

**DISCIPLINARY  
BOARD  
REPORTER**

Report of Lawyer Discipline Cases  
Decided by the Disciplinary Board  
and by the  
Oregon Supreme Court  
for 2016

**VOLUME 30**

*January 1, 2016, to December 31, 2016*

## 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 2016 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 30 DB Rptr \_\_\_\_ (2016).

In 2016, 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 citation errors, 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, 2016, 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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IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-50
	)	
RENE ERM II,	)	
	)	
Accused.	)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), and RPC 1.16(d). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	February 1, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Rene Erm II is suspended 30 days, effective February 1, 2016, or 10 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), and RPC 1.16(d).

DATED this 13th day of January, 2016.

/s/ Robert A. Miller  
 Robert A. Miller  
 State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Rene Erm II, attorney at law (“Erm”), 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.

Erm is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon on April 29, 1996, to practice law in this state and a member of the Bar, having his office and place of business in Walla Walla, State of Washington.

3.

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

4.

On August 5, 2015, a Formal Complaint was filed against Erm 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 matter or promptly comply with reasonable requests for information), RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 1.16(c) (failure to comply with law requiring notice to or permission of a tribunal to withdraw as counsel), and RPC 1.16(d) (failure to take steps to protect a client’s interest upon termination of representation). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

At all times relevant herein, Rhiana Sheridan (“Wife”) lived in Utah with three children from her marriage to Theron Scott Sheridan (“Husband”). Husband lived in Oregon.

6.

On January 10, 2014, Husband filed a petition for dissolution of marriage and a motion to determine temporary child custody and parenting time in Umatilla County Circuit Court, Oregon (“Oregon dissolution”). On February 12, 2014, Wife retained Erm to represent

her in the Oregon dissolution. Wife was served with Husband's Oregon petition and motion in the Oregon dissolution in Utah on February 13, 2014.

7.

On February 19, 2014, Erm made an appearance in the matter as attorney of record for Wife. Specifically, Erm prepared and filed a Motion to Sever Child Custody, asserting lack of subject matter jurisdiction as to child custody, but conceding that Oregon had jurisdiction to entertain all other aspects of the dissolution. Erm did not file a response to Husband's petition for dissolution or take other substantive action regarding Wife's interests in the Oregon dissolution.

8.

On February 14, 2014, Wife filed a petition for dissolution in Weber County, Utah ("Utah action"). Wife was represented in the Utah action by attorney Michael Christiansen ("Christiansen").

9.

On March 4, 2014, Husband's lawyer in the Oregon dissolution, Steven Thomas ("Thomas"), filed a response to Wife's Motion to Sever, noting that Wife had not contested Oregon's jurisdiction to dissolve the marriage, divide the assets and liabilities, and determine all support issues. Erm was served with Thomas's response. The Oregon court heard argument on the Motion to Sever on March 21, 2014, and held that Oregon had jurisdiction as to all issues except the child custody issues.

10.

On March 21, 2014, Erm believes that he wrote to Wife (Exhibit A, attached). Wife denies receiving this letter or other word from Erm notifying her that his representation was completed. Regardless, Erm failed to withdraw from the Oregon dissolution or notify Wife that he had not officially withdrawn but that Erm had no intention of taking any action to respond to court notices or filings or to pass them along to Christensen or Wife.

11.

After March 21, 2014, Erm did not take any substantive action in the Oregon dissolution. Erm did not file a notice of withdrawal in accordance with ORS 9.380, nor did he notify Christiansen or Thomas that he wished to no longer be involved. Thereafter, Erm remained counsel of record for Wife in the Oregon dissolution, receiving service of all pleadings and court notices.

12.

On March 21, 2014, Husband moved for a default judgment against Wife in the Oregon dissolution. Erm was served with this motion. Erm did not respond or object. Erm

did not forward the default motion to either Wife or Christiansen, or notify them of its receipt.

13.

On April 1, 2014, the Oregon court granted the Order of Default in favor of Husband. Erm did not forward the Order of Default to either Wife or Christiansen, or inform either of them that a default had been entered.

14.

On April 15, 2014, Attorney Thomas served Erm with Husband's proposed General Judgment of Dissolution pursuant to the Order of Default against Wife. Erm did not respond or object. Erm did not forward the proposed General Judgment of Dissolution to either Wife or Christiansen, or inform either of them that any such pleading had been filed.

15.

On April 16, 2014, the court executed and entered the General Judgment of Dissolution. Erm failed to forward the General Judgment of Dissolution to either Wife or Christiansen, or inform either of them that any such pleading had been executed and entered.

16.

On April 24, 2014, Wife and Attorney Christiansen attended mediation in the Utah action and learned from the mediator that a default had been entered in the Oregon dissolution. Husband refused to settle at mediation of the Utah action because he had already obtained the Oregon default. That same day, Wife contacted Erm to protest the default judgment. Erm assured Wife that he would file a motion to set aside the default judgment. Thereafter, Erm did not take any action to set aside the default.

17.

On May 27, 2014, Wife requested that Erm advise her about the status of the motion. Erm did not respond.

18.

In September 2014, Wife wrote to the Oregon court asking that the default judgment be vacated. Her *pro se* motion was heard and denied in November 2014.

### **Violations**

19.

Erm admits that by failing to take action on the Oregon dissolution he neglected a legal matter entrusted to him, in violation of RPC 1.3. Erm further admits that his failures to notify Wife of the status of the Oregon dissolution as he received notice of events, or advise

her of the ramifications of those matters, along with his failure to respond to Wife’s reasonable requests for information, constituted violations of RPC 1.4(a) and (b).

By failing to comply with court requirements requiring notice to or permission of a tribunal to withdraw as counsel, Erm admits that he violated RPC 1.16(c). And when Erm did not take any steps to ensure that Wife or Christensen received further notices after his election to withdraw, Erm admits that he violated RPC 1.16(d).

### Sanction

#### 20.

Erm 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. *Standards* § 3.0.

- a. **Duty Violated.** Erm violated his duty to his client to act with reasonable diligence and promptness in representing her, including the duty to adequately communicate with her. *Standards* § 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5. In addition, Erm violated his duty to the profession to refrain from improperly withdrawing from representation. *Standards* § 7.0.
- b. **Mental State.** There are three recognized mental states under the *Standards*. “‘Intent’ is the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9.

Erm did not act intentionally, rather Erm’s conduct in this matter was primarily knowing. That is, Erm 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* at 9. After Erm negligently believed that his representation was over, he then knew that Wife’s dissolution matter was ongoing because he received court notices and orders—but he did not read these legal documents and he did nothing to help Wife. After Wife alerted Erm to the default judgment against her, Erm agreed to take action to set aside the default judgment. At this point Erm renewed his

representation (assuming that Erm previously withdrew) and his subsequent failure to respond to Wife or to act on her behalf as promised was knowing.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Injury can either be actual or potential under the *Standards*. See *In re Williams*, 314 Or at 547. Erm’s client was actually injured to the extent that she paid for services that did not benefit her, suffered a default judgment against her, was forced to represent herself, and was involved in prolonged litigation in which she incurred additional attorney fees and costs. See, e.g., *In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). Because of the Oregon default, Wife incurred \$8,000 in legal expenses for protracted and ongoing litigation, including legal expenses to respond to repeated jurisdictional challenges that contradicted the parties’ agreements initially entered into in Utah that would have continued but for the contradictory rulings.

Further, the lack of communication caused actual injury in the form of client anxiety and frustration. See *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A prior record of relevant discipline. *Standards* § 9.22(a). In 2002, Erm was admonished for a violation of DR 2-110(A)(2) (*current* RPC 1.16(d)) when he did not give timely notice of his intent to withdraw from representation of a client and he did not take reasonable steps to avoid foreseeable prejudice to the rights of that client. *In re Erm*, OSB Case No. 01-160. See *In re Cohen*, 330 Or at 500 (a letter of admonition is considered evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue in the case at bar).
  2. A pattern of misconduct. *Standards* § 9.22(c). In this matter, Erm engaged in a series of elections not to respond to information received from the court and opposing counsel. In addition, Erm’s conduct in this matter is similar to that of his prior misconduct for which he was admonished in 2002. See *In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).



3. Multiple offenses. *Standards* § 9.22(d).
  4. Substantial experience in the practice of law. *Standards* § 9.22(i). Erm was admitted in Oregon in 1996, and in Washington in 1995.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).
  2. Physical disability. *Standards* § 9.32(h). Erm had a major hip surgery during some of the time period relevant to this matter, which caused him to be absent from the office for substantial periods of time.
  3. Remorse. *Standards* § 9.32(l). Erm has expressed extreme remorse for his conduct in this matter. Erm appreciates the seriousness of his conduct and the impact upon his client.
  4. Remoteness of prior offense. *Standards* § 9.32(m).

21.

Under the *Standards*, “[s]uspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to the 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* § 7.2.

22.

Oregon case law also supports the imposition of a suspension in this matter. *See In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004) (court stated that it has generally imposed a 60-day suspension as appropriate for neglectful conduct, including failing to adequately communicate with clients); *see also In re Castanza*, 350 Or 293, 253 P3d 1057 (2011) (attorney suspended for 60 days when he improperly withdrew from representing two clients in a civil action, and neglected other aspects of the case); *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (attorney suspended for 30 days for failing to adequately communicate with his client); *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (attorney with no prior discipline suspended for 60 days for failure to complete one client’s legal matter); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (attorney 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 for more than a year); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (attorney was suspended for 120 days—60 days each for failing to cooperate with the Bar and for knowingly neglecting clients’ cases for several months by failing to communicate with clients and opposing counsel); *In re Kissling*, 303 Or 638, 740 P2d 179

(1987) (attorney was suspended for 63 days when he failed to investigate and pursue claims for several clients and had misled them about his inaction); *In re Dugger*, 299 Or 21, 697 P2d 973 (1985) (attorney suspended for 63 days when he neglected client's case and misrepresented the status of the case to the client); *In re Morrow*, 297 Or 808, 688 P2d 820 (1984) (attorney was suspended for 60 days for his neglect in filing a civil action while leading his client to believe that the matter had been filed and that the lawyer was negotiating a settlement).

23.

Consistent with the *Standards* and Oregon case law, the parties agree that Erm shall be suspended for 30 days for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), and RPC 1.16(d), the sanction to be effective February 1, 2016, or 10 days after approval by the Disciplinary Board, whichever is later.

24.

Erm 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, Erm has arranged for Christine M. Wallace, an active member of the Bar, to either take possession of or have ongoing access to Erm's client files and serve as the contact person for clients in need of the files during the term of his suspension. Erm represents that Christine M. Wallace has agreed to accept this responsibility.

25.

Erm 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. Erm 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.

26.

Erm 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.

27.

Erm 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 Erm is admitted: Washington.

28.

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

EXECUTED this 31st day of December, 2015.

/s/ Rene Erm II

Rene Erm II

OSB No. 961454

EXECUTED this 8th day of January, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-105  
)  
WILLIAM L. GHIORSO, )  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 5.5(a) and ORS 9.160(1). Stipulation  
for Discipline. Public reprimand.  
Effective Date of Order: January 20, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and William Ghiorso is publicly reprimanded for violation of RPC 5.5(a) and ORS 9.160(1).

DATED this 20th day of January, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

/s/ James Edmonds  
James Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

William Ghiorso, attorney at law (“Ghiorso”), 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.

Ghiorso was admitted by the Oregon Supreme Court to the practice of law in Oregon in 1990 and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Ghiorso 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 October 3, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Ghiorso for alleged violations of RPC 5.5(a) (unauthorized practice of law) and ORS 9.160(1) (holding oneself out as a lawyer in Oregon when not an active member of the Bar). 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 July 17, 2015, after multiple letters and notices from the Bar, Ghiorso was suspended for failing to pay his Professional Liability Fund (“PLF”) assessment.

6.

On the first day of his suspension, Ghiorso appeared in court to argue pretrial motions, which resulted in a continuance of the trial.

7.

On July 20, 2015, Ghiorso’s office received another letter from the Bar, this one notifying him of the actual suspension. However, he was out of the office on personal time, and did not see it until he returned on July 22, 2015. At that time, he took immediate action

to apply for reinstatement, revealing that he had practiced law while suspended in the personal-injury case on July 17, 2015. He was reinstated that same day.

### Violations

8.

Ghiorso admits that, by appearing in court on behalf of a client and participating in the hearing at a time when he was suspended from the practice of law, he engaged in the unauthorized practice of law in violation of RPC 5.5(a), and held himself as an Oregon lawyer at a time that he was suspended from the Bar, in violation of ORS 9.160(1).

### Sanction

9.

Ghiorso 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. *Standards* § 3.0.

- a. **Duty Violated.** Ghiorso violated his duty as a professional to refrain from the unauthorized practice of law. *Standards* § 7.0.
- b. **Mental State.** Ghiorso acted negligently by failing to heed a substantial risk that circumstances exist or that a result will follow, that is a deviation from the standard of care that a reasonable lawyer would exercise in the situation by failing to take steps to insure that his PLF assessment would be paid in a timely fashion. *Standards* at 7.
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury can be considered. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “[T]he unauthorized practice of law inherently carries with it the potential to injure the legal system.” *In re Koliha*, 330 Or 402, 409, 9 P3d 102 (1994), citing *In re Whipple*, 320 Or 476, 488, 886 P2d 7 (1994). There was potential injury to the client in that Ghiorso may have had no malpractice coverage for his acts or representations as an inactive member of the Bar. See *In re Devers*, 328 Or 230, 242, 974 P2d 191 (1999) (potential for client injury exists because of lack of malpractice coverage).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior record of discipline. *Standards* § 9.22(a). In 2012, Ghiorso was admonished for the same misconduct, which was found to violate RPC

5.5(a) and ORS 9.160(1). *In re Ghiorso*, OSB Case No. 12-76, Letter of Adm. (May 7, 2012). A letter of admonition is considered as an aggravating factor 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).

Ghiorso was also reprimanded in 2013 for violations of RPC 1.8(a) and RPC 1.8(e), when he participated in two loan transactions with a personal-injury client without obtaining informed consent, and loaned the same client money beyond the costs of the litigation.

2. A pattern of misconduct. *Standards* § 9.22(c). This matter, combined with Ghiorso's prior—nearly identical—misconduct show a pattern of negligence with respect to his professional obligations.
3. Substantial experience in the practice of law. *Standards* § 9.22(i). Ghiorso was admitted in Oregon in 1990.

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

1. Timely good-faith effort to make restitution or to rectify consequences of misconduct. *Standards* § 9.22(d). Ghiorso took steps to be reinstated as soon as he was actually aware of the suspension and fully disclosed his actions.
2. Full and free disclosure and cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).

10.

Under the ABA *Standards*, an admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is in violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system. *Standards* § 7.4. However, a reprimand is generally appropriate when a lawyer has received an admonition 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* § 8.3(b). Moreover, Ghiorso's aggravating factors outweigh those in mitigation and suggest that an upward departure from the presumptive sanction is appropriate. *Standards* § 9.21.

11.

Oregon case law is consistent with the imposition of a public reprimand under these circumstances. See *In re Smith*, 22 DB Rptr 113 (2008) (reprimand for appearing in court on behalf of client during a period of suspension for nonpayment of bar dues); *In re Davidson*, 20 DB Rptr 264 (2006) (reprimand for practicing for five days not realizing she was

suspended for nonpayment of bar dues); *In re Dixon*, 17 DB Rptr 102 (2003) (attorney practiced for eight days before realizing she was suspended for nonpayment of bar dues).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Ghiorso shall be publicly reprimanded for violation of RPC 5.5(a) and ORS 9.160(1), the sanction to be effective upon approval by the Disciplinary Board.

13.

Ghiorso 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.

Ghiorso 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 Ghiorso is admitted: None.

15.

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

EXECUTED this 5th day of January, 2016.

/s/ William L. Ghiorso

William L. Ghiorso

OSB No. 902706

EXECUTED this 5th day of January, 2016.

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. 14-120  
)  
LARRY WRIGHT, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Philip Alan Johnson, Chairperson  
John T. Bagg  
Dorothy A. Fallon, Public Member  
Disposition: Violation of RPC 8.1(a)(2). Trial Panel Opinion. 120-  
day suspension.  
Effective Date of Opinion: February 3, 2016

**TRIAL PANEL OPINION**

**PROCEDURAL HISTORY**

This matter comes before this Trial Panel of the Oregon State Bar Disciplinary Board alleging that the Accused knowingly failed to respond to a lawful demand for information from a disciplinary authority. We take the facts from the Oregon State Bar’s Memorandum regarding Sanctions and the exhibits submitted with that document. The Bar filed a Formal Complaint against the Accused on June 22, 2015, for a violation of the Rule of Professional Conduct (RPC) 8.1(a)(2). A copy of the complaint was personally served to the Accused on June 23, 2015. He did not respond. The Bar petitioned the Disciplinary Board Regional Chair to declare the Accused in default. On August 24, 2015, the Regional Chair entered an order of default against the Accused. This panel was convened on September 23, 2015. The complaint was sent to the panel on October 1, 2015. On October 21, 2015, this panel, pursuant to its authority under Procedural Rule (PR) 5.8(b), requested from the Accused any additional information he might choose to provide. He sent nothing. On October 28, 2015, this panel received a memorandum of recommended sanction from the Bar. On that same date, the record closed.

## FINDINGS OF FACT

On or around June 3, 2014, the Client Assistance Office (“CAO”) requested that the Accused respond to a complaint that had been filed against him by F. Jason Seibert. The Accused initially responded to the CAO, but then subsequently stopped any further communication with that agency. The matter was referred to the Bar’s Disciplinary Counsel’s Office (“DCO”). On September 15, 2014, the DCO sent a letter to the Accused requesting specific information relating to the complaint filed by Mr. Seibert. The Accused did not respond. On October 10, 2014, the DCO followed up with an additional certified letter requesting a response. That letter was signed for at the office of the Accused and was not returned via mail. The Accused did not respond. On October 20, 2014, the DCO sent additional follow-up emails to all known email addresses of the Accused and left a telephone message at the office of American West Property Management requesting a response. He did not respond. On June 23, 2015, the Accused was personally served with a formal complaint. He did not respond. On October 21, 2015, this Trial Panel provided the Accused yet another opportunity to explain his actions. He did not respond.

## VIOLATION

RPC 8.1(a)(2) provides:

[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.

The Trial Panel finds that the Accused intentionally violated this rule when he refused to respond to all attempts to contact him. We consider his failure to respond as intentional, rather than merely neglect or procrastination, because it occurred over a lengthy period of time (more than a year) and the Accused knew during that time that he had a duty as a member of the Bar to respond. *See In re Sousa*, 323 Or 137, 144, 915 P2d 408 (1996); *In re Loew*, 292 Or 806, 810–11, 642 P2d 1171 (1982). We also note that the Bar attempted to contact the Accused through various different mediums (email, letter, personal service, and phone) and in all cases he did not respond. We consider the facts alleged as true and therefore establishing that the Accused acted knowingly and intentionally in failing to respond to a lawful request for information. *In re Kluge*, 332 Or 251, 262, 27 P3d 102 (2001).

## SANCTION

The Trial Panel is bound to consider four factors in determining the appropriate sanctions for violation of the rules of conduct for lawyers: (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. American Bar Association’s *Standards for Imposing Lawyer Sanctions* (1992) (“Standards”) § 3.0; *In re Sousa*, 323 Or 137, 145, 915 P2d 408 (1996); *In re Miles*, 324 Or 218, 221, 923 P2d 1219 (1996). In this case, the duty violated was to the legal profession. *In re Miles*, 324 Or at 221.

As the court noted regarding the conduct in *In re Miles*, 324 Or at 221: “In failing to cooperate with the Bar’s investigation, the accused violated [his] duty to the legal profession. ABA Standard 7.0; *see also In re Schaffner*, 323 Or 472, 479 & n. 6, 918 P2d 803 (1996) (applying that standard in similar circumstances).” The Accused did so knowingly when he failed to respond to the certified letter or the complaint. We agree with the Bar’s assertion in this case that the Accused’s failure to respond caused actual and potential injury to the legal profession and the public by undermining and unnecessarily delaying the resolution of this disciplinary matter. As the Oregon Supreme Court noted in *In re Miles*, we so find in this case:

[W]e take this opportunity to emphasize the seriousness with which this court views the failure of a lawyer to cooperate with a disciplinary investigation. The public protection provided by [RPC 8.1(a)(2)] is undermined when a lawyer accused of violating . . . the Code of Professional Responsibility fails to participate in the investigatory process. Indeed, the disciplinary system likely would break down if the mandatory cooperation rule set forth in [RPC 8.1(a)(2)] were not in place, given the lack of incentive for a lawyer to cooperate with a Bar investigation if that lawyer had the option of not cooperating.

*In re Miles*, 324 Or at 222–23 (footnote omitted).

This panel must now analyze the aggravating and mitigating circumstances in determining the appropriate sanction. *Standards* § 9.0; *In re Miles*, 324 Or at 221; *In re Hereford*, 306 Or 69, 756 P2d 30 (1998). The aggravating factors in this case include that the Accused acted with a selfish motive in failing to respond to the disciplinary investigation. *Standards* § 9.22(b). He has substantial experience in the practice of law having been a licensed member of the Bar since September 1984. *Standards* § 9.22(i). He intentionally failed to comply with the rules of the disciplinary agency, in this case the Rules of Professional Conduct. *Standards* § 9.22(e). The mitigating factor in this case is a lack of any prior discipline. *Standards* § 9.32(a). The lack of prior discipline by the Accused, however, does not outweigh the other aggravating factors in this case and *Standards* § 7.2 supports a suspension. That standard states: “Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.”

The Oregon Supreme Court has previously held that a 120-day suspension with a requirement for formal reinstatement under RPC 8.1 is appropriate in cases when a lawyer refuses to comply with the disciplinary authority, even in a situation when that violation is the sole violation of the Rules of Professional Conduct. *In re Miles*, 324 Or 218; *In re Hereford*, 306 Or 69. We therefore agree that a 120-day suspension is appropriate in this case and that the Accused should be required to apply for reinstatement under RPC 8.1. Requiring reinstatement after a period of suspension will allow the Bar, the Board of Governors, and the Oregon Supreme Court to evaluate fully the character and fitness of the Accused to determine if his reinstatement will not be a further detriment to the public and the profession.

Cite as *In re Wright*, 30 DB Rptr 15 (2016)

RPC 8.1(b); *see also In re Coyner*, 342 Or 104, 149 P3d 1118 (2006). Although probation is an option in this type of case pursuant to RPC 6.2, the Accused has presented no evidence that probation should be the appropriate remedy in this case and we therefore decline to consider it further.

### **ORDER**

For the aforementioned reasons, the Trial Panel finds that the Accused violated RPC 8.1(a)(2) and is hereby suspended from the practice of law for 120 days. Following his period of suspension, the Accused shall be required to seek formal reinstatement under RPC 8.1.

IT IS SO ORDERED.

Dated this 2nd day of December, 2015:

/s/ Philip Alan Johnson, II

Philip Alan Johnson II, Trial Panel Chair

/s/ John T. Bagg

John T. Bagg, Trial Panel Member

/s/ Dorothy A. Fallon

Dorothy A. Fallon, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 14-12, 14-94, 14-118,  
) and 14-144  
)  
JEFFREY DICKEY, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson

Counsel for the Accused: None

Disciplinary Board: David W. Hercher, Chairperson  
David A. Rabbino  
Joyce E. Ironside, Public Member

Disposition: Violation of RPC 1.5(c)(3), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 8.1(a)(1), RPC 8.1(a)(2), RPC 8.4(a)(3), RPC 8.4(a)(4). Trial Panel Opinion. Disbarment.

Effective Date of Opinion: February 6, 2016

**TRIAL PANEL OPINION**

The matter came before a Trial Panel of the Disciplinary Board consisting of David W. Hercher, chair; David A. Rabbino; and Joyce Ironside, public member. Kellie F. Johnson represented the Oregon State Bar. The accused, Jeffrey Dickey, 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 Dickey violated Oregon Rules of Professional Conduct 1.5(c)(3); 1.15-1(a), (c), and (d); 8.1(a)(1) and (2); and 8.4(a)(3) and (4). We further determine that he should be disbarred.

**1. PROCEDURAL STATUS**

An Amended Formal Complaint was filed on February 18, 2015, against Dickey, claiming violations of the RPCs in seven causes of complaint. The Bar’s first five causes of complaint relate to his representation of John Patapoff, who had hired Dickey to represent

him on criminal matters and to handle Patapoff's personal affairs. In its first cause of complaint, the Bar claimed that, in connection with Patapoff's property and proceeds thereof possessed by Dickey, Dickey violated RPC 1.15-1(a) (failure to safeguard client property in his possession), RPC 1.15-1(d) (failure to safeguard client property in his possession, failure to notify a client upon receiving funds or other property in which the client has an interest, failure to promptly deliver to the client any funds or other property that the client is entitled to receive, and failure to promptly render a full accounting regarding such property upon request by the client), and RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on his fitness to practice law). In its second cause of complaint, the Bar claimed that, in connection with Dickey's representation of Patapoff in a criminal matter, Dickey violated RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). In its third and fourth causes of complaint, the Bar claimed that, in connection with the investigation by an Adult Protective Services Investigator and Dickey's communications with Patapoff, Dickey violated RPC 8.4(a)(3). In its fifth cause of complaint, the Bar claimed that, in connection with Dickey's response to the Bar's investigations of complaints against him, he violated RPC 8.1(a)(1) (knowingly making a false statement of material fact in connection with a disciplinary matter), and RPC 8.1(a)(2) (knowingly failing to respond to a lawful demand for information from a disciplinary authority in connection with a disciplinary matter).

The Bar's sixth cause of complaint relates to Dickey's representation of Jose Bazan-Garcia in a criminal matter, in connection with which the Bar claimed that Dickey violated RPC 1.15-1(d).

The Bar's seventh cause of complaint relates to Dickey's representation of Alex Cavender, in connection with which the Bar claimed that Dickey violated RPC 1.5(c)(3) (collecting a nonrefundable fee in the absence of required terms), RPC 1.15-1(c) (failure to deposit advance fees of another in a lawyer trust account), and RPC 1.15-1(d).

On April 1, 2015, Dickey answered the Amended Formal Complaint.

On July 16, 2015, the Bar filed and served its Motion to Strike Answer. In that motion, the Bar claimed, among other things, that Dickey had failed to obey the Bar's subpoena to appear for his deposition on July 9, 2015. Also on July 16, the Bar filed and served its OSB's Notice of Intent to Take Default, in which the Bar gave Dickey notice that the Bar intended to apply on or after July 28, 2015, for an order of default for his failure to appear for his deposition. On August 17, 2015, the Bar filed and served its Motion for Order of Default based on the striking of Dickey's answer.

On August 31, 2015, the trial-panel chair signed an Order re Motion to Strike Answer, striking Dickey's answer, and an Order of Default, entering Dickey's default for failing to appear for his deposition.

On August 11, 2015, the chair wrote to the parties and asked them to inform him by August 25, 2015, whether either of them requested a hearing at which the panel would consider both (1) any argument regarding whether the allegations of the complaint suffice to constitute RPC violations and (2) any argument and evidence regarding the appropriate sanction, should the panel determine that violations occurred. In that letter, the chair also requested that, if no hearing is held, the parties file and serve any briefs or other written submissions by September 8, 2015. On August 28, 2015, the chair again wrote to the parties to (1) tell them that neither had requested a hearing and (2) remind them of the September 8 deadline.

On September 8, the Bar filed and served its Oregon State Bar’s Sanction Memorandum. Dickey has not filed any brief or other written submission, other than his stricken answer.

## 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 Dickey’s answer was stricken and his default entered.

#### *2.1(a) First cause of complaint*

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 lawyers.<sup>1</sup>

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

In early 2013, 69-year-old Patapoff was charged, arrested, and held in custody at the Washington County Jail on multiple felony charges. While in custody, Patapoff retained Dickey to represent him on his pending felony criminal matters and to handle his personal affairs, including vacating his apartment, storing or selling his personal property, storing his vehicle, and paying his bills. At all times mentioned herein, Patapoff remained in custody.<sup>3</sup>

In late March 2013, Dickey drafted a General Durable Power of Attorney (“POA”) for Patapoff to sign naming Dickey as Patapoff’s attorney-in-fact. The POA specifically restricted Dickey from using Patapoff’s property for Dickey’s benefit. Dickey presented the

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<sup>1</sup> Complaint at 1, ¶ 1.

<sup>2</sup> Complaint at 1, ¶ 2.

<sup>3</sup> Complaint at 1, ¶ 3.

original POA to Patapoff for signature. After Patapoff executed the POA, Dickey retained the signed original but did not give Patapoff a copy of the document despite multiple requests.<sup>4</sup>

On Patapoff's behalf, Dickey sold multiple items of Patapoff's personal property, including gold and diamond jewelry, a television, and furniture. Dickey collected the proceeds of these sales. Dickey also collected approximately \$2,250 from individuals who owed Patapoff money. Patapoff asked Dickey multiple times for a list of the items sold and an accounting of the sales proceeds and other funds collected, but Dickey did not provide this information to Patapoff.<sup>5</sup>

When Patapoff signed the POA, he had approximately \$13,000 in his Wells Fargo checking account. In addition, Patapoff received approximately \$1,335 in Social Security benefits each month by electronic deposit into the Wells Fargo account. Patapoff requested that Dickey access Patapoff's money in his Wells Fargo account to pay off his utilities accounts, cell phone account, and car insurance and to put the remaining funds into his Washington County inmate account. Patapoff did not authorize Dickey to use the Wells Fargo account for any purpose other than to pay Patapoff's own expenses. Patapoff did not authorize Dickey to withdraw funds from the Wells Fargo account to pay for any legal or other services Dickey rendered to him.<sup>6</sup>

Patapoff repeatedly requested that Dickey provide him copies of his monthly Wells Fargo account statements and an accounting of the funds Dickey had collected or bills Dickey paid on Patapoff's behalf. Dickey did not provide the statements or an accounting of funds.<sup>7</sup>

Between late 2013 and early 2014, Patapoff agreed to pay Dickey a 40 percent contingency fee to handle a civil-forfeiture claim against the federal government. Pursuant to their agreement, Dickey was required to deposit the net recovery into the Wells Fargo account. Dickey recovered \$9,800 for Patapoff on the claim but failed to disburse any of the funds to Patapoff or the Wells Fargo account, or to provide an accounting of the funds to Patapoff.<sup>8</sup>

Using the POA, Dickey obtained a debit card on the Wells Fargo account in his own name. Between May 2013 and July 2014, Dickey used the debit card to make multiple unauthorized ATM cash withdrawals and debit purchases for his own use, including approximately 169 cash withdrawals at bars, casinos, or other nonbank ATMs; approximately 133

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<sup>4</sup> Complaint at 2, ¶ 4.

<sup>5</sup> Complaint at 2, ¶ 5.

<sup>6</sup> Complaint at 2, ¶ 6.

<sup>7</sup> Complaint at 3, ¶ 7.

<sup>8</sup> Complaint at 3, ¶ 8.



iTunes or Hulu.com online purchases; approximately 131 purchases at gas stations, restaurants, or other retail businesses; and approximately 23 cash withdrawals at Wells Fargo Bank branches.<sup>9</sup>

When he withdrew or spent Patapoff's funds from the Wells Fargo account, Dickey knowingly and intentionally converted client funds when he knew that he was not authorized to use Patapoff's funds for his personal expenses.<sup>10</sup>

***2.1(b) Second cause of complaint***

A trial-readiness hearing was set in Patapoff's criminal case for May 16, 2014, with trial set to begin on May 20, 2014. Dickey was aware of the hearing and of his obligation to appear, but knowingly failed to appear with Patapoff.<sup>11</sup>

When he did not appear in court with Patapoff, Washington County Circuit Court Judge Kirsten Thompson directed her staff to contact Dickey. Dickey did not respond to the court's telephone calls or emails. As a result of Dickey's failure to appear, Judge Thompson appointed new counsel to Patapoff's criminal matter.<sup>12</sup>

***2.1(c) Third cause of complaint***

Multnomah County Adult Protective Services Investigator Steven Jackson contacted Dickey to investigate a report made in February 2014 about suspicious transactions that occurred on Patapoff's Wells Fargo account. In March 2014, Jackson told Dickey that he (Dickey) was a potential suspect in possible elder financial abuse of Patapoff.<sup>13</sup>

In March 2014, Dickey told Jackson that his office assistant and domestic partner, Ezekiel Kirk Stroschein, had inadvertently confused Dickey's debit card for the Wells Fargo account with Dickey's debit card for Dickey's own checking account. Dickey represented that he did not know that Stroschein had been using the Wells Fargo account debit card and promised to take steps to safeguard the card in the future. Dickey represented that Stroschein had conducted all of the unauthorized transactions on the Wells Fargo account.<sup>14</sup>

When Dickey made the statements described above, he knew that they were material and false.<sup>15</sup>

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<sup>9</sup> Complaint at 3, ¶ 9.

<sup>10</sup> Complaint at 3, ¶ 10.

<sup>11</sup> Complaint at 4, ¶ 12.

<sup>12</sup> Complaint at 4-5, ¶ 14.

<sup>13</sup> Complaint at 5, ¶ 17.

<sup>14</sup> Complaint at 5, ¶ 18.

<sup>15</sup> Complaint at 6, ¶ 19.

***2.1(d) Fourth cause of complaint***

After he had recovered approximately \$9,800 for Patapoff on the civil-forfeiture claim, Dickey told Patapoff that he had collected a 40 percent contingency fee and deposited the rest of the funds into the Wells Fargo account.<sup>16</sup>

In May 2014, Dickey told Patapoff that he had recently learned that Stroschein had inadvertently confused Dickey's debit card for the Wells Fargo account with Dickey's debit card for Dickey's own checking account. Dickey represented that he had not known that Stroschein had been using the Wells Fargo account debit card and promised to take steps to safeguard the card in the future. Dickey represented that Stroschein had conducted all of the unauthorized transactions on the Wells Fargo account.<sup>17</sup>

When Dickey made those statements, he knew that they were material and false.<sup>18</sup>

***2.1(e) Fifth cause of complaint***

In July 2014, Patapoff submitted a complaint to the Bar regarding Dickey's conduct. Thereafter, the Disciplinary Counsel's Office ("DCO") asked Dickey to describe how he had handled Patapoff's funds, to provide an accounting of Patapoff's funds in his possession, to identify who had used the Wells Fargo account debit card, and to provide copies of bank records for the Wells Fargo account and Dickey's personal, business, and IOLTA accounts.<sup>19</sup>

In response to DCO's inquiries, Dickey made the following representations of fact to DCO staff on July 16, 2014:

1. That Stroschein had made all of the ATM withdrawals and purchases with the Wells Fargo account debit card;
2. That Stroschein's use of the Wells Fargo account debit card had been accidental;
3. That Dickey had been unaware of Stroschein's unauthorized use of the Wells Fargo account debit card until Jackson interviewed him about possible financial abuse of Patapoff;
4. That none of the ATM withdrawals or debit card purchases on the Wells Fargo account represented Dickey's collection of fees owed for services rendered to Patapoff; and

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<sup>16</sup> Complaint at 6, ¶ 22.

<sup>17</sup> Complaint at 6, ¶ 23.

<sup>18</sup> Complaint at 7, ¶ 24.

<sup>19</sup> Complaint at 7, ¶ 27.

5. That Dickey had deposited into his IOLTA account the approximately \$9,800 he had recovered on Patapoff's civil-forfeiture claim and that, after paying himself a 40 percent contingency fee, he deposited the remaining funds into the Wells Fargo account.

When Dickey made those representations to DCO staff, Dickey knew that they were material and false.<sup>20</sup>

In response to DCO's inquiries, Dickey made the following representations of fact to DCO staff on September 4, 2014:

1. That he personally had made some, but not all, of the ATM withdrawals and purchases with the Wells Fargo account debit card; and

2. That Patapoff had authorized him to use the Wells Fargo account to compensate himself for services rendered to Patapoff.

When Dickey made these representations to DCO staff, Dickey knew that they were material and false.<sup>21</sup>

In response to DCO's inquiries, Dickey represented to DCO staff on September 18, 2014, that all of the ATM withdrawals and purchases with the Wells Fargo account debit card were made as draws against monies owed by Patapoff to Dickey. When Dickey made this representation to DCO staff, Dickey knew that it was material and false.<sup>22</sup>

During the course of DCO's investigation of Patapoff's complaint regarding his conduct, Dickey acknowledged but did not comply with the following requests for information or records:

1. An accounting of Patapoff's jewelry or the sales proceeds thereof;

2. An accounting of funds collected from three individuals on Patapoff's behalf;

3. An accounting of the funds recovered on Patapoff's civil-forfeiture claim;

4. Monthly bank statements for Dickey's IOLTA account from December 2012 to October 2014;

5. A description of how Dickey took possession of Patapoff's car and how Stroschein was allowed to operate the vehicle under the influence of intoxicants;

6. The location of Patapoff's "Passkey" file folder, Social Security card, birth certificate, and other documents;

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<sup>20</sup> Complaint at 7-8, ¶ 28.

<sup>21</sup> Complaint at 8, ¶ 29.

<sup>22</sup> Complaint at 8-9, ¶ 30.

7. A list of the specific purchases and ATM withdrawals Dickey personally made on the Wells Fargo account;

8. An explanation why Dickey did not tell Patapoff or Jackson that he had knowingly withdrawn or spent funds from the Wells Fargo account in payment of fees; and

9. A statement whether his representations to Patapoff or Jackson were true or false.<sup>23</sup>

**2.1(f) Sixth cause of complaint**

In 2012, Dickey represented Jose Bazan-Garcia in a criminal proceeding in Clackamas County Circuit Court. The state case was resolved by plea agreement in September 2012.<sup>24</sup>

In July 2014, a federal grand jury indicted Bazan-Garcia on one count of illegal reentry, a Class C felony. Bazan-Garcia was arrested and detained. Lawyer Ruben L. Iniguez represented Bazan-Garcia in the federal case.<sup>25</sup>

On August 4, 2014, Iniguez's investigator, Martin Caballero, provided Dickey Bazan-Garcia's signed release and requested a complete copy of Dickey's file from the state case, including all log notes. Caballero explained that Iniguez needed Dickey's file as soon as possible because the government's plea offer in the federal case would automatically expire on September 2, 2014, and Iniguez needed to review Dickey's file to assess the offer. Dickey timely received the request.<sup>26</sup>

Bazan-Garcia was entitled to receive a copy of his file in Dickey's possession.<sup>27</sup>

Despite numerous voice and email messages from Iniguez and Caballero, Dickey did not deliver any portion of the file from the state case until September 10, 2014, one week after the government's plea offer was set to expire. Dickey did not provide a complete copy of Bazan-Garcia's file until November 7, 2014.<sup>28</sup>

**2.1(g) Seventh cause of complaint**

In March 2013, Christy Brewster retained Dickey to represent her 23-year-old son, Alex Cavender, on criminal charges in Clackamas County and paid Dickey \$5,200 as a flat fee earned upon receipt. The fee agreement failed to explain some or all of the following: (a)

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<sup>23</sup> Complaint at 9, ¶ 31.

<sup>24</sup> Complaint at 10, ¶ 34.

<sup>25</sup> Complaint at 10, ¶ 35.

<sup>26</sup> Complaint at 10, ¶ 36.

<sup>27</sup> Complaint at 11, ¶ 37.

<sup>28</sup> Complaint at 11, ¶ 38.

that the funds would not be deposited into a lawyer trust account and (b) the client could discharge the lawyer at any time and in that event might be entitled to a refund or all or part of the fee if the services for which the fee was paid will not be completed.<sup>29</sup>

Dickey failed to deposit and keep in a lawyer trust account the \$5,200 that Brewster had advanced.<sup>30</sup>

On March 29, 2013, Brewster terminated the representation and requested a statement of Dickey's fees and a refund of any unearned balance of her \$5,200. Dickey told Brewster that the figures would not be available until the end of April. When that date in April passed with no further response, Brewster asked Dickey for an accounting twice in May 2013.<sup>31</sup>

In June 2013, Dickey told Brewster that the fee was earned upon receipt and no refund would be made. Dickey failed to send Brewster an itemized statement until June 15, 2013, after Brewster's son retained new counsel.<sup>32</sup>

Dickey failed to timely provide Brewster with a full accounting regarding the \$5,200 she had advanced.<sup>33</sup>

## **2.2 Other facts allegations by the Bar, not in the Formal Complaint**

The Bar's Sanction Memorandum made factual allegations in addition to those in the Formal Complaint. In view of our decision below, which is based only on the allegations of the Formal Complaint, we need not address the additional allegations of the Sanction Memorandum.

## **3. DISCUSSION AND CONCLUSIONS OF LAW**

The Bar's factual assertions against Dickey in the Formal Complaint are deemed to be true by virtue of the orders striking Dickey's answer and entering his default.<sup>34</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>35</sup>

Below, we consider separately whether the Formal Complaint's allegations suffice to constitute clear and convincing evidence that Dickey violated RPCs. We conclude that the

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<sup>29</sup> Complaint at 11, ¶ 41.

<sup>30</sup> Complaint at 12, ¶ 6 [*sic*; should be 42].

<sup>31</sup> Complaint at 12, ¶ 7 [*sic*; should be 43].

<sup>32</sup> Complaint at 12, ¶ 8 [*sic*; should be 44].

<sup>33</sup> Complaint at 12, ¶ 9 [*sic*; should be 45].

<sup>34</sup> *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001).

<sup>35</sup> *See In re Koch*, 345 Or 444, 198 P3d 910 (2008); *see also In re Kluge*, 332 Or 251 (describing two-step process).

Amended Formal Complaint constitutes clear and convincing evidence that he violated each of the RPCs of which the Bar accuses him of violating.

**3.1 The allegations of the first cause of complaint state violations of RPC 1.15-1(a), RPC 1.15-1(d), and RPC 8.4(a)(3).**

RPC 1.15-1(a) requires that, among other things, a lawyer hold property of a client that is in the lawyer's possession separate from the lawyer's own property. RPC 1.15-1(d) requires that, among other things and with immaterial exceptions, a lawyer promptly deliver to the client any funds or other property that the client is entitled to receive and, upon request by the client, the lawyer promptly render a full accounting regarding the property.

