communicate with clients and opposing counsel).

34.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also, Standards*, § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

35.

Consistent with the *Standards* and Oregon case law, the parties agree that Merrill shall be suspended for 120 days for violations of RPC 1.3, RPC 1.4(a), RPC 1.4 (b), RPC 1.15-1(a), RPC 1.15-1(d), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.1(a)(2), with all but 30 days of the suspension stayed, pending Merrill's successful completion of a 2-year term of probation. The sanction shall be effective December 1, 2015, or 10 days after approval by the Disciplinary Board, whichever is later.

36.

Merrill's license to practice law shall be suspended for a period of 30 days beginning December 14, 2015, or 10 days after approval by the Disciplinary Board, whichever is later ("actual suspension"), assuming all conditions have been met. Merrill understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Merrill re-attains his active membership status with the Bar, Merrill shall not practice law or represent that he is qualified to practice law; shall not hold him out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of active suspension.

37.

Probation shall commence upon the date Merrill is reinstated to active membership status and shall continue for a period of 2 years, ending on the day prior to the 2nd year anniversary of the commencement date (the "period of probation"). During the period of probation, Merrill shall abide by the following conditions:

- (a) Merrill shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (b) Merrill shall abstain from using any controlled substances not prescribed by a physician. Any prescribed medications shall be taken only as prescribed.

- (c) A member of SLAC or such other person approved by DCO in writing shall monitor the treatment portions of Merrill's probation ("Monitor"). Merrill is working with the Oregon Attorney Assistance Program ("OAAP"). Merrill shall immediately notify SLAC upon approval of this Stipulation for Discipline by the Disciplinary Board of: 1) the existence and contents of this Stipulation for Discipline; 2) the history and status of any OAAP treatment or programs in which Merrill has/is participating; and 3) discuss with SLAC whether and how to modify his current treatment plan to best accomplish the objectives of Merrill's probation. Merrill does not waive any medical privileges he has in providing medical information to DCO.
- (d) A person to be selected by Merrill prior to the beginning of the probationary period, and acceptable to DCO, shall serve as Merrill's probation supervisor ("Supervisor"). Merrill shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Merrill's clients, the profession, the legal system, and the public.
- (e) Merrill shall meet at least monthly with his Monitor for the purpose of reviewing Merrill's compliance with the terms of the probation. Merrill shall cooperate and shall comply with all reasonable requests of SLAC that will allow the SLAC and DCO to evaluate Merrill's compliance with the terms of this stipulation for discipline.
- (f) Merrill shall enter into or continue substance abuse treatment as determined by SLAC to be appropriate, including any aftercare and relapse prevention education and therapy recommended by SLAC.
- (g) To the extent that SLAC or the Monitor recommends that Merrill attend OAAP, AA, NA, or equivalent meetings, Merrill agrees to obtain, upon SLAC's request, verification of attendance at such meetings.
- (h) Merrill shall arrange for and meet with a health care professional acceptable to DCO and his Monitor to develop and implement a course of mental health or substance treatment that will address any identifiable concerns.
- (i) Merrill shall continue to attend regular counseling/treatment sessions with the approved health care professional for the entire term of his probation. Merrill shall continue to take, as prescribed, any health-related medications.
- (j) Merrill shall not terminate his counseling/treatment or reduce the frequency of his counseling/treatment sessions without first submitting to DCO a written recommendation from the health care professional that Merrill's counseling/treatment sessions should be reduced in frequency or terminated and

Merrill undergoes an independent evaluation by a second professional acceptable to DCO and his Monitor, which evaluation confirms Merrill's fitness.

- (k) Merrill shall report to his Monitor and to DCO 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 Merrill has possessed or consumed any controlled substances not prescribed by a physician in kind or amount, or which raises concerns about his fitness.
- (l) Within 7 days of Merrill's reinstatement date, Merrill shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Merrill shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (m) Merrill shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than 30 days after recommendations are made by the PLF, Merrill shall adopt and implement those recommendations.
- (n) No later than 60 days after recommendations are made by the PLF, Merrill shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (o) Each month during the period of probation, Merrill shall review all client files to ensure that he is timely attending to the clients' matters and that he is maintaining adequate communication with clients, the court, and opposing counsel.
- (p) Beginning with the first month of the period of probation, Merrill shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Merrill's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of 10 or 10% of Merrill's active cases, whichever is less, to determine whether Merrill is timely, competently, dili-

gently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.

- (q) Merrill authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to Disciplinary Counsel any information necessary to permit Disciplinary Counsel to assess Merrill's compliance.
- (r) During the period of probation, Merrill shall attend not less than 6 MCLE accredited programs, for a total of 20 hours, which shall emphasize law practice management, time management, and effective communication with clients. These credit hours shall be in addition to those MCLE credit hours required of Merrill for his normal MCLE reporting period.
- (s) On a quarterly basis, on dates to be established by DCO beginning no later than 90 days after his reinstatement to active membership status, Merrill shall submit to DCO a written "Compliance Report," approved as to substance by his Monitor and Supervisor (or separate reports signed by his Monitor and Supervisor, respectively), advising whether Merrill is in compliance with the terms of this agreement. In the event that Merrill has not complied with any term of the agreement, the Compliance Report(s) shall describe the noncompliance and the reason for it.
- (t) Merrill hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by SLAC, his Monitor or any other mental health or substance abuse treatment providers of Merrill's compliance or noncompliance with this stipulation and their treatment recommendations to SLAC and DCO. Merrill agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (u) Merrill is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (v) Merrill's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Monitor or Supervisor, shall constitute a basis for the revocation of probation pursuant to BR 6.2(d), and imposition of the stayed portion of the suspension. In such event, the period of probation and its terms shall be continued until resolution of any revocation proceeding.
- (w) A Compliance Report(s) is/are timely if emailed, mailed, faxed, or delivered to DCO on or before the due date.
- (x) The SPRB's decision to bring a formal complaint against Merrill for unethical conduct that occurred or continued during the period of his probation shall

also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

- (y) Merrill has been represented in this proceeding by Richard Helzer (“Helzer”). Merrill and Helzer hereby authorize direct communication between Merrill and DCO after the date this agreement is signed by both parties, for the purposes of administering the probation and monitoring Merrill’s compliance.

38.

Merrill 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, Merrill has arranged for Mark Ropp (“Ropp”), an active member of the Bar, to either take possession of or have ongoing access to Merrill’s client files and serve as the contact person for clients in need of the files during the term of his suspension. Merrill represents that Ropp has agreed to accept this responsibility.

39.

Merrill 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. Merrill 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.

40.

Merrill acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

41.