Under RPC 8.4(a)(3), it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law. A lawyer who holds money in trust for another and converts the money to the lawyer's own use engages in conduct involving dishonesty within the meaning of the rule.<sup>36</sup> To find dishonesty in a lawyer's handling of client funds or property, the court asks two questions: (1) Does the lawyer's conduct amount to conversion? (2) If it does, did the lawyer have the requisite intent such that conversion constituted conduct involving dishonesty?<sup>37</sup> One commits the act of conversion when, without the legal right to do so, one exercises dominion or control over a chattel that so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.<sup>38</sup>

Patapoff's power of attorney restricted Dickey from using Patapoff's property to benefit Dickey. Patapoff did not otherwise authorize Dickey to use Patapoff's checking account for any purpose but to pay Patapoff's own expenses. Dickey thus had no legal right to exercise dominion or control over Patapoff's funds or other property in such a way as to interfere with Patapoff's use of them. Dickey's use of Patapoff's checking account constituted conversion.

Dickey failed to hold Patapoff's property separate from Dickey's; Dickey did not deliver to Patapoff the funds that Patapoff was entitled to received; and Dickey did not promptly render a full accounting of Patapoff's property upon Patapoff's request. Thus, Dickey violated RPC 1.15-1(a), RPC 1.15-1(d), and RPC 8.4(a)(3).

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<sup>36</sup> *In re Phelps*, 306 Or 508, 760 P2d 1331 (1988).

<sup>37</sup> *In re Peterson*, 348 Or 325, 333, 232 P3d 940 (2010) (citing *In re Martin*, 328 Or 177, 184, 970 P2d 638 (1998)).

<sup>38</sup> *In re Martin*, 328 Or at 184 (quoting *Restatement (Second) of Torts* § 222A (1965)).

**3.2 The allegations of the second cause of complaint state a violation of RPC 8.4(a)(4).**

Under RPC 8.4(a)(4), it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. To establish a violation of that rule, the Bar must show that (1) the lawyer's action or inaction was improper, (2) the lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding, and (3) the lawyer's conduct had or could have had a prejudicial effect upon the administration of justice.<sup>39</sup> The administration of justice includes the procedural functioning of a proceeding and the substantive interests of parties to the proceeding.<sup>40</sup>

Dickey's failure to appear for Patapoff's hearing or to respond to telephone calls and emails from Judge Thompson's staff constituted conduct that was prejudicial to the administration of justice. Thus, he violated RPC 8.4(a)(4).

**3.3 The allegations of the third cause of complaint state a violation of RPC 8.4(a)(3).**

Dickey's knowingly false misstatements to Jackson constituted conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on his fitness to practice law. Thus, he violated RPC 8.4(a)(3).

**3.4 The allegations of the fourth cause of complaint state a violation of RPC 8.4(a)(3).**

Dickey's knowingly false statements to Patapoff regarding Stroschein's withdrawals from the Wells Fargo account were conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on his fitness to practice law. Thus, Dickey violated RPC 8.4(a)(3).

**3.5 The allegations of the fifth cause of complaint state violations of RPC 8.1(a)(1) and (2).**

RPC 8.1(a)(1) prohibits a lawyer in connection with a disciplinary matter from knowingly making a false statement of material fact. RPC 8.1(a)(2) prohibits a lawyer in connection with a disciplinary matter from knowingly failing to respond to a lawful demand for information from a disciplinary authority.

Dickey's knowingly false and material statements to DCO staff constituted knowingly false statements of material fact in connection with a disciplinary matter. His failure to comply with DCO's request for information or records constituted making false statements of material fact and knowingly failing to respond to a lawful demand for information from a disciplinary authority. Thus, he violated RPCs 8.1(a)(1) and (2).

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<sup>39</sup> *In re Jackson*, 347 Or 426, 436, 223 P3d 387 (2009).

<sup>40</sup> *In re Haws*, 310 Or 741, 747, 801 P2d 818 (1990).

### **3.6 The allegations of the sixth cause of complaint state a violation of RPC 1.15-1(d).**

RPC 1.15-1(d) requires a lawyer to promptly deliver to the client any funds or other property that the client is entitled to receive. A client is entitled to receive the client's file, absent a valid lien.<sup>41</sup>

Dickey failed to promptly deliver to Bazan-Garcia Dickey's file regarding Bazan-Garcia, which Bazan-Garcia was entitled to receive. Thus, Dickey violated RPC 1.15-1(d).

### **3.7 The allegations of the seventh cause of complaint state violations of RPC 1.5(c)(3) and RPC 1.15-1(c) and (d).**

RPC 1.5(c)(3) prohibits a lawyer from entering into an arrangement for, charging, or collecting a fee denominated as "earned on receipt," "nonrefundable," or in similar terms unless it is pursuant to a written agreement signed by the client that explains that the funds will not be deposited into the lawyer's trust account and the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed. RPC 1.15-1(c) requires that a lawyer deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable," or similar terms and complies with RPC 1.5(c)(3).

Dickey entered into a fee agreement to represent Cavender and accepted a fee as a flat fee, earned on receipt, but the written fee agreement failed to include some or all of the required statements. Dickey failed to deposit the fee in his client trust account. When Dickey's representation of Cavender ended, Dickey refused to provide a statement of any unearned portion of the fee. Thus, Dickey violated RPC 1.5(c)(3) and RPC 1.15-1(c) and (d).

## **4. SANCTION**

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>42</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>43</sup> The presumptive sanction under the

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<sup>41</sup> OSB Formal Ethics Op Nos 2005-90, 2005-125. *See, e.g., In re Snyder*, 348 Or 307, 232 P3d 952 (2010).

<sup>42</sup> *In re Herman*, 357 Or 273, 289, 348 P3d 1125 (2015).

<sup>43</sup> *Standards*, § 3.0; *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008).



*Standards* should be adjusted based on the presence of aggravating or mitigating circumstances.<sup>44</sup> Finally, the sanction must be consistent with Oregon case law.<sup>45</sup>

**4.1(a) Ethical duties that Dickey violated**

Under the *Standards*, generally the appropriate sanction for violation of an ethical duty, before consideration of aggravating and mitigating factors, turns in part on whether the duty is one categorized by the *Standards* as being owed to clients,<sup>46</sup> the public,<sup>47</sup> the legal system,<sup>48</sup> or the legal profession.<sup>49</sup>

A lawyer's duties to clients include the duty to preserve a client's property<sup>50</sup> and the duty of candor to clients.<sup>51</sup> Dickey violated his duties to preserve a client's property by violating RPC 1.5(c)(3) and RPC 1.15-1(a), (c), and (d) (first, sixth, and seventh causes of complaint). He violated his duty of candor to a client by violating RPC 8.4(a)(3) with respect to Patapoff (first and fourth causes of complaint).

A lawyer's duties to the public include the duty to maintain the lawyer's personal integrity, which includes the duty not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.<sup>52</sup> By violating RPC 8.4(a)(3), Dickey violated his duty to the public not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (first, third, and fourth causes of complaint).

A lawyer's duties to the legal system include the duty not to engage in conduct that is prejudicial to the administration of justice.<sup>53</sup> By violating RPC 8.4(a)(4) (second cause of complaint), Dickey violated his duty not to engage in conduct that is prejudicial to the administration of justice.

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<sup>44</sup> *In re Jackson*, 347 Or at 441.

<sup>45</sup> *In re Jackson*, 347 Or at 441.

<sup>46</sup> *Standards* § 4.0.

<sup>47</sup> *Standards* § 5.0.

<sup>48</sup> *Standards* § 6.0.

<sup>49</sup> *Standards* § 7.0.

<sup>50</sup> *Standards* § 4.1.

<sup>51</sup> *Standards* § 4.6.

<sup>52</sup> *Standards* § 5.1.

<sup>53</sup> *Standards* § 6.1.

A lawyer's duties to the legal profession include the duty to cooperate with a disciplinary investigation.<sup>54</sup> By violating RPCs 8.1(a)(1) and (2) (fifth cause of complaint), Dickey violated his duty to cooperate with a disciplinary investigation.

#### **4.1(b) *Dickey'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 circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."<sup>55</sup>

Dickey acted knowingly and intentionally when he converted Patapoff's funds by using those funds when Dickey knew that he was not authorized to use them for himself (first cause of complaint).

Dickey acted knowingly when he failed to appear at Patapoff's hearing (second cause of complaint), made false statements to Jackson (third cause of complaint), made false statements to Patapoff (fourth cause of complaint), and failed to respond to a lawful demand for information from DCO and made false statements of fact to DCO staff in connection with its investigation of Dickey (fifth cause of complaint).

The complaint does not address Dickey's mental state with respect to the sixth cause of complaint (that he violated RPC 1.15-1(d) by failing promptly to deliver Bazan-Garcia's file) and the seventh cause of complaint (that he violated RPC 1.5(c)(3) and RPC 1.15-1(c) and (d) by failing to account for the fee he received on account of Cavender or to refund any unearned portion of that fee). We find that he acted knowingly in committing those violations.<sup>56</sup>

#### **4.1(c) *Injury caused by Dickey's violations***

Under the *Standards*, the injuries caused by a lawyer's professional misconduct may be either actual or potential.<sup>57</sup>

##### **a. Dickey injured clients.**

Dickey injured Patapoff by converting Patapoff's property and potentially injured Patapoff by failing to appear for his hearing. Dickey's delay in delivering Bazan-Garcia's file exposed Bazan-Garcia to potential legal injury in connection with Bazan-Garcia's federal

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<sup>54</sup> *In re Schaffner* ("Schaffner I"), 323 Or 472, 479, 918 P2d 803 (1996).

<sup>55</sup> *Standards* pt II (Definitions).

<sup>56</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>57</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.").

plea offer. Dickey's failure to return any unearned portion of Cavender's fee exposed Cavender to potential injury by delaying his use of any unearned funds to engage a replacement lawyer.

A rule violation presumptively causes the client to suffer actual anxiety and frustration.<sup>58</sup> We thus hold that that Dickey caused Patapoff, Bazan-Garcia, and Cavender actual injury in the form of anxiety and frustration.

**b. Dickey injured the public and the legal profession.**

The Oregon 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>59</sup>

Dickey's misrepresentations to and failure to provide information requested by the Bar caused actual injury to the public and the legal profession.

**4.2 Presumptive sanctions 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>60</sup>

The presumptive sanction 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 **Error! Reference source not found.**

**4.2(a) Duty to client: duty to preserve client property (first, sixth, and seventh causes of complaint)**

Disbarment is the presumptive sanction for knowingly converting a client's property and causing actual or potential injury to a client.<sup>61</sup> Suspension is the presumptive sanction if the lawyer does not convert client property but instead deals improperly with it, knowing that it is client property.<sup>62</sup>

Dickey violated his duty to preserve client property by knowingly converting Patapoff's property (first cause of complaint, violation of RPC 1.15-1(a) and (d)), for which the presumptive sanction is disbarment. He also violated his duty not to deal improperly with

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<sup>58</sup> *In re Koch*, 345 Or at 456 (lawyer's repeated failure to respond to a client's 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).

<sup>59</sup> *In re Schaffner II*, 325 Or at 427; *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996).

<sup>60</sup> BR 6.1(a)(ii).

<sup>61</sup> *Standards* § 4.11.

<sup>62</sup> *Standards* § 4.12.

client property by not promptly delivering Bazan-Garcia's file (sixth cause of complaint, violation of RPC 1.15-1(d)) and by not accounting for the retainer he received for representing Cavender (seventh cause of complaint, violation of RPC 1.15-1(c) and (d)), for which the presumptive sanction is suspension.

**4.2(b) *Duty to client: duty of candor to clients (fourth cause of complaint)***

Disbarment is the presumptive sanction for knowingly deceiving a client with the intent to benefit the lawyer or another and causing actual serious or potential injury.<sup>63</sup> If the injury is not serious, then the presumptive sanction is suspension.<sup>64</sup>

Dickey knowingly deceived Patapoff with the intent to benefit himself by making false statements regarding Stroschein's withdrawals from the Wells Fargo account (fourth cause of complaint, violation of RPC 8.4(a)(3)). We cannot determine from the deemed-true allegations of the complaint whether Dickey's false statements caused serious injury to Patapoff, that is, whether Patapoff could have reversed prior loss or prevented future loss had Dickey not made those false statements then. Thus, the presumptive sanction for the fourth cause of complaint is suspension.

**4.2(c) *Duty to public: duty not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (first, third, and fourth causes of complaint)***

Disbarment is the presumptive sanction for engaging in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously and adversely reflects on the lawyer's fitness to practice.<sup>65</sup> Suspension is the presumptive sanction if the conduct is knowing, but not intentional.<sup>66</sup>

Dickey knowingly and intentionally converted Patapoff's funds (first cause of complaint, violation of RPC 1.15-1(a) and (d) and RPC 8.4(a)(3)) and lied to Patapoff about the conversion (fourth cause of complaint, violation of RPC 8.4(a)(3)). A lawyer's actions that violate RPC 8.4(a)(3) also reflect adversely on the lawyer's fitness to practice.<sup>67</sup> Those acts constituted dishonesty that seriously adversely reflect on Dickey's fitness to practice, for which disbarment is the presumptive sanction.

Dickey also engaged in knowing dishonesty that seriously reflects on his fitness to practice (third and fourth causes of complaint regarding false statements to Jackson and Patapoff, violating RPC 8.4(a)(3)), for which the presumptive sanction is suspension.

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<sup>63</sup> *Standards* § 4.61.

<sup>64</sup> *Standards* § 4.62.

<sup>65</sup> *Standards* § 5.11(b).

<sup>66</sup> *Standards* § 5.12.

<sup>67</sup> *In re Renshaw*, 353 Or 411, 420, 298 P3d 1216 (2013).

**4.2(d) *Duty to legal system: duty not to engage in conduct prejudicial to the administration of justice (second cause of complaint)***

Suspension is the presumptive sanction for a lawyer's knowing violation of a court order or rule that causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.<sup>68</sup>

By failing to appear at Patapoff's hearing, Dickey knowingly engaged in conduct prejudicial to the administration of justice that caused interference or potentially interfered with a legal proceeding and caused injury or potential injury to Patapoff (second cause of complaint, violation of RPC 8.4(a)(4)), for which the presumptive sanction is suspension.

**4.2(e) *Duty to legal profession: violation of duty to cooperate with disciplinary investigation (fifth cause of complaint)***

Suspension is the presumptive sanction for a lawyer's knowing violation of a duty owed as a professional that causes injury to a client, the public, or the legal system.<sup>69</sup>

By knowingly making false statements of material fact to DCO staff and failing to cooperate with the Bar's disciplinary investigation, Dickey knowingly violated a duty owed as a professional that caused injury to the public, for which the presumptive sanction is suspension.

**4.3 *Aggravating and mitigating circumstances.***

After the presumptive sanction has been determined, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.<sup>70</sup>

**4.3(a) *Dickey acted with a dishonest or selfish motive***

Under *Standards* § 9.22(b), that a lawyer acts with dishonest or selfish motives is an aggravating factor. Dickey acted with a dishonest and selfish motive in knowingly and intentionally converting Patapoff's property.

**4.3(b) *Dickey engaged in a pattern of misconduct***

Under *Standards* § 9.22(c), that a lawyer has engaged in a pattern of misconduct is an aggravating factor. Dickey has injured three separate clients, and he injured Patapoff in several related but separate instances over a period of several months.

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<sup>68</sup> *Standards* § 6.22.

<sup>69</sup> *Standards* § 7.2.

<sup>70</sup> *Standards* § 9.1.

**4.3(c) *Dickey committed multiple offenses***

Under *Standards* § 9.22(d), that a lawyer has committed multiple disciplinary offenses may be considered in aggravation. Because Dickey engaged in several distinct acts with respect to three separate clients and others, each of which act 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>71</sup>

**4.3(d) *Dickey obstructed this proceeding in bad faith***

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 is an aggravating factor. Dickey obstructed this proceeding in bad faith by failing to appear for his deposition, for which he had been subpoenaed, without excuse.

**4.3(e) *Dickey has not acknowledged the wrongful nature of his conduct***

Under *Standards* § 9.22(g), a lawyer's refusal to acknowledge the wrongful nature of the lawyer's conduct is an aggravating factor. Dickey has refused to acknowledge the wrongful nature of his conduct.

**4.3(f) *Patapoff is a vulnerable victim***

Under *Standards* § 9.22(h), that a victim is vulnerable is an aggravating factor. Being in jail, Patapoff could neither act for himself nor supervise Dickey's actions supposedly on behalf of Patapoff. Rather, Patapoff could only trust that Dickey would properly carry out Dickey's fiduciary duties to Patapoff. Patapoff is thus a vulnerable victim.<sup>72</sup>

**4.3(g) *Dickey has no prior disciplinary record***

Under *Standards* § 9.32(a), the absence of a prior disciplinary record is a mitigating factor. The Bar concedes that Dickey has no prior disciplinary record.

**4.3(h) *Dickey has provided no evidence of physical disability***

Under *Standards* § 9.32(h), a lawyer's physical disability is a mitigating factor.

Dickey submitted to the trial panel no evidence or argument regarding liability or sanction, including any evidence or argument that a physical disability excused or mitigated his liability for his violations. He did include in his answer the following allegation:

“At all or most of the relevant times related to Causes 1–7, Dickey was suffering serious health problems, including a severely compromised immune system, sinus tachycardia, staph and the need for at least one surgery. Any errors or omissions during that time

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<sup>71</sup> See *In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).

<sup>72</sup> See *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (incarcerated client was vulnerable).

period were primarily due to Dickey’s health problems and not negligence, recklessness or any intentional misconduct.”<sup>73</sup>

But his answer was properly stricken for his failure to appear for his subpoenaed deposition. And even if his answer had not been stricken, we could not consider his allegation of disability without evidence that he had the claimed health problems at the times of the charged violations and that those health problems caused him to commit the violations. The court has rejected a lawyer’s request that the court consider in mitigation the lawyer’s “personal or emotional problems” when the lawyer “offered no expert witness to establish a psychological or emotional condition that might explain his actions or mitigate his culpability.”<sup>74</sup> We thus cannot consider any health problems in mitigation of Dickey’s violations.

#### ***4.3(i) Effect of aggravating and mitigating factors***

Considering Dickey’s conduct and the aggravating and mitigating factors, we conclude that the aggravating factors outweigh the one mitigating factor.

#### **4.4 Applying Oregon case law to determine final sanction.**

Because disbarment is the presumptive sanction for some of Dickey’s violations, and he should be disbarred if disbarment is appropriate for any of his violations, we first consider Oregon case law addressing circumstances for which the presumptive sanction is disbarment.

##### ***4.4(a) Case law addressing disbarment as presumptive sanction***

The ABA *Standards* that make disbarment the presumptive sanction in this case are *Standards* § 4.11<sup>75</sup> for violating his duty to preserve client property (first, sixth, and seventh causes of complaint), *Standards* § 4.61<sup>76</sup> for violating his duty of candor to clients (fourth cause of complaint), and *Standards* § 5.11(b)<sup>77</sup> for violating his duty to the public not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (first, third, and fourth causes of complaint).

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<sup>73</sup> Answer ¶ 37, at 6.

<sup>74</sup> *In re Renshaw*, 353 Or 411, 424, 298 P3d 1216 (2013).

<sup>75</sup> See section 4.2(a) above.

<sup>76</sup> See section 4.2(b) above.

<sup>77</sup> See section 4.2(c) above.

In each reported case in which the court has found that disbarment is the presumptive sanction under either *Standards* § 4.11<sup>78</sup> or *Standards* § 4.61,<sup>79</sup> the court has disbarred the lawyer. The court has held that “[e]ven a single act of intentional and dishonest appropriation of a client’s trust funds in violation of DR 1-102(A)(3) [now designated as RPC 8.4(a)(3)] warrants disbarment.”<sup>80</sup> In the court’s 1998 decision in *In re Murdock*, the court reinforced the *Standards* § 4.61 presumptive sanction of disbarment for conversion in a case involving funds from the lawyer’s firm.<sup>81</sup>

In some,<sup>82</sup> but not all,<sup>83</sup> reported cases in which the court has found that disbarment is the presumptive sanction under *Standards* § 5.11(b), the court has disbarred the lawyer.

#### **4.4(b) 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>84</sup>

Disbarment is the sanction for several of Dickey’s violations, and it is appropriate in view of the number and seriousness of those violations. We need not consider case law addressing sanctions for the other violations.

Dickey should be disbarred.

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<sup>78</sup> *In re Donovan*, 327 Or 76, 81, 957 P2d 575 (1998); *In re Maroney*, 324 Or 457, 461, 927 P2d 90 (1997); *In re Dickerson*, 322 Or 316, 326, 905 P2d 1140 (1995); *In re Whipple*, 320 Or 476, 488, 886 P2d 7 (1994); *In re Biggs*, 318 Or 281, 296, 864 P2d 1310 (1994).

<sup>79</sup> *In re Murdock*, 328 Or 18, 27, 968 P2d 1270 (1998); *In re Brown*, 326 Or 582, 606, 956 P2d 188 (1998); *In re Morin*, 319 Or 547, 565, 878 P2d 393 (1994).

<sup>80</sup> *In re Donovan*, 327 Or at 81.

<sup>81</sup> *In re Renshaw*, 353 Or 411, 427, 297 P3d 1266 (2013).

<sup>82</sup> *See, e.g., In re Herman*, 357 Or 273, 289, 348 P3d 1125 (2015).

<sup>83</sup> *See, e.g., In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).

<sup>84</sup> *Standards* pt II (Theoretical Framework).



**5. DISPOSITION**

Dickey is disbarred.

DATED this 30th day of November, 2015.

/s/ David W. Hercher

David W. Hercher

OSB No. 812639

Trial-Panel Chair

/s/ David A. Rabbino

David A. Rabbino

OSB No. 106348

Trial-Panel Member

/s/ Joyce Ironside

Joyce Ironside

Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-67  
)  
HOWARD HUDSON, )  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(b), RPC 1.16(a)(1), and RPC 1.16(d). Stipulation for Discipline. 120-day suspension, 60 days stayed, one-year probation.  
Effective Date of Order: March 1, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Hudson is suspended 120 days, with 60 days of the 120-day suspension stayed pending Hudson’s successful completion of a one-year period of probation, effective March 1, 2016 or 10 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.4(b), RPC 1.16(a)(1), and RPC 1.16(d).

DATED this 8th day of February, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Jet Harris

Jet Harris, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Howard Hudson (“Hudson”), 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.

Hudson 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 Lane County, Oregon.

3.

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

4.

On September 22, 2015, the Bar filed a Formal Complaint against Hudson pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.4(b) (duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), RPC 1.16(a) (improper withdrawal from representation of a client), and RPC 1.16(d) (failure to take appropriate steps upon withdrawal to protect a client’s interests) 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.

On September 16, 2013, Hudson executed a Stipulation for Discipline (“Stipulation”) in which he agreed to a two-year suspension, with all but six months stayed, pending a two-year term of probation for misconduct unrelated to this proceeding.

6.

In the Stipulation, Hudson acknowledged his obligation to “immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension.”

7.

Prior to September 2013, Hudson undertook to represent Cathy Chase (“Chase”) in a dispute that involved back child support payments. On or about November 7, 2013, Hudson appeared before the Oregon Supreme Court and argued Chase’s appeal of the circuit court’s judgment.

8.

On November 14, 2013, the Oregon Supreme Court entered an order accepting the Stipulation, and ordering that Hudson’s suspension would be effective 10 days thereafter (November 25, 2013).

9.

Between September 16, 2013, and November 24, 2013, Hudson did not clearly inform Chase of his signing of the Stipulation or the eminent suspension of his license to practice law. Hudson did not recommend to Chase that she may need to consult with other counsel, nor did he assist her in locating alternative counsel, as he did not recognize that anything might need to be done on her case during the period of his anticipated six-month suspension. Hudson did not provide Chase with her client file.

10.

After November 7, 2013, Hudson did not withdraw from Chase’s appellate matter or otherwise notify the court or Chase that he could no longer be Chase’s counsel of record in light of his suspension from the practice of law.

11.

Between November 24, 2013, and February 13, 2014, Hudson did not convey to Chase that he was subject to at least a six-month suspension from the practice of law, or that he was unable to represent her in her legal matter during that period. Hudson did not provide Chase with her client file or recommend that she consult with alternative counsel.

12.

On February 13, 2014, the court rendered its decision on the Chase appeal. The order was primarily favorable to the opposing party. Shortly thereafter, the opposing party sought reconsideration and attorney fees. As Chase’s counsel of record, Hudson was served with the court’s decision regarding Chase, as well as the opposing party’s petitions.

13.

After February 13, 2014, Hudson did not, and could not, counsel Chase on whether to challenge the court’s decision or the petition for attorney fees. However, Hudson also did not communicate to Chase that he had been suspended from the practice of law and could no longer represent her. Hudson did not respond to the petition for attorney fees or notify Chase

that he would not, and could not, do so. Hudson did not assist Chase in finding an attorney to assist her in dealing with the matters still outstanding before the court. Hudson did not withdraw from Chase's appellate matter or notify either the court or Chase of his need to do so.

### Violations

14.

Hudson admits that, by failing to tell Chase that he would be and then had been suspended, and that he could not represent her during his suspension, he failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of RPC 1.4(b).

Hudson further admits his continued representation of Chase upon his suspension from the practice of law would have resulted in a violation of the Rules of Professional Conduct, and his failure to withdraw from representing her once he was suspended violated RPC 1.16(a).

Hudson admits that by failing to (1) terminate the representation upon the imposition of his suspension, (2) notify Chase of the need to find another lawyer, (3) file a withdrawal with the court, and (4) return Chase's file, he failed to take the steps reasonably practicable to protect a client's interests upon termination of the representation, in violation of RPC 1.16(d).

### Sanction

15.

Hudson 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 Hudson'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.

- a. **Duty Violated.** Hudson violated his duties to his client to fully inform her of information relevant to the representation, and to take reasonable steps upon termination of the representation to protect his client's interests. *Standards* § 4.42, § 4.1. The *Standards* presume that the most important duties a lawyer owes are those owed to clients. *Standards* at 5. Hudson also violated his duties owed as a professional when he failed to withdraw from the representation when failure to do so would have violated the Rules of Professional Conduct. *Standards* § 7.0.

- b. **Mental State.** Hudson acted negligently or knowingly, at various stages, in failing to communicate with Chase. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. Hudson acted knowingly in failing to communicate with Chase and inform her of his suspension. Hudson acted negligently when he failed to withdraw upon his suspension from practice, and when he failed to take steps to protect Chase’s interests once he was suspended and the representation was terminated.
- c. **Injury.** Injury can be either potential or actual under the *Standards*. *Standards* § 3.0; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Hudson’s lack of communication and failure to properly terminate the representation caused actual and potential injury to Chase. Hudson’s failure to communicate with Chase about his impending suspension deprived her of information that may have prompted her to hire another lawyer, which may have prevented the attorney fee petition from being entered, or resulted in a lesser award. Hudson’s failure to communicate with Chase also 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 due to the 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). Additionally, after Hudson was suspended, his continued receipt of notifications from the Oregon Supreme Court, and his failure to notify the court that he no longer represented Chase, deprived Chase of knowledge of what was transpiring, leaving both Chase and the court believing that Chase was represented, when she was left unrepresented. Further, as a result of this unknowing lack of representation, Chase did not have a true opportunity to be heard on the opposing party’s motions for reconsideration and for attorney fees.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. **Prior disciplinary offenses.** Hudson was suspended for two years (all but six months stayed pending successful completion of probation) on November 25, 2013, for violations including RPC 1.1 (competence), RPC 1.3 (neglect), RCP 1.4(a) and (b) (failure to adequately communicate with a client), RPC 1.5(a) (charging an excessive fee), RPC 3.3(a) (candor with a tribunal), RPC 3.4(b) (creation of false evidence), RPC

8.1(a)(1) (false statement to a disciplinary authority), RPC 8.4(a)(3) (dishonesty or misrepresentation), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice) in connection with two domestic relations matters. *In re Hudson*, 27 DB Rptr 226 (2013). *Standards* § 9.22(a).

2. **A pattern of misconduct.** Hudson's failure to withdraw from his client's representation upon commencement of his term of suspension, together with his failure to communicate with his client or the court, demonstrates a pattern of neglect, avoidance, and disregard for client matters and professional obligations. *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Schaffner*, 325 Or at 427; *Standards* § 9.22(c).
3. **Multiple offenses.** *Standards* § 9.22(d).
4. **Substantial experience in the practice of law.** Hudson has been a lawyer in Oregon since 2007. *Standards* § 9.22(i).

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

1. Absence of a dishonest motive. *Standards* § 9.32(b).
2. Cooperative attitude toward disciplinary proceeding. *Standards* § 9.32(e).

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.” *Standards* § 4.42(a). A “[r]eprimand 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 violates 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 reprimand is generally appropriate when a lawyer negligently engages in conduct that violates a duty owed to the profession and “causes injury or potential injury to a client, the public, or the legal system.” *Standards* § 7.3. Considering the totality of the circumstances, a suspension is appropriate.

16.

Oregon cases likewise support the imposition of a suspension. Generally, lawyers who knowingly fail to keep clients informed are suspended for 60 days or more. *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*

*Knappenberger*, 337 Or 15, 90 P3d 614 (2004) (attorney who appealed a spousal support determination was suspended for 90 days when he neglected the matter and failed to keep the client informed of the status of the appeal, did not respond to the client's inquiries, and essentially abandoned the client after oral argument).

Lawyers who fail to properly withdraw from the representation typically receive a term of suspension. *See, e.g., In re Worth*, 336 Or 256, 82 P3d 605 (2003) (attorney was part of a consortium of lawyers who received court appointments to represent indigent clients in postconviction relief and habeas corpus proceedings. He was suspended for 90 days when he failed to read the provisions of the consortium contract, failed to notify the court that he was the lawyer assigned by the consortium to individual cases such that he did not receive various court notices, failed to communicate with his clients, and did not attend to or monitor client matters resulting in their repeated dismissals and subsequent reinstatements); *See also In re Clarke*, 22 DB Rptr 320 (2008) (attorney suspended for 60 days when, after deciding that a client's appeal had no merit, attorney decided not to file a brief, allowed the appeal to be dismissed, and thereafter failed to disclose the dismissal to the client).

17.

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 that 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.

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Hudson shall be suspended for 120 days for his violations of RPC 1.4(b), RPC 1.16(a)(1), and RPC 1.16(d), the sanction to be effective March 1, 2016, or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later ("the effective date"). However, 60 days of the 120-day suspension shall be stayed pending Hudson's successful completion of a one-year period of probation on the conditions described below. Hudson 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 Oregon State Bar. During the period of active suspension, and until Hudson re-attains active membership status with the Oregon State Bar, Hudson 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.

Probation shall commence upon Hudson's reinstatement to active membership status from the imposed portion of his suspension (the "commencement date") and shall continue for a period of one year, ending on the day prior to the one-year anniversary of the commencement date (the "period of probation"). During the period of probation, Hudson shall abide by the following conditions:

**General Provisions**

- (a) Hudson 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) Within seven days of the commencement date, Hudson shall contact the Professional Liability Fund ("PLF") in order to set up an appointment to obtain practice management advice. Hudson shall schedule the first available appointment with the PLF and notify Disciplinary Counsel's Office ("DCO") of the time and date of the appointment.
- (c) Hudson 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 steps to protect clients upon the termination of representation. No later than 30 days after recommendations are made by the PLF, Hudson shall adopt and implement those recommendations.
- (d) No later than 60 days after recommendations are made by the PLF, Hudson 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.
- (e) An active Oregon attorney to be selected by Hudson prior to the beginning of the period of probation and acceptable to DCO shall serve as Hudson's probation supervisor ("Supervisor"). Hudson 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 Hudson's clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Hudson shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Hudson's law practice and his performance of legal services on the behalf of clients. At each meeting, Supervisor shall conduct an

audit of all of Hudson's active files to determine whether Hudson is timely, competently, diligently, and ethically attending to matters, regularly communicating with clients, and taking reasonably practicable steps to protect his clients' interests upon the termination of the representation. At the point that Hudson's caseload exceeds 20 files, Supervisor shall conduct random audits of at least 20 of Hudson's active files.

- (f) Each month during the period of probation, Hudson 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; properly calendaring deadlines and court dates; keeping his clients informed; utilizing appropriate procedures for maintaining client files; and properly closing client files upon termination of the representation.
- (g) During the period of probation, Hudson shall attend not less than seven CLE accredited programs, for a total of at least 35 hours, which shall emphasize client management and practice management, including utilizing proper fee agreements, recognizing and avoiding conflicts of interest, maintaining adequate communication, and properly terminating or withdrawing from a client representation. These credit hours shall be in addition to those MCLE credit hours required of Hudson for his normal MCLE reporting period, and any other CLE credit hours required under this agreement.
- (h) On a monthly basis, on dates to be established by DCO beginning no later than 30 days after the commencement date, Hudson shall submit to DCO a written "Compliance Report," approved as to substance and signed by Supervisor, advising what actions Hudson has taken in furtherance of his probation and whether Hudson is in compliance with the terms of this agreement. In the event that Hudson has not complied with any term of the agreement for the previous reporting period, the Compliance Report shall describe the noncompliance and the reason for it.
- (i) Throughout the period of probation, Hudson shall diligently attend to client matters and adequately communicate with clients regarding their cases. Hudson shall also take all steps reasonably necessary to properly withdraw from termination or to protect client's interests when terminating the representation.
- (j) Hudson 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 it to assess Hudson's compliance.
- (k) Hudson is responsible for any costs required under the terms of this stipulation and the terms of probation.

- (l) Hudson's failure to comply with any term of this agreement, including but not limited to the 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.
- (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (n) The SPRB's decision to bring a formal complaint against Hudson for unethical conduct that occurred or continued during the term of suspension or the period of probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

20.

Hudson 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. Similarly, in the event that Hudson's probation is revoked and the stayed portion of his suspension imposed, he acknowledges that he has the same 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, Hudson has arranged for Rebecca May, an active member of the Bar, to either take possession of or have ongoing access to Hudson's client files and serve as the contact person for clients in need of the files during the term of Hudson's suspension. Hudson represents that Rebecca May has agreed to accept this responsibility. Hudson further agrees that no later than 10 days prior to the effective date, he will notify all clients with whom he has, or has reason to believe he will have, active matters as of the effective 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 Hudson's client files. Hudson shall, on or before the effective 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 Hudson's.

21.

Hudson acknowledges that reinstatement is not automatic on the expiration of the period of suspension and, should his probation be revoked and the stayed portion of his suspension imposed, reinstatement would not be automatic on expiration of that period of suspension. Rather, he is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Hudson also acknowledges that during any period of suspension 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.

22.

Hudson 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.

23.

Hudson 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 Hudson 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.

EXECUTED this 25th day of January, 2016.

/s/ Howard Hudson

Howard Hudson

OSB No. 074098

EXECUTED this 28th day of January, 2016.

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. 15-25
	)	
CAROLYN R. SMALE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Angela W. Bennett
Counsel for the Accused:	Calon Nye Russell
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Stipulation for Discipline. 60-day suspension, all stayed, two-year probation.
Effective Date of Order:	February 18, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Smale is suspended for 60 days, the entirety of the 60-day suspension shall be stayed pending Smale’s successful completion of a two-year term of probation, effective February 1, 2016 or 10 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

DATED this 8th day of February, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.

Carl W. Hopp, Jr., Region 1  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Carolyn R. Smale, attorney at law (“Smale”), 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.

Smale was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 22, 1995, and has been a member of the Bar continuously since that time, having her office and place of business in Hood River County, Oregon.

3.

Smale 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 11, 2015, the Bar filed a Formal Complaint against Smale 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(a) and (b) (duties to adequately and fully communicate with clients) 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 April 2010, Bob Mitchell and Kathy Mitchell (“Kathy,” collectively “the Mitchells”) consulted with Smale about potentially filing bankruptcy. Kathy later retained Smale, and Smale filed a Chapter 7 bankruptcy petition on Kathy’s behalf in November 2010.

6.

In May 2011, the bankruptcy trustee (“trustee”) notified Smale that he would seek to avoid a lien exempting Kathy’s vehicle from the bankruptcy estate. The trustee offered to settle the issue for \$5,000. Smale conveyed this offer to Kathy, who rejected the trustee’s offer and directed Smale to counter-offer for \$2,000. Smale did not convey that offer to the trustee.

7.

In early October 2011, the trustee filed a motion for an order requiring Kathy to relinquish the vehicle as part of the bankruptcy estate. The order was granted. Smale believed that the motion and order had been sent directly to Kathy (and assumed that Kathy had received them). Smale was also notified of both the motion and the order, but did not communicate with Kathy about them and, after entry of the order, did not resume or pursue settlement negotiations with the trustee.

8.

In mid-October 2012, the trustee filed an adversary proceeding seeking judgment and seeking to avoid the lien on Kathy's vehicle. A pretrial hearing was set for December 4, 2012.

- Smale believed that notice would be sent directly to Kathy, and did not notify Kathy of the adversary proceeding or the upcoming hearing.
- Smale did not communicate or consult with Kathy about how Kathy wanted to proceed, nor did she explain the significance of the adversary proceeding and how the trustee's action could affect the bankruptcy discharge.
- Smale did not determine what position Kathy wanted to take, nor did she discuss resolving the matter with the trustee.

9.

Neither Kathy nor Smale made an appearance at the December 4, 2012 hearing, and the trustee obtained a default judgment against Kathy. Thereafter, Smale did not inform her client of the default judgment. On January 7, 2013, the court entered an order of Final Judgment Revoking Bankruptcy Discharge.

10.

From May 2011 until March 2013, the Mitchells sent numerous email and telephone requests for information and updates to Smale. Smale did not respond to most of their requests. Similarly, Smale did not maintain contact with the trustee regarding the status of the matter.

11.

In March 2013, Smale told Kathy she would take remedial measures regarding the adversary judgment and the revocation of Kathy's discharge, but did not timely file a motion to set aside the judgment or take other action to assist Kathy with the bankruptcy proceeding. Smale repeatedly promised the Mitchells that she was attempting to contact the trustee to resolve the matter, but did not do so.

12.

In September 2013, the Mitchells contacted the trustee directly and resolved the matter.

### **Violations**

13.

Smale admits that, by failing to take steps to pursue the settlement of the lien on the vehicle, and follow up on promised remedial measures, she neglected a legal matter entrusted to her, in violation of RPC 1.3.

Smale further admits that failing to notify her client of and consult with her regarding the adversary proceeding and order, and failing to keep her client updated on the progress of her bankruptcy and any related proceedings, or respond to her client's inquiries, constituted a failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, as well as a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of RPC 1.4(a) and (b).

### **Sanction**

14.

Smale 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 Smale'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.

- a. **Duty Violated.** Smale violated her duties to attend to her client's case and communicate with her client. *Standards* § 4.42. The *Standards* presume that the most important duties a lawyer owes are those owed to clients. *Standards* at 5.
- b. **Mental State.** Smale acted negligently or knowingly, at various stages, in failing to communicate with Kathy and attend to Kathy's bankruptcy proceeding. "'Negligence' is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Standards* at 9. "'Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Standards* at 9.



- c. **Injury.** Injury can be either potential or actual. *Standards* § 3.0. Smale’s lack of diligence caused actual and potential injury to her client. Her failure to communicate with Kathy about the adversary proceeding led to a turn-over order and a default judgment being entered against Kathy in that matter, and the bankruptcy being set aside. Additionally, Smale’s lack of diligence caused actual and potential injury in the form of unnecessary delay to Kathy in getting her bankruptcy resolved, as well as anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration due to the 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).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. **Multiple offenses.** *Standards* § 9.22(d).
  2. **Substantial experience in the practice of law.** Smale had been a lawyer in Oregon for over 15 years at the time of the misconduct. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. **Absence of prior discipline.** Smale has no prior, relevant disciplinary record. *Standards* § 9.32(a).
  2. **Personal or emotional problems.** Smale was suffering from physical health problems as well as dealing with numerous family and coworker health crises at the time of some of the misconduct. *Standards* § 9.32(c).
  3. **Cooperative attitude toward disciplinary proceeding.** *Standards* § 9.32(e).
  4. **Character or reputation.** Smale presented references from legal professionals supporting her character and reputation in the local legal community. *Standards* § 9.32(g).
  5. **Remorse.** Smale expressed remorse for injury she caused the Mitchells. *Standards* § 9.32(l).

15.

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,” or when “a lawyer engages in a pattern of neglect [and] causes injury or potential injury to a client.” *Standards* § 4.42(a)–(b). A reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, resulting in injury

or potential injury. *Standards* § 4.43. Considering the totality of the circumstances, a suspension is appropriate. However, Smale's mitigation suggests that a short suspension would be sufficient.

16.

Oregon cases likewise support the imposition of a short suspension. Generally, lawyers who knowingly neglect a legal matter and fail to keep clients informed are suspended for 60 days or more. *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 re Worth*, 337 Or 167, 82 P3d 605 (2004) (attorney was suspended for 120 days when he failed to move a client's case forward, despite several warnings from the court and a court directive to schedule arbitration by a date certain, resulting in the court granting the opposing party's motion to dismiss); *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004) (attorney who appealed a spousal support determination was suspended for 90 days when he neglected the matter and failed to keep the client informed of the status of the appeal, did not respond to the client's inquiries, and essentially abandoned the client after oral argument).

17.

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.

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Smale shall be suspended for 60 days for violations of RPC 1.3, RPC 1.4(a), and RPC 1.4(b), the sanction to be effective February 1, 2016, or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later ("the effective date"). However, the entirety of the 60-day suspension shall be stayed pending Smale's successful completion of a two-year term of probation on the conditions described below.

19.

Probation shall commence on the effective date and shall continue for a period of two years, ending on the day prior to the two-year anniversary of the effective date (the "period

of probation”). During the period of probation, Smale shall abide by the following conditions:

### **General Provisions**

- (a) Smale 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) Within seven days of the effective date, Smale shall contact the Professional Liability Fund (“PLF”) in order to set up an appointment to obtain practice management advice. Smale shall schedule the first available appointment with the PLF and notify Disciplinary Counsel’s Office (“DCO”) of the time and date of the appointment.
- (c) Smale 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, calendaring, effectively managing a client caseload, keeping her clients’ files updated with contact information, and taking reasonable steps to protect clients upon the termination of representation. No later than 30 days after recommendations are made by the PLF, Smale shall adopt and implement those recommendations.
- (d) No later than 60 days after recommendations are made by the PLF, Smale shall file a report with DCO stating the date of her consultation(s) with the PLF and identifying the recommendations that she has adopted and implemented. She shall also include in the report the specific recommendations she has not implemented, together with an explanation as to why she has not adopted and implemented those recommendations, if any. Smale shall submit with this report a copy of the PLF’s Office Practice Assessment.
- (e) An active Oregon attorney to be selected by Smale prior to the beginning of the probationary period and acceptable to DCO shall serve as Smale’s probation supervisor (“Supervisor”). Smale 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 Smale’s clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Smale shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Smale’s law practice and her performance of legal services on the behalf of clients. At each meeting, the Supervisor shall conduct a random audit of 10 to 20 of Smale’s files to determine whether Smale is timely, competently, diligently, and ethically attending to matters, communicating with clients in a timely manner and providing them with accu-

rate updates on their cases, properly calendaring court dates and deadlines, keeping client files updated with client information, and taking reasonably practicable steps to protect her clients' interests upon the termination of representation.