Merrill represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Merrill is admitted: Arizona (resigned); US District Court for the District of Oregon.

42.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 November, 2015.

/s/ Nick Merrill

Nick Merrill

OSB No. 072606

APPROVED AS TO FORM AND CONTENT:

/s/ Richard G. Helzer

Richard G. Helzer

OSB No. 690735

EXECUTED this 12th day of November, 2015.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-103
	)	
MICHAEL JAMES BUROKER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Theodore W. Reuter
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 4.2. Stipulation for Discipline. Public reprimand.
Effective Date of Order:	December 2, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Michael James Buroker is public reprimand, for violation of RPC 4.2.

DATED this 2nd day of December, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson  
/s/ Kelly L. Harpster  
Kelly L. Harpster, Region 7  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Michael James Buroker, attorney at law (“Buroker”), and the Oregon State Bar (“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.

Buroker 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, having his office and place of business in Clackamas County, Oregon.

3.

Buroker enters into this Stipulation for Discipline freely, voluntarily, and with the right to advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 3, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 4.2 (communication with a represented party) 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.

Brent Martin (“Martin”) hired Buroker to represent him with respect to the administration of the estate of Martin’s father. After a brief representation, Martin terminated the attorney client relationship and retained Tiffany Elkins (“Elkins”).

6.

Buroker determined that Martin owed him approximately \$840 in attorney fees for his representation of Martin in the probate matter and filed suit against Martin in small claims court. Elkins notified Buroker that she represented Martin in relation to this fee claim.

7.

Buroker persisted in contacting Martin directly with respect to his fee claim, over Elkins’s continued objections.

8.

Ultimately, Buroker reached a (presumably equitable) settlement of the fee issue with Martin.

### Violation

9.

Buroker admits that, by contacting an individual that he knew to be represented without permission of the attorney, he violated RPC 4.2.

### Sanction

10.

Buroker 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* (“*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.** Buroker violated his duty to the public to refrain from improper communications with represented parties. *Standards*, § 6.0.
- b. **Mental State.** Buroker’s mental state was knowing, in that he was aware that Martin was represented. Knowledge is defined 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*, p. 5. However, Buroker was negligent, in failing to recognize Elkins’s involvement in the small claims action implicated the restrictions of RPC 4.2. Negligence is defined as “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.” *Id.*
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury can be considered. *Standards*, p. 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this matter, there was actual and potential injury in that Buroker’s direct communication with Martin interfered with his relationship with Elkins, made it difficult for Elkins to represent Martin, and created the risk that Buroker would overreach when negotiating the attorney fee dispute.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Existence of a selfish motive. *Standards*, § 9.22(b). Buroker engaged in misconduct in his attempt to collect money he believed was owed to him.
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). Buroker has been admitted in Oregon since 1987.

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior disciplinary record. *Standards*, § 9.32(a)
  2. Full and free disclosure and cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e).
  3. Remorse. *Standards*, § 9.32(l).

11.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.32. A reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system and cause injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.33. In this matter, the mitigating and aggravating circumstances appear to be in equipoise.

12.

Oregon case law favors reprimand under similar circumstances. *See In re Newell*, 348 Or 396, 234 P3d 967 (2010) (attorney reprimanded for deposing civil defendant on matters regarding which attorney knew he was represented in a parallel criminal proceeding); *see also, In re Lewelling*, 296 Or 702, 706, 678 P2d 1229 (1984) (“Communicating with a person the lawyer knows to be represented does not involve dishonesty or a breach of trust and if that were the only charge here we would impose only a public reprimand.” The court went on to impose a stricter sanction because of an unwarranted threat of criminal prosecution.)

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Buroker shall be publicly reprimanded for violation of RPC 4.2, the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

14.

Buroker acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

15.

Buroker represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or

suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Buroker is admitted: None.

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 10th day of November, 2015.

/s/ Michael James Buroker

Michael James Buroker

OSB No. 870284

EXECUTED this 17th day of November, 2015.

OREGON STATE BAR

By: /s/ Theodore W. Reuter

Theodore W. Reuter

OSB No. 084529

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-78  
)  
WILLIAM BRYAN PORTER, )  
)  
Accused. )

Counsel for the Bar: Justin N. Rosas; Amber Bevacqua-Lynott  
Counsel for the Accused: Wayne Mackeson  
Disciplinary Board: None  
Disposition: Violation of 8.4(a)(4). Stipulation for Discipline. Public reprimand.  
Effective Date of Order: December 7, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Porter is publically reprimanded, for violation of RPC 8.4(a)(4).

DATED this 7th day of December, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

William Bryan Porter, attorney at law (“Porter”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Porter was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 19, 1984, and has been a member of the Bar continuously since that time, having his office and place of business in Tillamook County, Oregon.

3.

Porter 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 9, 2015, a Formal Complaint was filed against Porter pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 3.4(a) (knowing and unlawful obstruction a party’s access to evidence); RPC 3.4(d) (failure to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party); RPC 8.4(a)(3) (conduct involving 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**

5.

At all times herein, Porter was the duly elected District Attorney (“DA”) for Tillamook County, Oregon, responsible for the prosecution of criminal matters occurring within that jurisdiction.

6.

In January 2010, Ronald Lunsford (“Lunsford”) shot and killed Chris Brusman in Chris Brusman’s travel trailer while it was parked on land belonging to Lunsford in Tillamook County, Oregon. Lunsford was charged in Tillamook Circuit Court (Case #10-1003) with murder and aggravated murder. Porter was responsible for his prosecution.

7.

A disputed issue relative to the aggravated murder charge was whether Lunsford was legally entitled to enter the trailer.

8.

The arraignment in the *Lunsford* case was held in January 2010.

9.

In June 2010, Lunsford's lawyer sent Porter a letter describing examples of his client's generosity to the victim "over and above the cheap rent, the sharing of homes, and meals."

10.

In November 2010, Porter received two emails from the victim's widow, Bobbie Sue Brusman ("Brusman"), stating that her husband paid \$200 a month rent to park his travel trailer on Lunsford's property.

11.

Porter emailed the lead detective to follow up on this information.

12.

In December 2010, the lead detective contacted Brusman, asking her about "the rent payments from Chris to Lunsford." Brusman responded by email stating, in relevant part, "I have found Chris' checkbook with records of the rent he paid to the lunsfords (sic)..."

13.

The lead detective did not obtain the checkbook and failed to prepare a report memorializing this information.

14.

At the time, Porter did not think the statements were admissible and therefore did not undertake an analysis of whether the statements were discoverable, and subsequently forgot about the three emails that had been received from Brusman.

15.