- (f) Each month during the period of probation, Smale 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, properly calendaring deadlines and court dates, and keeping her contacts, addresses, and files up-to-date, including her online case files in court systems.
- (g) During the period of probation, Smale shall attend not less than five (5) MCLE accredited programs, for a total of at least fifteen (15) hours, which shall emphasize law practice management, time management, client communication, calendaring, and office administration. These credit hours shall be in addition to those MCLE credit hours required of Smale for her normal MCLE reporting period, and any other MCLE credit hours required under this agreement.
- (h) On a monthly basis, for the first six (6) months after the effective date, on dates to be established by Disciplinary Counsel beginning no later than 30 days after the effective date, Smale shall submit to DCO a written "Compliance Report," approved as to substance and signed by Supervisor, advising what actions she has taken in furtherance of her probation and whether she is in compliance with the terms of this agreement. In the event that Smale has not complied with any term of the agreement for the previous reporting period, the Compliance Report shall describe the noncompliance and the reason for it. After the sixth Compliance Report, DCO may allow Smale to begin reporting on a quarterly basis, provided Smale has timely and fully complied, without exception, with her probation obligations thus far in her period of probation. If not, monthly reporting will continue to be required until such time that DCO determines, in its sole discretion, that the frequency of reporting may be reduced. If DCO allows Smale to begin reporting on a quarterly basis, DCO will inform her of the due date of her first quarterly Compliance Report. That report, and all successor Compliance Reports, will include Smale's activities pursuant to the probation for the preceding three months, but will require the same information and Supervisor approval as that of the monthly reports. Smale will thereafter submit quarterly Compliance Reports for the remainder of the period of probation.
- (i) Throughout the period of probation, Smale shall diligently attend to client matters and adequately communicate with clients regarding their cases.

- (j) Smale authorizes 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 Smale's compliance.
- (k) Smale is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (l) Smale's failure to comply with any term of this agreement, including but not limited to the 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.
- (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (n) The SPRB's decision to bring a formal complaint against Smale 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.

20.

In the event that Smale's probation is revoked and the stayed portion of her suspension imposed, Smale 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, Smale will arrange for an active member of the Bar in good standing, to either take possession of or have ongoing access to Smale's client files and serve as the contact person for clients in need of the files during the term of her suspension. In the event of Smale's suspension, Smale will notify DCO of the name of the lawyer who agrees to accept this responsibility.

21.

Smale acknowledges that should her probation be revoked and the stayed portion of her suspension imposed, 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. Smale also acknowledges that during any period of suspension 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.

Smale 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.

23.

Smale 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 Smale is admitted: Washington.

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.

EXECUTED this 21st day of January, 2016.

/s/ Carolyn R. Smale

Carolyn R. Smale

OSB No. 954157

EXECUTED this 28th day of January, 2016.

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. 15-102
	)	
MICHAEL G. ROMANO,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Mark J. Fucile
Disciplinary Board:	None
Disposition:	Violation of RPC 1.4(b) and RPC 1.7(a)(2). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	March 1, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Romano is suspended for 60 days for violations of RPC 1.7(a)(2) and RPC 1.4(b), effective March 1, 2016, or 10 days after the Order is signed, whichever is later.

DATED this 8th day of February, 2016.

/s/ Robert A. Miller  
 Robert A. Miller  
 State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
 Carl W. Hopp, Jr., Region 1  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Michael G. Romano, attorney at law (“Romano”), 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.

Romano was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 26, 2000, and has been a member of the Bar continuously since that time, having his office and place of business in Deschutes County, Oregon.

3.

Romano 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 14, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Romano for alleged violations of RPC 1.4(b) (duty to communicate adequately to enable client to make informed decisions regarding the representation); and RPC 1.7(a)(2) (personal-interest current-client conflict) 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 September 2012, Romano was hired to represent Trisha Reece (“Reece”) in connection with DUII charges and associated matters. During September and October, Romano worked with Reece on matters related to her driver license, including a hearing before the DMV, appeared with her for arraignment in circuit court on the DUII charge, and communicated with the assistant district attorney regarding the case.

6.

In November 2012, a personal relationship developed between Reece and Romano that affected Romano’s professional judgment on behalf of Reece in her criminal matters. Romano recognized the conflict of interest and attempted to craft a conflict waiver but did not immediately withdraw from Reece’s representation or provide her with sufficient



information to allow her to determine whether to continue with Romano as her lawyer in the matters.

### Violations

7.

Romano admits that, by continuing to represent Reece after a personal relationship developed, and without providing her with sufficient disclosures about how that might affect his representation, he engaged in a personal-interest conflict in violation of RPC 1.7(a)(2) and failed to explain a matter sufficient to allow Reece to make informed decisions regarding his continued representation, in violation of RPC 1.4(b).

### Sanction

8.

Romano 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 Romano’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.

- a. **Duty Violated.** Romano violated his duties to his client to avoid conflicts of interest and to diligently represent her interest, which duty includes adequate communication. *Standards* §§ 4.3, 4.4. The *Standards* provide that the most important ethical duties are those that a lawyer owes to clients. *Standards* at 5.
- b. **Mental State.** Romano acted negligently and knowingly. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9. Romano acted knowingly in engaging in a continuing conflict of interest but negligently in failing to recognize the extent of information he needed to share with Reece regarding that conflict.
- c. **Injury.** Injury can be either potential or actual. *Standards* § 3.0. Reece was actually injured to the extent that Romano had to withdraw from her legal matter very near a trial setting. Reece was potentially injured to the extent that Romano’s representation of her in her legal matter was affected by his personal feelings for her.
- d. **Aggravating Circumstances.** Aggravating circumstances include:

1. A selfish motive. *Standards* § 9.22(b).
  2. A vulnerable victim. *Standards* § 9.22(h). Reece was emotionally and mentally fragile, in addition to be in a precarious legal position in dire need of objective legal representation.
  3. Substantial experience in the practice of law. *Standards* § 9.22(i). Romano has been a lawyer in Oregon for more than 15 years.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior relevant disciplinary record. *Standards* § 9.32(a).
  2. Full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings. *Standards* § 9.32(e).
  3. Remorse. Romano has expressed remorse for his conduct, has apologized to Reece, and regrets what occurred. *Standards* § 9.32(l).

9.

Under the ABA *Standards*, a “[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” *Standards* § 4.32. A “[r]eprimand 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.

10.

Oregon cases also hold that a short suspension is appropriate for inadequate communication connected with a conflict of interest involving personal feelings toward a client. *See, e.g., In re Goode*, 26 DB Rptr 213 (2012) (attorney suspended for 120 days for engaging in sexual relations with a client shortly after he undertook to represent her in litigation); *In re Cherry*, 20 DB Rptr 59 (2006) (attorney received 30-day suspension when she represented her sister in becoming guardian and conservator over the sister’s granddaughter, despite attorney’s reservations concerning the sister’s suitability, and thereafter encouraged other family members to intervene and seek the sister’s removal as guardian and conservator, contrary to the sister’s wishes and objectives); *In re Peters*, 18 DB Rptr 238 (2004) (attorney who had sexual relations with a client was suspended for 180 days and subject to formal reinstatement, in part because he denied the relationship when questioned by a police detective regarding the client’s whereabouts, knowing that this information was material to the investigation); *In re McNeff*, 17 DB Rptr 143 (2003) (attorney suspended for 60 days when she entered into a business venture with her client/boyfriend during the representation without obtaining his informed consent to her continued representation).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Romano shall be suspended for 60 days for violation of RPC 1.4(b) and RPC 1.7(a)(2), the sanction to be effective March 1, 2016, or 10 days after approval by the Disciplinary Board, whichever is later.

12.

Romano 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, Romano has arranged for Mark Gorski and Larry Irwin, active members of the Bar, to either take possession of or have ongoing access to Romano's client files and serve as contact persons for clients in need of the files during the term of his suspension. Romano represents that Mr. Gorski and Mr. Irwin have agreed to accept this responsibility.

13.

Romano 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. Romano 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.

14.

Romano 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.

Romano 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 Romano 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.

Cite as *In re Romano*, 30 DB Rptr 61 (2016)

EXECUTED this 25th day of January, 2016.

/s/ Michael G. Romano

Michael G. Romano

OSB No. 000942

EXECUTED this 28 day of January, 2016.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990289

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-104  
)  
CURTIS CHARLES CALDWELL, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 4.4(a). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: February 18, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Curtis Charles Caldwell is publicly reprimanded, for violation of RPC 4.4(a).

DATED this 18th day of February, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ James Edmonds

James Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Curtis Charles Caldwell, attorney at law (“Caldwell”), 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.

Caldwell was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 6, 2011, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Caldwell 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 10, 2015, a Formal Complaint was filed against Caldwell pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 4.4(a) (knowingly using methods of obtaining evidence that violate the legal rights of third persons). 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, the Fair Credit Reporting Act, 15 USC § 1681(b), allowed Caldwell to obtain credit reports on behalf of his bankruptcy clients “in accordance with the written instructions of the consumer to whom the report relate[d].” 15 USC § 1681(b)(2). The Fair Credit Reporting Act, 15 USC § 1681(b), did not permit Caldwell to obtain credit reports for the spouses of his clients or his friends preparatory to filing petitions for the dissolution of their marriages.

6.

At all relevant times, 15 USC § 1681(n)(a) provided that persons who willfully failed to comply with any requirement imposed by the Fair Credit Reporting Act with respect to any consumer could be held civilly liable to that consumer, and 15 USC § 1681(n)(b) provided that persons who obtained a consumer report from a consumer reporting agency under false pretenses or who knowingly obtained such a report without a permissible purpose

could be held civilly liable to that agency. At all relevant times, 15 USC § 1681(q) provided that any person who knowingly and willfully obtained information on a consumer from a consumer reporting agency under false pretenses was subject to a fine and/or imprisonment for up to two years.

7.

For purposes of his bankruptcy law practice, Caldwell was registered as a member of the Online Credit Reporting Corporation (“OCRC”). In the course of his bankruptcy practice, and with his clients’ permission, he commonly requested the credit reports of his clients from OCRC.

8.

Caldwell’s OCRC membership allowed him to request individual consumers’ credit reports using those consumers’ protected personal information. Caldwell’s contractual service agreement with OCRC was subject to a condition that required Caldwell to only run credit reports for “permissible purposes.” This agreement obligated Caldwell to determine what purposes were permissible. OCRC also required that when Caldwell requested a client’s credit report, the request must be “authenticated” by correct responses to three questions to which only the client would likely know the answer. To request a consumer’s credit report through OCRC, Caldwell was specifically required to provide the following information:

- (a) Consumer’s name;
- (b) Consumer’s Social Security number; and
- (c) Certification that the request was being made for a proper purpose under the law.

To request a credit report for a husband and wife, each spouse must consent, the above-described information for each spouse must be provided, and the request must be made for a permissible purpose.

9.

On October 16, 2013, Caldwell met with his friend Kimberly P. (“Kimberly”) at his law office to assist her in obtaining financial evidence that she could use in her anticipated dissolution of marriage and to support a petition for spousal support.

10.

On October 16, 2013, Caldwell requested and obtained a joint credit report through OCRC for both Kimberly and her husband (“DP”), without DP’s knowledge or consent. Caldwell utilized DP’s protected personal information to authenticate the request for DP’s credit report, and falsely certified that he was requesting DP’s credit report for a permissible reason.

11.

Caldwell requested DP's credit report without DP's permission and for an impermissible purpose, in violation of DP's legal right to maintain the privacy of his credit history. 15 USC § 1681(n).

### **Violation**

12.

Caldwell admits that, by obtaining DP's credit report, contrary to statutory and OCRC requirements and without DP's permission, he knowingly used methods of obtaining evidence that violated the legal rights of a third person, in violation of RPC 4.4(a).

### **Sanction**

13.

Caldwell 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 Caldwell'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.

- a. **Duty Violated.** Caldwell violated his duty to the public to refrain from conduct adversely reflecting on his fitness to practice law. *Standards* § 5.13.
- b. **Mental State.** Caldwell acted knowingly. That is, 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* at 7. Caldwell met with Kimberly to obtain financial evidence that she could use in her anticipated divorce. Caldwell's own interest in helping Kimberly caused him to knowingly request and obtain DP's credit report for an impermissible purpose, in violation of DP's legal right to maintain the privacy of his credit history. *See* 15 USC § 1681(n)(a).
- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Injury can either be actual or potential under the *Standards*. *See In re Williams*, 314 Or at 547. Caldwell actually injured DP by violating DP's legally protected right to privacy. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A selfish motive. *Standards* § 9.22(b).



2. Vulnerability of victim. *Standards* § 9.22(h). Under the circumstances and the methods employed, DP had no ability to defend his rights in advance of their violation.

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

1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
2. A cooperative attitude toward these disciplinary proceedings. *Standards* § 9.32(e).
3. Imposition of other penalties and sanctions. *Standards* § 9.32(k). Caldwell paid money damages to DP in resolution of a civil claim initiated on behalf of DP.

14.

Under the *Standards*, the appropriate discipline in this matter is either a public reprimand or a suspension. *Standards* § 5.12 states that suspension is generally appropriate when a lawyer knowingly engages in certain misconduct that seriously adversely reflects on the lawyer's fitness to practice. *Standards* § 5.13 states that "[r]eprimand 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." The fact that Caldwell's mitigating factors outweigh those in aggravation supports that the imposition of a reprimand is sufficient in this instance.

15.

Oregon cases likewise provide that a reprimand is appropriate when deceptive practices are employed to gain access to information (to which the attorney may not otherwise be entitled) in connection with a civil matter. *See, e.g., In re Ositis*, 333 Or 366, 40 P3d 500 (2002) (ruse employed by attorney in directing a private investigator to pose as a journalist to interview a party to a potential legal dispute resulted in reprimand); *In re Gatti*, 330 Or 517, 8 P3d 966 (2000) (reprimand when attorney misrepresented his identity to medical records company to gain information in anticipation of a lawsuit).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that Caldwell shall be publicly reprimanded for violation of RPC 4.4(a), the sanction to be effective upon approval by the Disciplinary Board.

17.

Caldwell 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.

Caldwell represents that, in addition to Oregon, he is also 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 Caldwell is admitted: US Bankruptcy Court for the District 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.

EXECUTED this 2nd day of February, 2016.

/s/ Curtis Charles Caldwell

Curtis Charles Caldwell

OSB No. 113470

EXECUTED this 8th day of February, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-103, 14-104, and 15-60  
)  
KIRK TIBBETTS, )  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: None  
Disciplinary Board: John T. Bagg, Chairperson  
Yvonne Ana Tamayo  
Fadd E. Beyrouty, Public Member  
Disposition: Violation of RPC 1.16(d), RPC 8.1(a)(2), and RPC  
8.4(a)(3). Trial Panel Opinion. 30-month suspension.  
Effective Date of Opinion: February 20, 2016

**TRIAL PANEL OPINION**

**PROCEDURAL HISTORY**

This is a disciplinary proceeding in which Kirk Tibbetts is charged with a total of six violations of the Rules of Professional Conduct (“RPC”) arising from three separate matters relating to his practice of law. The Bar served a Formal Complaint and an Amended Formal Complaint and Notice to Answer on Mr. Tibbetts, and he failed to appear within the time provided by the applicable rules of procedure. An Order of Default was entered by the Region 6 Chairperson of the Disciplinary Board on September 21, 2015, finding Mr. Tibbetts in default and holding “the allegations of the Bar’s Formal Complaint are deemed true.” Mr. Tibbetts has not responded to the order finding him in default. On November 23, 2015, the Bar filed a memorandum with a recommendation for sanction with the Trial Panel. Mr. Tibbetts made no appearance before the Trial Panel.

**SUMMARY OF FACTS AND ASSERTIONS OF MISCONDUCT**

We take the facts and assertions of relevant law from the Bar’s Second Amended Formal Complaint (“*Complaint*”) and the Bar’s Memorandum Re: Sanction (“*Memoran-*

*dum*)”.<sup>1</sup> For the purposes of this proceeding, the allegations as stated in the Bar’s Second Amended Formal Complaint are deemed true. RPC 5.8(a); *In re Magar*, 337 Or 548, 100 P3d 727 (2004). In summary, the facts and allegations address three separate matters.

The first two causes of complaint about Mr. Tibbetts’ conduct (Case No. 14-103) involve multiple requests for a client’s files. In 2014, a former client, William Brown, sent the accused a written request for a copy of his files from two criminal representations. The cases concluded in 2008. Mr. Tibbetts did not respond to Mr. Brown. Mr. Brown complained to the Bar, and the Bar’s Client Assistance Office forwarded the complaint to Mr. Tibbetts, and, again, Mr. Tibbetts did not respond. On two subsequent occasions, the Bar’s Disciplinary Counsel sent the accused written requests for information about Mr. Brown’s complaint, and Mr. Tibbetts did not respond. The accused also failed to comply with a telephone request to provide Mr. Brown with his files from a Bar assistant disciplinary counsel.

The Bar asserts failure to comply with the requests constitutes a violation of RPC 1.16(d) in “failing upon termination of employment to take reasonably practicable steps to protect a client. . . .” *Complaint* at 2. RPC 1.16(d) requires that

[u]pon 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.

Because Mr. Tibbetts failed to respond to the demands from the Disciplinary Counsel Office (“DCO”), the Bar also claims violation of RPC 8.1(a)(2). RPC 8.1(a)(1) to (2) provides:

- (a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
  - (1) knowingly make a false statement of material fact; or
  - (2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

The Bar’s third cause of complaint asserts the accused violated RPC 8.4(a)(2) and RPC 8.4(a)(3) by engaging in conduct amounting to a criminal act and a misrepresentation reflecting adversely on his fitness to practice law. Mr. Tibbetts was a member of the Linn County Legal Defense Consortium (“Consortium”) from “about” 1992 through early 2013

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<sup>1</sup> Our record does not include the Bar’s initial complaint or its first amended complaint.

and received income from that organization. The Bar asserts he was aware that “compliance with United States and Oregon tax laws was a condition” of his membership. *Complaint* at 4. The complaint asserts Mr. Tibbetts “was required to and willfully failed” to make and file federal or Oregon state tax returns for the tax years 2007 through 2010. *Complaint* at 5.

Notwithstanding his own obligation to pay his state and federal income taxes and his obligation under the Consortium to do the same, Mr. Tibbetts certified to the Consortium on or about September 17, 2007, June 22, 2009, and May 18, 2011, that he was not in violation of any Oregon tax laws. The Bar asserts Mr. Tibbetts’ certification to the Consortium was “false and material, and Tibbetts knew it was false and material when he made it.” *Complaint* at 5.

According to the Bar, Mr. Tibbetts handling of his tax issues and his obligations to the Consortium amounted to criminal conduct reflecting on a lawyer’s honesty, trustworthiness, or fitness to practice law under RPC 8.4(a)(2) and RPC 8.4(a)(3). Rule 8.4(a)(2) to (3) provides:

It is professional misconduct for a lawyer to:

....

- (2) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law. . . .

The Bar’s fourth and fifth causes of complaint mirror the first two. Mr. Tibbetts represented Colleen Mitchell in a Linn County matter. He completed his representation; and, thereafter, attorney James Van Ness was appointed counsel for Mitchell’s postconviction relief action arising from a conviction and sentence. While not expressly stated in the Bar’s *Complaint* or *Memorandum*, we presume Ms. Mitchell’s conviction and sentence were events within Mr. Tibbetts’ representation. Between late October of 2014 and February 2 of this year, Mr. Van Ness and staff sent letters, left voicemail messages, and issued a subpoena in attempts to get Ms. Mitchell’s file from the accused. There was no response from Mr. Tibbetts. The Bar charges Mr. Tibbetts with violation of RPC 1.16(d) for failure to supply the requested file.

The Bar also charges the accused with violation of RPC 8.1(a)(2). Attorney Van Ness complained to the Bar of the accused’s failure to respond to his request for Ms. Mitchell’s file. The DCO sent letters to the accused in February, March, and April of this year seeking information on Mr. Van Ness’ February 5, 2015 complaint about Mr. Tibbetts’ lack of response to his request for the Mitchell file. Mr. Tibbetts made no response and his failure falls within the prohibition in RPC 8.1(a)(2).

## SANCTIONS

We are reminded we are to consider four factors in determining appropriate sanctions for violation of the rules of 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. *See* American Bar Association’s *Standards for Imposing Lawyer Sanctions* § 3.0 (1992) (“Standards”); *In re Miles*, 324 Or 218, 221, 923 P2d 1219 (1996). In this case, there exists no contest to the Bar’s claim that Mr. Tibbetts violated the Bar’s rules of conduct in the manner asserted in the complaint and recited above. The first of the *Standards* is settled.

As to the second of the *Standards*, the only evidence before us about his mental state is that stated in the *Complaint*; that is, that he had knowledge of the various requests and Bar inquiries and, presumably, that he knew he was obliged to comply with them. Also, he was aware of his duty to and failure to comply with applicable tax laws and intentionally misrepresented to the Consortium that he had complied with at least the Oregon income tax laws. The matter of actual or potential injury also is settled as the Bar alleges. The injury, whether actual or potential is, of course, to his former clients and to the Bar, the legal profession, and the public. *See In re Schaffner*, 323 Or 472, 478–79, 918 P2d 803 (1996). Further, in failing to file his taxes, both federal and state, he harmed the government in its ability to administer the tax system. *See In re Lawrence*, 332 Or 502, 510, 514, 31 P3d 1078 (2001). He also harmed the Consortium, as the Bar asserts, by remaining associated with it when not qualified to do so and, thereby, potentially exposing it “to liability or loss of coverage for Mr. Tibbetts’ services while performing work for the Consortium.” *Memorandum* at 6.

Under the fourth of the *Standards*, the Bar asserts aggravating circumstances existed in that Mr. Tibbetts acted for dishonest and selfish reasons when failing to abide by tax laws and, further, in that he made “misrepresentations designed to conceal his criminal conduct.”<sup>2</sup> *Memorandum* at 7. It asserts multiple offenses aggravated by substantial experience in the practice of law (he was admitted to the Bar in 1991) and indifference to making restitution (because there is no evidence of his resolution of the failed tax obligations). *See generally Standards* §§ 9.22(b), 9.22(d), 9.22(I), and 9.22(j).

The Bar acknowledges as mitigating factors his lack of a prior disciplinary record (*see Standards* § 9.32(a)) and his divorce and relocation of his children during the time he failed to pay taxes, and his father’s death. *See Standards* § 9.32(c); *Memorandum* at 7; and the attached *Exhibits* 1 and 2. Two exhibits attached to the Bar’s *Memorandum* address these possible mitigating circumstances. The first is a copy of an email message of July 2013 to Ms. Hicks of the Bar in which Mr. Tibbetts acknowledges the requirement to make certain

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<sup>2</sup> We understand the Bar to refer to his falsehood to the Consortium that he had filed his Oregon tax returns as required.

quarterly tax payments and his failure to do so. He claims the reasons for his failure rest on personal and financial matters. He mentions a death in the family, his “unhealthy” response to that event, his spousal and child support obligations, two mortgages, and the expense of being a sole practitioner. He advises he was “taking steps to address issues and move forward.”

The second exhibit is a May 30, 2013 letter from Roger H. Reid, an Albany, Oregon lawyer involved with the Consortium. Mr. Reid describes himself as a friend of the Tibbetts family. He advises Mr. Tibbetts had been very helpful and cooperative in handing all his court-appointed cases over to Mr. Reid’s firm. The letter adds that Mr. Tibbetts is “very sorry about this problem,” and Mr. Reid believed Mr. Tibbetts is “being treated now by a doctor, and I know he wants to continue being an attorney.” The letter closes with Mr. Reid’s belief that Mr. Tibbetts did not have a criminal intent or any intent to actually deceive Mr. Reid.

Notwithstanding the two exhibits, there remains no evidence of a circumstance or condition that fully explains the combined failures and conduct leading to this disciplinary proceeding. We understand the accused experienced some personal difficulties in 2013, but there is no indication the difficulties were so severe or of such duration as to offer any mitigation either of his conduct in 2014 or of his falsifications to the Consortium in 2007 through 2011.

We now consider the Bar’s request for sanctions. The Bar advises the failure to respond to client requests for files may result in suspension from practice and cites *In re Snyder*, 348 Or 307, 232 P3d 952 (2010). Also, failure to respond to disciplinary authority is “a basis for a stiff sanction.” *In re Schenck*, 345 Or 350, 372, 194 P3d 804 (2008), *modified on recons*, 345 Or 652, 202 P3d 165 (2009); *In re Miles*, 324 Or 218, 223–24, 923 P2d 1219 (1996). Suspensions in such cases vary from 30 days to 180 days in cases the Bar cites in its memorandum. We agree suspension is appropriate in this case for the accused’s failure to respond to former client and attorney requests for files, and for his failure to respond to the Bar’s disciplinary process, or for either offense by itself.

Failure to file tax returns also warrants suspension. *In re Lawrence*, 332 Or at 515. In that case, failure to file federal and state income tax returns for three years resulted in only a 60-day suspension because of a delay in prosecution of the matter. The court noted that a suspension from six months to two years was appropriate in most cases involving failure to file taxes. When the accused fails to file tax returns for multiple years and also fails to cooperate with the Bar, the penalties increase. In *In re Kolstoe*, 21 DB Rptr 43 (2007), the trial panel imposed a four-year suspension for the accused attorney’s failure to file tax returns for seven years and failure to respond to a Bar inquiry regarding his conduct. As in the instant case, accused attorney Kolstoe did not respond to the Bar’s inquiries and defaulted in the disciplinary proceeding against him. It should be noted, however, that Kolstoe had a prior disciplinary record with the Bar.

The Bar asks that Mr. Tibbetts be suspended for two years and be required to undergo formal reinstatement prior to being restored to the practice of law. We understand the Bar's recommendation to be based on prior cases with similar instances of misconduct in matters of client property, including files, and filing of tax returns. We regard Mr. Tibbetts' conduct as distinguishable from the cases cited, however, because of the added offense arising from his relationship with the Consortium and, particularly, his false certification to that organization that he filed his Oregon income tax returns for three years running. Mr. Tibbetts understood his obligations to file tax returns and to certify to the Consortium that he had done so. He knowingly breached both obligations, and, in doing so, he effectively declared himself dishonest in these obligations. Dishonesty, particularly in circumstances showing the dishonest act was done for personal benefit (a continued relationship with the Consortium), reflects poorly on his fitness to practice law. His willful failure to file his tax returns constituted "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . . ." RPC 8.4(a)(2). When considering the totality of the circumstances, that is, his failure to honor his obligations to two former clients and a fellow attorney, his duties to the Bar's Client Assistance Office and the Disciplinary Counsel Office, his duty to the taxing authorities, and his falsifications to the Consortium, a more severe penalty is appropriate.

We hold a 30-month suspension is required in Mr. Tibbetts' case. Were we dealing with simple neglect of legal and professional obligations without the overlay of deceitful conduct, our view would be different. Here, we are presented with a severe aggravating factor in his dishonest treatment of his tax and certification obligations.

Finally, we agree with the Bar that formal reinstatement under the provisions of RPC 8.1 is appropriate. It will allow the Bar, the Board of Governors, and the Supreme Court to evaluate Mr. Tibbetts' character and fitness to practice law and help ensure that any reinstatement will not be a further detriment to the public and the profession. *See In re Coyner*, 342 Or 104, 115, 149 P3d 1118 (2006).

### CONCLUSION

For the reasons stated above, this Trial Panel finds Mr. Tibbetts in violation of RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3), and he is therefore suspended from the practice of law for 30 months. Following the period of suspension, should Mr. Tibbetts desire reinstatement as an Oregon attorney, he will be required to seek formal reinstatement under Bar Rule of Procedure 8.1.

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<sup>3</sup> The Bar correctly advises it is not necessary that one be convicted of a crime for the rule to apply. *See In re Summer*, 338 Or 29, 36, 105 P3d 848 (2005).



IT IS SO ORDERED.

Dated this 18th day of December, 2015

/s/ John T. Bagg

John T. Bagg  
Trial Panel Chairperson

/s/ Yvonne Ana Tamayo

Yvonne Ana Tamayo  
Trial Panel Member

/s/ Fadd E. Beyrouy

Fadd E. Beyrouy  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 16-05  
 )  
JENNIFER L. LUPTON, )  
 )  
Accused. )

Counsel for the Bar: Dawn M. Evans  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(2), RPC 8.4(a)(3), and ORS 9.527(1). Stipulation for Discipline. Six-month suspension, all stayed, one-year probation.  
Effective Date of Order: February 23, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Lupton is suspended for six months, all stayed pending successful completion of a one-year term of probation, effective seven days after approval by the Disciplinary Board for violation of RPC 8.4(a)(2), RPC 8.4(a)(3), and ORS 9.527(1).

DATED this 16th day of February, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Jennifer L. Lupton, attorney at law (“Lupton”), 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.

Lupton was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 23, 1996, and has been a member of the Bar continuously since that time. Her office and place of business is in Jackson County, Oregon.

3.

Lupton enters into this Stipulation for Discipline freely and voluntarily, and has had 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 January 9, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Lupton for alleged violations of RPC 8.4(a)(2) (criminal act reflecting adversely on honesty, trustworthiness, or fitness as a lawyer), RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Oregon Rules of Professional Conduct, and ORS 9.527(1) (committing an act of such a nature that, were the lawyer an applicant, the existence of the conduct should have resulted in a denial of the application). 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.

After being admitted to the Bar in 1996, Lupton became an inactive member in February 1997. Lupton obtained a real estate license and opened and operated a property management business. Lupton also owned a property maintenance company that was managed by her brother, William Lupton (“William”). In the course of managing the two businesses, Lupton maintained a trust account pertaining to tenants’ security deposits (“tenant trust account”) and a trust account pertaining to property management (“property management trust account”).

6.

In 2009 or early 2010, Lupton discovered a \$40,000 shortfall in the tenant trust account. Over an undetermined period of time, money had been transferred from the tenant trust account to a business account and used to pay expenses associated with maintaining the properties. At the time, the shortfall was believed to be the result of glitches in the property management software that tracked, among other things, payments to vendors. Lupton also discovered that her bookkeeper was only doing two-way reconciliations of her trust accounts instead of the three-way reconciliations required by the Oregon Real Estate Agency (“OREA”), the agency that regulates licensed real estate agents.

7.

Lupton did not report the trust account deficit to OREA, nor did she make any of the property owners aware of the discrepancies in the account. Rather, she secured training for her bookkeeper that was specific to the software, as well as additional training on bookkeeping by an outside accounting firm. She made no other changes in the way the accounts were managed. Unable to borrow the money she needed to make up the shortfall, she set up automatic payments from her business account to the trust account, hoping over time to rectify the shortfall.

8.

Lupton’s husband left her in late 2011, leaving her to care for the couple’s three small children and manage her business alone. During the next year, Lupton did not go to her office very often, relying upon her longtime bookkeeper and William to run the company and reconcile the financials. Lupton did not review records pertaining to the tenant trust account or the business’s operating account during this time. As a result of her lack of oversight, she was unaware that during this period of time William signed her name to over \$150,000 in checks from the property management trust account and that funds were transferred out of the tenant trust account to cover operating expenses, shortfalls in the maintenance company’s account, and the unauthorized checks.

9.

In February 2012, Lupton’s bookkeeper told Lupton about the unauthorized checks and that money was being transferred from the tenant trust account to cover these checks and maintenance company shortfalls. By that time, the tenant trust account deficit was believed to be in excess of \$100,000. Lupton fired the bookkeeper and contacted an accountant for help reconciling her company’s books. Upon learning how much it would cost for an accountant to do a reconciliation, Lupton concluded that the only way to handle the problem was to put money back into the trust account and reduce personnel. Again, she did not report the situation to OREA, nor did she divulge to any of the property owners the shortfall in the trust accounts.

10.

In November 2012, after OREA notified Lupton of a mandatory mail-in audit of the property management company, Lupton contacted OREA, admitting a shortfall and acknowledging that money from two trust accounts had been regularly transferred to a business account to cover expenses. Shortly thereafter, she was interviewed at her place of business and confirmed what she had reported. A trust account reconciliation performed by OREA revealed shortages in both trust accounts totaling in excess of \$250,000.

11.

A receiver was appointed to manage the business and bring the trust accounts into balance. Lupton cooperated with the receiver. She also borrowed \$100,000 to help balance the accounts. The receiver was able to get the property management company back on its feet and sell it.

12.

In December 2013, Lupton entered into a stipulated order in which she acknowledged violating six separate statutes governing real estate licensees, which include provisions requiring: (1) reconciliation of clients' trust accounts, taking corrective action or documenting good-faith efforts to resolve the adjustments; (2) maintaining tenants' security deposits in trust until disbursed or refunded pursuant to the lease agreement; (3) discipline if a licensee demonstrates incompetence or untrustworthiness; (4) discipline if a licensee commits an act of fraud or engages in dishonest conduct substantially related to the fitness of the licensee to conduct professional real estate activity; and (5) the real estate property manager to act in a fiduciary manner in all matters related to trust funds by being loyal to the owner and not taking action that is adverse or detrimental to the owner's interest. The order also found that Lupton engaged in professional real estate activity without a license for an eight-month period between when her license expired and when the stipulated order was entered.

### **Violations**

13.

Lupton admits that by violating the six separate statutes governing real estate licensees she committed a criminal act that reflects adversely on her trustworthiness in violation of RPC 8.4(a)(2). Lupton also admits that her failure to disclose to the property owners that their tenants' security deposits were no longer in trust, particularly in light of her acknowledged violation of the statutory requirement of dealing honestly and in good faith, and accounting for all funds received, was dishonest conduct that reflected adversely on her fitness to practice law in violation of RPC 8.4(a)(3). Lupton further admits that, by violating statutory standards of conduct that resulted in the loss of her real estate license, she committed an act of such a nature that, were she a bar applicant, should have resulted in a denial of the application, for which she can be disciplined pursuant to ORS 9.527(1).

## Sanction

14.

Lupton 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 Lupton’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.

- a. **Duty Violated.** Lupton violated her duty owed to the public to maintain the standards of personal integrity upon which the community relies. *Standards* § 5.0.
- b. **Mental State.** Lupton 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.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Lupton’s neglect in failing to appropriately monitor and reconcile the tenant trust account and the property management trust account caused both actual and potential injury. The tenants whose security deposits were not maintained were actually injured by the usage of their funds for purposes not authorized by statute. The property owners were potentially injured by being deprived of knowledge that the security deposits were not on hand and by being faced with a potential inability of the property management company to appropriately refund security deposits as they were demanded.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. *Standards* § 9.22(b). Lupton elected not to disclose the misuse of funds to either OREA or the property owners in part to avoid negative consequences to herself.
  2. A pattern of misconduct. *Standards* § 9.22(c). Lupton created and maintained a situation in her property management business that allowed staff to misappropriate tenant trust account funds. Lupton also made a conscious decision on two separate occasions not to inform

property owners of the depletion of the tenant trust account. *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).

3. Multiple offenses. *Standards* § 9.22(d).

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).
4. Timely good-faith effort to make restitution or to rectify consequences of the misconduct. *Standards* § 9.32(d).
5. Imposition of other penalties or sanctions. *Standards* § 9.32(k).
6. Remorse. *Standards* § 9.32(l).

15.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in certain types of criminal conduct “that seriously adversely reflects on the lawyer’s fitness to practice law.” *Standards* § 5.12. “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.

16.

In *In re Kimmell*, 332 Or 480, 491, 31 P3d 414 (2001), the court noted that whether the lawyer was acting in a fiduciary capacity affects the evaluation of sanctions for conduct involving dishonesty outside the practice of law. In *In re Flannery*, 334 Or 224, 233, 47 P3d 891 (2002), the court considered the degree of personal gain to the lawyer in determining whether the lawyer’s conduct in applying for an Oregon driver license when he lived in Washington reflected seriously on his fitness to practice law. In *In re Carpenter*, 337 Or 226, 232, 95 P3d 203 (2004), the court wrote that for DR 1-102(A)(3) (the predecessor to RPC 8.4(a)(3)) to apply to a lawyer’s conduct outside the practice of law, the conduct, “must demonstrate that the lawyer lacks those characteristics that are essential to the practice of law.” The court identified intentional or knowing dishonesty, that is, conduct that lacks trustworthiness and integrity, as a relevant consideration. In *In re Renshaw*, 353 Or 411, 421, 298 P3d 1216 (2013), in which the conduct was found to be violative of RPC 8.4(a)(2), the court wrote that the duration, magnitude, and effect of a lawyer’s misrepresentations are relevant considerations in assessing whether the lawyer’s conduct reflects adversely on his or her fitness. Most recently, in *In re Herman*, 357 Or 273, 287, 348 P3d 1125 (2015), in which the conduct was found to have violated RPC 8.4(a)(3), the court considered whether the lawyer’s conduct involved dishonesty and a lack of trustworthiness.

17.

Oregon cases applying these various criteria—whether the lawyer was acting in a fiduciary capacity, whether there was personal gain, whether the conduct demonstrated the lawyer lacks characteristics essential to the practice of law, and whether the conduct involved dishonesty and a lack of trustworthiness—range from reprimand to disbarment. A public reprimand was imposed in *In re Carpenter*, 337 Or 226 (the court concluded that a lawyer who posed as a teacher on an internet website and posted information that could be construed as acknowledging he engaged in sexual behavior with students had caused actual injury), and *In re Flannery*, 334 Or 224 (the court concluded that a Washington resident lawyer who falsely stated he was an Oregon resident in order to renew his Oregon driver license had derived minimal personal gain from the conduct). A 60-day suspension was imposed in *In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001) (lawyer willfully failed to file tax returns). A six-month suspension was imposed in *In re Kimmell*, 332 Or 480 (the court, in evaluating the appropriate sanction for a lawyer who shoplifted, distinguished between cases in which a theft violated a fiduciary duty or not, and found that the lawyer’s conduct demonstrated a disrespect for the law that he had taken an oath to uphold, calling into question whether he had good moral character). Disbarment was imposed in *In re Renshaw*, 353 Or 411 (lawyer in charge of making the firm’s shareholder distributions overpaid himself, underpaid others, misrepresented to the other shareholders why their distributions were low, and used law firm funds to pay personal expenses over several years’ time), and *In re Herman*, 357 Or 273 (lawyer, while inactive, embarked on a business venture, diverting the business’s funds to his own use, depriving his business partners of knowledge of his actions, and filing documents to dissolve the entity in which he misrepresented his authority to do so).

18.

Lupton’s conduct occurred in the context of a fiduciary duty. To the extent that the funds transferred from the trust accounts to the business account benefited the property management business she owned, she derived a personal gain from the continuation of the business for a period of time. The conduct to which she admitted is the type of conduct that would have raised a substantial question for a bar applicant as to whether the person was of good moral character. For those reasons, suspension would be an appropriate sanction under the applicable *Standards* and consistent with Oregon law. In light of Lupton’s mitigating factors, particularly her absence of prior discipline, personal or emotional problems, timely good-faith effort to make restitution or to rectify consequences of the misconduct, and the imposition of other penalties or sanctions, a probated term of suspension is appropriate.

19.

Consistent with the *Standards* and Oregon case law, the parties agree that Lupton shall be suspended for six months for violations of RPC 8.4(a)(2), RPC 8.4(a)(3), and ORS 9.527(1), effective February 1, 2015, or seven days after approval by the Disciplinary Board,



whichever is later. However, all of the suspension shall be stayed, pending completion of a one-year term of probation, which shall include the following terms and conditions:

- (a) Lupton 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) During the term of her probation, Lupton shall obtain not less than 12 hours of CLE-accredited programming, which shall include education about appropriate management of trust accounts and otherwise pertain to practice management. These credit hours shall be in addition to those MCLE credit hours required of Lupton for her normal MCLE reporting period.
- (c) Upon completion of the CLE programs described in paragraph (b), and no later than January 1, 2017, Lupton shall submit an Affidavit of Compliance to Disciplinary Counsel's Office ("DCO") regarding this condition.
- (d) An SPRB decision to bring a formal complaint against Lupton 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.
- (e) In the event Lupton fails to comply with any condition of her probation, DCO may initiate proceedings to revoke her probation pursuant to BR 6.2(d), and impose the stayed six months of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

20.

Lupton 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 any term of her suspension, if any stayed period of suspension is actually imposed. In this regard, in the event that a suspension is imposed, Lupton has arranged for David L. Smith, an active member of the Bar, to either take possession of or have ongoing access to Lupton's client files and serve as the contact person for clients in need of the files during the term of her suspension. Lupton represents that David L. Smith has agreed to accept this responsibility.

21.

Lupton acknowledges that reinstatement is not automatic on expiration of any period of suspension, if any stayed period of suspension is actually imposed. If a period of suspension is necessitated by her noncompliance with the terms of her probation, she will be required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Lupton also acknowledges that, should a suspension occur, 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.

Lupton 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.

23.

Lupton 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 Lupton 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.

EXECUTED this 29th day of January, 2016.

/s/ Jennifer L. Lupton

Jennifer L. Lupton

OSB No. 960867

EXECUTED this 8th day of February, 2016.

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 Nos. 15-13 and 15-73  
)  
MARY E. LANDERS, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: John E. Davis, Chairperson  
Joan Marie Michelsen  
April L. Sevcik, Public Member  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC  
1.15-1(a), RPC 1.15-1(d), RPC 8.1(a)(2), and RPC  
8.4(a)(3). Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: April 2, 2016

**TRIAL PANEL OPINION**

The Oregon State Bar (“Bar”) filed a Formal Complaint against Mary E. Landers (“Landers”) in this matter in Case No. 15-13 on June 19, 2015. On July 28, 2015, the Bar filed an Amended Formal Complaint against Landers and filed Case No. 15-73. The accused was personally served with the Formal Complaint on June 27, 2015. The accused was personally served by mail with the Amended Formal Complaint and Case No. 15-73 on July 28, 2015. Landers was served with the notice of intent to take a default by mail on September 9, 2015. Landers never responded to the Formal Complaint in Case No. 15-13 or to the Amended Formal Complaint in Case No. 15-13 or Case No. 15-73.

Based upon a motion for default dated September 23, 2015, which was mailed to Landers on September 23, 2015, an order of default was granted by the Regional Disciplinary Board and chairperson on September 28, 2015.