In March 2011, Lunsford entered pleas of not guilty to the charges and the case was set for trial in October 2011. In August 2011, Lunsford's lawyer passed away and new counsel was appointed. As a result, the case was tried in September 2012.

16.

In June 2012, a pretrial conference was held in the Lunsford case at which time Porter disclosed that he intend to prove that the victim paid \$200 a month rent to park his travel trailer on Lunsford's property. By this time, the case of *State v. Supanchick*, 245 Or App 651, 263 P3d 378 (2011), *affirmed*, 354 Or 737 (2014), had been decided, which Porter believed provided an avenue for Porter to argue that the victim's statements to Brusman regarding the payment of rent was admissible testimony. Porter did not then disclose the emails.

17.

During opening statements, Porter told the jury there was a \$200 per month rental agreement and Lunsford's lawyer told the jury that there was no rental agreement.

18.

During the State's case-in-chief, Porter asked Brusman on direct examination, whether she was aware of an arrangement between her husband and Lunsford relating to the travel trailer.

19.

In aid of a hearsay/confrontation objection, Lunsford's lawyer asked, "anything you knew about whether or not there was or wasn't a rental agreement between Mr. Lunsford and Mr. Brusman, would that have come from Mr. Brusman?"

20.

To the surprise of both parties, Brusman testified that the defendant also made statements to her about a rental agreement. When asked whether the information about whether rent was actually paid would have come from Lunsford or her husband, Brusman testified that it came from her husband and from his checkbook.

21.

Lunsford's lawyer made a hearsay objection. After argument, the trial court overruled Sweeney's objection. Lunsford's lawyer then asked, "Well, is that as to the bank records?" The trial court ruled, "No, not as to the bank records." Porter advised the trial court, "So, no, Your Honor, we wouldn't be asking about [the bank records]. We'd just be asking about what her husband had told her."

22.

Porter never secured and did not intend to submit Chris Brusman's checkbook at trial.

23.

On cross-examination, Lunsford's lawyer asked Brusman if she had spoken to the lead detective about the case. Brusman answered, "I don't know if I spoke to him at all. I know I emailed him." Lunsford's lawyer asked, "In the 33 months that have been pending since January 11, 2010, did you ever tell a member of law enforcement, these police officers you spoke to in an email, about this arrangement for \$200 a month?" She answered, "I don't recall, but I do recall discussing it with Mr. Porter."

24.

The next morning, Lunsford's lawyer asserting a discovery violation, moved for a mistrial or, alternatively, to strike Brusman's testimony.

25.

Porter responded that the State had maintained all along that Chris Brusman was paying rent and that the travel trailer was a separate residence and that this had been discussed with defense counsel at the judicial settlement conference in June 2012. However, Porter did not disclose any additional specifics of the information given to him by Brusman.

26.

Lunsford's lawyer conceded to the court that the defense was aware that Porter believed there was a rental agreement and that the defense was not surprised by the fact that Porter was claiming that rent was paid. Lunsford's lawyer explained, "I never thought they'd be able to assert it at trial. I discussed that. I did not think there was going to be trial testimony about rent because of the rules of hearsay."

27.

Lunsford's lawyer stated that he was surprised by Brusman's testimony, including that she had heard Lunsford offer to let the victim stay at his place for \$200 a month and that there were bank records to prove or disprove it.

28.

In court, Lunsford's lawyer demanded the emails and, pursuant to that demand, Porter produced all of the emails without any claim of work product or other privilege. Porter subsequently advised the trial court, "I don't think there's a discovery violation, but I don't want to try this thing twice. And I've offered to just have Ms. Brusman's testimony stricken and move on."

29.

The following morning, at the hearing on Lunsford's motion for a mistrial, Porter advised the trial court that, upon reflection, he agreed that he should have provided the emails to the defense and explained that the failure to do so was not intentional. Following argument, the trial court denied the motion for a mistrial but ordered that Brusman's testimony be stricken in its entirety, as agreed to by Porter.

### **Violations**

30.

Porter admits that, by his failure to recognize and appreciate the need to provide his email communications with Brusman prior to trial, he violated RPC 8.4(a)(4).

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 3.4(a), RPC 3.4(d), and RPC 8.4(a)(3) should be and, upon the approval of this stipulation, are dismissed.

## Sanction

31.

Porter 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* (“*Standards*”). The *Standards* require that Porter’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.** Porter violated his duties to the public trust to avoid conduct prejudicial to the administration of justice. *Standards*, §§ 5.2, 6.2.
- b. **Mental State.** Porter acted negligently. Negligence is “failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards*, p. 9.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *Standards*, p. 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The State was actually and potentially injured to the extent that investigative and judicial resources were misused or wasted; the State was deprived of evidence that they hoped to present to the trial, including the testimony of Brusman as well as evidence of a rental agreement on the Lunsford property.

Brusman was actually injured to the extent that she was caused time and anxiety in having to return home in the middle of trial to retrieve records that were subsequently not used and her testimony stricken and not considered in the course of the proceedings concerning the death of her husband. Her voice was not heard, and she saw her husband’s killer get a significantly reduced sentence from what she and the family had hoped for.

The defense was potentially injured because they were not able to timely investigate the significance of the bank records in relation to the issues in dispute at trial.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law. *Standards*, § 9.22(i). Porter has been a lawyer in Oregon since 1984 and has worked in a district attorney’s office his entire career.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior record of discipline. *Standards*, § 9.32(a).

2. Timely good faith effort to make restitution or to rectify consequences of misconduct. *Standards*, § 9.32(d). When the emails with Brusman were disclosed by her at trial, Porter located them, provided them to the defense in conjunction with information from Brusman, and agreed that Brusman’s testimony be stricken.
3. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards*, § 9.32(e).

32.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process. *Standards*, § 5.23.

33.

Oregon case law also supports the imposition of a reprimand or short suspension for conduct prejudicial to the administration of justice. *See, e.g., In re Carini*, 354 Or 47, 60, 308 P3d 197 (2013) (30-day suspension for attorney whose repeated failures to appear at court hearings was cumulative prejudice to the administration of justice. The court specifically emphasized that it was imposing a suspension—which was greater than the presumptive sanction—because the lawyer had previously been disciplined for violating the same rule); *In re Sione*, 355 Or 600, 330 P3d 588 (2014) (court reciprocally reprimanded lawyer for a single failure to appear in her client’s criminal matter and failing to respond to the Bar’s investigator in another matter); *In re Hartfield*, 349 Or 108, 239 P3d 992 (2010) (court reprimanded a conservatorship attorney who failed on two occasions to appear in court for scheduled hearings and failed to file an inventory or an accounting, resulting in the court removing the conservator and attorney from the case and the estate incurring unexpected attorney fees).

34.