The Bar submitted a memorandum regarding sanctions on December 14, 2015. Based upon the foregoing, the Disciplinary Board for Region 3 issued the following Trial Panel Opinion:

## NATURE OF CHARGES AND DEFENSES

The Bar has alleged four causes of complaint against the accused:

### 1. Foster Matter:

1.1 Accused undertook to represent Sandra Foster in a custody dispute. Foster paid to the accused over \$8,400 for Landers's representation and in retainer payments. The Bar claims Landers's actions constituted charging and collecting an excessive fee in violation of RPC 1.5(a).

1.2 The Bar asserts Landers failed to maintain client funds in trust in violation of RPC 1.15-1(a).

1.3 The Bar asserts Landers failed to account for Foster's funds and return the same to her in violation of RPC 1.15-1(d).

1.4 The Bar asserts Landers's conduct involved dishonesty in violation of RPC 8.4(a)(3).

1.5 The Bar asserts Landers failed to respond to lawful demands from the Bar in violation of RPC 8.1(a)(2).

### 2. Austin Matter:

2.1 Landers was hired by Evan Roy Austin in September of 2011 to represent Austin in a custody matter. Austin paid Landers \$11,000. Austin fired Landers.

2.2 The Bar asserts Landers neglected a legal matter in violation of RPC 1.3.

2.3 The Bar asserts the Accused failed to keep Austin informed about the status of his case and promptly comply with reasonable requests for information in violation of RPC 1.4(a).

2.4 Landers charged and collected excessive fees in violation of RPC 1.5(a).

2.5 Landers did not provide a refund of the unused portion of Austin's \$11,000 retainer, nor did she do an accounting in violation of RPC 1.15-1(a).

2.6 Landers did not provide an accounting to Austin of the use of his retainer in violation of RPC 1.15-1(d).

2.7 Landers knowingly failed to respond to the Bar regarding Austin's Client Security Fund matter in violation of RPC 8.1(a)(2).

## SUMMARY OF UNDISPUTED FACTS

All facts are undisputed as Landers did not appear and an order of default has been entered.

**1. Foster Matter:**

1.1 First Cause of Complaint:

1.1.1 In or around 2009, Sandra Foster (“Foster”) retained Landers to represent her in a custody dispute. The matter concluded in or around March 2010.

1.1.2 At the conclusion of the custody dispute, Foster had funds remaining in her account with Landers (“Remaining Foster Funds”). Foster wanted Landers to continue representing her in the event that Foster’s ex-husband sought custody again. Landers told Foster that, if she continued to make payments to bring the balance of her retainer up to \$3,000, then Landers would keep the file open and be available to provide future legal services.

1.1.3 In accordance with Landers’s instructions, Foster made a number of additional payments (“Foster Retainer Payments”) to build up the amount Landers had on hand for possible future legal actions. Landers did not deposit the Foster Retainer Payments into her lawyer trust account. Rather, in or before 2012, when Landers closed her practice, she knowingly converted all of the Remaining Foster Funds and all of the Foster Retainer Payments to her own personal use.

1.1.4 In or around September 2014, when Foster’s ex-husband had not brought any further custody actions, Foster sought to close her account with Landers and obtain a refund of her monies but could not locate or reach Landers. Foster attempted to call Landers several times and stopped by her office. The office was closed, and the number was disconnected.

1.1.5 Foster paid Landers over \$8,400 total for Landers’s representation and in Foster Retainer Payments. Landers provided Foster with invoices that only account for a portion of the payments Foster made during the representation, as well as the Foster Retainer Payments. Landers had failed to credit at least two of the Foster Retainer Payments to Foster’s account, one for over \$1,800 and one for \$3,000.

1.1.6 In or about October 2014, the Bar contacted Landers and requested that she provide an accounting of all monies received from Foster and explain the apparent \$6,000 discrepancy between the invoices and receipts in Foster’s account records. Landers acknowledged that she owed Foster money, and promised to follow up, provide an accounting, and return the Remaining Foster Funds and Foster Retainer Payments. However, Landers did not thereafter account for the discrepancy in the records she provided, did not return any monies to Foster, and did not respond to the Bar’s further inquiries.

1.1.7 Landers’s conduct constitutes charging or collecting a clearly excessive fee; failure to maintain client funds in trust; failure to account for client property, upon request, and to promptly return client property; and conduct involving dishonesty, in violation of the following standards of professional conduct established by law and by the Bar: RPC 1.5(a); RPC 1.15-1(a); RPC 1.15-1(d); and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

1.2 Second Cause of Complaint:

1.2.1 On or about November 19, 2014, Disciplinary Counsel’s Office (“DCO”) received a complaint from Foster about Landers’s conduct. By letter dated December 2, 2014, DCO requested Landers’s response to Foster’s complaint. The letter was sent by first-class mail to Landers at the last address Landers provided to the Bar. The letter was not returned undelivered. Landers did not respond to it.

1.2.2 By letter dated December 13, 2014, DCO again requested Landers’s response to Foster’s complaint. The letter was addressed to Landers at her last known address, and sent via first-class mail and certified mail, return-receipt requested. The December 13 letter was also sent to Landers at the email address provided to the Bar by Landers’s former attorney in October 2014, and to which she had previously responded. The letter sent by first-class mail was not returned undelivered. The letter sent by certified mail was signed for by “Spencer.” The email was not rejected. Landers did not respond.

1.2.3 On January 29, 2015, DCO petitioned the Disciplinary Board Chairperson to suspend Landers pursuant to BR 7.1, for failing to respond to DCO’s inquiries. Landers was served with DCO’s petition by first-class mail to her last known address, along with a Notice to Respond. She did not respond and was administratively suspended for her noncompliance on February 11, 2015.

## **2. Austin Matter:**

2.1 Third Cause of Complaint:

2.1.1 Evan Roy Austin (“Austin”) retained Landers in or around September 2011 to represent him in a child custody case. Austin paid Landers \$11,000, against which Landers was to bill at \$195 per hour.

2.1.2 In or around March 2012, Austin fired Landers when she stopped responding to his inquiries. Thereafter, Austin learned that during the representation Landers failed to respond on Austin’s behalf to a motion and failed to inform Austin about an upcoming hearing. Finally, after Austin terminated the representation, Landers failed to inform the court that she no longer represented Austin.

2.1.3 Landers did not provide a refund to Austin for the unearned portion of his \$11,000 retainer. She also did not provide an accounting to Austin or explain her activities on the case when requested to do so by the Bar.

2.2 Fourth Cause of Complaint:

2.2.1 On or about March 24, 2014, Austin filed a claim with the Bar's Client Security Fund ("CSF") seeking a return of the money he paid to retain Landers. Soon thereafter, the CSF notified DCO of Austin's claim. By letter dated April 16, 2015, DCO wrote to Landers seeking a response to the allegations contained in Austin's CSF claim. The letter was sent by first-class mail to Landers at the last address Landers provided to the Bar. The letter was not returned undelivered. Additionally, the April 16 letter was sent to Landers at the email address provided to the Bar by Landers's former attorney in October 2014, and to which she had previously responded. The email was not rejected. Landers did not respond to the Bar's correspondence.

2.2.2 By letter dated May 14, 2015, DCO again requested Landers's response to the Austin claim. The letter was addressed to Landers at her last known address, and sent via first-class mail and certified mail, return-receipt requested.

The letter sent by first-class mail was returned as undeliverable, although later that month Landers was personally served with pleadings at that address. Landers did not respond.

## CONCLUSIONS OF LAW

### 1. Foster Matter: First Cause of Complaint.

1.1 Collection of Excessive Fees: RPC 1.5 prohibits lawyers from charging an excessive fee. A violation of RPC 1.5 occurs when an attorney collects up front for his services, does not complete the services for which he was paid, but fails to properly remit the unearned portion of the fee. *See In re Gastineau*, 317 Or 545, 857 P2d 136 (1993). In this case we concluded the Bar has proven by clear and convincing evidence that Landers charged an excessive fee in violation of RPC 1.5.

1.2 Mishandling Foster Funds: RPC 1.15-1(a) requires a lawyer to hold funds of clients in a lawyer's possession separate from the lawyer's own property (namely in a trust account). When Landers did not deposit Foster's retainer payments to a trust account, she failed to separate and protect said funds in violation of RPC 1.15-1(a).

1.3 Failure to Deliver and Account for Trust Funds: RPC 1.15-1(d) in part requires a lawyer to promptly deliver to the client any funds that the client is entitled to receive and, upon request by the client, to promptly render a full accounting regarding said funds. When Foster requested a refund of the unused portion of the retainer, Landers failed to provide a refund or an accounting for Foster's funds. Therefore, she violated RPC 1.15-1(d).

1.4 Dishonest Conduct: RPC 8.4(a)(3) prohibits lawyers from engaging in dishonest conduct reflecting adversely on the lawyer's fitness to practice law. Dishonesty is conduct evidencing a disposition to lie, cheat, or defraud, as well as a lack of trustworthiness or integrity. *In re Kluge*, 335 Or 326, 66 P3d 492 (2003).

1.5 Embezzlement Is Dishonesty: "[A] lawyer who holds money in trust for another and converts that money to his own use has engaged in conduct 'involving dishonesty' within the meaning of [former] DR 1-102(A)(4)." *In re Holman*, 297 Or 36, 57-58, 682 P2d 243 (1984).

When Landers deposited Foster's retainer payments into her own account, knowing the funds were either remaining client funds or retainer funds for services yet to be rendered, she converted her client's funds to her own use and engaged in dishonesty and conversion in violation of RPC 8.4(a)(3).

1.6 Failure to Respond to the Bar: RPC 8.1(a)(2) prohibits a lawyer, in connection with a disciplinary matter, from knowingly failing to respond to a lawful demand for information from a disciplinary authority, except for information protected by RPC 1.6. Landers's failure to respond to DCO's letters and correspondence during the course of a disciplinary investigation is a violation of RPC 8.1(a)(2).

## **2. Austin Matter:**

2.1 Neglect of Legal Matter: RPC 1.3 prohibits a lawyer from neglecting a legal matter entrusted to him or her. Landers' failure to respond to Austin's inquiry or failure to respond to neglect of a legal matter is a violation of RPC 1.3.

2.2 Failure to Communicate: RPC 1.4(a) requires a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Landers' failure to return calls of Austin, respond to inquiries, inform him about his case, or advise him on an upcoming hearing constitutes failure to communicate with a client in violation of RPC 1.4(a).

2.3 Collection of Excessive Fees: RPC 1.5 prohibits lawyers from charging an excessive fee. A violation of RPC 1.5 occurs when an attorney collects up front for his service, does not complete the services for which he was paid, but fails to properly remit the unearned portion of the fee. *See In re Gastineau*, 317 Or 545. Landers failed to provide a partial refund to Austin from the unearned fees she charged therefore Landers is in violation of RPC 1.5.

2.4 Failure to Account for Funds: RPC 1.15-1(d) requires a lawyer to account for clients' funds when requested and return funds to the person entitled to them even if not specifically requested. Landers' failure to provide Austin or the Bar an accounting of his funds and her failure to return funds violated RPC 1.15-1(d).

2.5 Failure to Cooperate and Failure to Respond to the Bar: RPC 8.1(a)(2) prohibits a lawyer in connection with a disciplinary matter from knowingly failing to respond



to a lawful demand for information from a disciplinary conduct, except for information provided by Rule 1.6. Landers' failure to timely respond to the DCO's letters and correspondence during the course of a disciplinary investigation is a violation of RPC 8.1(a)(2).

### SANCTIONS

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* ("*Standards*"), in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993).

The *Standards* establish the framework to analyze Landers's conduct, including: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the conduct, and (4) the existence of aggravating mitigating circumstances. *Standards* § 3.0.

- A. **Duty Violated.** The most important ethical duties are those obligations that a lawyer owes to clients. *Standards* at 5. In this case, Landers violated her most fundamental duty to her clients to preserve and return their client property. *Standards* § 4.1. Landers also violated her duty to act with reasonable diligence and promptness in representing her clients, and to adequately communicate with clients. *Standards* §§ 4.4, 4.5. Landers violated her duties owed to her clients, the public, and the profession to avoid conduct involving dishonesty, fraud, deceit, or misrepresentation. *Standards* §§ 4.6, 5.1, 7.0. Lastly, Landers violated her duty to the profession when she charged a clearly excessive fee and when she failed to cooperate with the disciplinary investigation. *Standards* § 7.0.
- B. **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* at 9. "Negligence' is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Standards* at 9.

The trial panel concludes that Landers acted knowingly in all respects namely in failing to reply to the Bar, in failing to communicate with and attend to the Austin matter, and in mishandling her client's funds.

- C. **Extent of Actual or Potential Injury.** For the purposes of determining an appropriate disciplinary sanction, the trial panel has taken into account both actual and potential injury. *Standards* at 6. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The *Standards* define *injury* as “harm to the client, the public, the legal system or the profession which results from a lawyer’s conduct.” *Potential injury* is harm to the client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer’s conduct. *Standards* at 7.

Landers had a duty to promptly reply to her clients’ requests for an accounting, return their funds and property, and refrain from engaging in dishonest conduct. She knowingly failed to satisfy these duties. Landers also had an ethical duty to diligently pursue her clients’ matters, and to timely and sufficiently cooperate with the Bar about the disciplinary proceedings. Landers chose instead to knowingly and intentionally disregard and fail to comply with these ethical obligations, and these failures have resulted in substantial, actual, and potential injury to her clients and the profession.

More and most importantly, Landers knowingly and intentionally—dishonestly—appropriated client money to her own use, and still has not returned it. Such dishonesty cannot be tolerated from a member of the Bar.

- D. **Aggravating and Mitigating Circumstances.** All of the following facts, which are recognized as aggravating under the *Standards*, exist in this case:

1. Prior discipline. *Standards* § 9.22(a). In 2014, Landers was suspended for 30 days for violations in three separate matters, including violations of RPC 8.1(a)(2) (two counts) and RPC 1.4(a)—all of which are also at issue in these matters. *In re Landers*, 28 DB Rptr 15 (2014). Prior discipline is a significant aggravating factor, particularly when it is of a similar nature. In her prior case, all of Landers’s suspension was stayed pending her completion of a two-year term of probation. That probation is ongoing.<sup>1</sup> Landers’s conduct in this matter occurred despite that probation.

*Standards* § 8.0 provides that severe sanctions should be imposed on lawyers who violate the terms of prior disciplinary orders.

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<sup>1</sup> The Bar has recently obtained an order to show cause why that term of probation should not be revoked and the stayed portion of her suspension imposed due to her lack of compliance with her probationary requirements. Her response to that motion is due on December 18, 2015.

2. A dishonest and selfish motive. *Standards* § 9.22(b). Landers's misappropriation of and failure to return her client's funds was both dishonest and selfishly motivated.
3. A pattern of misconduct. *Standards* § 9.22(c). Landers's conduct in neglecting client matters, failing to return client funds, and avoiding the Bar's inquiries demonstrates a pattern of neglect, avoidance, and disregard for client matters and professional obligations. *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).
4. Multiple offenses. *Standards* § 9.22(d).
5. Refusal to acknowledge the wrongful nature of her misconduct. *Standards* § 9.22(g). Landers's refusal to respond to DCO and to return her client's funds constitutes a failure to acknowledge her wrongdoing. *In re Schaffner*, 325 Or 421 (court found that attorney's failure to respond or cooperate constituted a failure to acknowledge any wrongdoing).
6. Substantial experience in the practice of law. *Standards* § 9.22(i). Landers was licensed in Oregon on May 29, 2001, and has practiced primarily in domestic relations for a majority of that time.
7. Indifference to making restitution. *Standards* § 9.22(j). Landers's knowledge of her obligation to repay her clients and her subsequent failure to repay even a portion of the amount owed demonstrates her indifference to making restitution.
8. Illegal conduct. *Standards* § 9.22(k). Although not separately charged, Landers's conversion constitutes theft.

Because Landers has failed to participate in the underlying investigations or this formal proceeding, the trial panel is not aware of any applicable mitigating factors. Because Landers intentionally and dishonestly converted client funds, disbarment is the only appropriate sanction. *See In re Pierson*, 280 Or 513, 518, 571 P2d 907 (1977) (a single conversion by a lawyer to his own use of his client's funds resulted in permanent disbarment). *See also In re Renshaw*, 353 Or 411, 298 P3d 1216 (2013).

Landers has demonstrated that she is either unable or unwilling to conform her conduct to the required ethical standards and for the reasons stated above, and in order to protect the public and the Bar, Landers is hereby disbarred.

Cite as *In re Landers*, 30 DB Rptr 89 (2016)

Dated the 29th day of January, 2016.

/s/ John E. Davis

John E. "Jack" Davis, Trial Panel Chairperson

/s/ Joan Marie Michelsen

Joan Marie Michelsen, Trial Panel Member

/s/ April L. Sevcik

April L. Sevcik, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-39  
)  
FRANCO DORIAN FERRUA, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: Courtney C. Dippel, Chairperson  
Ulanda L. Watkins  
JoAnn Jackson, Public Member  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC  
1.5(c), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d),  
and RPC 8.4(a)(4). Trial Panel Opinion. 181-day  
suspension, plus restitution.  
Effective Date of Opinion: May 10, 2016

**TRIAL PANEL OPINION**

This matter came regularly before a trial panel of the Disciplinary Board consisting of Courtney C. Dippel, Chair; Ulanda L. Watkins, Esq.; and JoAnn Jackson, Public Member (“Trial Panel”) on February 19, 2016. Amber Bevacqua-Lynott and Angela W. Bennett represented the Oregon State Bar (“Bar”). The Accused, as further described below, represented himself in this matter, but failed to appear at the hearing.

The Trial Panel has considered the factual allegations in the Complaint, the Bar’s Trial Memorandum, the Bar’s exhibits, and the live testimony of Marcelino Lopez-Diaz, Lynn Bey-Roode, Becky Peer, and Steven Wax.

Based on the findings and conclusions below, we find that the Accused violated Oregon Rules of Professional Conduct (“RPC”) 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.5(c)(3), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(4). We further determine that the Accused should be suspended from the practice of law for a period of 181 days, should have to apply for formal reinstatement should he choose to practice law in Oregon again, and shall pay restitution in the amount of \$12,500 to Mr. Marcelino Lopez-Diaz.

## INTRODUCTION

**The Complaint:** The Bar filed a Formal Complaint on July 7, 2015 against the Accused claiming violations of the Oregon RPCs. Specifically, the Bar claimed that the Accused violated RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to keep a client reasonably informed and respond to reasonable requests for information), RPC 1.5(a) (charge or collect a clearly excessive fee), RPC 1.5(c)(3) (failure to include necessary language required in a flat-fee agreement), RPC 1.15-1(a) (failure to deposit and hold client funds in trust account), RPC 1.15-1(c) (failure to deposit client funds into trust and withdraw them only as earned), RPC 1.15-1(d) (failure to return client property and provide accounting to client), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

The Trial Panel noticed this matter for hearing on February 19, 2016, and on December 18, 2015, the Trial Panel sent the notice setting the hearing to the Accused's last known address in the United States. On January 8, 2016, the Trial Panel emailed the notice for the hearing to the Accused upon learning that the Accused had moved to Brazil. On January 8, 2016, the Accused emailed the Trial Panel Chair's office and acknowledged the notice of hearing for February 19, 2016, but stated he had moved to Brazil and had no financial means to return to Oregon for the hearing.

On January 12, 2016, the Bar stated that it had no objection to the Accused appearing at the hearing via telephone, video, or both, but objected to continuing the hearing. On January 13, 2016, the Trial Panel Chair wrote to the Bar and the Accused notifying both that the hearing would be going forward on February 19, 2016, and informing the Accused that he could participate by telephone or video.

Thereafter, the Accused sent numerous emails to the Trial Panel Chair's office regarding various issues. However, at no point in time did the Accused file a motion for a continuance of the February 19, 2016 hearing date, nor did the Accused ever inform the Trial Panel that the Accused did not intend to participate at the hearing on February 19, 2016.

**The Bar's Motion for Default:** The Accused failed to appear for the hearing on February 19, 2016. Upon his failure to appear, the Bar moved to hold the Accused in default for his failure to appear and to accordingly strike his Answer to the Complaint. The Trial Panel Chair granted the Bar's Motion, held the Accused in default, and struck the Accused's Answer. Thus, pursuant to BR 5.8, the allegations of the Complaint were deemed true and the hearing proceeded.

## FINDINGS OF FACT

The Trial Panel makes the following findings of fact.

The Accused was admitted to practice in Oregon in 1992. Since his admission, the Accused has primarily practiced in the area of criminal defense.

In November 2012, Marcelino Lopez-Diaz (“Lopez-Diaz”) was arrested and jailed for drug-related charges. Soon thereafter, Lopez-Diaz’s brother contacted the Accused to consult with him regarding representing Lopez-Diaz.

In November 2012, the Accused agreed to meet with Lopez-Diaz at the jail for a consultation and fee of \$1,500, which was paid. In January 2013, for an additional payment of \$1,500, the Accused again met with Lopez Diaz at jail “because they were considering retaining the Accused.”

That same day, Lopez-Diaz’s sister-in-law paid the Accused an additional \$15,000 in cash to represent Lopez-Diaz. The Accused did not obtain a written fee agreement, signed by either Lopez-Diaz or his sister-in-law. The Accused provided Lopez-Diaz’s sister-in-law a receipt acknowledging receipt of the \$15,000 as a flat fee for “a legal consultation regarding Marcelino Lopez-Diaz.” In a “PS” written in Spanish, the receipt the Accused prepared stated that the \$15,000 represented the entire fee through trial, even if the case were transferred to federal court.

Nowhere in the receipt did the Accused indicate that the Lopez-Diaz funds would not be deposited into trust. Nor did the receipt include a statement that Lopez-Diaz was entitled to discharge the Accused at any time and in that event would be entitled to a refund of all or part of the fee, if the services for which the fee was paid were not completed.

The Accused did not deposit the Lopez-Diaz funds into his lawyer trust account. The Accused did not create a trust ledger for the Lopez-Diaz funds or track them in any fashion.

In late May 2013, the Accused appeared at Lopez-Diaz’s arraignment and detention hearing in federal court. At that hearing, a five-day jury trial was scheduled for July 23, 2013, in front of the Honorable Robert E. Jones (“Judge Jones”).

On July 1, 2013, Judge Jones’ judicial assistant, Becky Peer (“Peer”) emailed the Accused inquiring whether he intended for Lopez-Diaz’s case to go to trial on July 23, 2013, as scheduled. The Accused sent a responsive email the same day stating that he expected an amicable resolution, and if not, he would require at least another 60 to 90 days to prepare for trial.

On July 16, 2013, the Accused moved to extend the trial date for 90 days. The court granted the motion, continued the five-day jury trial to November 5, 2013, and ordered the parties to notify the court by October 22, 2013, whether they expected the case to proceed to trial.

From the arraignment on May 28, 2013, until November 4, 2013, the Accused visited Lopez-Diaz once. Apart from that single visit in July, the Accused did not meet with Lopez-Diaz again or have any written communication with him for the remainder of his representation.

Additionally, there is no documentation that the Accused performed substantive legal services on behalf of Lopez-Diaz, or that he took any steps to prepare for trial. The Accused did not file pleadings on Lopez-Diaz's behalf or interview witnesses, nor did he prepare exhibits or pretrial motions, memos, or materials. There is no evidence that the Accused took any steps to negotiate a plea with the Assistant U.S. Attorney handling Lopez-Diaz's prosecution. In sum, there is no evidence that the Accused did any work to defend Lopez-Diaz on the serious charges he was facing.

In August/September of 2013, the Accused left the country for a planned vacation to Brazil to visit his girlfriend. The Accused did not notify Lopez-Diaz of his plan to leave the country prior to his departure.

A few weeks after he returned to the U.S., the Accused was hospitalized for a few days due to an intestinal illness. The Accused did not notify Lopez-Diaz or the court of his illness or a subsequent hospitalization when they occurred.

The Accused did not notify the court on or before October 22, 2013, whether the case would go to trial, as he had been ordered to do by Judge Jones. He also did not file a motion for a continuance by October 22, 2013, or at any time thereafter.

In mid-October, Peer attempted to contact the Accused and inquire whether there would be a trial on November 5, 2013. At some point, the Accused spoke with Peer by telephone and told her he intended to move for a continuance, but the Accused did not file the motion for continuance.

On October 31, 2013, three working days before trial, when the Accused still had not filed a motion to set over the case, the court requested help from the Federal Public Defender's Office. The Federal Public Defender's Office attempted multiple times to contact the Accused by phone and email, and employed its chief investigator to track him down. The Accused acknowledged that he received the messages from the Federal Public Defender and that he ignored one or more of them.

On November 1, 2013, the Accused called the court in response to the messages he had received and represented to Peer that he would be seeking a continuance because "he needed to do more investigation."

Peer again instructed the Accused that he would need to file a motion if he wanted the trial to be postponed.<sup>1</sup> However, the Accused did not file the motion, nor did he consult with Lopez-Diaz about a speedy trial waiver or any trial date changes.

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<sup>1</sup> The court could not entertain such a motion from a party other than the defendant or even set a matter on its own initiative because a setover required the defendant to waive his right to a speedy trial. *See* 18 USC § 3161(h)(7)(a).



When the Accused had still not filed the motion or contacted the court by mid-day on November 4, 2013 (the day before the scheduled trial), the court removed the Accused as Lopez-Diaz's counsel and appointed Assistant Federal Public Defender Thomas Price ("Price") to replace the Accused and complete Lopez-Diaz's legal matter. Trial was required to be postponed.

On November 4, at about the same time that the court terminated the Accused's representation of Lopez-Diaz, Brad Tompkins, an attorney with the Bar's Professional Liability Fund ("PLF") telephoned the Federal Public Defender's office and stated that the Accused needed to withdraw from the case due to health issues. Both Peer and Mr. Steven Wax, the Federal Public Defender at the time of the underlying events, testified that they understood the court's termination/removal of the Accused was due to his health and health-related concerns. No witness testified, nor did the Bar present any uncontroverted evidence that the Accused's termination was due to a lack of competence or communication with the court.

Subsequently, Lopez-Diaz had his brother contact the Accused and request a refund of the unused portion of the Lopez-Diaz funds. The Accused refused.

The Accused's rationale for not returning unearned portions of the Lopez-Diaz funds has evolved. Initially, in an October 2014 letter, the Accused told Lopez-Diaz that according to his "template" fee agreement, if there were any disputes between them, they needed to go to mediation before taking court action. The Accused further claimed "the retainer provides that should there be a termination of our attorney-client relationship, I am entitled to compensation—if deemed that I was not responsible for such termination—at a rate of \$500 dollars per hour." The Accused concluded that he worked far more than the 30 hours he needed to work to earn his retainer at \$500 per hour, and as it was not his fault he was removed from the case, he was entitled to compensation for his work.

According to the Accused's deposition testimony, he initially refused Lopez-Diaz's brother's request for a refund, because "the client makes the ultimate decision whether to terminate the case or not."

The Accused later said that he reasoned that he did not have to give the money back because Lopez-Diaz could have changed his mind. The Accused could not produce any file of any work he undertook in preparing to defend Lopez-Diaz. More importantly, there is no evidence that the Accused maintained contemporaneous time records on the time he later claimed to have spent on Lopez-Diaz's defense.

#### **DISCUSSION 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 once the Accused was held in default pursuant to BR 5.8(a). *In re Magar*, 337 Or 548, 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 rules of professional conduct, and if so, what sanctions may be appropriate. *In re Koch*, 345 Or 444, 198 P3d 910 (2008); *see also In re Kluge*, 332 Or 251 (describing the two-step process).

**A. The Accused neglected Lopez-Diaz’s case, failed to keep him informed of important events in his case, and respond to reasonable requests for information from Lopez-Diaz, in violation of RPC 1.3 and RPC 1.4(a).**

Neglect in the context of RPC 1.3 is the failure to act or the failure to act diligently. The lawyer’s conduct must be viewed along a temporal continuum, rather than as discrete, isolated events. *In re Magar*, 335 Or 306, 66 P3d 1014 (2003); *In re Eadie*, 333 Or 42, 36 P3d 468 (2001). Although one act of negligence is not sufficient to violate RPC 1.3, either a course of neglectful conduct or an extended period of neglect is sufficient to establish a violation of the rule. *In re Jackson*, 347 Or 426, 435, 223 P3d 387 (2009), *citing In re Koch*, 345 Or 444.

Admitted and virtually unexplained inaction on the part of an attorney, while simultaneously failing to communicate with a client, is sufficient to find neglect. *See, e.g., In re Purvis*, 306 Or 522, 760 P2d 254 (1988) (attorney failed to take any action over several months after being retained by client to seek reinstatement of child support payments); *In re Dixson*, 305 Or 83, 750 P2d 157 (1988) (attorney guilty of neglect for failing to file a timely discrimination complaint on behalf of client and failing to keep client informed of case’s progress).

In this case, the Accused engaged in a course of neglectful conduct after receiving the \$15,000. Apart from seeing Lopez-Diaz at the arraignment, the Accused met with his client only once in the time between the indictment in March and the second trial setting in November of 2013. The Accused spoke on the phone with Lopez-Diaz only four times, totaling 29 minutes, during that same period, and failed to take or return the vast majority of Lopez-Diaz’s family’s calls, and failed to provide Lopez-Diaz or his family with important updates or information in his case.

During the same time frame, the Accused undertook few activities to advance Lopez-Diaz’s case. The evidence establishes that from January 2013 to May 21, 2013, the Accused did nothing on behalf of Lopez-Diaz, and that, even after arraignment, the only noteworthy

time was spent allegedly researching theories of the case via Google, and a couple of telephone calls with other lawyers to obtain some guidance as to how to proceed with the case.<sup>2</sup>

Other than unsubstantiated research, the Accused's time records demonstrate he performed no substantiated, practical work on Lopez-Diaz's case between July 26, 2013, and November 4, 2013. The only contacts he had with Lopez-Diaz during this time were two phone calls, one for eight minutes, and one for two minutes.

In the time leading up to the November 5 trial date, the Accused failed to communicate with Lopez-Diaz about key occurrences, failed to inform Lopez-Diaz that he intended to request a set-over of the trial, and failed to obtain his client's consent to waive his speedy trial rights.

The Accused knew he was supposed to notify the court of trial readiness by October 22, 2013, as ordered on July 23, 2013. He did not do so. The Accused thereafter ignored numerous telephone calls, emails, and voicemails from Peer (as well as the Federal Public Defender's office) requesting that he inform the court of his readiness for trial, or his intentions to set over the trial.

The Accused's failures to communicate with the court, respond to the court's requests for information, and file the motion to set over the case constitute neglect. *See, e.g., In re Jackson*, 347 Or at 435–36 (neglect found when, over a period of three months, accused was not prepared for a settlement conference, failed to provide requested availability dates to the arbitrator, failed to respond to two voicemail messages from the arbitrator's assistant, and subsequently took no steps to pursue arbitration after the case was again referred for arbitration). As the court noted in *In re Jackson*, “[a]ny of those enumerated events can—and will—occur on occasion, but having all of them occur in the same case and in the serial manner in which they occurred is sufficient to constitute neglect.” *In re Jackson*, 347 Or at 435–36.

The Accused's failure to substantively act on behalf of Lopez-Diaz throughout the pendency of his representation, his failure to communicate with the court, his failure to respond to the court's inquiries, and his failure to timely file the motion for a continuance, all constitute neglect. This neglect, together with his failure to stay in contact with his incarcerated client, Lopez-Diaz, provide Lopez-Diaz with information about case progress, respond to his client's inquiries, or inform or advise Lopez-Diaz on upcoming hearings, constituted neglect of a legal matter and failure to communicate with a client in violation of RPC 1.3 and RPC 1.4(a). *See In re Koch*, 345 Or 444 (attorney found to have violated both rules when she failed to advise her client that another lawyer would prepare a qualified

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<sup>2</sup> Nine months after he was initially questioned by the Bar, the Accused provided a “billing statement” to support that he had spent exactly the right amount of time to have fully earned the \$15,000 he had received on behalf of Lopez-Diaz at \$400 per hour.

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).

**B. The Accused's failure to refund any portion of the Lopez-Diaz funds, after failing to complete the representation, amounted to collecting a clearly excessive fee, in violation of RPC 1.5(a), and a failure to return client property, in violation of RPC 1.15-1(d).**

A lawyer collects a clearly excessive fee in violation of RPC 1.5(a) when he collects the fee up front for services, does not complete the professional services for which the fee was paid, but fails to promptly remit the unearned portion of the fee to the client. *In re Gastineau*, 317 Or 545, 551, 857 P2d 136 (1993); *see also In re Balocca*, 342 Or 279, 151 P3d 154 (2007).

There is no evidence that the Accused and Lopez-Diaz entered into a written fee agreement. Both agree that the \$15,000 payment was a flat fee for the Accused to represent Lopez-Diaz through completion of the prosecution. The Accused agreed to represent Lopez-Diaz until his matter was completed, through trial if necessary. The Accused fell well short of completing the representation. He was therefore required under *Gastineau* and *Balocca* to promptly refund part or all of Lopez-Diaz's retainer. His failure to do so violated RPC 1.5(a).

The Accused's failure to refund any of the Lopez-Diaz funds amounted to a clearly excessive fee in violation of RPC 1.5(a). *See, e.g., In re Obert*, 352 Or 231, 282 P2d 825 (2012) (attorney who took a flat fee to represent a client on a years-old out-of-state warrant met with the client once, before the client was released from jail because the other state decided not to pursue extradition; attorney refused to make a refund of the fee, and was found to have collected a clearly excessive fee because he had not taken any substantial step toward completing work on the matter); *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (\$10,000 retainer attorney accepted became a clearly excessive fee when the client terminated him before much work had been done and the legal matter was not completed).

The Accused further violated this rule when he refused to refund the unused portion of Lopez-Diaz's funds. The Accused's failure to return client funds that Lopez-Diaz was entitled to violated RPC 1.15-1(d). *See, e.g., In re Obert*, 352 Or 231; *In re Benett*, 331 Or 270, 14 P3d 66 (2000) (attorney committed a violation of former rule when he refused to return to his former clients funds that were undisputedly theirs); *In re Hedges*, 313 Or 618, 836 P2d 119 (1992) (failure to account for and return client funds from attorney's trust account was an ethical violation despite attorney's claim that it was a nonrefundable fixed fee).

**C. The Accused violated RPC 1.15-1(a) and (c).**

The Accused did not have a signed, written, flat-fee agreement with Lopez-Diaz that complied with RPC 1.5(c)(3). Therefore, he was required to place Lopez-Diaz's funds in

trust, withdraw sums only as earned, and account to the client on request. *See In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994) (“Without a clear written agreement between a lawyer and a client that fees paid in advance constitute a non-refundable retainer earned on receipt, such funds must be considered client property and are, therefore, afforded the protections imposed by DR 9-101(A) [*current* RPC 1.15-1(a) and (c)].”); *In re Hedges*, 313 Or at 623–24 (1992) (in the absence of a specific written agreement, funds received by the lawyer are considered “client funds” for purposes of safekeeping rules).

Funds received from someone other than a client directly may still be considered client funds, and subject to the requirements of both RPC 1.15-1(a) and (c). The language of RPC 1.15-1(a) is mandatory and may not be waived by a client. When he received the \$15,000, the Accused was required to deposit the funds into his lawyer trust account and maintain them separately from his own funds unless and until he obtained proper written authorization to do otherwise. The Accused admitted that he never placed the Lopez-Diaz funds into his trust account.

In order for an attorney to be entitled to take funds before work is performed, he must have a valid retainer agreement in place that complies with RPC 1.5(c)(3) in all respects, designating the funds as “earned upon receipt.” The Accused did not have such an agreement in place when he took the Lopez-Diaz funds.

**D. The Accused failed to obtain a signed retainer agreement that included the necessary language required to support a flat-fee, earned-on-receipt fee agreement in violation of RPC 1.5(c)(3).**

As found above, there was no written fee agreement. Therefore, because there was no written fee agreement, the Accused violated RPC 1.5(c)(3), which requires that “earned on receipt” or “nonrefundable” fee agreements be in writing. The written fee agreement must explain that the fees will not be deposited into the lawyer’s trust account and the client may discharge the lawyer at any time and be entitled to a refund for the unearned portion of the fee. RPC 1.5(c)(3).

**E. The Accused violated RPC 8.4(a)(4).**

It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice. RPC 8.4(a)(4). A lawyer violates RPC 8.4(a)(4) when he does something he should not do, or fails to do something that he should do, and thereby causes actual or potential harm either to the procedural functioning of a judicial proceeding or to the substantive interest of a party to that proceeding. If the misconduct consists of a single act or omission, the Bar must prove that it caused substantial actual or potential harm; if the conduct consists of multiple acts or omissions, the Bar must only prove that there was some harm. The Bar is not required to prove that the accused lawyer intended to prejudice the administration of justice because the focus of the rule is on the effect of the lawyer’s conduct rather than his or her state of mind. *In re Lawrence*, 337 Or 450, 464, 98 P3d 366 (2004).

In this case, the Accused's inaction violated the rule. The Accused knew from at least mid-October that he intended to set over the trial. He was required to notify the court by October 22, 2013, whether the case would go to trial in November. He did not, despite reminders and requests from the court. In late October, the Accused knew that the court was trying to reach him, but he still did not communicate regarding his intent for the case. Later, when the court was able to communicate with him on November 1, 2013, Judge Jones's judicial assistant informed the Accused that she could not take the court date off the calendar until he filed a motion, and he said he would file a motion. The Accused failed to file any motion for a continuance. On the day before the jury trial was set to begin, the Accused had still not filed a motion to set over the case.

Judge Jones was compelled to remove the Accused from Lopez-Diaz's case, continue the trial date, and appoint new defense counsel in order to protect Lopez-Diaz. As a result of the Accused's inaction, the court docket was unnecessarily cleared for a five-day jury trial, and numerous staff from both Judge Jones's chambers and the Federal Public Defender's office were left scrambling, just days before the trial, trying to find the Accused, and make arrangements to protect his client. For three days (October 31, November 1, and November 4) staff from the court and the Federal Public Defender were coordinating efforts to find out how the Accused intended to proceed.

The Accused's failure to file the motion to continue the November 1 trial date, or timely return the calls of the court and the Federal Public Defender, unnecessarily expended judicial resources, wasted the time of the court's staff and that of the Federal Public Defender, and potentially jeopardized the substantive speedy trial rights of his client. *See In re Jackson*, 347 Or 426 (attorney's failure to respond to trial court's order to schedule arbitration and to arbitrator's attempts to secure compliance unnecessarily expended the time of the arbitrator and his staff and undercut the essential purpose of the final resolution conference; attorney's failure to be prepared for a settlement conference unnecessarily expended judicial resources). The Accused's inaction constitutes conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

### **SANCTION**

In fashioning a sanction, the Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* ("Standards"), in addition to its own case law. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002); *In re Biggs*, 318 Or at 295.

#### **A. ABA Standards.**

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 at 440; *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 evaluates whether the sanction is consistent with Oregon case law. *In re Jackson*, 347 Or at 441.

**B. Duties Violated.**

In this case, the Accused violated duties to his client to preserve client property, and to diligently pursue his client's case, including a duty to adequately communicate with his client. *Standards* §§ 4.1, 4.4. The *Standards* presume that the most important ethical duties are those that a lawyer owes to clients. *Standards* at 5.

In addition, the Accused violated his duties to the legal system to refrain from conduct prejudicial to the administration of justice and abusive to the legal practice. *Standards* §§ 6.1, 6.2. Finally, the Accused violated his duty to the profession to refrain from charging improper or excessive fees. *Standards* § 7.0.

**C. Mental State.**

The *Standards* recognize these mental states: intentional, knowing, and negligent. "Intent" is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result.<sup>3</sup> "'Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result." *Standards* at 9. "'Negligence' is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Standards* at 9.

In the absence of other evidence, the Bar may rely upon the facts alleged in the Complaint to establish the mental state of an accused lawyer. *In re Kluge*, 332 Or at 262.

The Accused acted knowingly when he deposited Lopez-Diaz's funds into his general business account rather than his trust account, and knew he did not have a written fee agreement.

After the Accused was aware that no signed written fee agreement existed, he intentionally refused to refund the unearned portion of the \$15,000 retainer. He did so with the intent that he be allowed to keep all the unearned money. This is particularly apparent when considering that the Accused claimed that he was wrongfully terminated from the representation and used that as a basis to keep the client's entire fee, while he knew that on the same day he was terminated by the court, he contacted the PLF and requested its assistance to withdraw from representing Lopez-Diaz. This action belies his assertions that he was

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<sup>3</sup> Editor's note: The *Standards* define *intent* as "the conscious objective or purpose to accomplish a particular result." *Standards* at 9.

ready, willing, and able to represent Lopez-Diaz and it was solely Lopez-Diaz's fault that the Accused was not completing the representation.

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

*Injury* is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct." *Standards* at 5. *Potential injury* is the harm that is reasonably foreseeable at the time of the misconduct, "and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Standards* at 5. For the purposes of determining an appropriate disciplinary sanction, the Trial Panel may take into account both actual and potential injury. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The Accused caused actual substantial injury to his client. Lopez-Diaz was wrongfully deprived of \$15,000, he received little to no benefit from his representation, and the Accused did not complete the representation.

Furthermore, the Accused's failure to communicate with the court caused injury to the procedural functioning of the court as the court had its docket cleared for a five-day jury trial, a time slot that could have been utilized by a number of other cases waiting for trial. Finally, it required numerous personnel from Judge Jones's chambers and the Federal Public Defender's office to waste time and resources that could have been put to better use on other matters ready for adjudication.

**E. Preliminary Sanction.**

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

- 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.”

- 7.1 “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.”
- 7.2 “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.”
- 7.3 “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.”

**F. Aggravating and Mitigating Circumstances.**

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

1. A dishonest or selfish motive. *Standards* § 9.22(b). The Accused’s actions and responses in the Lopez-Diaz matter and the subsequent Bar investigation were aimed at justifying and retaining the fee he charged and spent, but did not earn.
2. Multiple offenses. *Standards* § 9.22(d). The Accused is charged with violating different rules, on multiple occasions, and related to separate and distinct conduct.
3. Deceptive practices during the disciplinary process. *Standards* § 9.22(f). The Accused has provided numerous inconsistent accounts of the events in this matter. For example, in his original response to the Bar, the Accused did not indicate that he had attempted to get back on the Lopez-Diaz case right away—something he later argued in earnest, but which is contrary to Lopez-Diaz’s version. In his initial account, the Accused also did not mention the existence of a fee agreement—although he later claimed that he witnessed Lopez-Diaz sign it, and that his assertions regarding it should be sufficient to negate any inference of unethical behavior on his part.

The Accused’s “developing” story has evolved throughout the Bar’s investigation and formal discovery with every response calculated toward—not the candid disclosures of facts—but in deflecting, obfuscating, and manipulating, to make his conduct appear less culpable.

4. Refusal to acknowledge wrongful nature of conduct. *Standards* § 9.22(g). The Bar does not dispute that the Accused has a right to vigorously defend himself against disciplinary charges. *In re Davenport*, 334 Or 298, 321, 49 P3d 91 (2002). However, when, as here, the Accused has “acknowledged the factual accuracy of the Bar’s complaint in nearly all material respects, but . . . claimed (and still claims) that that conduct was not blameworthy . . . the accused has failed to acknowledge the wrongful nature of his conduct.” *In re Strickland*, 339 Or 595, 605 n 9, 124 P3d 1225 (2005).
5. Vulnerability of victim. *Standards* § 9.22(h). Lopez-Diaz is a non-English speaker, noncitizen, who, at the time of the underlying events, was facing 10 to 25 years in prison. Lopez-Diaz placed his trust and his money in the Accused’s care. Lopez-Diaz was incarcerated with limited access to methods of communication, and relied almost solely on the Accused for information about his case throughout the time the Accused represented him.
6. Substantial experience in the practice of law. *Standards* § 9.22(i). The Accused was admitted to practice in California in 1991 and Oregon in 1992, and has practiced criminal law almost exclusively since his admittance.
7. Indifference to making restitution. *Standards* § 9.22(j). The Accused has refused to pay any amount in response to Lopez-Diaz’s request for any refund, including a partial refund.

In mitigation, the only factor that the Accused has demonstrated is the absence of a prior record of discipline. *Standards* § 9.32(a).

Some term of suspension is appropriate for the Accused’s misconduct. When suspension is presumed, the *Standards* indicate that the suspension should generally be for a period of time equal to or greater than six months. *Standards* § 2.3. Case law informs us that a suspension of at least six months is warranted in this case.

#### **G. 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).

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

The court typically imposes a presumptive sanction of at least 60 days for freestanding neglect. *See In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (court found that a 60-day suspension was appropriate for attorney’s neglect and his failure to cooperate with the Bar); *see also In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension imposed for single serious neglect despite fact that young, inexperienced lawyer had no prior discipline);

*In re Worth*, 337 Or 167, 92 P3d 721 (2004) (attorney who failed to move a client's case forward, despite several warnings from the court and a court directive to schedule arbitration by a date certain, was suspended for 120 days, when his neglect resulted in the court granting the opposing party's motion to dismiss); *In re Labahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for neglect of tort claim and subsequent failure to notify client when aggravating and mitigating factors were in equipoise).

The court has been inconsistent regarding lapses in communication, but has required some form of suspension. *See, e.g., In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (attorney's failure to respond to his client's status inquiries, failure to inform the client of communications with the other side, and failure to explain the strategy attorney decided upon regarding settlement negotiations, resulted in 30-day suspension); *In re Koch*, 345 Or 444 (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 Coyner*, 342 Or 104, 149 P3d 1118 (2006) (attorney was suspended for three months, plus required to seek formal reinstatement, when he was appointed to handle a client's appeal, but took no action and failed to disclose the ultimate dismissal to the client); *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004) (90-day suspension for attorney, who appealed a spousal support determination, failed to keep the client informed of the status of the appeal, did not respond to the client's inquiries, and essentially abandoned the client after oral argument).

### **Excessive Fee**

Most excessive-fee cases provide for a suspension of between 60 days and six months. *See, e.g., In re Obert*, 352 Or 231 (attorney suspended for six months when he took a flat fee to represent a client, but when, prior to commencing any work on the matter, the client was released from jail at the state's election, the attorney refused to refund the fee despite the fact that he had not taken any substantial steps toward completing work on the matter); *In re Campbell*, 345 Or 670, 202 P3d 871 (2009) (attorney suspended for 60 days when he billed a client for late fees in excess of the legal rate of interest without obtaining the client's written agreement to pay those charges); *In re Balocca*, 342 Or 279 (attorney who agreed to perform specified legal services for a flat fee, failed to complete the work, and then claimed that the fee was earned based on an hourly computation of time spent on the matter, was suspended for 90 days for keeping the fee without completing the work).

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

The court has expressed a dim view of failing to remit client funds. When such conduct, as here, has been engaged in knowingly, substantial suspensions have been imposed. *See, e.g., In re Lopez*, 350 Or 192, 252 P3d 312 (2011) (attorney was suspended for nine months when he represented various clients in personal-injury actions, and after settling these

matters, failed to distribute proceeds to his clients and to pay medical liens for substantial periods of time); *In re Bennett*, 331 Or 270 (attorney suspended for 180 days when he refused to return to his former clients funds that were undisputedly theirs).

Given that the Accused has refused to return any of the Lopez-Diaz funds when he knows that he did not complete the representation for which he was paid also requires some length of suspension.

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

The sanctions for conduct prejudicial to the administration of justice depend greatly on the extent of the actual or potential injury to the legal process. However, when the lawyer's conduct is knowing, suspensions have resulted. *See, e.g., In re Carini*, 354 Or 47, 308 P3d 197 (2013) (attorney received 30-day suspension for his repeated failure to appear at court hearings, which constituted violation of professional rule prohibiting engaging in conduct prejudicial to the administration of justice); *In re Jackson*, 347 Or 426 (attorney suspended for 120 days because, while representing a client in a dissolution of marriage proceeding, attorney was not prepared for a settlement conference he had requested, failed to send his calendar of available dates to an arbitrator, failed to respond to messages from the arbitrator's office, and failed to take steps to pursue the arbitration after a second referral to arbitration by the court); *In re Worth*, 336 Or 256, 82 P3d 605 (2003) (attorney who received court appointments to represent indigent clients in postconviction relief and habeas corpus proceedings was suspended for 90 days when his failures to read the provisions of the consortium contract, notify the court that he was the lawyer assigned by the consortium to individual cases, and to monitor client matters, resulted in their repeated dismissals and subsequent reinstatements, aggravated by his failure to communicate with his clients); *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995) (a criminal defense lawyer who did not want to proceed to trial that day was suspended for nine months when he threatened to create reversible error unless the court granted his motion to continue).

The Accused's conduct is closest to that in *Worth*, with respect to the impact that he had on his client's matter and the functioning of the court.

### **Collective Misconduct**

According to the Bar, the Accused's collective misconduct, added together, would result in a 16-month suspension, and therefore, the Bar's request for a 12-month suspension is reasonable.

The Trial Panel disagrees. Much of the Bar's arguments regarding the Accused's conduct centered around Judge Jones's removal of the Accused. While an unusual action, the Bar suggested that the removal was due to either the Accused's incompetence, failure to communicate, or some combination of both. However, both Judge Jones's judicial assistant and Steve Wax, the Federal Public Defender, testified they understood the removal was

based on the court's concerns regarding the Accused's health. This testimony was supported by the exhibits, which include statements from the PLF that the Accused needed to withdraw from representing Lopez-Diaz.

While the Trial Panel agrees that suspension is warranted, it believes in light of the additional sanctions it imposes as described below, that a period of 181 days is appropriate to deter this kind of conduct.

**H. Formal Reinstatement**

The Trial Panel agrees with the Bar that the Accused should be subject to formal reinstatement pursuant to BR 8.1.

**I. Restitution**

Although not frequently utilized, BR 6.1(a) provides that: "In conjunction with a disposition or sanction referred to in this rule, an accused may be required to make restitution of some or all of the money, property or fees received by the accused in the representation of a client. . . ."

The Bar has requested restitution in the full amount of \$15,000. The Trial Panel agrees that restitution should be ordered, but disagrees that it should be ordered in the full amount. The full amount would only be appropriate if the Accused did not one single act on behalf of Lopez-Diaz after receiving the fee. Instead, the evidence demonstrated that the Accused attended Lopez-Diaz's arraignment, did some research, had telephone discussions with other attorneys about the case, and did communicate with the court, albeit inconsistently. Therefore, the Trial Panel orders restitution in the amount of \$12,500.

Respectfully submitted this 8th day of March 2016.

/s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

/s/ Ulanda L. Watkins

Ulanda L. Watkins, Esq.

OSB No. 964516

/s/ JoAnn Jackson

JoAnn Jackson

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 12-93, 12-94, 13-34, 13-56,  
) and 14-22  
GERALD NOBLE, ) SC S063906  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Frederic E. Cann  
Disciplinary Board: None  
Disposition: Violation of RPC1.8(a), RPC 1.15-1(a), RPC 1.15-1(c),  
RPC 3.4(b), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC  
8.4(a)(4). Stipulation for Discipline. Four-year  
suspension, two years stayed, two-year probation.  
Effective Date of Order: June 6, 2016

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. Gerald Noble, Oregon State Bar No. 104634, is suspended from the practice of law for four years for violations of RPC 1.8(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 3.4(b), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4), with all but two years of the suspension stayed pending Gerald Noble's successful completion of a two-year term of probation.

The sanction shall be effective 60 days from the date of this order.

/s/Thomas A. Balmer 04/07/2016 8:12 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

## STIPULATION FOR DISCIPLINE

Gerald Noble, attorney at law (“Noble”), 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.

Noble was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 7, 2010, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Noble 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 22, 2016, a Second Amended Formal Complaint was filed against Noble pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.8(a) (improperly entering into a business transaction with a client), RPC 3.4(b) (an inducement and offer to pay a witness contingent upon the content of the witness’s testimony), RPC 1.15-1(a) (failing to safeguard client and third-party property and keep and maintain complete records regarding them), RPC 1.15-1(c) (failing to deposit and maintain client funds in trust), RPC 8.1(a)(1) (knowing false statement of material fact in connection with a disciplinary matter), RPC 8.4(a)(2) and (3) (criminal conduct reflecting adversely on his fitness to practice law and conduct involving dishonesty), 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.

### General Facts

5.

Noble was admitted to the practice of law in Oregon in October 2010, and immediately entered into the private practice of law as a solo practitioner.

6.

Although Noble maintained some client funds in a lawyer trust account, from the time he entered into the practice of law through approximately December 2013, he failed to

consistently keep and maintain complete records of deposits into and withdrawals from the account. Instead, Noble periodically estimated fees owed and withdrew them.

7.

During this same time period, Noble treated his trust account as a business account and drew on client funds to pay firm expenses not directly related to the representation of a particular client. Each of these payments from funds that Noble had a duty to safeguard was not for the benefit of the client to whom they belonged.

### **Jasmyn Norris Matter**

#### **OSB Case No. 13-56**

#### **Facts**

8.

About March 2011, Noble undertook to represent Jasmyn Norris (“Norris”) on a personal injury claim and in dealing with her medical creditors with regard to treatment arising from the injuries. Noble continued to represent Norris on both matters until in or after March 2012.

9.

In late May 2011, Noble assisted Norris to apply for and obtain a litigation loan from PS Finance in the amount of \$2,020 at an annual interest rate of 46.75 percent. Norris received only \$1,500, as \$520 of the advance was immediately paid back to PS Finance for processing and origination fees. After Norris secured the loan, Noble approached Norris for a personal loan, and borrowed \$400 from the PS Finance loan proceeds (“Norris loan”). There was no discussion about the terms or duration of the Norris loan, including interest to be paid to Norris or PS Finance, if any. There was no documentation of the Norris loan. Noble did not obtain Norris’s informed consent, in a writing signed by Norris, to the essential terms of the transaction and Noble’s role in the transaction, including whether Noble was representing Norris in the Norris loan transaction, nor did Noble advise Norris of the desirability of seeking independent legal counsel.

10.

Noble settled Norris’s personal-injury claim for \$10,000 in late September 2011. On October 6, 2011, Noble received the Norris proceeds check which, per his instructions, was deposited into his general office account. Noble then distributed \$3,000 to Norris, paid himself \$500, and had the remaining \$6,500 (“Norris funds”) transferred into his lawyer trust account.



11.

Thereafter, Noble did not keep complete or adequate records of the Norris funds, and distributed amounts to Norris's medical creditors, PS Finance, Norris, and himself that more than exhausted the Norris funds, and drew on the funds of other clients whose funds were subsequently deposited into Noble's trust account.

12.

Shortly thereafter, Noble became aware that he had exhausted the Norris funds. In response, Noble assumed responsibility for Norris's remaining medical creditors, which he paid out of fees he earned from other clients, or from other personal funds.

13.

In March 2015, staff from Disciplinary Counsel's Office ("DCO") took Noble's deposition in connection with the Norris matter. In response to a specific inquiry about the disposition of the Norris funds, Noble represented under oath that they were all used only to pay Norris's creditors when he knew that he had more than exhausted all of the Norris funds before he was able to pay Norris' creditors.

#### **Violations**

14.

Noble admits that by obtaining a loan from Norris on terms that were not fair and reasonable to her, and without her informed consent, confirmed in writing, following full disclosure, he improperly entered into a business transaction with a client, in violation of RPC 1.8(a).

15.

Noble further admits that his failures to properly handle, track, and manage the Norris funds caused him to commingle personal and client funds, and prematurely draw on the Norris funds, in violation of RPC 1.15-1(a) and (c).

16.

Noble also admits that he was aware that his representations to DCO regarding his treatment of the Norris funds were not accurate when he made them, particularly without additional clarification about the timing of the use of the Norris funds and therefore violated RPC 8.1(a)(1) and RPC 8.4(a)(3).

17.

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 8.4(a)(2) and RPC 8.4(a)(3), related to the allegations that Noble knowingly converted client funds, should be and, upon the approval of this Stipulation for Discipline, are dismissed.

**Lawyer Trust Account Matters**

**Case Nos. 12-93 and 12-94**

**Facts**

18.

On February 23, February 24, and March 9, 2012, Noble presented for payment checks drawn on his lawyer trust account in amounts that exceeded the funds on deposit in the account. The checks were honored by the bank, and funds in excess of the funds on deposit were paid on the checks. Noble's withdrawals and other trust account activity prior to the presentment of these checks resulted in funds that Noble had a duty to safeguard being paid for something other than the benefit of the client to whom they belonged.

**Violations**

19.

Noble admits that his conduct resulting in the February and March 2012 overdrafts constituted failures to safeguard client funds, and keep and maintain complete records regarding them, and a failure to deposit and maintain client funds in trust until earned, in violation of RPC 1.15-1(a) and (c).

**Anita Smith Matter**

**OSB Case No. 13-34**

**Facts**

20.

Noble undertook to represent Anita Smith ("Smith") in a claim against Nordstrom, Inc., before the American Arbitration Association ("the arbitration"). The arbitration of Smith's claim was scheduled to occur in June 2012.

21.

Beginning in May 2012, Noble promised to pay Dar Sernoff ("Sernoff"), a former co-worker of Smith's and witness to the events giving rise to the litigation, \$250 to appear as a witness and testify at the arbitration. When Sernoff expressed reluctance to testifying, Noble further promised Sernoff that, if Sernoff testified at the arbitration and Smith's claim was successful, Noble would pay Sernoff an additional \$750.

**Violations**

22.

Noble admits that his promise to pay Sernoff additional money for his testimony at the arbitration was contingent on the outcome of the arbitration, and that his promise to pay Sernoff as much as \$1,000 to testify at the arbitration exceeded reasonable compensation for

Sernoff's loss of time in attending and testifying at the arbitration, in violation of RPC 3.4(b). Noble further admits that his conduct was prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

### **Coleman Matter**

#### **OSB Case No. 14-22**

#### **Facts**

23.

On May 15, 2012, on behalf of his client, Adrian Coleman ("Coleman"), Noble received approximately \$72,500 in settlement funds ("Coleman funds"). Noble properly deposited the Coleman funds into his lawyer trust account. However, Noble did not timely disburse the majority of the Coleman funds to Coleman. Rather, Noble maintained the Coleman funds in his lawyer trust account for a prolonged period, during which time Noble or his legal assistant, Karen Coleman (Coleman's mother), distributed portions of the Coleman funds to Coleman or Karen Coleman in intermittent small cash payments.

24.

In addition, after Coleman received the Coleman funds, Noble approached Coleman for a loan. Noble borrowed at least \$2,000 of the Coleman funds ("Coleman loan"), but he did not track or account for the true amount of the Coleman funds that he borrowed.

25.

There was no discussion about the terms or duration of the Coleman loan, including interest to be paid to Coleman, if any. There was no documentation of the Coleman loan. Noble did not obtain Coleman's informed consent, in a writing signed by Coleman, to the essential terms of the transaction and Noble's role in the transaction, including whether Noble was representing Coleman in the Coleman loan transaction, nor did Noble advise Coleman of the desirability of seeking independent legal counsel.

#### **Violations**

26.

Noble admits that by obtaining a loan from Coleman on terms that were not fair and reasonable to him (including determining a precise amount), and without his informed consent, confirmed in writing, following full disclosure, he improperly entered into a business transaction with a client, in violation of RPC 1.8(a).

27.

Noble further admits that his failures to properly handle, track, and manage the Coleman funds caused him to commingle personal and client funds, and prematurely draw on the Coleman funds, in violation of RPC 1.15-1(a) and (c).

28.

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 8.4(a)(2) and RPC 8.4(a)(3), related to the allegations that Noble knowingly converted client funds, should be and, upon the approval of this Stipulation for Discipline, are dismissed.

### **Lawyer Trust Account Matter**

#### **OSB Case No. 14-22**

#### **Facts**

29.

On December 12, 2013, Noble presented for payment a check drawn on his lawyer trust account in an amount that exceeded the funds on deposit in the account. The check was honored by the bank, and funds in excess of the funds on deposit were paid on the check. Noble's withdrawals and other trust account activity prior to the December 12 presentment of this check resulted in funds that Noble had a duty to safeguard being paid for something other than the benefit of the client to whom they belonged.

#### **Violations**

30.

Noble admits that his conduct resulting in the December 2013 overdraft constituted a failure to safeguard client funds, a failure to keep and maintain complete records regarding them, and a failure to deposit and maintain client funds in trust until earned, in violation of RPC 1.15-1(a) and (c).

#### **Sanction**

31.

Noble and the Bar agree that in fashioning an appropriate sanction in this case, the Oregon Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* ("Standards"). The *Standards* require that Noble'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.

- a. **Duty Violated.** Noble violated his duty to clients to preserve client property by failing to keep adequate records and by commingling client property with his own. *Standards* § 4.1. He also violated his duty to clients to avoid conflicts of interest by entering into business transactions with them, without adequate disclosures. *Standards* § 4.3. The *Standards* presume that the most important ethical duties are those which a lawyer owes to clients. *Standards* at 5.

Noble violated his duties to the legal system to avoid abuse to the legal process, prejudice to the administration of justice, and to refrain from improper communications with individuals in the legal system. *Standards* §§ 6.2, 6.3.

Finally, Noble violated his duty to the profession to cooperate in the investigation of professional misconduct and to be candid in his representations to the Bar. *Standards* § 7.0

- b. **Mental State.** Noble acted negligently and knowingly. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9.

Noble’s initial handling of his trust account was negligent, in that he failed to appreciate the distinction between client funds and funds he was obligated for on behalf of his clients. However, Noble’s commingling was knowing, particularly when he began moving funds from his general and business accounts into trust, and when he allowed the Coleman funds to remain in trust for an extended period.

Noble also knew that he was not being candid with the Bar when he represented that all the money that paid Norris’s bills had come from her settlement. The Norris funds were gone, or nearly gone, when he undertook the responsibility to pay her creditors.

Similarly, Noble knew he was entering into undocumented loans with Norris and Coleman, and had some awareness that he was taking client money in excess of the amount to which he was entitled at the time that he took it.

Finally, Noble knew he was offering to pay a witness a larger amount contingent on the outcome of the case. The only thing he did not know with respect to that transaction was the actual consequence of that payment at the time that he made it.

- c. **Injury.** The Court may take into account both actual and potential injury. *Standards* at 9; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

Noble’s promise to pay Norris’s creditors with her settlement money and subsequent failure to fully pay all debts caused both actual and potential injury as she was left with unpaid bills (years later) that had great potential to harm her financial position and her creditworthiness.

Noble's loans from Norris and Coleman with no written agreement, security, collateral, interest obligation, or any of the standard loan terms, caused actual and potential injury to both. The lack of documentation would have left the clients with little recourse or proof to support their claim to funds if Noble chose not to or was unable to repay the obligation, or filed bankruptcy. Additionally, if something had happened to Noble, his clients would have had no proof of what he owed them. Noble's taking of his clients' money at no interest also actually harmed them in that they lost the "use value" of their money.

Noble's failure to use appropriate accounting procedures caused actual and potential injury to all or most of his clients as it created a risk that the clients' funds would not be timely paid out to the appropriate persons in the correct amounts. Additionally, by failing to comply with the trust account rules, Noble "caused actual harm to the legal profession." *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012).

Noble's offer to pay a witness for testimony contingent on the outcome of the case caused actual and potential harm to his client, as it threatened her case and her credibility when revealed. Sernoff's testimony could have had a significant effect on the arbitrator's finding of facts, including findings related to the merit of Smith's claims and the reliability of Smith's testimony. Noble's promise to pay Sernoff additional funds contingent on the outcome of the proceeding created a significant potential that Sernoff would improperly give testimony favorable to Smith and her claims and unfavorable to Nordstrom, Inc., or its witnesses. It also harmed the legal system and the profession, as public confidence in the fairness of the system was potentially reduced, and the trust the public places in lawyers to act with integrity was diminished.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A selfish motive. *Standards* § 9.22(b). Nearly all of Noble's conduct in these matters can be attributed to self-serving motives.
  2. A pattern of misconduct. *Standards* § 9.22(c). Noble mishandled and has failed to properly account for client funds nearly continuously since becoming a lawyer in 2010. Even after he was unmistakably made aware of the shortcomings of his practices through Bar and PLF involvement, he continued his pattern of poor handling of client funds and improper loans from clients. *See In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).

3. Multiple offenses. *Standards* § 9.22(d).
  4. Vulnerability of victims. *Standards* § 9.22(h). Noble acknowledged that his clients were desperate for money when they received their settlement loans and proceeds. However, given their relationship with and dependence on Noble, they were not in a position to be able to rebuff his requests when he approached them for loans.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior record of discipline. *Standards* § 9.32(a).
  2. Personal or emotional problems. Noble has expressed that he was suffering from depression and other undiagnosed mental health concerns at the time of some of the conduct at issue in these matters. *Standards* § 9.32(c).
  3. Inexperience in the practice of law. *Standards* § 9.32(f).

32.

Under the ABA *Standards*, “[s]uspension 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. Similarly, a “[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” *Standards* § 4.32. “[S]uspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.” *Standards* § 6.22. “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. Finally, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession “and causes injury or potential injury to a client, the public, or the legal system.” *Standards* § 7.2.

33.

Oregon cases support the imposition of a long suspension for Noble’s mishandling of client funds. *See, e.g., In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (attorney was suspended for one year when it was determined that he never reconciled his monthly trust account statements or maintained a trust account ledger to keep track of client funds and was negligent in his trust accounting practices); *In re Harvey*, 268 Or 390, 521 P2d 327 (1974) (respondent suspended for three years for commingling clients’ funds and failing to turn over funds to clients or their designees).

The court has imposed two-year suspensions when it found that a lawyer had failed to respond truthfully and fully in disciplinary proceedings in addition to other serious misconduct. See *In re Gallagher*, 332 Or 173, 190, 26 P3d 131 (2001) (two-year suspension when attorney repeatedly lied to Bar and Local Professional Responsibility Committee); *In re Huffman*, 331 Or 209, 229, 13 P3d 994 (2000) (lawyer suspended for two years when made misrepresentations in motions filed with court and failed to respond truthfully to the Bar); *In re Wyllie*, 327 Or 175, 957 P2d 1222 (1998) (two-year suspension when attorney misrepresented his CLE activities to the MCLE Board and then lied to the Bar in its investigation of the conduct); *In re Staar*, 324 Or 283, 292, 924 P2d 308 (1996) (respondent who failed to cooperate with Bar, engaged in misrepresentation, and knowingly made false statements of fact under oath resulting in prejudice to administration of justice was suspended for two years); *In re Brown*, 298 Or 285, 692 P2d 107 (1984) (lawyer who prepared and had his client sign an affidavit that he knew was false to persuade the Bar to drop an investigation against the lawyer was suspended for two years); see also *In re Goff*, 352 Or 104, 280 P3d 984 (2012) (18-month suspension for attorney's false statements to the Bar when responding to a disciplinary complaint).

The Court has held that when a lawyer conceals critical facts from a client regarding a business transaction between the lawyer and a client, at least a substantial suspension is warranted. See, e.g., *In re Schenck*, 345 Or 652, 202 P3d 165 (2009) (imposing a one-year suspension when an attorney had advised a client to give him more favorable loan terms than he otherwise would have advised, drafted a will that included a gift to his wife, and otherwise violated the rules of professional conduct); *In re Brown*, 326 Or 582, 606, 956 P2d 188 (1998) (lawyer disbarred for failing to clarify terms of loan from lawyer to a client).

Under the foregoing cases, Noble's collective misconduct warrants a lengthy suspension.

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 that 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 Noble shall be suspended for four (4) years for violations of RPC 1.8(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 3.4(b), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4), with all but two (2) years of the suspension stayed pending Noble's successful completion of a two-year (2) term of probation. The sanction shall be effective May 2, 2016, or sixty (60) days after this Stipulation



for Discipline is approved by the Oregon Supreme Court, whichever is later (“effective date”).

36.

Noble’s license to practice law shall be suspended for a period of two (2) years beginning May 2, 2016, or sixty (60) days after approval by the Oregon Supreme Court, whichever is later, assuming all conditions have been met (“actual suspension”). Noble 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 Noble re-attains his active membership status with the Bar, Noble 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.

37.

Probation shall commence upon the date Noble is reinstated to active membership status and shall continue for a period of two (2) years, ending on the day prior to the second (2nd) year anniversary of the commencement date (the “period of probation”). During the period of probation, Noble shall abide by the following conditions:

- (a) Noble will communicate with DCO and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Noble 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, Noble shall attend not less than eight (8) CLE accredited programs, for a total of twenty-four (24) hours, all of 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 Noble for his normal MCLE reporting period.
- (d) Upon completion of the CLE programs described in paragraph 37(c), and prior to the end of his period of probation, Noble shall submit an Affidavit of Compliance to DCO.
- (e) Every month for the period of probation, Noble 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.

- (f) Every month for the period of probation, Noble 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, Noble will employ a bookkeeper approved by DCO, 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, Noble 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 DCO within 30 days thereafter.
- (i) A person to be selected by Noble, and approved by DCO, prior to the beginning of the probationary period shall serve as Noble's probation supervisor ("Supervisor"). Noble 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 Noble's clients, the profession, the legal system, and the public.
- (j) Beginning with the first month of the probation period, Noble shall meet with his Supervisor in person at least once a month for the purpose of:
  - (1) Allowing his Supervisor to review the status of Noble'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 twenty percent (20%) of his current caseload, whichever is greater, to determine whether Noble 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 Noble'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. Noble agrees that his Supervisor may contact all employees and independent contractors who assist Noble in the review and reconciliation of his lawyer trust account records.

- (k) Noble authorizes his Supervisor to communicate with DCO regarding Noble's compliance or noncompliance with the terms of his probation and to release to DCO any information DCO deems necessary to permit it to assess Noble's compliance.
- (l) On or before seven (7) days after his reinstatement date, Noble 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. Noble shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (m) Noble shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for effective trust account management, 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 thirty (30) days after recommendations are made by the PLF, Noble shall adopt and implement those recommendations.
- (n) No later than sixty (60) days after recommendations are made by the PLF, Noble 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) A member of the State Lawyer's Assistance Committee ("SLAC"), or such other person approved by DCO in writing, shall monitor Noble's probation ("Monitor"), and Noble agrees to enter into and comply with the terms of a Monitoring Agreement with SLAC. Noble is currently working with the Oregon Attorney Assistance Program ("OAAP") regarding possible treatment. Noble shall notify SLAC within 14 days of the effective date of:
  - (1) the existence and contents of this Stipulation for Discipline;
  - (2) the history and status of any OAAP treatment or programs in which Noble has/is participating; and
  - (3) discussions with SLAC on whether and how to modify his current treatment plan to best accomplish the objectives of Noble's probation.

- (p) Prior to the probationary period, Noble shall arrange for and meet with a mental health care professional acceptable to DCO and Noble's Monitor, to evaluate Noble, and develop and implement a course of treatment, if appropriate.
- (q) Noble shall meet with Monitor as often as recommended by SLAC, and shall comply with all reasonable requests and recommendations made by SLAC to supplement his treatment and to promote compliance with this Stipulation for Discipline, and as necessary for the purpose of reviewing Noble's compliance with the terms of the probation. Noble shall cooperate and shall comply with all reasonable requests of SLAC that will allow SLAC and DCO to evaluate his compliance with the terms of this Stipulation for Discipline.
- (r) Noble authorizes Monitor to communicate with DCO regarding Noble's compliance or noncompliance with the terms of his probation and to release to DCO any information DCO deems necessary to permit it to assess Noble's compliance.
- (s) Noble shall continue regular treatment sessions with Ray Shellmire, MSW, LCSW ("Shellmire") or another treatment provider determined by SLAC to be appropriate.
- (t) Noble agrees that, if SLAC is alerted to facts that raise concern that he may be violating his requirements as described in paragraph 37(o) above, he will participate in a further evaluation at the request and direction of SLAC.
- (u) Noble shall arrange for and meet with Shellmire or another health care professional acceptable to DCO and Monitor to develop and implement a course of treatment that will address any identifiable concerns.
- (v) Noble shall continue to attend regular counseling or treatment sessions with the approved health care professional for the entire term of his probation. Noble shall obtain and take, and continue to take, as prescribed, any health-related medications.
- (w) Noble shall not terminate his counseling or treatment or reduce the frequency of his counseling or treatment sessions without first submitting to DCO a written recommendation from the health care professional that his counseling or treatment sessions should be reduced in frequency or terminated, and Noble undergoes an independent evaluation by a second professional acceptable to DCO and Monitor, which evaluation confirms his fitness.

- (x) Noble consents to the release of information by Shellmire, other mental health or substance abuse treatment programs or providers, OAAP, AA, NA, or any designee, to SLAC and to DCO, regarding his treatment plan, his progress under that plan, and his compliance with the terms of this Stipulation for Discipline; waives any privilege or right of confidentiality to permit such disclosure; and agrees to execute such releases as may be required by such providers upon request by SLAC or DCO. Noble acknowledges and agrees that SLAC shall promptly report to DCO any violation of the terms of this Stipulation for Discipline.
- (y) On a monthly basis, on dates to be established by Disciplinary Counsel beginning no later than thirty (30) days after his reinstatement to active membership status, Noble shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor and Monitor, advising whether Noble is in compliance with the terms of this Stipulation for Discipline, including:
  - (1) The dates and purpose of Noble's meetings with Supervisor.
  - (2) The number of Noble's active cases and percentage reviewed in the audit with Supervisor per paragraph 37(j) and the results thereof.
  - (3) Whether Noble has completed the other provisions recommended by Supervisor, if applicable.
  - (4) In the event Noble 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.
- (z) Noble is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (aa) Noble'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.
- (bb) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (cc) The SPRB's decision to bring a formal complaint against Noble for unethical conduct that occurred or continued during the period of his suspension or probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

38.

Noble 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 actual suspension or potentially any imposition of his stayed suspension. In this regard, Noble has arranged for Frederic Cann (“Cann”), Cann Lawyers PC, 851 SW 6th Ave Ste 1500, Portland, OR 97204, an active member of the Bar, to either take possession of or have ongoing access to Noble’s client files and serve as the contact person for clients in need of the files during the term of his suspension. Noble represents that Cann has agreed to accept this responsibility. The custodian for Noble’s files may be changed from Cann to another active Oregon lawyer during the term of Noble’s actual or imposed stayed suspension with ten (10) days prior written notice to DCO.

39.

Noble 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. Noble 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.

Noble 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.

Noble 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. Noble also represents that he will be reporting the disposition of this matter to all other jurisdictions with which he is affiliated. Other jurisdictions in which Noble is known to be admitted: US District Court for the District of Oregon and US Court of Appeals for the Ninth Circuit.

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

EXECUTED this 9th day of February, 2016.

/s/ Gerald Noble

Gerald Noble

OSB No. 104634

APPROVED AS TO FORM AND CONTENT:

/s/ Frederic E. Cann

Frederic E. Cann

OSB No. 781604

EXECUTED this 18th day of February, 2016.

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. 15-117  
)  
LYNN EARL SMITH, )  
)  
Accused. )

Counsel for the Bar: Susan R. Cournoyer  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(a). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: April 10, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Lynn Earl Smith is publicly reprimanded for violation of RPC 1.5(a).

DATED this 10th day of April, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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



### STIPULATION FOR DISCIPLINE

Lynn Earl Smith, attorney at law (“Smith”), 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.

Smith was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 27, 1990, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Smith 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 14, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Smith for alleged violation of RPC 1.5(a) (charging or collecting a clearly excessive fee) 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 early May 2014, John and Katharina Veenendaal retained Smith to pursue injury claims arising from a motor vehicle accident. John and Katharina signed fee agreements providing for a one-third contingency fee on “all monies successfully *negotiated* by [Smith], including but not limited to, medical payments, vehicular damage payments, personal injury protection (PIP) payments, and automobile rental payments.” (Emphasis in original.)

6.

Katharina’s PIP carrier did not contest her claim for wage-loss compensation. In early August 2014, the carrier sent Smith a \$2,361 check representing two weeks of Katharina’s lost wages. Smith charged and collected from Katharina \$779 (or 33 percent) as his fee. Thereafter, Katharina received one more wage-loss payment of \$2,221. Smith did not charge a fee for obtaining that amount. In all, Smith’s \$779 fee amounted to 17 percent of Katharina’s total wage-loss benefits. Katharina terminated their attorney-client relationship in

January 2015, before Smith made demand for the contested portion of her personal-injury claim.

7.

In January 2015, Smith negotiated a settlement of John's claims: \$5,479 in uncontested PIP benefits paid directly to John's medical providers and \$5,500 in personal-injury damages, for a total of \$10,979. Of this amount, Smith charged \$3,623 (or 33 percent) as his fee. John objected to paying a fee on the PIP benefits and Smith promptly retracted that portion of his fee. Ultimately, Smith billed John \$1,831.50 (or 33 percent of the \$5,500 personal-injury recovery).

8.

Smith admits that his retracted attempt to collect a one-third contingency fee on John's PIP benefits and his actual collection of what amounted to a 17 percent fee on Katharina's uncontested wage-loss violated RPC 1.5(a).

### Sanction

9.

Smith 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 ed) ("*Standards*"). The *Standards* require that Smith'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.

- a. **Duty Violated.** By charging and collecting an excessive fee, Smith violated a duty owed to the profession. *Standards* § 7.0.
- b. **Mental State.** "Negligence" is the failure to be aware of a "substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Standards* at 6. Smith acted negligently in failing to perceive that collecting a contingency fee on Katharina's wage-loss payments could result in an excessive fee when she subsequently terminated representation before he was able to negotiate an additional recovery on her contested injury claim. *See* OSB Formal Ethics Op No 2005-124 (an attorney fee agreement may provide for a contingent fee based upon both the contested and uncontested portions of a personal-injury recovery as long as the entire fee for handling the entire matter is not excessive or unreasonable). Smith also acted negligently in failing to perceive that, although his fee agreement complied with OSB Formal Ethics Op No 2005-124, charging a contingency fee on John's PIP payments would result in an overall excessive fee because the PIP

payments (\$5,479) were substantially equal to the contested claim recovery (\$5,500).

- c. **Injury.** Smith's collecting an excessive fee on Katharina's wage-loss benefits resulted in actual injury to her; his charging an excessive fee on John's PIP benefits resulted in potential injury to John.
- d. **Aggravating Circumstances.**
  - 1. Substantial experience in the practice of law. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.**
  - 1. Timely good-faith effort to rectify consequences of misconduct. Smith withdrew his charge for contingency fee on John's PIP recovery promptly upon John's request. *Standards* § 9.32(d).
  - 2. Full and free disclosure or cooperative attitude toward the proceedings. *Standards* § 9.32(e).
  - 3. Remorse. *Standards* § 9.32(l).

10.

Under the ABA *Standards*, reprimand is generally appropriate when a lawyer negligently engages in conduct that violates a duty to the profession and causes injury or potential injury to a client. *Standards* §7.3.

11.

Oregon case law involving an isolated violation of the excessive fee rule or of other rules relating to injury to a client is in accord. *See, e.g., In re Vanagas*, 27 DB Rptr 255 (2013) (attorney collected an illegal fee by taking compensation for work on a conservatorship without prior court approval); *In re Malco*, 27 DB Rptr 88 (2013) (attorney failed to respond to client's inquiries regarding representation over a four-month period, in violation of RPC 1.4(a)); *In re Grimes*, 27 DB Rptr 105 (2013) (attorney failed to respond to client's inquiries regarding representation over a six-month period, in violation of RPC 1.4(a)); *In re Campbell*, 17 DB Rptr 179 (2003) (attorney's fee agreement required client to pay 1½ times standard hourly rate if client dropped claim or rejected attorney's settlement recommendation; attorney attempted to enforce the agreement and collect the enhanced fee).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Smith shall be reprimanded for violation of RPC 1.5(a), effective upon approval by the Disciplinary Board.

13.

Smith 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.

Smith 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 Smith is admitted: Washington.

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 11th day of March, 2016.

/s/ Lynn Earl Smith  
Lynn Earl Smith  
OSB No. 901216

EXECUTED this 25th day of March, 2016.

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. 15-131  
)  
C. FREDRICK BURT, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a), RPC 1.6(c), and RPC 1.15-1(d). Stipulation for Discipline. Public reprimand.  
Effective Date of Order: May 2, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and C. Fredrick Burt is publicly reprimanded, for violation of RPC 1.4(a), RPC 1.6(c), and RPC 1.15-1(d).

DATED this 2nd day of May, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ James Edmonds

James Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

C. Fredrick Burt, attorney at law (“Burt”), 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.

Burt was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 22, 1983, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Burt 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 14, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Burt for alleged violations of RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), RPC 1.6(c) (failure to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client), and RPC 1.15-1(d) (failure to 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, to promptly render a full accounting regarding such property) 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.

Shortly after July 19, 2013, the court appointed Burt to represent Ricky Exe (“Exe”) in defense of a criminal matter. From the beginning of the representation, Exe asked Burt to provide with him copies of all discovery. Burt did not provide all of the discovery to Exe prior to trial or even prior to Exe’s subsequent complaint to the Bar. Burt did not notify Exe that he had not provided him with complete discovery.

6.

During the course of the representation, Burt did not reply to multiple letters from Exe, requesting updates and information. Similarly, Burt did not respond to multiple voicemail messages or other messages from Exe or his mental health worker.

7.

Burt met briefly with Exe several times at the jail, but discussions during these meetings were insufficient to give Exe a full understanding of the status and issues in his case, including a potential plea deal proffered by the prosecution.

8.

During the course of Burt's representation, Exe telephoned Burt and requested a copy of a report from a mental health examination. Burt promised to provide the report immediately but failed to do so. Exe repeated the request the following week. Shortly thereafter, Burt produced the sensitive and confidential information to jail personnel without identifying it as "legal mail" or taking other steps to ensure that it would not be reviewed by or disclosed to individuals other than Exe.

### **Violations**

9.

Burt admits that his failure to keep Exe fully informed and respond to Exe's reasonable requests for information violated RPC 1.4(a). By failing to make reasonable efforts to prevent the inadvertent disclosure of Exe's information, Burt admits that he violated RPC 1.6(c). Burt further admits that his failure to provide Exe with discovery documents that he had requested constituted a failure to promptly provide a client with property he was entitled to received, in violation of RPC 1.15-1(d).

### **Sanction**

10.

Burt 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 Burt'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.

- a. **Duty Violated.** Burt violated his duty to his client to refrain from revealing client information related to the representation of the client not otherwise lawfully permitted to be disclosed. *Standards* § 4.2. In addition, Burt violated his duty to his client to act with reasonable diligence and promptness in representing him, including the duty to adequately communicate with him. *Stan-*

*dards* § 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5.

- b. **Mental State.** Burt's conduct in this matter was primarily negligent. That is, Burt failed to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9.
- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Burt's client was actually injured to the extent that the lack of communication caused actual injury in the form of client anxiety and frustration. See *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A prior history of relevant discipline. *Standards* § 9.22(a). Burt was admonished in 1997 for failing to respond to a client's attempts to communicate with him (*current* RPC 1.4). *In re Burt*, OSB Case No. 97-176, Letter of Adm. (Nov 3, 1997). In 2001, Burt was admonished for failing to promptly provide client property (*current* RPC 1.15-1(d)). *In re Burt*, OSB Case No. 01-171, Letter of Adm. (Nov 6, 2001). Burt's conduct in this matter is similar to both of these prior admonitions. See *In re Cohen*, 330 Or at 500 (letter of admonition is considered as evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue in the current case).
  2. A pattern of misconduct. *Standards* § 9.22(c). In this matter, Burt failed to respond to his client's multiple requests for updates, information, and documents from his client file.
  3. Multiple offenses. *Standards* § 9.22(d).
  4. Substantial experience in the practice of law. *Standards* § 9.22(i). The Accused was admitted in Oregon on April 22, 1983.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).



2. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).
3. Remoteness of prior offenses. *Standards* § 9.32(m).

11.

Under the ABA *Standards*, a public “[r]eprimand 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. A public reprimand is also generally appropriate when the “lawyer negligently 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 the client.” *Standards* § 4.23. Finally, a public 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 to a client.” *Standards* § 4.43.

12.

Oregon cases also hold that a reprimand is the proper result. *See, e.g., In re Maloney*, 24 DB Rptr 194 (2010) (attorney reprimanded for failing to communicate with criminal appellate client despite numerous inquiries from him asking about the status of his legal matter); *In re Langford*, 19 DB Rptr 211 (2005) (attorney reprimanded 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); *In re Gregory*, 19 DB Rptr 150 (2005) (attorney reprimanded when he ignored requests from his former client and her new counsel for the client’s file and the unearned portion of her retainer, until the client filed a complaint with the Bar); *In re Scannell*, 8 DB Rptr 99 (1994) (attorney reprimanded because 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).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Burt shall be publicly reprimanded for his violations of RPC 1.4(a), RPC 1.6(c), and RPC 1.15-1(d), the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

14.

Burt 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.

Burt 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 Burt 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 7th day of April, 2016.