Consistent with the *Standards* and Oregon case law, the parties agree that Porter shall be publicly reprimanded for violation of RPC 8.4(a)(4), the sanction to be effective upon approval by the Disciplinary Board.

35.

Porter acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

36.

Porter represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Porter is admitted: none.

37.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 December, 2015.

/s/ William Bryan Porter  
William Bryan Porter  
OSB No. 840821

APPROVED AS TO FORM AND CONTENT:

/w/ Wayne Mackeson  
Wayne Mackeson  
OSB No. 823269

EXECUTED this 3rd day of December, 2015.

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. 14-63  
) SC S063647  
DAVID STANLEY AMAN, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: Christopher R. Hardman  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(d), RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(3), and ORS 9.160(1). Stipulation for Discipline. One-year suspension, all but 6 months stayed, 2-year probation.  
Effective Date of Order: January 1, 2016

**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 one year, all but six months of which will be stayed conditioned on the accused successfully completing two years of probation under the terms and conditions set out in the stipulation. Pursuant to the stipulation, the suspension will become effective January 1, 2016.

/s/ Thomas A. Balmer  
12/10/2015 8:23 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

Kistler, J., not participating.

**STIPULATION FOR DISCIPLINE**

David Stanley Aman, attorney at law (“Aman”), and the Oregon State Bar (“Bar”), stipulate to the following matters pursuant to 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 relevant times was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

Aman 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 Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Aman 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 22, 2014, a Formal Complaint was filed against Aman pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to keep a client reasonably informed of the status of a case), RPC 1.4(b) (failure to communicate with client sufficiently to allow client to make informed decisions regarding the representation), RPC 1.16(d) (failure to take necessary steps upon withdrawal), and RPC 8.1(a)(2) (failure to respond to a disciplinary authority).

On May 30, 2015, the SPRB authorized additional formal disciplinary proceedings against Aman for alleged violations of RPC 5.5(a) and ORS 9.160 (unlawful practice of law), and RPC 8.4(a)(3) (misrepresentation reflecting adversely on fitness to practice). 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 May 2008, Aman agreed to help Bronwyn Rice (“Rice”) with her patent infringement matter on a contingency fee basis. Aman agreed to represent Rice in attempting to negotiate a settlement with potential infringers, but not to pursue litigation. Specifically, Rice wanted an opinion before her next patent maintenance fees became due, about whether she had a viable infringement case against one or more manufacturers making similar products (“targets”). Rice sent Aman the file almost immediately, and also sent a sample of the potentially infringing article. Aman concluded that Rice had viable infringement claims against several companies, but advised Rice that the companies would likely attempt to locate “prior art” to invalidate Rice’s patent.

6.

Between May 2008, and mid-2013, Aman took little substantive action on Rice's legal matter. He wrote letters to two potential infringers. One of the potential infringers responded with prior art related to Rice's patent and claimed that the prior art invalidated the patent. This prior art raised serious issues concerning the validity of Rice's patent. Although Aman discussed his discoveries with Rice, he failed to advise Rice in writing or otherwise that the "prior art" made it unlikely that the targets would ever agree to pay license fees. Aman also failed to provide Rice with a written opinion as to the viability of her infringement case, and failed to respond to her numerous messages and inquiries regarding the status of his review.

7.

On September 3, 2013, Rice terminated Aman's representation and asked him to return her file, including the infringing article. He did not respond, despite follow-up inquiries in September and October 2013.

8.

Hearing nothing further from Aman, Rice complained to the Bar in January 2014. In April 2014, Rice's complaint was referred to Disciplinary Counsel's Office ("DCO").

9.

During May and June, DCO sent letters of inquiry to Aman at the address then on record with the Bar by first-class mail. DCO sent the second letter by certified mail as well. The letters were not returned undelivered, but Aman did not respond to them.

10.

On July 23, 2014, Aman was administratively suspended pursuant to BR 7.1 due to his lack of cooperation with the Bar. Aman continued to practice until October 1, 2014. During that time, Aman's law firm, unaware of his suspension, continued to allow Aman to meet with clients and practice law, and the law firm webpage indicated Aman was fully licensed to practice.

11.

Aman became aware of his suspension at least by September 23, 2014. Aman held himself out as an attorney and continued to practice until October 1, 2014, without notifying his clients or his partners of his suspension. Aman's law firm immediately intervened when it learned that Aman had been practicing while suspended.

## Violations

12.

Aman admits that his failure to more actively pursue Rice's legal matter constituted neglect of a legal matter, in violation of RPC 1.3. He further admits that his failure to respond to Rice's attempts to communicate with him violated RPC 1.4(a), while his failure to more fully explain the ramifications of his "prior art" findings and his intention to do nothing further on her matter violated RPC 1.4(b). Aman admits that his subsequent failure to provide Rice's file and documents violated RPC 1.16(d).

Aman acknowledges that his failures to respond to DCO in its investigation of Rice's complaint constituted a knowing failure to respond to a lawful demand from a disciplinary authority, in violation of RPC 8.1(a)(2). Aman also acknowledges that, by continuing to practice law at a time when he was suspended and not an active member of the Oregon State Bar, he violated RPC 5.5(a) and ORS 9.160. Finally, Aman admits that his failure to notify his partners and his clients of his suspension while he continued to practice was a misrepresentation in violation of RPC 8.4(a)(3).

## Sanction

13.

Aman 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* ("Standards"). The *Standards* require that Aman'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. *ABA Standards*, § 3.0. In determining the appropriate sanction, the court also examines the conduct of the accused attorney in light of the court's prior case law. *In re Garvey*, 325 Or 34, 932 P2d 549 (1997).

- a. **Duty Violated.** Aman violated his duty of diligence to his client when he neglected Rice's matter and failed to adequately communicate with her. *Standards*, § 4.4. He violated his duty to his client to preserve client property when he failed to return her file. *Standards*, § 4.1. The *Standards* provide that the most important ethical duties are those which lawyers owe to clients. *Standards*, p. 5.

Aman violated his duty to the public to maintain his personal integrity when he practiced without a license and failed to reveal that information once he became aware of it. *Standards*, § 5.0.

Aman violated his duties to the profession by practicing without a license, failing to cooperate with disciplinary authorities, failing to properly withdraw

from Rice’s representation, and misrepresenting to his clients and his law partners that he was licensed to practice when he was not. *Standards*, § 7.0.

- b. Mental State.** “‘Intent’ is the conscious objective or purpose to accomplish a particular result.” *Standards*, p. 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.” *Id.* “‘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.” *Id.*

Aman initially acted negligently when he failed to pursue Rice’s matter and communicate with Rice. Aman’s mental state became knowing after he received, and failed to respond to, telephone and email messages from Rice requesting updates on her case. Aman also acted knowingly when he failed to return Rice’s file to her after she requested it and when he failed to timely respond to DCO’s request for information when he knew a complaint was pending against him.