/s/ C. Fredrick Burt

C. Fredrick Burt

OSB No. 830240

EXECUTED this 14th day of April, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 15-07
	)	
GREGORY P. OLIVEROS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Xin Xu
Disciplinary Board:	None
Disposition:	Violation of RPC 1.1, RPC 1.7(a)(1), and RPC 1.7(a)(2). Stipulation for Discipline. 60-day suspension, all stayed, three-year probation.
Effective Date of Order:	May 15, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Gregory P. Oliveros is suspended for 60 days, all stayed pending successful completion of a three-year term of probation, effective March 1, 2016, or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later, for violation of RPC 1.1, RPC 1.7(a)(1), and RPC 1.7(a)(2).

DATED this 5th day of May, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Kelly L. Harpster

Kelly L. Harpster, Region 7  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Gregory P. Oliveros, attorney at law (“Oliveros”), 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.

Oliveros was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 26, 1991, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Oliveros 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 13, 2015, a Formal Complaint was filed against Oliveros pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.1 (competence), RPC 1.7(a)(1) (current-client conflict: direct adversity), and RPC 1.7(a)(2) (current-client conflict: representation materially limited by other obligations). 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 2006, an elderly couple, Terre Alberts (“Mrs. Alberts”) and Bennett Alberts (“Dr. Alberts”, collectively, “the Alberts”), retained Oliveros and his firm, Oliveros & O’Brien (“the firm”), to represent them in rescuing their home from foreclosure. Oliveros was primarily a family law and bankruptcy attorney but had known the Alberts personally for some time.

6.

The Alberts reported to Oliveros that Mrs. Alberts had recently received the final \$1 million installment of a \$3 million inheritance. As the previous \$2 million had been spent or lost, the Alberts instructed Oliveros to use half of the last \$1 million to resolve the foreclosure situation on their home and pay other specified bills. Using some of these funds, Oliveros was able to have the Alberts’s mortgage reinstated.

7.

The Alberts expressed a desire to invest the remaining inheritance funds (approximately \$500,000) to generate retirement income. They told Oliveros that the investments needed to be secure because they would generate the Alberts's only income other than Social Security.

8.

Within a couple of weeks, Oliveros introduced the Alberts to two prospective borrowers, Dave Galloway ("Galloway") and Thomas Jeziorski ("Jeziorski"), who were seeking short-term loans. Oliveros or the firm, or both, represented Galloway and Jeziorski in current unrelated matters. Through Galloway, the Alberts met a third prospective borrower, Ryan O'Farrell ("O'Farrell").

9.

On Oliveros's recommendation and with his assistance, the Alberts made a series of loans to Galloway, Jeziorski, and O'Farrell in November and December 2006. The notes reflected high interest rates and were secured by second lien positions on residential real estate, except for the loan to Jeziorski, which was secured by the title to a Harley Davidson motorcycle.

10.

In February 2007, the Alberts loaned an additional \$42,000 to Galloway in a series of four unsecured transactions.

11.

Oliveros prepared all of the loan documents (promissory notes and deeds of trust) and oversaw the closings. He assured the Alberts that the loans were secure and appropriate to their circumstances.

12.

The interests of the Alberts, as lenders, were directly adverse to the interests of Galloway and Jeziorski, as borrowers. All of them were Oliveros's current clients. Oliveros thus had a current-client conflict of interest when he represented the Alberts in the loan transaction. To the extent that the conflict could be waived by client consent after full disclosure, Oliveros failed to make the necessary disclosures and to obtain consents from the Alberts, Galloway, and Jeziorski.

13.

Because Oliveros represented the Alberts, but not Galloway or Jeziorski, in the loan transactions themselves, he did not have an "actual" (nonwaivable) current-client conflict. However, his representation of the Alberts as prospective lenders was directly adverse to the

interests of current clients Galloway and Jeziorski as prospective borrowers. When Oliveros undertook to represent the Alberts in the loan transactions, there was a significant risk that his responsibilities to the Alberts would be materially limited by his responsibilities to Galloway and Jeziorski. To the extent that the conflict could be waived by client consent after full disclosure, Oliveros did not explain to the Alberts how his duties to his other current clients might compromise the objectivity of his advice to them in the loan transactions and failed to obtain the required consents from the Alberts, Galloway, and Jeziorski.

14.

Oliveros did not instruct the Alberts that he had not performed adequate due diligence with respect to each of the loans or that he had not investigated the creditworthiness or financial circumstances of any of the debtors or the property being offered as security, including any liquidation value. Oliveros did not clarify to the Alberts that he had not conducted an investigation sufficient to determine whether the terms of the loans exceeded what was commercially reasonable. Oliveros reported to the Alberts that Galloway's and O'Farrell's prior bankruptcies made it more likely that they would repay the loans, without disclosing to the Alberts that the bankruptcies might reflect negatively on Galloway's and O'Farrell's creditworthiness. Oliveros also assured the Alberts that the loans to Galloway, Jeziorski, and O'Farrell were secure and appropriate to the Alberts's circumstances, without having conducted investigation sufficient to make that assurance. Oliveros did not advise the Alberts that their second lien position on the trust deeds securing the loan might reduce their ability to recover in the event of a default.

15.

Jeziorski paid off his loan in full. Galloway and O'Farrell made interest payments for a few months and Galloway made one principal payment. They stopped making any payments by the summer of 2007.

16.

Galloway filed for bankruptcy in the fall of 2007. Oliveros represented the Alberts in connection with that bankruptcy free of charge. The bankruptcy court ruled Galloway ineligible for a discharge because he had previously been discharged in a recent (2005) bankruptcy. Oliveros had represented Galloway in the 2005 bankruptcy. Oliveros then sued Galloway on the Alberts's behalf, again, free of charge. Galloway confessed to judgment in the amount of \$350,000 in August 2009. However, he had no assets and was able to make only a few modest payments totaling several hundred dollars.

17.

O'Farrell filed for bankruptcy in June 2009. Oliveros filed an adversary proceeding opposing the discharge but the bankruptcy court granted O'Farrell a discharge in December 2011.

18.

The security for the Galloway and O’Farrell loans—second lien positions on real estate—was inadequate. By the time the properties were foreclosed and sold, no equity was available to apply against the Alberts’s loans. The Alberts lost \$525,000—a substantial sum and nearly all of their investment. However, the Alberts were subsequently compensated for some or all of this loss by the Professional Liability Fund (“PLF”).

### **Violations**

19.

Oliveros admits that, by counseling and assisting his elderly clients to make unsecured or under-secured loans that were inconsistent with their desire and need for a safe investment, he failed to provide competent representation, in violation of RPC 1.1.

Oliveros further admits that by simultaneously representing clients with adverse interests and under circumstances in which his representation was materially limited by his responsibilities to those other clients or his own interests, he engaged in a current-client conflict of interest, in violation of RPC 1.7(a)(1) and (2).

### **Sanction**

20.

Oliveros 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 Oliveros’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.

- a. **Duty Violated.** Oliveros violated his duties to his clients to avoid conflicts of interest and to provide competent representation. *Standards* §§ 4.3, 4.5. The *Standards* provide that the most important ethical obligations are those obligations which a lawyer owes to clients. *Standards* at 5.
- b. **Mental State.** Oliveros acted negligently and knowingly. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. Oliveros appreciated he was arranging transactions between current clients but failed to recognize that their interests were adverse. Although he was also aware that he lacked experience in handling the

type of risky financial transactions he arranged for the Alberts, he failed to appreciate the importance of performing due diligence regarding the riskiness of the transactions and to communicate about that to his clients in advance of advising them to participate in the transactions.

c. **Injury.** Injury can be either potential or actual. *Standards* § 3.0. The Alberts were actually injured in that they lost \$525,000—nearly all of the investment they had entrusted Oliveros to protect. They were also caused stress and concern over the nonpayment and pursuit of the debtors. The Alberts were potentially injured to the extent that their entire investment was put at unnecessary risk prior to Jeziorski paying off his loan. Jeziorski, Galloway, and O’Farrell were all potentially injured to the extent that Oliveros failed to fully disclose and obtain written consent to his representation adverse to their objective interests.

d. **Aggravating Circumstances.** Aggravating circumstances include:

1. Prior relevant discipline. *Standards* § 9.22(a). Oliveros was admonished in 2002 for a violation of *former* DR 5-101(A) (*current* RPC 1.7(a)(2)) for a personal-interest conflict of interest. *In re Oliveros*, OSB Case No. 02-42, Letter of Adm. (Apr 3, 2002). A letter of admonition is considered as evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue in the case at bar. *In re Cohen*, 330 Or 489, 500, 8 P3d 953 (2000).

Oliveros was also publicly reprimanded in 2005 for violation of *former* DR 6-101(B) (*current* RPC 1.3) for neglect of a legal matter. *In re Oliveros*, 19 DB Rptr 260 (2005).

2. A pattern of misconduct. *Standards* § 9.22(c). There were numerous transactions with multiple borrowers for which Oliveros did not take necessary precautions or recognize the effect of the conflict in each event.

3. Multiple offenses. *Standards* § 9.22(d).

4. Vulnerable victims. *Standards* § 9.22(h).

5. Substantial experience in the practice of law. *Standards* § 9.22(i). Oliveros has been a lawyer in Oregon since 1991.

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

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

2. Cooperation with the Bar’s investigation. *Standards* § 9.32(e).



3. Good character or reputation. *Standards* § 9.32(g). Oliveros provided many letters from lawyers and judges in the legal community in support of his good character and reputation. Oliveros also provided information demonstrating that he engaged in substantial pro bono work to the benefit of his local community.
4. The imposition of other penalties and sanctions. *Standards* § 9.32(k). Oliveros was paid little in conjunction with the matters in this case and, in fact, wrote off over \$30,000 in bills for legal services. In addition, the malpractice case brought by Mrs. Alberts resulted in Oliveros paying some money toward the settlement of the Alberts's malpractice claim. *See In re Labahn*, 335 Or 357, 364, 67 P3d 381 (2003) (court found attorney had qualified for mitigation due to monetary malpractice settlement).
5. Remorse. *Standards* § 9.32(l). Oliveros has expressed genuine remorse for his actions in this matter.

21.

Under the ABA *Standards*, a “[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” *Standards* § 4.32. A “[r]eprimand 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. A suspension “is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent” and causes actual or potential injury to a client. *Standards* § 4.52.

22.

In *In re Moore*, 299 Or 496, 703 P2d 961 (1985), the court set forth that in multiple-client conflicts cases, the distinction is between

(1) cases in which the lawyer is guilty only of a conflict of interest, and (2) cases in which the conflict was aggravated by fraud, dishonesty, or misappropriation of funds. We noted that in the former class of cases, the sanctions have been a public reprimand or a suspension for less than one year. In the latter class of cases, the suspensions have exceeded one year and one case resulted in disbarment.

*In re Moore*, 299 Or at 510. Oliveros’s conduct falls within the first class of cases: there was no fraud, dishonesty, or misappropriation of funds involved. Oliveros’s conduct is factually similar to *In re Boyer*, 295 Or 624, 669 P2d 326 (1983), in which the lawyer was suspended for seven months after he was found guilty of a current-client conflict of interest and a personal-interest conflict, for arranging for one of his clients to borrow money from

another client and then preparing the loan documents. However, in addition to the trial panel finding that Boyer was “want of credibility,” Boyer’s area of practice was in real estate and contract law, and he represented both clients in the loan transaction, even receiving a finder’s fee from the debtor for locating the lender. In this matter, Oliveros—who was not well-versed in loan transactions—only represented the lenders in the transactions at issue, and ultimately received no fees for his services. Oliveros has been candid about his shortcomings in this matter.

Other cases also support the imposition of a short suspension. *See, e.g., In re Patrick*, 20 DB Rptr 47 (2006) (attorney suspended 30 days for a self-interest conflict that arose when he personally guaranteed repayment of a loan he arranged from one client to another while representing both clients in the transaction); *In re Browning*, 26 DB Rptr 176 (2012) (120-day suspension imposed by trial panel when, without sufficient disclosures and consent, attorney represented a creditor in the collection of a debt while simultaneously representing the debtor in an unrelated matter); *In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999) (attorney was suspended for four months when he engaged in self-interest conflicts while representing both himself and a client as co-lenders, and also was counsel for the borrower in a loan transaction; an additional conflict arose when he later undertook efforts to collect the loan on behalf of himself and the co-lender client).

23.

BR 6.1(a) contemplates that, in conjunction with a disciplinary sanction, a respondent may be required to make restitution of some or all of the money, property, or fees received by the respondent in the representation of a client. Oliveros did not receive money, property, or fees in conjunction with the services that are the subject of this proceeding, so there are no funds that would be subject to this provision (i.e., nothing to be refunded). Oliveros did not attempt to collect fees associated with the loans or his subsequent reparative efforts on behalf of the Alberts. In addition, as noted previously, the PLF contributed sums to mitigate the Alberts’s loss, the precise amount of which is unknown.

24.

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 that may be corrected). The court has also indicated that staying all or part of a suspension conditioned on the successful completion of probation can be appropriate and adequately protect the public, particularly when, as here, there was no dishonesty or intent to deceive on the part of the respondent, and considerable time has passed since the conduct at issue without further incident. *In re Morrow*, 303 Or 102, 109, 734 P2d 867 (1987). The Bar believes that, 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 in this instance.

25.

Consistent with the *Standards* and Oregon case law, the parties agree that Oliveros shall be suspended for 60 days for violations of RPC 1.1, RPC 1.7(a)(1), and RPC 1.7(a)(2), effective March 1, 2016, or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later (the “effective date”). However, all of the suspension shall be stayed pending Oliveros’s successful completion of a three-year term of probation on the conditions described below.

26.

Probation shall commence upon the effective date and shall continue for a period of three years, ending on the day prior to the third-year anniversary of the effective date (the “period of probation”). During the period of probation, Oliveros shall abide by the following conditions:

- (a) Oliveros shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (b) Within seven days of the effective date, Oliveros shall contact the PLF and schedule an appointment on the soonest date available to consult with a PLF practice management advisor (“PMA”) in order to obtain practice management advice. Oliveros shall notify Disciplinary Counsel’s Office (“DCO”) of the time and date of the appointment with the PMA.
- (c) Oliveros shall attend the appointment with the PMA and seek advice and assistance regarding procedures for establishing and implementing a vigorous conflicts check system, 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 PMA, Oliveros shall adopt and implement those recommendations.
- (d) No later than 60 days after recommendations are made by the PMA, Oliveros shall provide a copy of the Office Practice Assessment from the PMA and file a report with DCO stating the date of his consultation(s) with the PMA, 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.
- (e) An active Oregon attorney to be selected by Oliveros prior to the beginning of the probationary period and acceptable to DCO shall serve as Oliveros’ proba-

tion supervisor (“Supervisor”). Oliveros 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 Oliveros’ clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Oliveros shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Oliveros’ 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 percent of Oliveros’ files—whichever is greater—to determine whether Oliveros is timely, competently, diligently, and ethically attending to matters in a conflict-free manner, and taking reasonably practicable steps to protect his clients’ interests upon the termination of employment.

- (f) During the period of probation, Oliveros shall attend not less than six MCLE accredited programs, for a total of 15 hours, which shall emphasize law practice management, time management, conflicts of interest, and any areas of practice relevant to his clients or caseload. These credit hours shall be in addition to those MCLE credit hours required of Oliveros for his normal MCLE reporting period.
- (g) Each month during the period of probation, Oliveros shall review all client files to ensure that he has no conflicts of interest, that he is timely attending to the clients’ matters, and that he is maintaining adequate communication with clients, the court, and opposing counsel, and competently addressing client matters.
- (h) On a quarterly basis, on dates to be established by Disciplinary Counsel beginning no later than 90 days after the effective date, Oliveros shall submit to Disciplinary Counsel’s Office a written “Compliance Report,” approved as to substance by Supervisor, advising whether Oliveros is in compliance with the terms of this agreement. In the event that Oliveros has not complied with any term of the agreement, the Compliance Report shall describe the noncompliance and the reason for it.
- (i) Throughout the term of probation, Oliveros shall diligently attend to client matters and adequately communicate with clients regarding their cases. Oliveros shall also institute measures to ensure that he does not engage in current-client conflicts of interest, consistent with PMA recommendations.
- (j) Oliveros authorizes 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 Oliveros' compliance.

- (k) Oliveros is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (l) Oliveros' 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.
- (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (n) The SPRB's decision to bring a formal complaint against Oliveros 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.

27.

In the event that Oliveros' probation is revoked and the stayed portion of his suspension imposed, Oliveros 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, Oliveros will arrange for an active member of the Bar in good standing to either take possession of or have ongoing access to Oliveros' client files and serve as the contact person for clients in need of the files during the term of Oliveros' suspension. In the event of Oliveros' suspension, Oliveros will notify DCO of the name of the lawyer who agrees to accept this responsibility.

28.

Oliveros acknowledges that, should his probation be revoked and the stayed portion of his suspension imposed, 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. Oliveros also acknowledges that during any period of suspension imposed 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.

29.

Oliveros 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, if any actual suspension is imposed.

30.

Oliveros 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 Oliveros is admitted: US District Court, District of Oregon.

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 18th day of April, 2016.

/s/ Gregory P. Oliveros

Gregory P. Oliveros

OSB No. 910837

EXECUTED this 27th day of April, 2016.

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. 15-62  
)  
SCOTT P. BOWMAN, )  
)  
Accused. )

Counsel for the Bar: Martha M. Hicks  
Counsel for the Accused: Michael J. Slominski  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(c)(3) and RPC 8.1(a)(2).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: May 5, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Scott P. Bowman is publicly reprimanded for violation of RPC 1.5(c)(3) and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct..

DATED this 5th day of May, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Kelly L. Harpster

Kelly L. Harpster, Region 7  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Scott P. Bowman, attorney at law (“Bowman”), 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.

Bowman was admitted by the Oregon Supreme Court to the practice of law in Oregon on June 9, 2003, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Bowman 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 28, 2015, a Formal Complaint was filed against Bowman pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.5(c)(3) and RPC 8.1(a)(2) 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.

On September 19, 2012, Bowman undertook to represent Marie Merten (“Merten”) pursuant to a written fee agreement that provided for a flat fee of \$1,000, earned on receipt. Bowman’s fee agreement failed to advise Merten that her funds would not be deposited into a lawyer trust account and failed to advise Merten that she could discharge Bowman at any time and, in that event, could be entitled to a refund of all or part of the fee if the services for which the fee was paid were not completed by Bowman.

6.

In the course of the Bar’s investigation of Merten’s complaint about Bowman’s conduct, Disciplinary Counsel’s Office (“DCO”) lawfully requested information from Bowman by letters dated March 13, 2015, and April 8, 2015. Bowman knowingly failed to respond to these requests but misunderstood whether Disciplinary Counsel was requesting his response. He was suspended from the practice of law pursuant to BR 7.1.



## Violations

7.

Bowman admits that, by engaging in the conduct described in paragraphs 5 and 6 above, he violated RPC 1.5(c)(3) and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct.

## Sanction

8.

Bowman 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 Bowman’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.

- a. **Duty Violated.** Bowman violated his duty to the public to respond to Disciplinary Counsel’s attempts to investigate his conduct and as a professional by using an improper fee agreement. *Standards* §§ 5.0, 7.0
- b. **Mental State.** In failing to respond to Disciplinary Counsel’s requests for information, Bowman acted knowingly. In using an improper fee agreement, he acted negligently. *Standards* at 7.
- c. **Injury.** The Bar was actually injured in that its investigation of Bowman’s conduct was impeded, necessitating the filing of a BR 7.1 petition. Bowman’s failure to advise Merten of her rights under a nonrefundable flat-fee agreement had the potential to harm Merten.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Bowman has prior discipline that includes a one-year suspension that was partially stayed pending completion of probation for violation of, *inter alia*, RPC 8.1(a)(2), *In re Bowman*, 24 DB Rptr 144 (2010), and a 120-day suspension, partially stayed, for violation of RPC 8.4(a)(2) when he repeatedly drove while suspended or while under the influence of alcohol, *In re Bowman*, 28 DB Rptr 308 (2014). *Standards* § 9.22(a);
  2. Multiple offenses. *Standards* § 9.22(d); and
  3. Substantial experience in the practice of law. Bowman was admitted to the Florida Bar in 2000 and the Oregon Bar in 2003. *Standards* § 9.22(i).

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. *Standards* § 9.32(a);
  2. Personal or emotional problems. *Standards* § 9.32(c);
  3. Interim rehabilitation. Bowman was struggling with alcohol addiction, he was facing foreclosure on his home of 30 years as a result of financial problems resulting from the dissolution of his marriage, and he was suffering from complications of diabetes. He has since completed in-patient alcohol treatment, he has found housing in a group home where alcohol use is prohibited, he has begun to lose weight and attend to his other health and legal problems, and he has reinstated his active membership in the Bar. *Standards* § 9.32(j);
  4. Bowman misunderstood the nature of Disciplinary Counsel’s March 13, 2015, and April 8, 2015, letters and, while he knew that he was required to respond to Disciplinary Counsel’s requests for information, was unsure whether these letters were requests for information.

9.

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

10.

Oregon case law is in accord. A letter of admonition would be consistent with the SPRB’s recent resolution of cases involving single violations of RPC 1.5(c)(3). *See In re Springer*, OSB Case No. 15-95, Letter of Adm. (Feb 18, 2016); *In re Bons*, OSB Case No. 14-138, Letter of Adm. (Jan 5, 2015); *In re Enright*, OSB Case No. 15-26, Letter of Adm. (Mar 18, 2015); *In re Kahn*, OSB Case No. 15-24, Letter of Adm. (Mar 24, 2015); *In re Walker*, OSB Case No. 15-42, Letter of Adm. (Apr 29, 2015); and *In re Faulhaber*, OSB Case No. 15-51, Letter of Adm. (Jun 19, 2015).

With respect to the RPC 8.1(a)(2) charge, a reprimand is consistent with other stipulated outcomes when an initial failure to cooperate was the sole violation or accompanied only by other minor violations. *See, e.g., In re Burt*, 25 DB Rptr 238 (2011) (stipulated reprimand for violation of RPC 8.1(a)(2) only); *In re Hodgess*, 24 DB Rptr 253 (2010) (stipulated reprimand for practicing law while suspended for two days and subsequently failing to respond to Disciplinary Counsel’s Office); and *In re Sugarman*, 21 DB Rptr 188 (2007) (reprimand when attorney had some communication with DCO, but did not substantively respond to Disciplinary Counsel’s initial inquiry for nearly four months and thereafter failed to respond to subsequent inquiries, necessitating referral to the Local Professional Responsibility Committee).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Bowman shall be publicly reprimanded for violation of RPC 1.5(c)(3) and RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct.

12.

Bowman 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.

13.

Bowman represents that, in addition to Oregon, he also is admitted to practice law in Florida, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing this 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 28th day of April, 2016.

/s/ Scott P. Bowman

Scott P. Bowman

OSB No. 032174

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks

OSB No. 751674

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-86  
) SC S064013  
CHRISTIAN V. DAY, )  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.7(a)(2), RPC 1.8(j), RPC 8.4(a)(2),  
RPC 8.4(a)(4), and RPC 8.4(a)(7). Stipulation for  
Discipline. 36-month suspension.  
Effective Date of Order: May 26, 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 a period of 36 months, effective as of the date of this order.

/s/ Thomas A. Balmer 05/26/2016 10:49 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

Christian V. Day, attorney at law (“Day”), 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.

Day was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1993, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Day 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 9, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Day for alleged violations of RPC 1.7(a)(2) (personal-interest conflict), RPC 1.8(j) (sexual relations with a current client), RPC 8.4(a)(2) (criminal conduct reflecting adversely on fitness to practice), RPC 8.4(a)(4) (conduct prejudicial to the administration of justice), and RPC 8.4(a)(7) (harassment on the basis of sex) 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 or around 2013, Day engaged in inappropriate contact on multiple occasions with Heather Myers (“Myers”), an indigent incarcerated client, by engaging in “sexual relations” as defined by RPC 1.8(j)(1).

6.

In late March 2015, Day was appointed to represent Amy Hall (“Hall”) in her criminal matter, after Hall’s prior attorney had been removed, at her request. In appointing Day, the court informed Hall that it would not appoint another attorney if Day was unsatisfactory to Hall.

7.

In April 2015, at a time when Hall was incarcerated, Day engaged in inappropriate contact with her on multiple occasions, engaging in “sexual relations” as defined by RPC 1.8(j)(1).

8.

Day's sexual interactions with Myers and Hall violated the rules of the facilities in which they were incarcerated. Day would not have engaged in these sexual interactions if Myers and Hall were not women.

9.

Day believed his interactions with Myers and Hall to be consensual and that both had consented to all of their interactions. Hall represented that her interactions with Day were not consensual in her report to law enforcement. It is the Bar's position that sexual relations (as defined in RPC 1.8(j)) between a lawyer and an inmate-client cannot be consensual.

10.

On September 25, 2015, Day pled no contest to one count of harassment, a Class A misdemeanor, for harmful and offensive touching of the sexual or other intimate parts of Hall, in violation of ORS 166.065(4)(a).

### **Violations**

11.

Day admits that, by engaging in sexual relations with female incarcerated clients, as described above, he violated RPC 1.8(j), and engaged in a personal-interest conflict of interest, in violation of RPC 1.7(a)(2).

12.

Day further admits that he engaged in criminal conduct reflecting adversely on his fitness to practice law and interfered with Hall's right to counsel in violation of RPC 8.4(a)(2) and RPC 8.4(a)(4).

13.

Finally, Day admits that his harassment of Myers and Hall on the basis of their sex violated RPC 8.4(a)(7).

### **Sanction**

14.

Day and the Bar agree that in fashioning an appropriate sanction in this case, the Oregon Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* ("Standards"). The *Standards* require that Day'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.

- a. **Duty Violated.** Day violated his duty to his clients to avoid conflicts of interest. *Standards* § 4.3. The *Standards* provide that the most important ethical obligations are those which lawyers owe to clients. *Standards* at 5. Day also violated his duty to the public to maintain his personal integrity, and his duty to the legal system to avoid abuse to the legal process. *Standards* §§ 5.1, 6.2.
- b. **Mental State.** Day intentionally engaged in sexual relations with his clients, which means that his personal-interest conflict and discriminatory behavior were at least knowing. “Intent” is the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. Similarly, he knowingly engaged in criminal conduct and conduct prejudicial to the administration of justice.
- c. **Injury.** Injury can be either potential or actual. *Standards* § 3.0. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, both Myers and Hall were potentially or actually harmed by Day’s sexual interactions in the course of his representation of them in their criminal matters. The legal system was harmed by the need to appoint a new attorney for Hall, notwithstanding the judge’s prior position on that issue. There was also potential harm to the profession and legal system, as Day’s conduct may have diminished the trust the public places in lawyers to act with integrity.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. *Standards* § 9.22(b). Day acted out of his own sexual desire and personal interests.
  2. Multiple offenses. *Standards* § 9.22(d).
  3. Vulnerability of victim. *Standards* § 9.22(h). Myers and Hall were incarcerated at the time of Day’s sexual relations with them.
  4. 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. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards* § 9.32(e).

3. Imposition of other penalties or sanctions. *Standards* § 9.22(k). Day was criminally prosecuted and lost his job with his law firm as a result of his actions.
4. Remorse. *Standards* § 9.32(m).

15.

Under the ABA *Standards*, disbarment is generally appropriate when a lawyer, without the informed consent of clients, “engages in representation of a client knowing that the lawyer's interests are adverse to the client’s with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client.” *Standards* § 4.31(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. 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. “Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.” *Standards* § 6.22. The parties agree that, in this case, Day’s conduct warrants a substantial suspension.

16.

Oregon cases are in accord, imposing substantial suspensions or disbarment for sexual contacts with clients. *See, e.g., In re Hassenstab*, 325 Or 166, 934 P2d 1110 (1997) (attorney disbarred for multiple sexual contacts with a number of clients and additional related conduct); *In re Wolf*, 312 Or 655, 826 P2d 628 (1992) (18-month suspension for an isolated incident of sexual contact with a current vulnerable client). This case is less serious than the conduct in *Hassenstab* in that Day’s conduct was limited to two clients. However, his conduct is more serious than the conduct in *Wolf* in that it involves more than one client and, at least for one client, occurred multiple times early in the representation when she was completely dependent on Day to negotiate her freedom.

17.

Consistent with the *Standards* and Oregon case law, the parties agree that Day shall be suspended for 36 months for violations of RPC 1.7(a)(2), RPC 1.8(j), RPC 8.4(a)(2), RPC 8.4(a)(4), and RPC 8.4(a)(7) of the Oregon Rules of Professional Conduct. The sanction is to be effective 10 days after approval by the Oregon Supreme Court.

18.

Day 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. At this time, Day has no clients, or client files, as all of them remained with his former law firm.



19.

Day 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. Day also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

20.

Day 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.

21.

Day 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 Day is admitted: None.

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

EXECUTED this 8th day of April, 2016.

/s/ Christian V. Day

Christian V. Day

OSB No. 932517

EXECUTED this 11th day of April, 2016.

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. 14-25  
)  
JAMES R. DOWELL, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: Maite Uranga  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(a). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: May 27, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and James R. Dowell is publicly reprimanded for violation of RPC 1.5(a).

DATED this 27th day of May, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

James R. Dowell, attorney at law (“Dowell”), 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.

Dowell was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 21, 2004, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On May 30, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Dowell for alleged violations of RPC 1.5(a) (charge or collect a clearly excessive fee) 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.

Dowell accepted representation of Luz Callum (“Callum”) for a personal-injury matter arising out of a car accident that occurred on or about October 30, 2010. Callum informed Dowell that she was medically stationary in September of 2012.

6.

The case was scheduled for trial in September 2013. Dowell postponed the trial to accommodate his wedding plans. Callum objected to the postponement. Callum filed a Bar Complaint against Dowell on or about October 7, 2013. Shortly after this, Dowell came to the conclusion that he and Callum had a conflict of interest that prevented him from finishing the representation. Dowell withdrew and Callum found other representation.

7.

Dowell believed that settlement of the case was likely and that a reasonable value for the case was \$100,000. He filed a lien for approximately \$33,333, based on his contingency fee agreement with Callum. Dowell filed an amended lien, this time requesting in excess of \$23,000. Dowell attempted to negotiate with opposing counsel for a lesser amount.

8.

The court ultimately dismissed the second lien, finding that Dowell was not owed anything for the work he performed and did not order attorney fees to the prevailing party.

9.

Callum's settlement was ultimately less than half of what Dowell believed it to be. Even if Dowell had made a recovery on closer to what Dowell anticipated it would be, he had no expectation of receiving the full one-third of the recovery of his former client, because he had not completed the representation.

### **Violation**

10.

Dowell admits that, by asserting a lien against his former client's recovery, in an amount clearly in excess of the amount he was entitled to recover, he charged a clearly excessive fee, in violation of RPC 1.5(a).

### **Sanction**

11.

Dowell 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 Dowell'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.

- a. **Duty Violated.** Dowell violated his duty to the profession to refrain from charging improper fees. *Standards* § 7.0.
- b. **Mental State.** The *Standards* define *negligence* 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* at 7. In this case, Dowell was negligent in that he failed to heed the risk that his client had settled for substantially less than he estimated the case was worth, and that his filing a lien

against the case would delay his client's settlement and cost the client time and money.

- c. **Injury.** Injury can be actual or potential. *Standards* § 3.0. Dowell's client was actually injured by his attempt to assert this fee because it delayed the client's settlement and cost the client \$6,000 in additional attorney fees.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. *Standards* § 9.22(b). Dowell was seeking recovery of his own fees.
  2. Substantial experience in the practice of law. *Standards* § 9.22(i). Dowell was admitted in Oregon in 2004 and Texas in 2002.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Full and free disclosure to disciplinary counsel. *Standards* § 9.32(e).
  2. Imposition of other penalties or sanctions. *Standards* § 9.32(k). Dowell's lien against his former client was struck, and he was unable to collect any fee for his services.

12.

Under the ABA *Standards*, a reprimand is "generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system." *Standards* § 7.3. The aggravating and mitigating factors are in equipoise, supporting a reprimand as the appropriate result.

13.

Oregon case law is in accord. *See, e.g., In re Vanagas*, 27 DB Rptr 255 (2013) (attorney reprimanded by trial panel when he accepted payment from conservatorship funds without obtaining court approval as required by statute); *In re Grimes*, 25 DB Rptr 242 (2011) (reprimand when, in a dissolution of marriage matter, attorney 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 Lounsbury*, 24 DB Rptr 53 (2010) (reprimand when attorney collected a flat fee to defend a client in a criminal case, but then did not complete the legal services contemplated by the fee agreement before being terminated by his client; attorney's failure to refund part of the fee to the client was a violation, even though the fee agreement denominated the fee as nonrefundable); *In re Angel*, 22 DB Rptr 351 (2008) (attorney reprimanded by trial panel for improperly collecting an hourly fee in a contingent-fee case).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Dowell shall be publicly reprimanded for violation of RPC 1.5(a), the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

15.

Dowell 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.

Dowell 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 Dowell is admitted: Texas, California, and Illinois.

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.

EXECUTED this 19th day of May, 2016.

/s/ James R. Dowell

James R. Dowell

OSB No. 040581

EXECUTED this 25th day of May, 2016.

OREGON STATE BAR

By: /s/ Nik Chourey

Nik Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-71  
)  
MARIEL MARJORIE ETTINGER, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: Ronald L. Roome, Chairperson  
John E. Laherty  
William J. Olsen, Public Member  
Disposition: Violation of RPC 1.15-1(c), RPC 1.15-1(d), RPC  
1.16(d), and RPC 8.4(a)(3). Trial Panel Opinion.  
Disbarment.  
Effective Date of Opinion: June 1, 2016

**TRIAL PANEL OPINION**

**Introduction:**

After the Default of the Accused, Mariel Marjorie Ettinger, the Trial Panel Chairperson requested the Oregon State Bar and Ms. Ettinger to submit Sanctions briefs. Ms. Ettinger was given adequate time to respond to the Bar’s Sanctions Memorandum. She failed to do so. The Trial Panel then convened on March 14, 2016 to determine whether Ms. Ettinger (1) had violated certain Disciplinary Rules, as alleged by the Oregon State Bar, and, if so, (2) what sanction would be appropriate.

**TRIAL PANEL DETERMINATION:**

For the reasons set out below, the Trial Panel unanimously concludes that the Bar met its burden of proof, that Ms. Ettinger violated the Disciplinary Rules alleged by the Bar, and that Ms. Ettinger should be disbarred from the practice of law.

## **PROCEDURAL HISTORY:**

Ms. Ettinger was admitted to the Oregon State Bar on September 25, 2008.

Thereafter, in 2013, Ms. Ettinger was suspended from the practice of law in the State of Oregon for a period of two years. The suspension came as a result of a Formal Disciplinary Complaint (Case Nos. 11-123, 11-124, 12-58) filed by the Bar against her in March 2012. Ms. Ettinger did not file an Answer to that Disciplinary Complaint, and did not otherwise appear in that proceeding. The Trial Panel suspended Ms. Ettinger from the practice of law after determining, unanimously, that Ms. Ettinger had violated the Disciplinary Rules alleged in the Bar's Complaint.

The Bar filed the current Formal Disciplinary Complaint against Ms. Ettinger on August 18, 2015 (Case No. 15-71). She was personally served with the Complaint on August 25, 2015. The record reflects that Ms. Ettinger never filed a formal Answer to the Complaint. She did submit a short, single-page, undated, "To Whom It May Concern" letter, that was marked "RE: ANSWER." However, Ms. Ettinger was informed that the letter could not be considered because it did not comply with the provisions of BR 4.3(d), was not in the form set forth in BR 12.3, was not verified, and did not include proof of service on Disciplinary Counsel. Thereafter, the Bar submitted a Motion and obtained a signed Order requiring Ms. Ettinger to file an Answer in compliance with BR 4.3(d). Despite this Order, Ms. Ettinger did not file an Answer by the November 16, 2015 deadline. As a result, the Bar issued a 10-day Notice of Intent to Take Default. Ms. Ettinger still did not respond. The Bar then filed a formal Motion for an Order of Default. All motions, notices, and proposed orders were served on Ms. Ettinger. Yet, she failed to respond. The Default Motion was granted by the Disciplinary Board Region 1 Chairperson on December 18, 2015. The Region 1 Chairperson's Order stated that Ms. Ettinger was formally in Default and that, as a result, the allegations in the Bar's Complaint were now deemed to be true.

Thereafter, the Disciplinary Trial Panel Chair determined that it was not necessary, due to Ms. Ettinger's Default, to hold a formal Sanctions Hearing. Instead, under authority of BR 5.8(a) and BR 2.4(h), the Trial Panel Chair requested that the parties submit their evidence and arguments regarding Sanctions directly to the Trial Panel Members by written briefs and affidavits. The parties were advised that the Trial Panel would rely on the written briefs and affidavits to determine (1) whether Ms. Ettinger had violated the Rules of Professional Conduct, under the facts deemed admitted in the formal Complaint, and, if so, (2) what the appropriate sanction should be. The deadline for the Bar's brief was February 23, 2016. The deadline for Ms. Ettinger's brief was March 11, 2016. The Bar filed its Memorandum Regarding Sanction as required. Ms. Ettinger failed to respond.

The only response by Ms. Ettinger in this entire proceeding was the single-page, undated and unverified "To Whom It May Concern" letter. She otherwise failed to appear in



this action, despite being given many opportunities to do so. She also did not request that the Trial Panel hear testimony or take evidence in a formal Sanctions Hearing.

**GENERAL NATURE AND SCOPE OF CHARGES:**

Due to Ms. Ettinger’s Default, the allegations in the Bar’s Formal Complaint are deemed to be true. BR 5.8(a); *In re Magar*, 337 OR 548, 551–53, 100 P3d 727 (2004).

The allegations in the Bar’s Complaint are summarized as follows.

Steven and Brittany Smith hired Ms. Ettinger in January 2010 to seek joint custody of Steven Smith’s children. They paid Ms. Ettinger a \$2,000 retainer. Before Ms. Ettinger filed a petition regarding custody of the children, Steven Smith and the opposing party settled the matter through mediation. At that point, Ms. Ettinger had not conducted sufficient legal work to earn the full amount of the retainer. Despite that fact, Ms. Ettinger did not refund any portion of the retainer to the Smiths and did not respond to the Smiths’ requests that she refund the unearned portion of the retainer.

Ms. Ettinger left her law practice in mid-2010, closed her lawyer trust account, and withdrew the remaining funds in that account. At that time, Ms. Ettinger converted some of the Smiths’ retainer for her own personal use, unrelated to the Smiths’ matter.

After reviewing Ms. Ettinger’s records, attorney Wes Williams made a written demand on behalf of the Smiths in November 2011 for Ms. Ettinger to refund the unearned portion of the Smiths’ retainer. Ms. Ettinger did not respond to William’s letter and did not refund any portion of the Smith’s retainer.

In 2015, the Smiths made a claim for reimbursement with the Oregon State Bar’s Client Security Fund. A few months later, Ms. Ettinger sent the Smith’s the undisputed portion of their retainer, drawn on her personal bank account, along with a note of apology.

The Bar alleged in its Formal Disciplinary Complaint that Ms. Ettinger failed to deposit and maintain client funds in trust; failed to promptly return client property; failed to take reasonable steps upon withdrawal of employment, including the refund of unearned fees; and participated in conduct involving dishonesty—the conversion of client funds.

The Bar alleged that Ms. Ettinger’s conduct violated the following sections of the Oregon Rules of Professional Conduct: RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(d), and RPC 8.4(a)(3).

These Rules of Professional Conduct provide:

RPC 1.15-1(c).

“A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as ‘earned on receipt,’ ‘nonrefundable’ or similar terms and complies with Rule 1.5(c)(3).”

RPC 1.15-1(d).

“[A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.”

RPC 1.16(d).

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as . . . 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 8.4(a)(3).

“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.

### SANCTIONS ANALYSIS

Due to Ms. Ettinger’s Default, the facts of the underlying Rule violations, as set forth in the Bar’s Formal Complaint, are deemed to be true. BR 5.8(a): *In re Kluge*, 332 Or 251, 27 P3d 102 (2001).

The Trial Panel considered the Formal Complaint, the Oregon State Bar’s Sanctions Memorandum, the ABA *Standards for Imposing Lawyer Sanctions* (“Standards”), and Oregon case law in reaching its decision to disbar Ms. Ettinger.

#### A. The Standards.

The ABA *Standards* set out four factors for the Trial Panel to consider in its evaluation of Ms. Ettinger’s conduct: (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 factors. *Standards* at § 3.0.

##### 1. Duty Violated:

The most important ethical duties are those obligations that a lawyer owes to clients. *Standards* at 5. In this case, Ms. Ettinger violated her duty to her clients to preserve and return client property. *Standards* at § 4.1. She wrongfully converted money belonging to her clients for her personal use.

##### 2. Mental State:

Because the facts in the Bar’s Formal Complaint are deemed true, the Trial Panel finds that Ms. Ettinger acted knowingly or intentionally when she converted client funds. She withdrew all funds when she closed her lawyer trust account, thereby converting the Smiths’ money to her own use, and then

failed to respond to requests and demands from the Smiths and attorney Williams for the return of those funds. See *In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1988) (lawyer’s mental state can be inferred from the facts).

The Standards define *intent* as the conscious objective or purpose to accomplish a particular result. *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* at 9.

There was no evidence before the Trial Panel regarding the terms of any fee agreement Ms. Ettinger may have had with the Smiths. As a result, there was no defense or explanation available to Ms. Ettinger in that regard. The Trial Panel concluded, therefore, that Ms. Ettinger had to know she was taking client money for her personal use, and that she then compounded her misconduct by not responding to requests from her clients and others over a period of approximately five years to remedy her conversion of client funds.

3. Injury:

The Trial Panel may take into account both actual and potential injury, for the purpose of determining an appropriate disciplinary sanctions. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The *Standards* define *injury* as harm to the client, the public, the legal system, or the profession that results from a lawyer’s misconduct. *Standards* at 7.

Ms. Ettinger caused actual injury to her clients in not refunding money owed to them for almost five years. Her failing to communicate about those funds during that time caused actual injury to her clients in terms of frustration and anxiety. See *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney’s neglect can constitute actual injury); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

Ms. Ettinger’s conduct, the conversion of client funds, also caused injury to the profession by damaging the public’s confidence in attorneys. *In re McDonough*, 336 Or 36, 44, 77 P3d 306 (2003).

4. Aggravating and Mitigating Circumstances:

The *Standards* define *aggravating factors* as considerations that justify an increase in the degree of discipline to be imposed. *Standards* at § 9.22. The Trial Panel found a number of aggravating factors to be present in this case.

a. Prior History of Discipline. *Standards* at § 9.22(a).