Aman was not initially aware of his suspension when it went into effect, and simultaneously was struggling with some personal issues, thus he was initially negligent in practicing law while suspended. However, Aman’s mental state became knowing and intentional once he continued to practice law after learning of his suspension. Similarly, Aman’s failure to tell his law partners and clients of his suspension once he learned of it was knowing and intentional.

- c. Injury.** Both actual and potential injury are relevant to determining the sanction in a disciplinary case. *In re Williams*, 312 Or 530, 823 P2d 971 (1992). Aman caused actual and potential harm to his client when he failed to return Rice’s file and failed to provide her updates on her case. *See in re Cohen*, 330 Or 489, 46, 8 P3d 953 (2000) (client anxiety and frustration as a result of attorney neglect can constitute actual injury under the *Standards*); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

Aman caused potential injury to his clients and law partners when he continued to practice law while he was suspended (*e.g.*, no PLF coverage). His failure to cooperate with the Bar’s investigation of his conduct caused actual harm to both the legal profession and to the public because he delayed the Bar’s investigation and, consequently, the resolution of the complaint against him. *In re Schaffner*, 325 Or at 427; *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990). Finally,

Aman caused potential injury to clients, the profession, and the public when he failed to disclose his suspended status.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Selfish motive. Aman was seeking to avoid the consequences of his unauthorized practice and lack of action in handling Rice's matter. *Standards*, § 9.22(b);
  2. Multiple offenses. *Standards*, § 9.22(d);
  3. Substantial experience in the practice of law. Aman has been a lawyer in Oregon since 1996. *Standards*, § 9.22 (i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior disciplinary record. *Standards*, § 9.32(a).
  2. Personal and emotional problems. Aman was reportedly suffering from personal and emotional problems at the time of some of the misconduct at issue in these matters, including family crises and substance issues. *Standards*, § 9.32(c).
  3. Remorse. Aman has expressed remorse both for his inaction and lack of communication in the Rice matter and his actions in practicing law while suspended. *Standards*, § 9.32(i).
  4. Imposition of other penalties and sanctions. Aman is no longer employed with his prior law firm and has experienced other financial hardships due to his actions and corrective measures. *Standards*, § 9.32(k).

14.

Under the ABA *Standards*, a period of suspension is generally appropriate when a lawyer either 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 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*, §7.0. A reprimand is generally appropriate when a lawyer negligently engages in such conduct. *Standards*, §§ 7.2, 7.3. A reprimand is likewise appropriate where a lawyer knowingly engages in conduct involving a misrepresentation toward the public. *Standards*, § 5.0. Considering the totality of Aman's conduct, a suspension is appropriate.

15.

Oregon cases support a suspension of a year or more for similar collective misconduct.

Substantial suspensions are warranted where a lawyer's misconduct includes practicing while suspended. *See, e.g., In re Koliha*, 330 Or 402, 9 P3d 102 (2000) (attorney suspended for one year for violations of RPC 8.4(a)(3) (*former* DR 1-102(A)(3)), RPC 8.4(a)(4) (*former* DR 1-102(A)(4)), RPC 8.1(a) (*former* DR 1-103(C)), RPC 5.5(a) (*former* DR 3-101(B)), and ORS 9.160, where attorney engaged in unauthorized practice of law while suspended for failure to pay Bar dues and subsequently failed to cooperate with Bar investigation); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001) (lawyer suspended for three years where, contrary to statute and Bar bylaw, attorney engaged in the private practice of law in Oregon without professional liability insurance coverage).

Similarly, the court has emphasized a no-tolerance approach to noncooperation with the Bar. *See, e.g., In re Obert*, 352 Or 231, 282 P3d 825 (2012) (attorney suspended for six months where he failed to respond to numerous requests from the Bar about an ethics complaint until subpoenaed to do so); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *mod on recon*, 345 Or 652 (2009) (attorney who refused to respond to questions posed by the Bar concerning an allegation that attorney obtained a loan from an elderly client was suspended for one year); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (120-day suspension for failing to respond to the Bar where no substantive charges were brought); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension; 60 days each for neglect and failing to cooperate with the Bar).

Finally, Aman's neglect of client matters and failure to communicate with his client alone warrants at least a short suspension. *See, e.g., In re Koch*, 345 Or 444, 198 P3d 910 (2008) (attorney suspended for 120 days when 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) (attorney's serious neglect of a child support arrearage matter for a client warranted a 60-day suspension, despite the lawyer's lack of prior discipline).

In fact, *In re Purvis*, 306 Or 522, 760 P2d 254 (1988), provides authority for the imposition of a six-month suspension where a lawyer fails to pursue a single client's legal matter and fails to cooperate with the Bar's inquiry. Purvis failed to take any action to pursue the reinstatement of child support over the course of four months for his client and also made misrepresentations to his client regarding the progress of the case. Purvis then failed to respond to inquiries from DCO and the LPRC investigator. Although Aman did not make affirmative misrepresentations to Rice, he did fail to cooperate with the Bar and engaged in the unlawful practice of law.

Consistent with the *Standards* and Oregon case law, the parties agree that Aman shall be suspended for one year, for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(d), RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(3), and ORS 9.160, the sanction to be effective on the first day of the first month following approval by the Supreme Court, or as otherwise directed by the Court. However, six months of the suspension shall be stayed pending Aman's successful completion of a two-year term of probation on the conditions described below.

16.

Probation shall commence upon Aman's reinstatement to active membership status after the imposed portion of his suspension and shall continue for a period of two years, ending on the day prior to the two-year anniversary of the commencement date ("period of probation"). During the period of probation, Aman shall abide by the following conditions:

#### **General Provisions**

- (a) Aman 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) Any subsequent finding by the SPRB that there is probable cause that Aman violated a provision of the Oregon Rules of Professional Conduct or ORS Chapter 9 in a matter unrelated to the subject of this diversion, including for conduct that occurred or continued during the period of his probation, shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.
- (c) Aman is responsible for any costs required under the terms of this stipulation and the terms of probation.

#### **Practice Management Provisions**

- (d) Within seven days of his reinstatement date, Aman shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Aman shall notify DCO of the time and date of the appointment.
- (e) Aman shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, and taking reasonable steps to protect clients upon the termination of his employment. No later than 30 days after recommendations are made by the PLF, Aman shall adopt and implement those recommendations.

- (f) No later than 60 days after recommendations are made by the PLF, Aman shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (g) At least 14 days prior to commencement of his probation, Aman will name a licensed Oregon attorney in good standing who shall serve as Aman's probation supervisor ("Supervisor") and provide the name of the attorney to DCO for approval. Aman shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Aman's clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Aman shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Aman's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of the greater of 10 files or 30% of Aman's active files to determine whether Aman is timely, competently, diligently, and ethically attending to matters, adequately communicating with clients, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
- (h) Each month during the period of probation, Aman shall review all client files to ensure that he is timely attending to the clients' matters and that he is maintaining adequate communication with clients, the court, and opposing counsel.
- (i) On a quarterly basis, on dates to be established by DCO beginning no later than 90 days after his reinstatement to active membership status, Aman shall submit to DCO a written "Compliance Report," approved as to substance by Supervisor, advising whether Aman is in compliance with the terms of this agreement. In the event that Aman has not complied with any term of the agreement, the Compliance Report shall describe the noncompliance and the reason for it.
- (j) Aman authorizes Supervisor to communicate with DCO regarding Aman's compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Aman's compliance.

- (k) A Compliance Report is timely if it is e-mailed, mailed, faxed, or delivered to DCO on or before its due date.

### **Chemical Dependency Provisions**

- (l) No later than 30 days before Aman’s term of probation commences, Aman shall contact the State Lawyers Assistance Committee (“SLAC”). Aman agrees to enter into a “Monitoring Agreement” with SLAC, and to comply with all of the terms of that agreement and any subsequent modifications to that agreement.
- (m) Aman shall not consume any alcoholic beverages, controlled substances or prescription medications, except as prescribed by a licensed physician. Aman shall consume any prescribed substance only as prescribed.
- (n) A designee of SLAC shall serve as Aman’s monitor (“Monitor”). Aman agrees to cooperate and comply with all reasonable requests made by his Monitor that SLAC or his Monitor, in his/her sole discretion, determines are designed to achieve the purpose of the diversion and the protection of Aman’s clients, the profession, the legal system, and the public. Aman shall meet with his Monitor in person on a regular basis, as determined by SLAC and/or the Monitor, for the purpose of monitoring Aman’s sobriety.
- (o) Aman authorizes his Monitor to communicate with DCO regarding Aman’s compliance or noncompliance with the terms of this agreement and to release to DCO any information DCO deems necessary to permit it to assess Aman’s compliance.
- (p) Aman shall attend substance abuse treatment as determined and approved by SLAC to be appropriate, including any aftercare and relapse prevention education and therapy recommended by SLAC or Aman’s treatment provider. Aman shall comply with all terms and recommendations of the treatment provider for the duration of his treatment program.
- (q) Aman shall submit to random urinalysis tests at a facility designated by the Bar and that is licensed or accredited to perform such tests, and shall submit to such tests within the time period required by SLAC..
- (r) To the extent that SLAC or the Supervising Attorney recommends that Aman attend OAAP, AA, NA or equivalent meetings, Aman agrees to obtain, upon SLAC’s request, verification of attendance at such meetings.
- (s) Aman shall report to his Monitor and to DCO 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 Aman has possessed or consumed

alcohol, marijuana or other controlled substances not prescribed by a physician.

- (t) Aman waives any privilege or right of confidentiality to the extent necessary to permit disclosure by SLAC, his Supervising Attorney or any other mental health or substance abuse treatment providers of Aman's compliance or noncompliance with this stipulation and their treatment recommendations to SLAC and DCO. Aman agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (u) In the event Aman fails to comply with any condition of his probation, DCO may initiate proceedings to revoke Aman'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.
- (v) In the event Aman fails to comply with any condition of this stipulation, Aman shall immediately notify his Supervising Attorney, SLAC and DCO in writing.
- (w) Aman's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Supervisor or Monitor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.

17.

Aman 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, Aman's former law firm retained his client files upon his departure. Aman has no other active files in his possession.

18.

Aman understands that reinstatement is not automatic on expiration of the period of suspension and that he cannot resume the practice of law until he has taken all steps necessary to be reinstated to active membership status with the Oregon State Bar. During the period of active suspension, and until the date upon which Aman is reinstated to active membership status with the Oregon State Bar, Aman shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of active suspension.

19.

Aman acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

20.

Aman represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Aman is admitted: none.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

EXECUTED this 29th day of October, 2015.

/s/ David Stanley Aman

David Stanley Aman

OSB No. 962106

EXECUTED this 4th day of November, 2015.

OREGON STATE BAR

By: /s/ Angela W. Bennett

Angela W. Bennett

OSB No. 092818

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-50, 13-51, 13-116, 14-38,  
) 14-39, 14-40, and 15-12  
THEODORE F. SUMNER, ) SC S063678  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Michael A. Greene  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(d), RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(4), and ORS 9.160(1). Stipulation for Discipline. 3-year suspension.  
Effective Date of Order: December 24, 2015

**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. Pursuant to the stipulation, the Oregon State Bar is awarded costs against the accused in the amount of \$253.60, payable on or before January 15, 2016.

/s/ Thomas A. Balmer  
12/24/2015 9:52 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

Theodore F. Sumner, attorney at law (“Sumner”), and the Oregon State Bar (“Bar”), hereby stipulate to the following matters pursuant to 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.

Sumner was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 4, 2000, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Sumner 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.

Between September 21, 2013 and January 17, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Sumner for alleged violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 13-50; RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), and RPC 1.15-1(d) of the Oregon Rules of Professional Conduct in Case No. 13-51; RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 13-116; RPC 8.1(a)(2) and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct in Case No. 14-38; RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(d), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 14-39; RPC 1.3, RPC 1.15-1(d), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 14-40; RPC 5.5(a) of the Oregon Rules of Professional Conduct and ORS 9.160(1) of the Oregon Revised Statutes in Case No. 15-12. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

On June 19, 2015, a Formal Complaint was filed against Sumner pursuant to the authorization of the SPRB, consolidating the matters and alleging violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 13-50; RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), and RPC 1.15-1(d) of the Oregon Rules of Professional Conduct in Case No. 13-51; RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 13-116; RPC 8.1(a)(2) and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct in Case No. 14-38; RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(d), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 14-39; RPC 1.3, RPC 1.15-1(d), and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct in Case No. 14-40; RPC 5.5(a) of the

Oregon Rules of Professional Conduct and ORS 9.160(1) of the Oregon Revised Statutes in Case No. 15-12. 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.