Ms. Ettinger was previously suspended from the practice of law for two years in 2013. *In re Ettinger*, 27 DB Rptr 76 (2013). She was

suspended by a Trial Panel at that time for neglectful and unresponsive conduct similar to the conduct found in the current Disciplinary Complaint. Most importantly, one of the reasons the Trial Panel suspended her in 2013 was her failure to return client funds upon termination of the attorney-client relationship. There was no information at that time, however, that Ms. Ettinger had knowingly removed and personally utilized the client funds. In the Bar's current Disciplinary Complaint, by contrast, the Bar charged and proved that Ms. Ettinger knowingly converted the unearned portion of the Smiths' retainer. As a result, the current Trial Panel concluded that Ms. Ettinger wrongfully took funds belonging to her clients for her personal use.

The 2013 Trial Panel that suspended Ms. Ettinger found knowing violations of RPC 1.3 (neglect), RPC 1.4(a) (failure to keep a client reasonably informed), RPC 1.16(d) (failure to refund advance payment of unearned fees or expenses upon termination of representation), RPC 8.1(a)(2) (failure to respond to a lawful demand for information from a disciplinary authority), RPC 8.1(c) (failure to comply with State Lawyers Assistance Committee), RPC 8.4(a)(2) (criminal conduct reflecting adversely on a lawyer's fitness), and RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

- b. Dishonest or Selfish Motive. *Standards* at § 9.22(b).

The Trial Panel in this case concluded that Ms. Ettinger was motivated by her own personal interests, in paying herself and in utilizing client funds that did not belong to her. She also allowed her personal issues to overshadow her obligations to her clients.

- c. Pattern of Misconduct. *Standards* at § 9.22(c).

Both this case and the case giving rise to Ms. Ettinger's prior discipline demonstrate a pattern of neglect and disregard for client matters, as well as a self-serving practice of mishandling client funds.

- d. Obstruction of Disciplinary Proceeding. *Standards* at § 9.2(e).

Ms. Ettinger was aware of the Bar's investigation and was personally served with the formal Complaint in this matter. Yet she chose not to cooperate with or respond to communications from the Bar or Disciplinary Board. With the exception of her single-page, undated, and unverified letter, Ms. Ettinger failed to file an appropriate Answer, failed to follow appropriate Orders, failed to file a Sanctions Memo-

randum, and failed to otherwise appear in any way in these proceedings.

The Trial Panel that suspended Ms. Ettinger in 2013 found that she similarly failed to comply with or participate in any way with the Bar's investigation and disciplinary proceedings brought against her.

**B. Standards for Disbarment:**

As a result of the foregoing, The Trial Panel in this case found that the *Standards* warrant disbarment of Ms. Ettinger.

*Standards* § 4.11. "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."

*Standards* § 8.1.

Disbarment is generally appropriate when a lawyer:

....

(b) 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.

**C. Oregon Case Law:**

The Trial Panel also found that under Oregon case law the appropriate sanction was disbarment.

Sanctions in disciplinary matters are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998).

A single conversion by a lawyer to his own use of client funds may result in disbarment. *In re Pierson*, 280 Or 513, 518, 571 P2d 907 (1977). A single act of intentional misappropriation of client funds to the lawyer's own use generally warrants disbarment. *In re Martin*, 328 Or 177, 192, 970 P2d 638 (1998). *See also In re Whipple*, 320 Or 476, 488, 886 P2d 7 (1994); *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994); *In re Benjamin*, 312 Or 515, 823 P2d 413 (1991); *In re Phelps*, 306 Or 508; *In re Laury*, 300 Or 65, 76, 706 P2d 935 (1985).

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 properly to discharge their professional duties to clients, the public, the legal system and the legal profession." *Standards*, § 1.1; *In re Stauffer*, 327 Or at 66.

The Trial Panel in this case concluded that Ms. Ettinger is unable or unwilling to conform her conduct to the required ethical standards. Ms. Ettinger knowingly misappropriated and wrongfully converted funds from clients for her own personal use. This is very

serious misconduct. Further, it is similar to the misconduct leading to Ms. Ettinger's prior discipline, and taken together it shows a pattern of behavior that warrants disbarment.

**ORDER**

It is hereby Ordered that the Accused, Mariel Marjorie Ettinger, is hereby Disbarred from the practice of law in the State of Oregon.

Dated the 28th day of March, 2016.

/s/ Ronald L. Roome

Ronald L. Roome

OSB No. 880976

Trial Panel Chairperson

/s/ John E. Laherty

John E. Laherty,

OSB No. 036084

Trial Panel Attorney 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. 14-130  
)  
SYDNEY E. BREWSTER, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Mary Kim Wood  
Disciplinary Board: None  
Disposition: Violation of RPC 1.1 and RPC 8.4(a)(4). Stipulation for  
Discipline. Public reprimand.  
Effective Date of Order: June 3, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Brewster is publically reprimanded for violation of RPC 1.1 and RPC 8.4(a)(4).

DATED this 3rd day of June, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ James C. Edmonds

James C. Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Sydney E. Brewster, attorney at law (“Brewster”), 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.

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

3.

Brewster 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 14, 2015, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Brewster for alleged violations of RPC 1.1 (duty to provide competent representation), 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

5.

At all relevant times herein, ORS 107.095 set forth various forms of temporary relief that a court could order in a proceeding for the dissolution of marriages prior to a general judgment therein, including temporary orders for child custody, child support, spousal support, payment of suit money, and temporary use, possession, and control of the real or personal property of the parties.

6.

At all relevant times herein, ORS 107.097 prohibited the court from ordering *ex parte* any temporary orders in a dissolution matter for child support, spousal support, payment of suit money, or temporary use, possession, and control of the real or personal property of the parties, except temporary orders relating to child custody or parenting time when the party requesting the order is present in court, presents an affidavit alleging that the child is in



immediate danger, and the court finds based upon the requesting party's testimony and affidavit that the child is in immediate danger.

7.

At all relevant times herein, Brewster had substantial experience in the practice of law. A significant portion of her practice involved domestic relations cases; however, her domestic relations forms were developed and maintained by her law partner, Kevin Mayne ("Mayne"), whom she believed was more competent in drafting and research than she was, and to whom she entrusted the creation and update of all legal forms utilized by the firm.

#### **Jones and Jones Matter**

8.

On January 17, 2012, in the *Jones and Jones* matter, Case No. 12C30012, Brewster applied for and obtained an *ex parte* order granting her client, Helena Jones, temporary relief including: sole custody of the child of the marriage with no parenting time for Michael Jones, child support, and an award of \$5,000 in attorney fees (suit money) to Brewster's client if Michael Jones contested the matter. Utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

#### **Flaherty and Flaherty Matter**

9.

On January 20, 2012, in the *Flaherty and Chastain-Flaherty* matter, Case No. 12C30153, Brewster applied for and obtained an *ex parte* order granting her client, Arjay Flaherty, temporary relief including: sole custody of all children (one of whom was Arjay Flaherty's step-child) with no parenting time for the children's mother, exclusive use of the family home, child support, and an award of \$5,000 in attorney fees (suit money) to Brewster's client if Andrea Chastain-Flaherty contested the matter. Utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

10.

Andrea Chastain-Flaherty hired attorney Richard Alway ("Alway"). On March 1, 2012, Alway filed on behalf of Andrea Chastain-Flaherty a Motion to Quash *Ex Parte* Temporary Restraining Order, and contemporaneously provided Brewster with a service copy. In his motion to quash, Alway argued that ORS 107.097 prohibited Arjay Flaherty from seeking, and the court from granting, the *ex parte* temporary orders Brewster had sought and obtained in the *Flaherty and Chastain-Flaherty* matter.

11.

After being served with Alway's motion to quash, Brewster did not research the matter herself but instead inquired of Mayne whether his form (which she was using)

properly requested relief permitted under ORS chapter 107. Brewster was assured by Mayne that he had reviewed the form and that it was appropriate under the statutes.

**Meek and Meek Matter**

12.

On April 17, 2012, in the *Meek and Meek* matter, Case No. 12C31104, Brewster applied for and obtained an *ex parte* order granting her client, Vicki Meek, temporary relief including: exclusive use of the family home, exclusive use of family vehicles, and an award of \$5,000 in attorney fees (suit money) to Brewster's client if Phynes Meek contested the matter. Utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

**Pierce and Pierce Matter**

13.

On May 3, 2012, in the *Pierce and Pierce* matter, Case No. 12C31277, Brewster applied for an order *ex parte* granting her client, Cassandra Pierce, temporary relief including: sole custody of the child of the marriage, child support, exclusive use of a family vehicle, and an award of attorney fees (suit money) to Brewster's client if Leslie Pierce contested the matter. Utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

14.

On May 4, 2012, prior to entering the proposed order in the *Pierce and Pierce* matter, the court struck the requested provisions for child custody, child support, suit money, and exclusive use of a vehicle, and Brewster was sent notice of this action. Nevertheless, without verifying it herself, Brewster continued to rely on Mayne's representation that the form she was utilizing was in conformity with the domestic relations statutes.

**Story and Story Matter**

15.

In August 2012, Julie Story obtained an *ex parte* restraining order pursuant to the Family Abuse Prevention Act (FAPA) against her husband, Charles Story (the "Story FAPA matter"). Charles Story retained attorney Lauren Saucy ("Saucy") to represent him in contesting the order, and a hearing on the order was set during October 2012.

16.

In September 2012, Brewster sent a letter to Saucy stating that she had been retained to represent Julie Story in the Story FAPA matter.

17.

At the October 2012 hearing in the Story FAPA matter, Saucy learned that Julie Story intended to petition for dissolution of her marriage to Charles Story. Saucy informed Brewster that she would accept service on behalf of Charles Story.

18.

On December 7, 2012, Brewster filed a petition for dissolution on behalf of Julie Story in Marion Circuit Court Case No. 12C33242. Brewster also applied for and obtained an *ex parte* order granting her client, Julie Story, temporary relief including: exclusive use of the family home and a family vehicle, and an award of \$5,000 in attorney fees (suit money) if Charles Story contested the matter. Utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

19.

On December 12, 2012, Saucy obtained copies of the pleadings Brewster had filed on December 7, 2012. Saucy notified Brewster that it would be improper to seek the *ex parte* temporary relief she requested. Brewster told Saucy that she was not seeking such relief.

20.

Saucy learned later on December 12, 2012, that Brewster had already obtained the *ex parte* temporary order. She immediately contacted Brewster about vacating the order. Although Brewster acknowledged that the *ex parte* temporary order was improperly entered, she took no action to vacate the order, necessitating that Saucy later file an objection and motion to vacate the improperly entered order.

### **Lindsay and Lindsay Matter**

21.

On January 7, 2013, in the *Lindsay and Lindsay* matter, Case No. 13C30091, Brewster applied for and obtained an *ex parte* order granting her client, Andrea Lindsay, temporary relief including: sole custody of the child of the marriage with no parenting time for the child's father, James Lindsay; exclusive use of a family vehicle; and child support. Still utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

### **Brewer and Brewer Matter**

22.

On May 15, 2013, in the *Brewer and Brewer* matter, Case No. 13C31350, Brewster applied for and obtained an *ex parte* order granting her client, Leah Brewer, temporary relief including: spousal support, exclusive use of a family vehicle, an award of \$3,000 in attorney fees (suit money) to Brewster's client if Richard Brewer contested the matter, and exclusive

use of the family home to Richard Brewer if Richard Brewer cooperated in selling the home or refinancing it to assume sole responsibility for the mortgage. Still utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095.

### **Galenbeck and Galenbeck Matter**

23.

On May 30, 2013, in the *Galenbeck and Galenbeck* matter, Case No. 13C31518, Brewster applied for and obtained an order *ex parte* granting her client, Joyce Galenbeck, temporary relief including: sole custody of the couple's child, exclusive use of the family home and a family vehicle, child support, and requiring Gary Galenbeck to pay \$5,000 to Brewster's client for fees and costs of the proceeding (suit money) if he contested the matter. Again utilizing one of Mayne's forms, Brewster wrongfully asserted to the court that her client was entitled to this relief pursuant to ORS 107.095. On June 17, 2013, Brewster submitted documents vacating the temporary order.

### **Violations**

24.

Brewster admits that, by requesting relief to which her clients were not entitled and failing to sooner recognize that Mayne's forms were not in conformity with the statutes, she failed to provide competent representation (which requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation) to her clients, in violation of RPC 1.1, and engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

### **Sanction**

25.

Brewster 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 Brewster'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.

- a. **Duty Violated.** Brewster violated her duty to her clients to provide competent representation. *Standards* § 4.5. The *Standards* provide that the most important ethical duties are those that lawyers owe to their clients. *Standards* at 5. Brewster also violated her duty to the legal system to avoid abuse to the legal process. *Standards* § 6.2.

- b. **Mental State.** Brewster’s conduct was negligent in failing to recognize that her form documents contained requests that were not in conformity with the applicable statute and in failing to adequately research the matter herself when the inconsistencies were brought to her attention, thus preventing her from immediately taking remedial measures to ensure that all of her later filings cited correct provisions of the statute and omitted seeking relief that was not authorized under the applicable statutes.
- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). In these matters, there was actual injury in that the courts that entered *ex parte* orders were not informed by Brewster that they provided relief not authorized by statute in an *ex parte* proceeding when deciding whether to issue the *ex parte* orders. There was also injury to each party against whom an order was issued that denied them rights or property in derogation of statute for the period of time that the improper order remained in place. There was also potential injury to every party against whom an order was entered requiring them to pay costs or making them liable for costs contingent upon whether they contested the order, had the orders been left unchallenged.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A pattern of misconduct. *Standards* § 9.22(c).
  2. Multiple offenses. *Standards* § 9.22(d).
  3. Substantial experience in the practice of law. *Standards* § 9.22(i). Brewster has been a lawyer in Oregon for more than 20 years.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior discipline. *Standards* § 9.32(a).
  2. Personal or emotional problems. *Standards* § 9.32(c). During the period of some of the misconduct at issue, Brewster was experiencing financial difficulties, problems with her partner, and suffering from the residual effects of physical issues.
  3. Character and reputation. *Standards* § 9.32(g).
  4. Remorse. *Standards* § 9.32(l).

26.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer “demonstrates failure to understand relevant legal doctrines or procedures,” 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 reprimand is also “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.” *Standards* § 6.23.

27.

Oregon case law affirms that public reprimand is the presumptive sanction for repeated violations of a lawyer’s duty to abide by the legal rules of procedure that affect the administration of justice. *In re Carini*, 354 Or 47, 59, 308 P3d 197 (2013). In *Carini*, the court suspended the lawyer for 30 days for failing to attend scheduled court appearances in four client matters. In imposing a suspension, the court noted with particular emphasis that the lawyer’s prior discipline for the same conduct was a significant aggravating factor that weighed in favor of imposing a greater-than-presumptive sanction. *In re Carini*, 354 Or at 59–60. That is not the situation here.

A reprimand for conduct prejudicial to the administration of justice is also consistent with prior cases, even when actual injury results, when it is unaccompanied by other more serious allegations. *See, e.g., In re Maass*, 29 DB Rptr 116 (2015); *In re Dugan*, 26 DB Rptr 277 (2012) (reprimand when lawyer filed and maintained a civil suit that did not have merit); *In re Christensen*, 26 DB Rptr 241 (2014) (reprimand when attorney failed to provide complete information regarding income for support calculations; District Attorney obtained correct figures elsewhere); *In re Jaspers*, 28 DB Rptr 211 (2014) (reprimand when 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).

28.

Consistent with the *Standards* and Oregon case law, the parties agree that Brewster shall be publicly reprimanded for violations of RPC 1.1 and RPC 8.4(a)(4), with the sanction to be effective upon approval by the Disciplinary Board.

29.

Brewster 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.

30.

Brewster 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 Brewster is admitted: None.

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 7th day of March, 2016.

/s/ Sydney E. Brewster

Sydney E. Brewster

OSB No. 922370

EXECUTED this 11th day of March, 2016.

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. 16-33  
)  
LINDSAY H. FOWLER, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: John Fisher  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a), RPC 1.5(c)(3), RPC 1.15-1(a),  
and RPC 1.15-1(c). Stipulation for Discipline. Public  
reprimand.  
Effective Date of Order: June 15, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Lindsay H. Fowler is publicly reprimanded for violation of RPC 1.4(a), RPC 1.5(c)(3), RPC 1.15-1(a), and RPC 1.15-1(c).

DATED this 15th day of June, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Jet Harris

Jet Harris, Region 2  
Disciplinary Board Chairperson



### STIPULATION FOR DISCIPLINE

Lindsay H. Fowler, attorney at law (“Fowler”), 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.

Fowler was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 26, 2002, and has been a member of the Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

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

4.

On February 27, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Fowler for alleged violations of RPC 1.4(a) (failure to keep a client reasonably informed of the status of a matter or promptly comply with reasonable requests for information), RPC 1.5(c)(3) (charge or collect a fee denominated as earned on receipt without written fee agreement with required disclosures), RPC 1.15-1(a) (failure to safeguard client funds), and RPC 1.15-1(c) (failure to deposit and maintain client funds in trust) 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 or around July 30, 2014, Fowler was paid \$10,000 to defend David Reitz (“Reitz”) against 23 felony child sex abuse charges. Fowler believed that the payment was a non-refundable retainer. Reitz, however, believed that his payment was for Fowler to represent him through a trial in his criminal matter. There was no written fee agreement and Fowler did not deposit the \$10,000 payment into a client trust account. Fowler kept no records of her billable time because she believed that the payment was a nonrefundable retainer.

6.

On or around October 23, 2014, Reitz resolved his criminal matter by pleading guilty to some charges, and he was sentenced to a term of imprisonment. At the end of 2014 and early 2015, while incarcerated following his convictions, Reitz sent Fowler letters that requested, in part, a refund of what Reitz believed to be an unearned portion of his payment. Fowler never responded directly to Reitz about his request for a partial refund.

7.

In her response to the Bar's inquiry in this matter, Fowler provided that the objective of her representation was to use her skill and experience to represent Reitz to the best of her ability. Fowler expected to try the case, but in her opinion a good plea deal emerged. Reitz accepted the plea deal. Fowler believed that she earned the full fee because she represented Reitz to the end of his case.

### **Violations**

8.

Fowler admits that her failure to keep Reitz reasonably informed and promptly respond to Reitz's reasonable requests for a partial refund violated RPC 1.4(a). By charging or collecting a fee denominated as earned on receipt without written fee agreement with required disclosures, Fowler admits that she violated RPC 1.5(c)(3). In the absence of the written fee agreement required by RPC 1.5(c)(3), by failing to deposit Reitz's payment into her client trust account and to maintain it separate from her own property, Fowler admits that she violated RPC 1.15-1(a) and RPC 1.15-1(c).

### **Sanction**

9.

Fowler 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 Fowler'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.

- a. **Duty Violated.** Fowler violated her duty to preserve her client's property. *Standards* § 4.1. Fowler violated her duty to her client to act with reasonable diligence and promptness in representing him, including the duty to adequately communicate with him. *Standards* § 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5.

- b. **Mental State.** There are three recognized mental states under the *Standards*. “‘Intent’ is the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9. Fowler did not act knowingly, rather Fowler’s conduct in this matter was primarily negligent. That is, Fowler failed to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. In failing to use a written fee agreement in representing Reitz and failing to deposit his payment into her client trust account, Fowler deviated from the standard of care that a reasonable lawyer would exercise in that situation. Fowler knew that Reitz demanded a partial refund of his payment from her, but she never responded directly to Reitz.
- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Injury can either be actual or potential under the *Standards*. See *In re Williams*, 314 Or at 547. Fowler’s lack of communication regarding the client’s request for a partial refund caused actual injury in the form of client anxiety and frustration. See *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Substantial experience in the practice of law. *Standards* § 9.22(i). The Accused was admitted in Oregon in 2002.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards* § 9.32(a);
  2. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).

10.

Under the *ABA Standards*, a “[r]eprimand 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. A reprimand is also “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. This is also the typical result for cases dealing with insufficient communication and those dealing with minor mishandling of client funds—particularly when there is, as here, little actual injury to the client.

11.

Oregon case law also supports a public reprimand in this matter. *See, e.g., In re Kleen*, 27 DB Rptr 213 (2013) (attorney reprimanded for failing to inform the client of his concerns regarding her case, responding to the client’s inquiries, or taking any further action her behalf, including notifying the client of claims by medical creditors, until after the client contacted the Bar); *In re May*, 27 DB Rptr 200 (2013) (attorney reprimanded for failing to respond to client’s attempts to reach her for a number of months, resulting in the client coming to her office to find that the office had been moved out of town. Client did not obtain a response from attorney until after she contacted the Bar); *In re Grimes*, 27 DB Rptr 105 (2013) (attorney reprimanded for failing to respond to her client’s attempts to communicate with her regarding the status of her case over several months, after attorney was unsure as to how to handle an increasingly complicated guardianship/conservatorship when an insurer was seeking a probate proceeding and attorney questioned proper venue); *In re Malco*, 27 DB Rptr 88 (2013) (attorney reprimanded for failing to communicate with his client after recognizing that he had miscalculated the scope of necessary work to research and competently represent the client in her civil matter. Attorney thereafter failed to respond to the requests for a status update and took no further action until he learned that the client had contacted the Bar); *In re Grimes*, 25 DB Rptr 242 (2011) (attorney reprimanded for entering into an oral, flat-fee agreement and depositing client funds into her business account, not realizing that the funds had to be deposited and maintained in a trust account until earned); *In re Coran*, 24 DB Rptr 269 (2010) (attorney reprimanded for using a written fee agreement that failed to provide that funds would not be deposited in trust and then depositing the funds into an account other than his lawyer trust account); *In re Rose*, 20 DB Rptr 237 (2006) (attorney reprimanded for depositing a retainer into his trust account, but then withdrawing the funds before they were earned, mistakenly believing he had a written fee agreement allowing him to do so); *In re Hendershott*, 17 DB Rptr 13 (2003) (attorney reprimanded for depositing a flat fee in his lawyer trust account and failing to properly maintain his client’s funds when he withdrew almost the entire fee, having done far less work on the case than the amount withdrawn and without a written fee agreement permitting this to occur).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Fowler shall be publicly reprimanded for violations of RPC 1.4(a), RPC 1.5(c)(3), RPC 1.15-1(a), and RPC 1.15-1(c).

13.

Fowler 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.

14.

Fowler 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 Fowler is admitted: None.

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 31st day of May, 2016.

/s/ Lindsay H. Fowler

Lindsay H. Fowler

OSB No. 021275

EXECUTED this 9th day of June, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-132  
)  
STEVEN FISHER, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(a), RPC 1.7(a)(2), and RPC 1.8(h)(2). Stipulation for Discipline. 30-day suspension.  
Effective Date of Order: October 15, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Steven Fisher is suspended 30 days, effective October 15, 2016, or 10 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.5(a), RPC 1.7(a)(2), and RPC 1.8(h)(2).

IT IS FURTHER ORDERED that Steven Fisher shall pay restitution in the amount of \$5,553 to Ronald Cole before he is reinstated to practice law in Oregon.

DATED this 29th day of August, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Ronald Atwood

Ronald Atwood, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Steven Fisher, attorney at law (“Fisher”), 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.

Fisher was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 27, 2006, and has been a member of the Bar continuously since that time, having his office and place of business in Ada County, Idaho.

3.

Fisher 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 April 19, 2016, a Formal Complaint was filed against Fisher pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.5(a) (excessive fee), RPC 1.7(a)(2) (personal-interest conflict), and RPC 1.8(h)(2) (settling a potential malpractice claim with an unrepresented client). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

#### **Facts**

5.

In or around September 2012, Ronald Cole (“Cole”) hired the Stunz, Fonda, Kiyuna, and Horton firm (“Firm”), pursuant to a contingency arrangement (“Contingency-Fee Agreement”), to seek compensation for damages as a result of a fire on Cole’s real property that began on a neighbor’s property. The Firm assigned the case to Fisher, an attorney with the Firm.

6.

The Contingency-Fee Agreement stated that:

“Client agrees to pay Firm: 33% of whatever may be recovered from the claim, whether in the form of economic damages, such as medical payments, or compensation for damaged property, or noneconomic damages, such as pain and suffering. If lawsuit is filed, Client agrees to pay Firm 40% of whatever may be recovered from the claim or Firm’s actual

attorney fees, whichever is greater. Firm reserves the right to reduce the 40% fee to 33% . . . .”

7.

Cole signed the Contingency-Fee Agreement in October 2012, and there is a dispute about whether Cole was provided a copy of the agreement at that time. Regardless, the Contingency-Fee Agreement did not define the term *actual attorney fees*, or identify what hourly rates would apply using such a calculation.

8.

Sometime prior to September 2013, Fisher separated from the Firm, and opened his own law practice. Fisher retained Cole as a client but did not execute a new fee agreement.

9.

In or around September 2013, Fisher filed a civil complaint on Cole’s behalf, seeking \$250,000 in damages against the defendant neighbor where the fire began.

10.

On or about January 15, 2014, Fisher provided Cole with a copy of the Contingency-Fee Agreement with the Firm and a written “Explanation of Contingent Fee Agreement” that included the statement: “Our fee will be a percentage of what we recover for you. The percentage is set forth in the Contingent Fee Agreement.”

11.

Fisher’s representation of Cole was marked by considerable discord. On or about June 9, 2014, after mediation, the case settled when Cole agreed to accept \$25,000. Cole understood that he would be obligated to Fisher for 40 percent of this amount (\$10,000). Fisher knew that Cole was not satisfied with his representation and unhappy with the amount of the settlement.

12.

In or around mid-July 2014, Fisher received the settlement payment of \$25,000. On or about July 31, 2014, Fisher removed \$17,500 of the settlement funds that Fisher had allocated and charged to Cole as attorney fees and costs.

13.

In or around mid-August 2014, Cole received a check written on Fisher’s lawyer trust account for \$7,500. Enclosed with the check was a letter from Fisher (“*Fisher v. Cole* Release”), an “Accounting,” and a Statement of Fisher’s time and expenses (“Statement”). The Statement asserted that Fisher’s time and expenses were \$21,271.09. However, Fisher provided that he had “discounted” his bill by withholding only \$17,500 of the \$25,000 settlement for his attorney fees and costs.



14.

The *Fisher v. Cole* Release instructed Cole that by accepting or negotiating the \$7,500 check, Cole “acknowledge[d] and accept[ed] this settlement and indicate[d] that [he was] satisfied with the efforts of Fisher Law Office, PLLC (“Firm”) on [his] behalf.”

15.

In conditioning Cole’s acceptance of his own funds on Cole’s concession that he was “satisfied” with the both the settlement and Fisher’s legal representation, Fisher used funds that undisputedly belonged to Cole as consideration to settle any prospective malpractice claim. This condition created a significant risk that Fisher’s representation of Cole was or reasonably may have been materially limited by Fisher’s personal interest in retaining the portion of the fee he had attributed to his fees, as well as his interest in avoiding litigation and liability for Cole’s complaints as to Fisher’s representation.

16.

Fisher represented himself in drafting and negotiating the *Fisher v. Cole* Release. Cole was unrepresented. Fisher:

1. Failed to advise Cole in writing of the desirability of seeking the advice of independent counsel;
2. Failed to obtain written informed consent from Cole regarding:
  - a. The essential terms of the transaction;
  - b. Cole’s legal and financial rights;
  - c. Fisher’s role in the transaction; and
  - d. Whether Fisher represented Cole in the transaction.

17.

The transaction and the terms of the *Fisher v. Cole* Release were not objectively fair and reasonable to Cole, nor were they fully disclosed and transmitted in a manner that could reasonably be understood by Cole. To the extent that Fisher’s conflict of interest was capable of being waived by written consent, following full disclosure, he did not obtain signed written consent from Cole.

18.

Cole promptly protested the *Fisher v. Cole* Release, and Fisher’s purported settlement offer. He also later complained to the Bar.

19.

In or around March 2015, fearful that it would go stale, Cole negotiated the \$7,500 check.

### Violations

20.

Fisher admits that, by charging and collecting a fee in excess of the fee that Cole had agreed to pay pursuant to their Contingency-Fee Agreement, he violated RPC 1.5(a). Fisher also admits that, by failing to obtain written informed consent from Cole to continue the representation when Fisher had a personal interest in obtaining the *Fisher v. Cole* Release, he engaged in a personal-interest conflict that violated RPC 1.7(a)(2). Finally, Fisher admits, that in entering the *Fisher v. Cole* Release with Cole and failing to obtain written informed consent when Cole was unrepresented, he violated RPC 1.8(h)(2).

### Sanction

21.

Fisher 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 Fisher’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.

- a. **Duty Violated.** Fisher violated his duties to his client to avoid conflicts of interest. *Standards* § 4.3. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5. Fisher also violated his duty to the profession to avoid excessive fees. *Standards* § 7.0.
- b. **Mental State.** Fisher’s conduct was initially negligent as it related to the charging and collection of an excessive fee. That is, he failed to “heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in that situation.” *Standards* at 9. Fisher subsequently came to understand that he had failed to provide sufficient disclosures to Cole to enable him to collect and maintain the fee that he did.

Fisher’s conduct was generally knowing as it related to the *Fisher v. Cole* Release. That is, he 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* at 9. Fisher knew that Cole was unhappy with the settlement amount and with his representation when he presented the *Fisher v. Cole* Release without the required disclosures and written informed consent.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840

P2d 1280 (1992). Injury can either be actual or potential under the *Standards*. See *In re Williams*, 314 Or at 547. Here, Fisher overcharged Cole in the amount of \$5,553, thereby causing actual injury to Cole to the extent that he was without his funds for a period of time, and by the anxiety and frustration caused by the delay in receipt of his funds. See *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration can constitute actual injury); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A selfish motive. *Standards* § 9.22(b). Fisher charged and collected a clearly excessive fee for his own personal benefit.
  2. Substantial experience in the practice of law. *Standards* § 9.22(i). Fisher was admitted in Oregon in 2006 and Idaho in 2008.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
  2. Cooperative attitude in disciplinary investigation and formal proceedings. *Standards* § 9.32(e).
  3. Remorse. *Standards* § 9.32(l). Fisher has accepted responsibility for his misconduct in this matter, including his agreement to pay full restitution to Cole.

22.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose the possible effect, thereby causing injury or potential injury to the client. *Standards* § 4.32. 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* § 7.2.

23.

Oregon case law also supports the imposition of a short suspension in this matter. See, e.g., *In re Bowman*, 24 DB Rptr 144 (2010) (attorney suspended for entering into an agreement that required his client to prospectively and unconditionally waive any right of action or claim against the attorney arising out of the legal services rendered under the agreement along with other provisions, without the client’s informed consent to the agreement); *In re Campbell*, 345 Or 670, 202 P3d 871 (2009) (60-day suspension when attorney billed a client for late fees in excess of the legal rate of interest without obtaining the client’s written agreement to pay those charges); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007) (90-day suspension for attorney who agreed to perform specified legal services for a flat fee, failed to

complete the work, and then claimed the fee was earned based on an hourly computation of time spent on the matter); *In re Wilkerson*, 17 DB Rptr 79 (2003) (30-day suspension for attorney who prepared an agreement for the clients' signature to settle any malpractice claim against attorney, without disclosing his personal-interest conflict).

24.

Consistent with the *Standards* and Oregon case law, the parties agree that Fisher shall be suspended 30 days for violations of RPC 1.5(a), RPC 1.7(a)(2), and RPC 1.8(h)(2), the sanction to be effective October 15, 2016, or 10 days after approval by the Disciplinary Board, whichever is later.

25.

In addition, before he is reinstated to practice in Oregon, Fisher shall pay restitution in the amount of \$5,553 to Cole.

26.

Fisher 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, Fisher has arranged for Gary Kiyuna, an active member of the Bar, to either take possession of or have ongoing access to Fisher's client files and serve as the contact person for clients in need of the files during the term of his Oregon suspension. Fisher represents that Gary Kiyuna has agreed to accept this responsibility.

27.

Fisher 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. Fisher 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.

Fisher 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.

Fisher 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 Fisher is admitted: Idaho.

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 Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 12th day of August, 2016.

/s/ Steven Fisher

Steven Fisher

OSB No. 063260

EXECUTED this 22nd day of August, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 15-53 and 16-13  
)  
RONALD M. HELLEWELL, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: John Pollino  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), and RPC 1.15-1(c). Stipulation for Discipline. 30-day suspension, all stayed, 18-month probation.  
Effective Date of Order: October 1, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Ronald M. Hellewell is suspended for 30 days, all stayed pending successful completion of an 18-month term of probation, effective August 1, 2016, or on the first day of the month following approval by the Disciplinary Board, whichever is later, for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), and RPC 1.15-1(c).

DATED this 2nd day of September, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson  
/s/ James Edmonds  
James Edmonds, Region 6  
Disciplinary Board Chairperson

## STIPULATION FOR DISCIPLINE

Ronald M. Hellewell, attorney at law (“Hellewell”), 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.

Hellewell was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 13, 1983, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Hellewell 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 4, 2015, a Formal Complaint was filed in OSB Case No. 15-53 against Hellewell 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 and promptly comply with reasonable requests for information), and RPC 1.4(b) (duty to explain a matter to enable a client to make informed decisions regarding the representation) of the Oregon Rules of Professional Conduct. On March 21, 2016, an Amended Formal Complaint was filed against Hellewell pursuant to consolidation by the SPRB of Case No. 15-53 with Case No. 16-13, alleging additional violations of RPC 1.15-1(a) (failure to separate and safeguard client funds), and RPC 1.15-1(c) (failure to deposit and maintain client funds in trust). The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Katerina and Marco Gomez Matter**

#### **OSB Case No. 15-53**

#### **Facts**

5.

In March 2013, Katerina (“Katerina”) and Marco Gomez (“Marco,” collectively, the “Gomez”) retained Hellewell to expunge Marco’s sex crime conviction in Linn County, Oregon. The Gomezes conveyed to Hellewell that the annual sex offender reporting require-

ment was both expensive and inconvenient for them so, at minimum, they requested that Hellewell petition for relief from the annual sex offender reporting requirement (“petition”). In or around mid-March and April 2013, the Gomezes paid Hellewell for the applicable filing fee and his legal services.

6.

Between March 2013 and April 2014, apart from drafting the petition, Hellewell failed to perform legal services to assist the Gomezes with their legal matter, including failing to file the petition or any expungement pleadings with the court.

7.

Between March 2013 and April 2014, Katerina made multiple requests for Hellewell to advise her about the status of the petition. Hellewell did not substantively respond apart from repeated erroneous assertions that the petition was pending.

8.

In April 2014, after a further inquiry from Katerina prompted Hellewell to review his file, Hellewell informed Katerina that the petition had, in fact, not been filed. Hellewell subsequently refunded the Gomezes’ fee, apart from \$252 that they authorized and instructed Hellewell to use for the petition filing fee.

9.

On August 20, 2014, Hellewell filed the petition. Thereafter, Hellewell failed to promptly respond to Katerina’s inquiries regarding the status of the petition.

10.

On September 11, 2014, the court denied the petition without a hearing. Hellewell did not inform the Gomezes of this event until several weeks later.

### **Violations**

11.

Hellewell admits that his failure to timely attend to the Gomezes’ matter constituted neglect of a legal matter, in violation of RPC 1.3. Hellewell further admits that his failure to keep the Gomezes reasonably informed, to promptly comply with reasonable requests for information, and to explain the matter to the extent reasonably necessary to permit them to make informed decisions, violated the requirements of RPC 1.4(a) and RPC 1.4(b).



**Maria R. Luna Galvan Matter**

**OSB Case No. 16-13**

**Facts**

12.

In October 2014, Maria R. Luna Galvan (“Galvan”) retained Hellewell to initiate and complete a marital dissolution proceeding on her behalf, and paid him \$2,000 by credit card toward his attorney fees and anticipated expenses. There was no written fee agreement allowing Hellewell to treat the funds as earned upon receipt but he did not deposit Galvan’s payment into his lawyer trust account or ensure that the credit card proceeds were timely transferred there.

13.

When Galvan later requested a refund of her payment, Hellewell promptly refunded Galvan’s full payment from his business account.

**Violations**

14.

Hellewell admits that because he did not use a written fee agreement in compliance with RPC 1.5(c)(3) (stating that his client’s fee was a nonrefundable retainer earned on receipt among other requirements) he was required to deposit Galvan’s funds into his lawyer trust account, his failure to do so constituted a failure to separate and safeguard client funds in violation of RPC 1.15-1(a) and a failure to deposit and maintain client funds in trust, in violation RPC 1.15-1(c).

**Sanction**

15.

Hellewell 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 Hellewell’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.

- a. **Duty Violated.** Hellewell violated his duty to his clients to preserve client funds and to act with reasonable diligence and promptness in representing the Gomezes. *Standards* §§ 4.1, 4.4. Hellewell violated his duty to the profession when he failed to use a written fee agreement with Galvan and treated the client’s payment as earned upon receipt. *Standards* § 7.0.

- b. **Mental State.** Hellewell’s conduct in this matter 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* at 9.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). The Gomezes were actually injured to the extent that they paid for legal services that did not benefit them. Hellewell’s lack of communication 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*).

Hellewell’s failure to use a written fee agreement and his treatment of the Galvan’s payment as earned upon receipt caused potential injury to the client by failing to ensure that her funds were readily available for her legal matter. Galvan was potentially injured by Hellewell’s failure to deposit her money into trust.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Prior disciplinary offenses. *Standards* § 9.22(a). Hellewell was twice previously admonished for neglect (1992 and 1995). *See In re Cohen*, 330 Or at 500 (a letter of admonition is considered as evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue in the case at bar). In addition, in 1997, Hellewell was also suspended for one year, 10 months stayed, and placed on a two-year probation for neglect (*current* RPC 1.3), frivolous claims (*current* RPC 3.1), failing to timely or fully respond to a disciplinary investigation (*current* RPC 8.1(a)(1) and (2)), and conduct prejudicial to the administration of justice (*current* RPC 8.4(a)(4)). *In re Hellewell*, 11 DB Rptr 31 (1997).
  - 2. Multiple offenses. *Standards* § 9.22(d).
  - 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Hellewell was admitted to practice law in 1983.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
  - 2. Timely good-faith effort to make restitution or to rectify consequences of misconduct. *Standards* § 9.32(d). In both matters, Hellewell re-funded attorney fees paid by his clients.

3. Full and free disclosure to Disciplinary Board and a cooperative attitude toward proceedings. *Standards* § 9.32(e).
4. Proof of good character and reputation. *Standards* § 9.32(g). Hellewell provided multiple letters in support of his good professional reputation in the Marion County legal community.
5. Remorse. *Standards* § 9.32(l). Hellewell expressed remorse, and he promptly refunded the full amount of Galvan's fee when he was terminated.
6. Remoteness of prior offenses. *Standards* § 9.32(m). See *In re Jones*, 326 Or 195, 200–01, 326 Or 195 (1997); *In re Cohen*, 330 at 501–02.

16.

Under the ABA *Standards*, and without considering aggravating or mitigating factors, 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 the client.” *Standards* § 4.42. Further, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of his or her duty to the profession and causes actual or potential injury to a client. *Standards* § 7.2.

17.

Oregon cases similarly find that a suspension is appropriate for similar misconduct. See, e.g., *In re Ainsworth*, 20 DB Rptr 65 (2006) (30-day suspension for neglect and failure to adequately communicate); *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (court imposed a 30-day suspension when lawyer failed to adequately communicate with his client); *In re Cottle*, 27 DB Rptr 22 (2013) (30-day suspension when lawyer accepted a flat fee to file divorce, prepared some documents and paid himself for that time, but failed to file the petition or reasonably communicate with his client for more than four years); *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (attorney suspended for 30 days when he relied on oral agreement with a client that a retainer will be nonrefundable and earned on receipt and did not place the funds into trust); *In re Obert*, 352 Or 231, 282 P3d 825 (2012) (attorney was suspended for six months for taking a credit card payment from a client and depositing it directly into his business account without a written agreement allowing him to do so and before the fee was earned; and thereafter refusing to return any portion to the client when requested). Hellewell's conduct is not as egregious as that in *Obert*, as he promptly refunded the client's full payment upon request.

18.

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 that 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. In light of Hellewell's mitigating factors, notwithstanding his prior discipline, a probated term of suspension is appropriate.

19.

Consistent with the *Standards* and Oregon case law, the parties agree that Hellewell shall be suspended for 30 days for his violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), and RPC 1.15-1(c). However, all of the suspension shall be stayed pending Hellewell's successful completion of an 18-month term of probation. The sanction shall be effective August 1, 2016, or on the first day of the month following approval by the Disciplinary Board, whichever is later ("effective date").

20.

Probation shall commence on the effective date and shall continue for a period of 18 months, ending on the day prior to the 18-month anniversary of the commencement date (the "period of probation"). During the period of probation, Hellewell shall abide by the following conditions:

- (a) Hellewell shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (b) Hellewell 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. Hellewell shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (c) Hellewell 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, Hellewell shall adopt and implement those recommendations.
- (d) No later than 60 days after recommendations are made by the PLF, Hellewell 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.

- (e) A person approved by Disciplinary Counsel's Office on or before the effective date shall serve as Hellewell's probation supervisor ("Supervisor"). Hellewell 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 Hellewell's clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Hellewell shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Hellewell'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 twenty percent (20%) of Hellewell's current caseload, whichever is greater, to verify:
  - (1) Hellewell has and is timely, competently, diligently, and ethically attending to matters, and he is adequately communicating with clients, the court, and opposing counsel, as appropriate.
  - (2) Hellewell has reviewed and reconciled them with his calendaring system, such that all necessary appearances and deadlines are noted and memorialized.
  - (3) Hellewell has and is taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
  - (4) Hellewell is handling client and other funds in conformity with the fee agreements associated with each client matter.
- (f) During the period of probation, Hellewell shall attend not less than six MCLE accredited programs, for a total of 18 hours, which shall emphasize law practice management, and time management. These credit hours shall be in addition to those MCLE credit hours required of Hellewell for his normal MCLE reporting period. The Ethics School requirement does not count towards the 18 hours needed.
- (g) Each month during the period of probation, Hellewell 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.
- (h) On a quarterly basis, on dates to be established by Disciplinary Counsel beginning no later than 30 days after his execution of this stipulation, Hellewell shall submit to Disciplinary Counsel's Office a written "Compliance Report,"

approved as to substance by Supervisor, advising whether Hellewell is in compliance with the terms of this agreement. In the event that Hellewell has not complied with any term of the agreement, the Compliance Report shall describe the noncompliance and the reason for it.