#### **Smith Matter (Case No. 13-50)**

Stacy Smith (“Smith”) hired Sumner around April, 2012, to appeal an adverse decision entered against her by the Board of Veterans Appeals (“BVA”). Sumner obtained the record before the BVA in June, 2012, and prepared to attend a telephone briefing conference that was scheduled at his request on August 22, 2012. Sumner requested that BVA remand Smith’s case for further consideration. At the August hearing the remand was denied and Sumner either had to file a brief on Smith’s behalf or withdraw. Sumner did not file Smith’s brief, did not request an extension and didn’t tell his client. Smith called Sumner several times between October and November to express her concern about the brief deadline, status of the case and his lack of communication. Sumner did not respond. Smith fired Sumner on November 16, 2012.

6.

In June 2013, Disciplinary Counsel’s Office (“DCO”) requested that Sumner respond to Smith’s allegation. Sumner did not respond to DCO’s lawful request for information.

#### **Jin Matter (Case No. 13-51)**

7.

Young Jin (“Jin”) retained Sumner in March, 2010, to help him pursue a wage and hour case against Jin’s former employer. At the onset of the representation, Sumner said that Jin could win over \$20,000. Jin heard little more from Sumner until they met again in October, 2012. Sumner gave Jin a \$2,000 check but could not explain what it was for. When Jin expressed confusion, Sumner said he would figure it out and get back to Jin. Sumner kept the check. That was the last Jin heard from Sumner, although he’s called him several times (about twice a week since October 2012).

#### **Barrett Matter (Case No. 13-116)**

8.

A Texas active duty service member, Robert Barrett (“Barrett”), hired Sumner to represent him in a divorce filed in Washington County Circuit Court. Barrett paid Sumner \$1,500 as a retainer, against which Sumner would bill hourly. Sumner instructed Barrett to do nothing until he was served with the petition. However, in November, 2012, Barrett was contacted by his wife’s attorney who threatened to take a default judgment. Confused, Barrett called and emailed Sumner but he did not respond.

9.

Between January and March, 2013, Barrett asked Sumner for an accounting and a refund of unearned funds via three emails. Sumner did not respond.

Disciplinary Counsel's Office requested that Sumner respond to Barrett's allegations. Sumner did not respond.

**Cooper Matter (Case No. 14-38)**

10.

Attorney Brooks Cooper ("Cooper") represented the defendant in litigation in which Sumner represented the Plaintiff. Cooper prepared and filed a proposed supplemental judgment awarding fees to his client. Three days later, Sumner left a voicemail message for Cooper that he objected to the proposed form of judgment because it did not include the disposition of his client's fee petition filed on April 26, 2013. Cooper responded by letters to Sumner and the court that Sumner's objection was without merit because he had not been served with Sumner's fee petition. The court set a hearing on the matter. Cooper filed a formal objection to Sumner's fee petition, and Sumner filed a response to which he attached nine of the 36 pages of his fee petition.

11.

At the hearing, under oath, Sumner represented that he had faxed his fee petition to Cooper on April 26, 2013. The court ordered him to produce the fax confirmation sheet as required by ORCP 9C. Sumner produced an email from his fax service that confirmed a 19-page fax to Cooper on April 26, 2013. Cooper did not receive the fax. Sumner's oversights caused the court to hold a hearing that would have been unnecessary had Sumner followed the requirements of ORCP 9C.

12.

In September 2012, Disciplinary Counsel's Office requested Sumner's response to Cooper's complaint. He did not respond.

**Sprute Matter (Case No. 14-39)**

13.

In March 2012, Greg Sprute ("Sprute") hired Sumner to recover damages suffered when one of the trucks Sprute operated in his business was damaged in an accident. Over the next year, Sprute called Sumner's office several times for updates. He was repeatedly told by a receptionist that Sumner had the information he needed and that Sumner would contact him if he needed anything further. In August and September 2013, after hearing nothing for a year, Sprute called Sumner eleven times to request a status report and a copy of his file. Sumner's receptionist told him each time that his message would be conveyed to Sumner. Sumner has never responded and has not returned any part of Sprute's file.

14.

Disciplinary Counsel's Office requested Sumner's response to Sprute's complaint in November 2013, he did not respond.

**Randall Matter (Case No. 14-40)**

15.

Jason Randall ("Randall") hired Sumner in the summer of 2012 to modify a Department of Human Services ("DHS") child support order to take into account an additional \$3,600 he had paid to the mother of his child and that he had been unemployed for a year. Randall made several attempts to contact Sumner about the status of the case and demands his children's mother made for additional funds. In frustration, Randall scheduled an appointment with Sumner to discuss terminating their professional relationship because Sumner had neither resolved his support obligation nor determined whether Randall was being credited for the extra money he continued to pay to his children's mother. Sumner assured Randall that he was still capable of and willing to do what Randall needed.

16.

In August 2013, Randall became concerned about his daughter's safety when he learned that she had found a used syringe in the bathroom at her home. Randall contacted Sumner who said he would file an ex parte motion for temporary emergency custody the next day. Sumner did not file the petition for temporary custody. Instead, on August 6, 2013, the mother filed a petition for custody and obtained a temporary order of restraint that restrained Randall from interfering with the current placement of his daughter. When Randall was served with the temporary order he learned that Sumner had not petitioned for temporary emergency custody on his behalf. Randall called Sumner's office and was told by an assistant that Sumner was out of the state and unreachable. A few days later, Sumner did call Randall and informed him that he had not obtained temporary custody, but that his failure to do so "wasn't a big deal."

17.

A hearing was held on August 12, 2013, on the mother's motion to enforce the temporary order of restraint. At the hearing, the Judge ordered the mother to live in Bend with the child's grandparents and instructed Sumner to type it and provided copies to the parties within seven days. Sumner never provided a typed version of the judge's order. The mother threatened to take a default on the custody petition she had filed. Sumner filed a counterclaim in mid-October. The court ordered the parties to mediation.

18.

Randall attempted to contact Sumner multiple times, but did not hear from Sumner until October 25, 2013, when he received an email that included the mother's counterclaim

for parenting time. Randall called Sumner's office three times that week to speak with Sumner and request documents from his file. Sumner did not call him back or send the documents. On November 4, 2013, after hearing nothing from Sumner, Randall terminated the representation and requested by fax, mail, email and voicemail that Sumner return his file. On November 18, 2013, Sumner invoiced Randall for his services. The invoice included charges for time spent in correcting mistakes Sumner made. Apart from this invoice, Randall has not heard from Sumner or received a copy of his file.

19.

Disciplinary Counsel's office requested Sumner's response to Randall's complaint in January, April and June 2014. Sumner did not respond.

### **Gujal Matter (Case No. 15-12)**

20.

Attorney Aarti Gujral ("Gujral") and Sumner represented opposing parties in a domestic relations matter. For approximately two weeks after Sumner was administratively suspended pursuant to BR 7.1, Sumner continued to negotiate settlement of the case and respond to discovery requests. He did not tell Gujral he had been suspended.

### **Violations**

21.

Sumner admits that, by engaging in the conduct described in paragraphs 5 through 20, he violated in Case No 13-50—RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2); in Case No. 13-51—RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.15-1(d); in Case No. 13-116—RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2); in Case No. 14-38—RPC 8.1(a)(2) and RPC 8.4(a)(4); in Case No. 14-39—RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(d), and RPC 8.1(a)(2); in Case No. 14-40—RPC 1.3, RPC 1.15-1(d), and RPC 8.1(a)(2); and in Case No. 15-12—RPC 5.5(a) and ORS 9.160(1).

On October 3, 2015, the SPRB authorized that the duplicate charge of the alleged violation of RPC 8.4(a)(4) in Case No. 14-40 is dismissed. On October 3, 2015, the SPRB also authorized that the charge of the alleged violation of RPC 1.15-1(a) in Case No. 13-51 is dismissed.

### **Sanction**

22.

Sumner 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* ("Standards"). The *Standards* require that Sumner'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.** Sumner violated duties to his clients: to act with reasonable diligence and promptness in representing them (including communicating with them); and to properly handle and account for client funds and property. *Standards*, §§4.1, 4.5. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards*, p. 5. Sumner also violated his duty owed to the profession when he knowingly failed to cooperate with the Bar’s investigation. *Standards*, § 7.0
- b. **Mental State.** Sumner acted knowingly and negligently. “‘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 the result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards*, p. 7.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Sumner’s neglect of his clients’ matters caused both actual and potential injury. Their cases were stalled and resolutions of their matters were delayed. Sumner’s failures to act and communicate with his clients caused further actual injury in terms of anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner II*, 325 Or 421, 426–27, 939 P2d 39 (1997).

In addition, Sumner caused either potential or actual injury to those clients who did not timely receive the unearned portions of their fees or client materials.

Sumner’s failure to cooperate with the Bar’s investigations of his conduct caused actual injury to both the legal profession and to the public because the sending of many requests was necessitated by his failures to respond to the Bar or provide complete information, thereby delaying the Bar’s investigations and, consequently, the resolution of the multiple complaints against him. *In re Schaffner II*, *supra*; *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A pattern of misconduct. *Standards*, § 9.22(c);
  2. Multiple Offenses. *Standards*, § 9.22(d); and
  3. Substantial experience in the practice of law. *Standards*, § 9.22(i).

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior disciplinary history. *Standards*, § 9.32(a);
  2. Personal or emotional problems. *Standards*, § 9.32(c).

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. *Standards*, § 4.12. Suspension is 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. 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*, § 7.2.

23.

Like the *Standards*, Oregon cases suggest that a lengthy suspension is appropriate for Sumner's conduct. Sanctions are intended to protect the public and uphold the dignity, respect, and integrity for the profession, and are not designed to penalize the accused lawyer. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). Appropriate discipline also deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

The knowing neglect of a single client matter warrants a 60-day suspension. *In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004). The court has imposed substantial suspensions when a lawyer neglects multiple client matters. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (2000) (four-year suspension for knowing neglect, including failing to respond to client messages and knowing failure to respond to Bar inquiries in four matters); *In re Schaffner, supra*, (two-year suspension for neglect, failing to return client property, and failing to fully respond to the Bar); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (two-year suspension for neglect of five client matters, three instances of failing to return client property and substantially refusing to cooperate with the bar). *See also, In re Kent*, 20 DB Rptr 136 (2006); *In re O'Dell*, 19 DB Rptr 287 (2005); *In re Cumfer*, 19 DB Rptr 27 (2005) (all stipulations to two-year suspensions for neglect and/or failures to respond to the bar related to numerous client matters).

The Oregon Supreme Court considers a lawyer's failure to cooperate in a Bar investigation serious misconduct because the public protection provided by that obligation is undermined when a lawyer fails to participate in the investigatory process. *In re Miles, supra*, at 222–23. As such the court has consistently imposed a 60-day suspension for a single violation of RPC 8.1(a)(2). *In re Schaffner*, 325 Or at 426–27; *In re Miles, supra* (120-day suspension for two instances of failure to cooperate).

24.

Consistent with the *Standards* and Oregon case law, the parties agree that Sumner shall be suspended from the practice of law for three (3) years for violation of: in Case No

13-50—RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2); in Case No. 13-51—RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.15-1(d); in Case No. 13-116—RPC 1.3, RPC 1.4(a), RPC 1.15-(1)(d), and RPC 8.1(a)(2); in Case No. 14-38—RPC 8.1(a)(2) and RPC 8.4(a)(4); in Case No. 14-39—RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(d), and RPC 8.1(a)(2); in Case No. 14-40—RPC 1.3, RPC 1.15-1(d), and RPC 8.1(a)(2); and in Case No. 15-12—RPC 5.5(a) of the Oregon Rules of Professional Conduct and ORS 9.160(1) of the Oregon Revised Statutes, the sanction to be effective the date approved by the Supreme Court.

25.

In addition, on or before January 15, 2016, Sumner shall pay to the Bar its reasonable and necessary costs in the amount of \$253.60, incurred for his deposition. Should Sumner fail to pay \$253.60 in full by January 15, 2016, the Bar may thereafter, without further notice to him, obtain a judgment against Sumner for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

26.

Sumner 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, Sumner represents that he has no active or open files.

27.

Sumner 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. Sumner 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.

28.

Sumner acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

29.

Sumner represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which Sumner is admitted: Washington.

30.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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.

EXECUTED this 13th day of November, 2015.

/s/ Theodore F. Sumner

Theodore F. Sumner

OSB No. 004060

EXECUTED this 17th day of November, 2015.

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. 12-52, 12-53, and 13-06  
)  
MARY E. LANDERS, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Order revoking probation and imposing stayed  
suspension. 30-day suspension.  
Effective Date of Order: January 9, 2016

**ORDER REVOKING PROBATION**

This matter came on before Nancy M. Cooper, State Chairperson of the Disciplinary Board of the Oregon State Bar, upon the Bar’s Petition to Revoke Probation pursuant to BR 6.2(d). The State Chairperson being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED that Mary E. Landers’s probation is revoked and the 30-day stayed suspension she stipulated to in settlement of these matters is imposed effective ten days from the date of this order.

EXECUTED this 30th day of December, 2015.

/s/ Nancy M. Cooper  
Nancy M. Cooper  
State Disciplinary Board Chairperson

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*The text of the former DRs can be accessed at*

*<[www.osbar.org/docs/rulesregs/cpr.pdf](http://www.osbar.org/docs/rulesregs/cpr.pdf)>.)*

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