- (i) Throughout the term of probation, Hellewell shall diligently attend to client matters and adequately communicate with clients regarding their cases.
- (j) Hellewell authorizes 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 Hellewell's compliance.
- (k) Hellewell is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (l) Hellewell'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.
- (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (n) The SPRB's decision to bring a formal complaint against Hellewell 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.

21.

Hellewell 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, if necessary. In this regard, Hellewell has arranged for an active member of the Bar to either take possession of or have ongoing access to Hellewell's client files and serve as the contact person for clients in need of the files during the term of his suspension, if any.

22.

Hellewell acknowledges that reinstatement is not automatic on expiration of any period of suspension, if any stayed period of suspension is actually imposed. If a period of suspension is necessitated by his noncompliance with the terms of his probation, he will be required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Hellewell also acknowledges that, should a suspension occur, 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.

23.

Hellewell 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, if he is subject to suspension. This requirement is in addition to any other provision of this agreement that requires Hellewell to attend or obtain continuing legal education (CLE) credit hours.

24.

Hellewell 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 Hellewell is admitted: none.

25.

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 27th day of July, 2016.

/s/ Ronald M. Hellewell

Ronald M. Hellewell

OSB No. 832310

EXECUTED this 15th day of August, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 13-58  
 )  
ROBERT S. SIMON, )  
 )  
Accused. )

Counsel for the Bar: Richard A. Weill; Amber Bevacqua-Lynott  
Counsel for the Accused: Brian B. Williams  
Disciplinary Board: Bryan D. Beel, Chairperson  
Dylan M. Cernitz  
Charles A. Martin, Public Member  
Disposition: Violation of RPC 1.5(a), RPC 1.9(a), and RPC  
8.4(a)(3). Trial Panel Opinion. 185-day suspension.  
Effective Date of Opinion: September 24, 2016

**TRIAL PANEL OPINION**

**I. INTRODUCTION AND DECISION**

In this disciplinary action, No. 13-58, the Oregon State Bar (“Bar”) alleges that respondent Robert Simon (“Simon”) violated numerous provisions of the Oregon Rules of Professional Conduct (RPC) while he represented individuals and entities related to Paul and Tom Brenneke (“Paul” and “Tom,” respectively). The Disciplinary Trial Panel (“Panel”) held a trial on April 19, 20, and 22, 2016, and heard closing arguments on April 28, 2016.

The Panel finds that the Bar established, by clear and convincing evidence, that Simon committed three of the acts of misconduct alleged in the Bar’s Second Amended Complaint. The Panel finds that the Bar established, by clear and convincing evidence, that Simon violated Oregon RPC 1.9(a) (former-client conflict of interest), as alleged in the Bar’s first cause of complaint, and Oregon RPC 1.5(a) (charging an illegal or excessive fee), and Oregon RPC 8.4(a)(3) (misconduct), as alleged in the Bar’s second cause of complaint. The Panel recommends a sanction of a 185-day suspension.



## II. NATURE AND STATUS OF THE CASE

### A. Factual Background

At all times material to the allegations in the Bar’s Second Amended Formal Complaint,<sup>1</sup> Simon was a member of the Oregon State Bar, having been admitted in 1990. Ex. 226 (Transcript of the 8/26/2015 Deposition of Robert Simon) (Simon 8/26 Tr.) at 6:9; Compl. ¶ 2; Simon’s Answer to Second Amended Complaint (“Ans.”) ¶ 2. Simon was admitted to practice law in the State of Washington in April 1991, and the State of California in April 1997. Ex. 226 at 6:16-17. Simon is now a voluntarily inactive member of the Bar. Ans. ¶ 2.

At the time of the events described here, Simon focused on business workouts and restructurings. In the mid-1990s, Simon began representing Paul or entities that Paul owned or controlled. Trial Tr. (4/19/2016) at 50:14–17; Ex. 40 (Transcript of the 8/12/2009 Deposition of Robert Simon) (Simon 8/12 Tr.) at 76:3; Ex. 166 (Transcript of the 6/1/2011 Deposition of Robert Simon) (Simon 6/1 Tr.) at 17:7; Ex. 194 (2/3/2012 Letter from Tellam to Cooper) (Tellam 2012) at 2; Ex. 226 at 13:4. Simon had an engagement letter for his initial engagement with Paul in 1996, but has not entered into one since, for any new matter. Trial Tr. at 51:11–16; Ex. 166 at 17:7; Ex. 226 at 19:4. In 1998, Paul hired Simon to work for him in a more or less permanent capacity. Ex. 40 at 24:21; Ex. 194 at 2. Paul was essentially Simon’s sole client through 2008 or 2009. Trial Tr. 54:21–23; Ex. 40 at 8:9.

Beginning in about 1998, Paul gave Simon an office, cell phone, healthcare reimbursements, travel expenses, and a \$12,000 per month “flat fee earned upon receipt pursuant to [a] written agreement. . . .” Ex. 40 at 51:8. After 1998, almost all the clients that Simon represented were individuals or companies involved in deals with Paul or his companies.

In November 2004, Paul formed the Zoe Brenneke & Ava Brenneke Irrevocable Trust (“Z&A Trust”), whose corpus included several limited liability company interests that Paul held in his own name. Ex. 194. Paul Brenneke’s daughters (Zoe and Ava) were the beneficiaries of the Z&A Trust. Simon worked as an attorney for Paul Brenneke’s limited liability companies through their managers.

Also in November 2004, Paul established the Paul Brenneke Qualified Personal Residence Trust (“QPRT”), which would eventually hold title to Paul’s house (the “Summerville residence) for his family. Ex. 2. Paul chose his brother, Tom, to be the trustee

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<sup>1</sup> For purposes of this opinion, the Panel will refer to the operative complaint, the Second Amended Formal Complaint, filed March 16, 2016, as the “Complaint,” unless the identity of the source of a given allegation is important. Similarly, the Panel will refer to the operative answer, Mr. Simon’s Answer to the Bar’s Second Amended Formal Complaint, filed March 23, 2016, as the “Answer,” unless the identity of the source of a given response is important.

for the QPRT when it was formed. Ex. 2. Tom was the trustee for the QPRT from 2004 until he resigned on March 21, 2011.

Simon represented the QPRT in a number of transactions while Tom was the QPRT's trustee. For example, when the QPRT received the Summerville residence, the QPRT's only asset, in August 2005, there were two classes of encumbrances on its title: (1) a first mortgage held by Bank of America, and (2) second and third mortgages and a judgment lien ("the junior encumbrances"). Ex. 7. Simon represented the QPRT in dealing with these encumbrances and other challenges to the title of the QPRT.

In March and April 2008, Simon represented the QPRT and the Z&A Trust in obtaining a \$1 million loan from Frontier Bank, which was secured by the Summerville residence. The Frontier loan was intended to pay off the encumbrances on the Summerville residence other than the Bank of America first mortgage. Ex. 11A. To facilitate issuance of the Frontier Bank loan, Simon located a lender, negotiated the terms, coordinated the document flow, and prepared the closing instructions.

Frontier had two conditions for issuing the Frontier loan: (1) Frontier required that Tom sign a personal guaranty; and (2) Frontier required that the junior encumbrances be removed from the title of the Summerville residence, leaving the Frontier loan in second position after the Bank of America mortgage. Ex. 11A. Tom agreed to guarantee the loan only after Paul, the Z&A Trust, and the QPRT agreed to indemnify and hold him harmless from all costs, expenses, judgments, losses, etc. relating to the loan. Ex. 11A. Ron Shellan, Tom's personal attorney, represented Tom when he entered into the guarantee and indemnification agreement. Exs. 14, 18.

In late summer 2008, Tom and Paul each contributed \$600,000 to buy (through Tom's entity, Guardian Real Estate Services LLC, or GRES) a 50 percent partnership with Mr. Rand Sperry and Mr. Mark Van Ness, who owned Sperry Van Ness, a national real estate brokerage firm that sold franchises. Exs. 22, 24. Together, the parties formed a new entity: Sperry Van Ness Real Estate Services ("Sperry") to operate corporate offices in California and Arizona. Given the distressed state of the economy at that time, by November 2008, Sperry was losing significant amounts of money and Tom made a cash call to all of the Sperry partners. Tom raised \$500,000 by January 2009 to keep the company going. By that time, however, the Sperry partners were having significant conflicts. Thus, on January 29, 2009, the partners signed a settlement agreement, agreeing that GRES (Tom's entity) would take over and remain obligated on Sperry's leases. Ex. 32.

In April 2009, one of Paul's creditors, Western Pacific Building Materials ("Western"), brought a foreclosure action against the QPRT. Ex. 36. Simon appeared as counsel of record in the *Western Pacific* litigation on behalf of Tom, in his capacity as trustee for the QPRT.

In July 2009, another of Paul's creditors, Travelers Casualty and Surety Company of America, filed a petition to void the August 2005 transfer of the Summerville residence into the QPRT. Ex. 39B. The action named as defendants both Paul, individually, and Tom, as trustee of the QPRT. Travelers alleged that the transfer of the Summerville residence into the QPRT was fraudulent because it was intended to avoid an outstanding liability that Paul owed to Travelers. Simon represented Tom, in his capacity as trustee of the QPRT, in the *Travelers* litigation. Mr. Simon remained counsel of record for Tom, as trustee of the QPRT, in the *Travelers* litigation through March 11, 2011.

On February 22, 2010, the Sperry partners entered an Amendment to the January 2009 Agreement that terminated the venture, stating: "it is the intention of [Sperry] to shut down all offices and terminate all leases except West LA and Phoenix." Ex. 47. Sperry partners funded an escrow account with \$500,000 to be used to negotiate settlements with Sperry's creditors, primarily the leaseholders of Sperry's office space. These settlements protected the Sperry partners from the personal guarantees they made for some of the leases.

According to escrow instructions effective March 2, 2010, the Sperry partners directed that the \$500,000 be applied first to resolve the lease claims, with any remaining funds used to pay Sperry's "non-leasehold creditors" (including attorneys). Ex. 48. Under the escrow instructions, the Guardian parties (including Tom, personally) could be liable if there was a dispute or misuse of the escrow funds, that is, if the funds were not utilized in accordance with the Amendment and Escrow Instructions. Tom entrusted Simon with the task of negotiating the settlements and administering the disbursements from escrow.

Shortly after the escrow agreement went into force, Mr. Durkheimer's name appeared on a list of accounts payable, dated March 9, 2010. Ex. 50. Simon directed an escrow payment to John Durkheimer, after directing Mr. Durkheimer to send an invoice for \$75,000. Mr. Durkheimer's invoice was dated March 31, 2010, Ex. 52, and the escrow instructions to Williams & Jensen for Mr. Durkheimer's payment issued on May 12, 2010. Exs. 51, 55. Simon and Mr. Durkheimer had a history because Mr. Durkheimer was Paul's "go to" bankruptcy attorney, and had worked on an earlier failed Brenneke venture, called "Broken Top."

Shortly after Mr. Durkheimer received his payment, he received a call from Simon, who requested that Mr. Durkheimer reduce his fee. Mr. Simon directed Mr. Durkheimer to send \$25,000 of the \$75,000 payment to the Stoel Rives law firm. Ex. 167 at 49:6–50:19. The \$25,000 payment was for Simon's benefit, and Mr. Durkheimer made the payment on May 14, 2010.

On July 1, 2010, Tom asked in an email: "For what services are we paying Durkheimer?" Ex. 62B. Mr. Simon responded that the payment was for a bankruptcy plan prepared for Sperry, should it have become necessary in 2008. Ex. 62B. Mr. Simon acknowledged that there was no written fee agreement with Mr. Durkheimer, but asserted that Tom knew of the Durkheimer payment long before, and, at a meeting on May 19, 2010,

approved crediting the payment of \$25,000 to the sums owed by Sperry to Simon. Written corroboration of the May 19, 2010 meeting is allegedly provided by a memo from Simon to Tom dated May 24, 2010, about which there is some dispute regarding authenticity. Ex. 56.

By mid-2010, Paul and Tom began to have a falling out over a series of disputes, business and personal, which escalated over time into significant hostility. During this time, Simon tried to withdraw from representing either brother, in any capacity, including telling them that he was ready to withdraw from the *Travelers* litigation as soon as the brothers found replacement counsel. Exs. 65, 68, 89. Neither brother found an attorney to replace Simon.

Also in 2010, the Z&A Trust fell increasingly behind on the mortgage payments on the Summerville residence until, in late 2010, Bank of America began the foreclosure process. In November 2010, Bank of America scheduled a trustee's sale of the Summerville residence for March 17, 2011. Ex. 93. On November 22, 2010, Tom forwarded to Simon a copy of the Bank of America Notice of Trustee's Sale and requested that Simon provide an analysis of options for the QPRT. Ex. 93.

In the face of the trustee's sale of the Summerville residence, it became clear that Paul wanted to save his house. In addition, the QPRT had only the residence as an asset. Tom, however, in his capacity as trustee, wanted to surrender the house and collect whatever equity remained. Tom argued that completing a sale would maximize any equity from the QPRT or mitigate its further losses. In view of this divergence of opinions, Paul, the settlor of the trust, and Jimmy Drakos, trustee of the Z&A Trust, sought to remove Tom as QPRT trustee. Tom resisted these attempts.

Around this same time, near the end of 2010, a fee dispute developed between Tom and Simon. The central issues were Simon's alleged entitlement to unpaid fees for his work with Sperry, and the propriety of the escrow payment to John Durkheimer. Exs. 88, 89, 91, 119, 123, 125, 126.

In December 2010 and January 2011, Simon sued Sperry and Tom, personally, for attorney fees in Multnomah County Circuit Court. Mr. Simon claimed that Tom owed past-due attorney fees of more than \$130,000, Ex. 81, and that Sperry owed more than \$42,000.

In late January 2011, Simon learned that the *Travelers* case was nearing settlement. To resolve the case, Simon discussed the possibility of representing both Tom, as trustee of the QPRT, and Paul, asking them to waive any conflicts of interest, and noting that he would have to resign if the others could not agree to waive potential conflicts. Tom responded "ok." Ex. 126A, 127, 131. Mr. Simon then sought a more formal conflict waiver related to the *Travelers* litigation, which Jimmy and Paul, but not Tom, signed. Eventually, after providing Tom with more information and telling Tom to consult with his attorney, Simon received new terms from Tom related to the representation. Mr. Simon agreed to those terms. Ex. 140.

Mr. Simon successfully settled the Travelers case and withdrew on March 11, 2011, the same day that Paul and Tom, as trustee of the QPRT, were dismissed from the case. Exs. 145-146.

During this period, Tom asked Paul how he planned to pay the past-due mortgage payments on the Summerville residence and avoid Bank of America's foreclosure. Ex. 93. Importantly, Tom had recently learned that the junior encumbrances remained on the title to the Summerville residence, despite the intent that they be satisfied by the Frontier loan. Ex. 142. The possibility that the Frontier loan would be unsatisfied in the case of a foreclosure sale exposed Tom to significant financial risk because he personally guaranteed the Frontier loan. Tom requested that Paul have Simon ensure that the junior encumbrances were removed from the title. Tom suggested that the best solution to the situation was to sell the Summerville residence and use the proceeds to pay off the existing mortgage and satisfy the Frontier loan. Ex. 142.

In their urgency to stop Bank of America's March 17, 2011 foreclosure sale, Paul and Simon demanded that Tom file bankruptcy on the QPRT's behalf. Paul and Simon asserted that Tom had a conflict of interest and was not fulfilling his fiduciary duties as trustee for the QPRT. When Tom declined to file bankruptcy, Paul demanded he resign as the QPRT's trustee, but Tom refused. Mr. Simon still represented Tom in his capacity as trustee of the QPRT.

On March 11, 2011, Simon withdrew as counsel of record from the only two matters in which he represented Tom, as trustee for the QPRT: the *Western Pacific* litigation and the *Travelers* litigation. Exs. 148, 149.

On March 14, 2011, Simon filed a petition for involuntary bankruptcy against the QPRT, on behalf of three named creditors, including the Z&A Trust, which halted the foreclosure sale scheduled for just three days later. Ex. 147. The debtor identified in this filing was the "Paul Brenneke Personal Residence Trust aka Thomas B. Brenneke, Trustee of Paul Brenneke Personal Trust." Ex. 147.

Tom resigned as QPRT trustee on March 21, 2011. Ex. 84. Tom stated that he would possibly become a creditor of the QPRT because of the QPRT's agreement to indemnify Tom for claims arising from his personal guaranty of the Frontier loan. In other words, if Frontier foreclosed on its loan, then Tom would be personally liable for amounts owed, due to his guaranty, and would, in turn, look to the QPRT for indemnification, per their earlier agreement. Tom thus had a potential conflict of interest in continuing to act as the QPRT's trustee.

Mr. Simon's fee litigation proceeded to trial in October 2012. At trial, Bonnie Richardson used metadata<sup>2</sup> from a PDF copy of the May 24, 2010 memo to suggest that Simon created the memo on December 8, 2010, and not in May. The metadata from the PDF shows that it was created in December 2010. Ex. 57. At his fee litigation trial, and in a later deposition, Simon testified that he scanned a hard copy of the memo, which he kept in a workbook, on December 8, 2010. Mr. Simon testified at this trial that he misspoke previously, and that he had, in fact, acquired the PDF document from Paul in December 2010. Mr. Simon testified that he recently learned of his error when investigating the issue before the disciplinary trial, and talking with Jimmy Drakos.

## **B. Procedural Posture**

The Bar filed its Formal Complaint against Mr. Simon on August 16, 2013, and an Amended Formal Complaint on January 22, 2015. Mr. Simon challenged the sufficiency of the Bar's Amended Formal Complaint by motion dated November 19, 2015, which the chair of the Panel granted on March 10, 2016. The Bar thereafter filed a Second Amended Formal Complaint on March 16, 2016, and Simon served his Answer to Second Amended Formal Complaint on March 28, 2016. The Bar's Second Amended Formal Complaint alleged four causes of complaint and six violations of the Oregon Rules of Professional Conduct (RPCs), each of which Simon disputes.

The Panel held a trial at the Oregon State Bar Center on April 19, 20, and 22, with closing arguments heard at the same location on April 28, 2016.

The Bar called the following witnesses:

Mr. Robert Simon, the respondent;  
Ms. Bonnie Richardson;  
Mr. Thomas Brenneke;  
Mr. Thomas Howe, expert witness on document creation; and  
Mr. Will Wilson.

At the close of the Bar's case-in-chief, Mr. Simon moved orally for a directed verdict against the Bar's causes of complaint. Trial Tr. 465:5–472:25. The Panel denied the motion, not least because the Panel was uncertain whether the Bar Rules allow or contemplate such a motion for these proceedings. Trial Tr. 473:6–16.

Mr. Simon called the following witnesses:

Ms. Sam Ruckwardt;  
Mr. Thomas Brenneke, by videotape;

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<sup>2</sup> A document's metadata is information about the document itself, as contrasted with the content of the document. The metadata may show the document's creation date, dates that it was edited and saved, the identity of the creator, and so on. Trial Tr. (Howe) 395:3–396:8.

Mr. Brent Summers (Ex. 246);  
Mr. Paul Brenneke; and  
Mr. Jimmy Drakos.

At the close of the evidence, the parties submitted 228 exhibits into the record, including 10 demonstrative exhibits, which highlighted those portions of the transcript exhibits that the parties thought most relevant.

The trial transcript, as submitted, encompassed 780 pages of testimony and argument.

### **III. ISSUES OF FACT**

#### **A. Credibility of Witnesses**

The Panel found Mr. Drakos to be a credible witness. His testimony appeared honest and forthright. He seemed self-assured in his demeanor and answers, and spoke energetically and with little hesitation when discussing the events described here. He did not appear to struggle with his recollections, and spoke with confidence about the various transactions in which he has been involved. He did not shy away from addressing the Panel or counsel, as necessary, when making his points.

The Panel found Paul Brenneke to be a credible witness. Paul Brenneke's often emotional responses to questioning gave the distinct impression that he was invested in his testimony, and that discussing the events was sometimes truly painful. The Panel would not have expected to see such emotional turmoil in a witness who was being dishonest. At times, Paul was reduced to tears discussing the disputes described above. Paul was not halting in his testimony, and appeared to have a good recall of the facts and circumstances of the various business and legal situations he experienced.

The panel found Tom Brenneke to be less credible than other witnesses. Although Mr. Brenneke typically gave straightforward responses to questions, he seemed unemotional to the point of being cold. In addition, Mr. Brenneke rarely, if ever addressed the Panel or acknowledged its presence, speaking almost exclusively toward the counsel tables. Mr. Brenneke also did not display any obvious emotion, as might be expected, when addressing situations that left his brother, Paul Brenneke, either close to or in tears. Mr. Brenneke's lack of outward expressions of regret or misgivings was notable when he discussed what was essentially the destruction of his relationship with his brother, and the creation of an apparently irreconcilable rift between Mr. Brenneke and his father, on one side, and Paul Brenneke, on the other.

The Panel found Mr. Howe to be a credible witness. The Bar qualified Mr. Howe as an expert in electronic-document forensics, and the Panel accepts him as such. Mr. Howe gave his testimony in a straightforward manner, and he was both understandable and knowledgeable on technical issues. As well, when pressed, Mr. Howe readily disclosed

possible shortcomings in his analysis, described things that he might have done with other resources, and gave testimony that was, in the Panel's view, unbiased toward either party.

The Panel found Ms. Richardson to be a credible witness. Her demeanor was calm and reassured, and she gave her testimony in a matter-of-fact manner. Nothing about Ms. Richardson's mannerisms or body language suggested that she was being deceitful or anything less than truthful in her responses and explanations.

The Panel found Ms. Ruckwardt to be a credible witness. Like Ms. Richardson, Ms. Ruckwardt's demeanor suggested that she was simply relaying the facts, rather than shading the truth. Ms. Ruckwardt was friendly and animated and often directly addressed the Panel with her testimony. She did not appear uneasy or halting in anything she said, and appeared to do her best to answer all the questions she received.

The Panel found Mr. Simon to be a credible witness. Mr. Simon did not typically appear uneasy with his testimony, and did not portray any of the behaviors that one would typically expect of a witness shading the truth, such as fidgeting, avoidance of eye contact, or visible unease. To his credit, Mr. Simon did appear uneasy when describing actions for which he clearly has misgivings, such as convincing Mr. Durkheimer to give back \$25,000 of his attorney fee. Mr. Simon described that action as the "most reprehensible professional thing" he has done. Mr. Simon's candid admissions of his errors and personal faults make him believable. In addition, Mr. Simon was often engaged and energetic in his testimony, and appeared comfortable enough with his testimony to offer occasional moments of humor. Mr. Simon did display some moments of what might be called annoyance or exasperation with the situation, but the appearance of these reactions served to suggest that his testimony was honest rather than rehearsed or opaque.

The Panel found Mr. Summers to be a credible witness. Mr. Summers was often very animated and energetic in his testimony, and gave his answers with no hesitation. Mr. Summers was never halting or uncomfortable in making his statements, and often addressed the Panel or the questioning attorney directly.

The Panel found Mr. Wilson to be a credible witness. Mr. Wilson appeared relaxed during his testimony and answered questions in an unhesitating manner. He gave the Panel no reason to think that he was being anything but open and honest.

**B. First Cause of Complaint: QPRT (Qualified Personal Residence Trust) Matter**

The Bar alleges in its First Cause of Complaint that Mr. Simon violated Oregon RPC 1.7(a) (current-client conflict of interest) and Oregon RPC 1.9(a) (former-client conflict of interest).



Under Oregon RPC 1.7(a) (2015), Conflict of Interest: Current Clients:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client;
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

Under Oregon RPC 1.9(a) (2015), Duties to Former Clients:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

In support of these charges, the Bar alleges that Paul created the QPRT in 2004, and named Tom as trustee; Paul then transferred title to the Summerville residence, encumbered by the Bank of America mortgage and the junior encumbrances, into the QPRT. The Bar alleges that Paul also created the Z&A Trust, into which he transferred his interests in several limited liability corporations, whose income was intended to pay the mortgage debt on the Summerville residence.

The Bar alleges that in 2005, the Z&A Trust bought the junior encumbrances, represented by Simon. The Bar alleges that in early 2008, Simon negotiated a loan from Frontier Bank on behalf of the QPRT and the Z&A Trust; in return, Frontier Bank required security in the form of a lien against the Summerville residence, and satisfaction of the junior encumbrances. The Bar alleges that Frontier Bank also required a personal guarantee by Tom Brenneke. The Bar alleges that as a result of his representation of QPRT and the Z&A Trust, Simon knew that Tom guaranteed the Frontier loan, and that Z&A Trust was to use a portion of the loan proceeds to extinguish the indebtedness secured by the junior encumbrances.

The Bar further alleges that, upon receiving the loan proceeds from Frontier Bank, satisfactions of the junior encumbrances were signed, and Simon submitted the satisfactions to the title insurance company for recording. The Bar alleges that the satisfactions were never recorded, leaving the junior encumbrances on the title to the Summerville residence ahead of the Frontier lien. The Bar alleges that Simon took no steps to determine or verify whether the satisfactions were ever recorded.

The Bar alleges that in 2009, Travelers Insurance Company filed a petition to void the transfer of the Summerville residence from Paul to the QPRT, naming both Paul and Tom, as

trustee of the QPRT, as defendants. The Bar alleges that Simon represented both Paul and Tom in the *Travelers* litigation, and that Simon represented Tom, as trustee of the QPRT, from 2008 through March 2011, when Simon withdrew as attorney of record in the *Travelers* litigation.

The Bar further alleges that in late 2010, the relationship between Simon and Tom was strained because Simon sued Tom personally for fees due in another matter, and Simon remained close to Paul, who blamed Tom for losing Z&A Trust's investment in Sperry. The Bar alleges that Simon accused Tom of malfeasance related to the Frontier loan proceeds and demanded that he return money to the Z&A Trust, all while Simon represented Tom as trustee of the QPRT and individually in the *Travelers* litigation.

The Bar concludes that Simon violated Oregon RPC 1.7(a) because the *Travelers* litigation sought to void the transfer of the Summerville property from Paul to the QPRT, and Simon accused one client, Tom, on behalf of another client, Paul, of engaging in malfeasance regarding his use of the Frontier loan proceeds secured by the Summerville property, and owned by the QPRT. The Bar argues that these actions show that Paul and Tom Brenneke's interests were directly adverse and that Simon's continuing to represent each one of them was materially limited by responsibilities he owed to the other. The Bar argues that Simon did so in the absence of required informed consent, confirmed in writing, from both Tom and Paul Brenneke.

The Bar alleges that in early 2011, Simon urged Tom to file for bankruptcy on behalf of the QPRT to avoid a foreclosure sale scheduled for March 17, 2011; Tom refused both that request and a request that he resign as QPRT trustee. The Bar further alleges that on March 14, 2011, the *Travelers* court granted Simon's motion to withdraw as Tom Brenneke's attorney in the *Travelers* litigation, and Simon filed an involuntary bankruptcy petition against the QPRT. The Bar alleges that Tom resigned as QPRT trustee on March 21, 2011, and that Simon continued the bankruptcy against the QPRT, arguing that Tom committed theft and malfeasance.

The Bar concludes that Simon violated Oregon RPC 1.9(a) because his representation of the QPRT's creditors in the involuntary bankruptcy proceeding was substantially related to his prior representation of Tom because that was the matter on which Simon advised Tom at the time when the alleged malfeasance occurred. The Bar further argues that Simon's representation of the QPRT's creditors in the involuntary bankruptcy proceeding was materially adverse to Tom Brenneke's interests because it attacked Tom Brenneke's actions and sought to hold him financially responsible for conduct undertaken as trustee at the time when Simon represented him in that capacity. Finally, the Bar argues that Simon undertook these actions in the absence of informed consent from Tom and the QPRT creditors, confirmed in writing, to Simon's representing the creditors in the involuntary bankruptcy proceeding.

Mr. Simon disputes many aspects of the Bar's allegations, including the following:

Mr. Simon denies that Frontier Bank required satisfaction of the junior encumbrances as a condition of its loan, and that, as a result of his representing the QPRT and the Z&A Trust, he knew of Tom Brenneke's personal guarantee of the Frontier loan and a requirement that the Z&A Trust was supposed to extinguish the junior encumbrances with a portion of the loan proceeds.

Mr. Simon further denies that he was responsible for recording the satisfactions of the junior encumbrances, or for representing Tom in the *Travelers* litigation.

Mr. Simon denies that he represented Tom as QPRT trustee at the time Simon sued Sperry and Tom, personally, for legal fees. Mr. Simon also denies that he aligned himself with Paul or accused Tom of malfeasance regarding use of the Frontier loan proceeds.

Mr. Simon therefore denies that he violated Oregon RPC 1.7(a) because informed consent was never required; there was no conflict of interest between Paul, settlor of the QPRT, and Tom, its trustee, in the challenges to the QPRT; and there were no allegations regarding the capacity in which Simon might have been Paul Brenneke's attorney.

Mr. Simon also denies that, in early 2011, he and Paul urged Tom to file for bankruptcy protection on the QPRT's behalf. Mr. Simon also denies that his motion to withdraw from the *Travelers* litigation was granted as late as March 14, 2011.

Mr. Simon denies that he represented Tom as trustee for any matter other than in cases of public record, and that he represented Tom in any matters involving theft or malfeasance.

Mr. Simon therefore denies either that he violated Oregon RPC 1.9(a) or that he needed informed consent under the circumstances alleged.

**C. Second Cause of Complaint: Sperry Matter**

The Bar alleges in its Second Cause of Complaint that Simon violated Oregon RPC 1.5(a) (charging an illegal or excessive fee) and Oregon RPC 8.4(a)(3) (dishonest conduct).

Under Oregon RPC 1.5(a) (2015), Fees:

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

Under ORPC 8.4(a)(3) (2015), Misconduct:

- (a) 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[.]

The Bar alleges that in August 2008, Tom and Paul, through their legal entities, entered into a partnership with two others to operate Sperry in California and Arizona. The Bar further alleges that the partners in Sperry made capital contributions and named Tom the managing partner. The Bar also alleges that Simon began representing Sperry beginning in 2008.

The Bar alleges that by early 2010, the Sperry partners decided to dissolve Sperry, and that on March 2, 2010, they created and funded the Sperry escrow account to negotiate settlements with Sperry's leasehold creditors and, if possible, Sperry's remaining creditors. The Bar alleges that Tom entrusted Simon with negotiating the settlements and disbursing the escrow funds, and that Simon believed that Sperry owed him attorney fees for work performed on Sperry's behalf.

The Bar further alleges that on March 31, 2010, Mr. Durkheimer sent Sperry an invoice, at Simon's direction, for \$75,000 for legal services allegedly performed on Sperry's behalf, but Sperry did not owe Mr. Durkheimer the money, and Simon knew it when he instructed Mr. Durkheimer to issue the invoice. The Bar alleges that Sperry did not retain Mr. Durkheimer and Tom was unaware that Mr. Durkheimer rendered legal services on Sperry's behalf.

The Bar alleges that on May 12, 2010, Simon caused \$75,000 to be wired from the Sperry escrow account to Mr. Durkheimer. The Bar further alleges that on May 13, 2010, Simon instructed Mr. Durkheimer to send \$25,000 of the \$75,000 to a law firm to which Simon owed money, and that Mr. Durkheimer did so on May 14, 2010.<sup>3</sup>

Finally, the Bar alleges that when Simon directed Mr. Durkheimer to send the \$75,000 Sperry invoice, Simon knew that Sperry had not retained Mr. Durkheimer and that Mr. Durkheimer did not render services to Sperry worth \$75,000. The Bar also alleges that when Simon directed Mr. Durkheimer to send the \$25,000 to Simon's creditor, Simon knew that he was not entitled to use those funds to his benefit.

The Bar concludes that the described conduct constitutes charging or collecting a clearly excessive fee, and is dishonest in violation of Oregon RPC 1.5(a) and Oregon RPC 8.4(a)(3).

Mr. Simon denies that the Sperry partners decided, by early 2010, to dissolve Sperry. Mr. Simon also denies that Tom entrusted Simon with negotiating the necessary settlements and disbursing the escrow funds. Mr. Simon further denies that Sperry owed Simon money for attorney fees when the funds were deposited into the trust account.

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<sup>3</sup> The Second Amended Formal Complaint recites "March 14, 2010," Compl. ¶ 25, but the Panel believes this is in error.

Mr. Simon also denies that Sperry did not owe Mr. Durkheimer \$75,000, that Simon knew it when he instructed Mr. Durkheimer to issue an invoice, that Sperry had not retained Mr. Durkheimer, and that Tom was unaware that Mr. Durkheimer had rendered legal services on Sperry's behalf.

Mr. Simon denies that, when he directed Mr. Durkheimer to send Sperry an invoice for \$75,000, Simon knew that Sperry had not retained Mr. Durkheimer and that Mr. Durkheimer had not rendered services to Sperry worth \$75,000. Mr. Simon further denies that when he directed Mr. Durkheimer to send \$25,000 to Simon's creditor, Simon knew that he was not entitled to use those funds for his benefit.

Mr. Simon therefore denies that the conduct described constitutes charging or collecting a clearly excessive fee, and is dishonest in violation of Oregon RPC 1.5(a) and Oregon RPC 8.4(a)(3).

**D. Third Cause of Complaint: *Simon v. Brenneke* Fee Litigation**

The Bar alleges in its Third Cause of Complaint that Simon violated Oregon RPC 1.7(a) (self-interest conflict of interest).

Under ORPC 1.7(a) (2015), Conflict of Interest: Current Clients:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client;
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

The Bar alleges that at the end of 2010, Simon sued Sperry and Tom, personally, for attorney fees. The Bar alleges that Simon claimed Sperry and Tom owed Simon for legal services he performed for Sperry.

The Bar additionally alleges that, at the time Simon sued Tom, an act that could make Tom personally liable for fees found to be owed by Sperry, Tom was Simon's client in other matters. The Bar alleges, specifically, that, at the time, Simon was defending Tom in the *Travelers* litigation and representing Tom as the QPRT trustee.

The Bar alleges that there was a significant risk that Simon's representation of Tom in those matters would be materially limited by Simon's personal animosity toward Tom, as well as Simon's personal interest in prevailing in the lawsuit he brought against Tom to

collect attorney fees. Finally, the Bar alleges that Simon failed to obtain informed consent from Tom after full disclosure.

The Bar concludes that the described conduct constituted a self-interest conflict by Simon, in violation of Oregon RPC 1.7(a).

Mr. Simon denies the vagueness in the Bar's allegations that the fee litigation occurred at "the end of 2010." Mr. Simon also denies that, at the time he sued Tom for attorney fees, Simon represented Tom in other matters.

Mr. Simon denies that his suit for unpaid legal fees created a significant risk that Simon's representation of Tom in QPRT matters (to the extent the allegation can be understood in that manner) would be materially limited. Mr. Simon asserts that his work on the QPRT was a completely different matter than the Sperry matter and was provided at no charge. Mr. Simon therefore states that because he never expected payment on the QPRT matter, there could be no "significant risk" that Tom's failure to pay Simon's attorney fees would impact Simon's free work.

Mr. Simon admits that he did not obtain informed consent, confirmed in writing, but denies that informed consent was required.

Mr. Simon therefore denies that he engaged in a self-interest conflict of interest, in violation of Oregon RPC 1.7(a).

#### **E. Fourth Cause of Complaint: Creating a Fraudulent Document**

The Bar alleges in its Fourth Cause of Complaint that Simon violated Oregon RPC 8.4(a)(3) (dishonest conduct).

Under Oregon RPC 8.4(a)(3) (2015), Misconduct:

(a) 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[.]

The Bar alleges that during his attorney fee litigation against Tom and Sperry Van Ness Real Estate, Simon asserted that Tom approved Simon retaining and paying Mr. Durkheimer. The Bar alleges that this representation is a knowingly false statement by Simon.

The Bar further alleges that Simon produced a memo in support of his claim that Tom approved the payment to Mr. Durkheimer, which Simon claimed he wrote and sent to Tom around May 24, 2010. According to the Bar, the contents of the memo purportedly confirm that Simon disclosed to Tom that Simon asked Mr. Durkheimer to refund \$25,000 of the \$75,000 he received, and that Tom authorized Simon to apply the refunded amount against the attorney fees that Sperry owed Simon. The Bar alleges that the May 2010 memo was

fraudulently created after the fact, Simon knew that it was fraudulently created, and that Simon offered it as false evidence in his dispute with Tom intending that the court and the parties rely upon it.

Mr. Simon denies that he made a false representation when he asserted that Tom approved Simon retaining and paying Mr. Durkheimer. Mr. Simon also denies that the May 2010 memo was fraudulently created, either originally or as reproduced in PDF form, and that the contents of the memo speak for themselves in confirming that Tom authorized Simon's actions regarding the \$75,000 and \$25,000 payments.

#### IV. FINDINGS AS TO GUILT

In a disciplinary proceeding, the respondent is “entitled to a presumption that [he is] innocent of the charges” alleged. *In re Brandt*, 331 Or 113, 149–50, 10 P3d 906 (2000) (citing *In re Jordan*, 295 Or 142, 156, 665 P2d 341 (1983)). To overcome that presumption and establish a violation alleged in a cause of complaint, the Bar must prove every element of the alleged violation by clear and convincing evidence, which means that the truth of the necessary facts is “highly probable.” Oregon State Bar Rules of Procedure (“BR”) 5.2 (Burden of Proof); *In re Ellis*, 356 Or 691, 693, 344 P3d 425 (2015) (citing *In re Phinney*, 354 Or 329, 330, 311 P3d 517 (2013)). In determining whether the Bar carried its burden, the Panel “may admit and give effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs.” BR 5.1(a). Thus, while much evidence is admissible, the Panel should disregard “[i]ncompetent, irrelevant, immaterial, and unduly repetitious evidence.” BR 5.1(a).

##### A. Evidentiary Issues and Rulings

With his pretrial memorandum, Simon made several motions *in limine* and sought several rulings regarding the nature of the proceedings.

###### 1. Motions *in limine*<sup>4</sup>

###### a. Sequester nonparty lay witnesses from the hearing room.

Mr. Simon moved to “exclude[e] all nonparty lay witnesses from the hearing room during the trial until closing argument, unless it is shown that the witness is essential to presenting a claim or defense.” Simon Trial Memo at 41–42. Mr. Simon argued that such a ruling was necessary to “prevent witnesses from tailoring or being influenced by the testimony of others who testify before them.” Simon Trial Memo at 42–43 (citing *State v. Cooper*, 319 Or 162, 166 & n 1, 874 P2d 822 (1994)). The Bar did not object to this motion. Bar's Response to Motions *in limine* (“Bar's Response”) at 2. The Panel therefore held that

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<sup>4</sup> The Panel considered Mr. Simon's motions *in limine* in light of its understanding that disciplinary proceedings are *sui generis* and have unique requirements of evidence and procedure. BR 1.3; BR 5.1; *see also In re Thorp*, 296 Or 666, 668, 679 P2d 857 (1984).

nonparty lay witnesses should be excluded from the hearing room until closing argument. Trial Tr. 5:19–20.

b. Exclude references to the “Golden Rule.”

Mr. Simon moved to “exclude[e] any arguments asking the Panel to apply the ‘Golden Rule,’ or otherwise place themselves in the position of the complainant.” Simon Trial Memo at 43 (citing *Hovis v. City of Burns*, 243 Or 607, 614, 415 P2d 29 (1966)). Mr. Simon contended that such arguments should not be permitted because they ask the finder of fact to ignore his or her duty of neutrality and decide the case on the basis of sympathy and bias, not the evidence. The Bar had no objection to limiting argument that “places the trial panel ‘in the shoes’ of the complainant.” Bar’s Response at 3. The Bar asserted, however, that it must be allowed to make arguments regarding Tom Brenneke’s view of the attorney-client relationship. Bar’s Response at 3. The Panel agreed to allow this line of argument, but disallowed references to the Golden Rule. Trial Tr. 6:7-9.

c. Exclude testimony providing that Simon represented Tom Brenneke, always and for everything.

Mr. Simon moved to bar any suggestions by Tom that Simon was Tom’s attorney on a general counsel basis, that is, that Simon represented Tom on almost all matters. Simon Trial Memo at 43. Apparently because various attorney-client relationships are so central to the conflicts analysis in this case, Simon considered such suggestions more prejudicial than probative. The Bar agreed not to refer to Simon as Tom Brenneke’s general counsel but asserted that witnesses should be allowed to testify as to “when they understood that Simon was acting on behalf of Tom Brenneke[.]” Bar’s Response at 4. The Panel adopted the parties’ agreement. Trial Tr. at 6:10–16.

d. Exclude personal opinions of counsel.

Mr. Simon moved to exclude any attorney from “express[ing] his or her opinion regarding the facts of the case, or give what amounts to unsworn testimony regarding any aspect of the case[.]” Simon Trial Memo at 43–44 (citing *Jefferis v. Marzano*, 298 Or 782, 795 n 5, 696 P2d 1087 (1985)). Mr. Simon was of the opinion that statements of this type tainted the outcome in other cases in which he was involved. Simon Trial Memo at 44. The Bar agreed that counsel’s personal opinions should be excluded, but that argument must be allowed. Bar’s Response at 4. Trial Tr. at 6:22–7:17.

e. Disclose expert files in advance of testimony.

Mr. Simon moved to require disclosure for review of “any testifying expert’s entire file concerning this case, including any notes, memoranda, correspondence, or other factual documentation provided to them.” Simon Trial Memo at 44 (citing OEC 705). The Bar argues that the exchange of expert files should not be required because the Oregon Rules of Evidence do not apply to this proceeding. Bar’s Response at 4–5 (citing *In re Barber*, 322 Or



194, 206, 904 P2d 620 (1995)). The Panel held that the parties must exchange expert files. Trial Tr. at 7:24–8:1.

f. Exclude evidence of conduct not pled in the complaint.

Mr. Simon moved to preclude the Bar from offering any new causes of complaint or new bases for a cause of complaint at trial. Simon Trial Memo at 44–45. Mr. Simon argued that fundamental concerns of due process required that he not face new charges and theories of violations during the course of his trial. Simon Trial Memo at 44 (citing *In re Magar*, 296 Or 799, 806 n 3, 681 P2d 93 (1984); *In re Chambers*, 292 Or 670, 676, 642 P2d 286 (1982); *In re Ainsworth*, 289 Or 479, 487, 614 P2d 1127 (1980)). Mr. Simon further argued that the Bar should not be allowed to amend its complaint at trial to conform to the evidence, as might be allowed under ORCP 23B. Simon Trial Memo at 44 (citing *In re Ellis*, 356 Or at 739). The Bar agreed that it cannot add new charges during the proceeding, but asserted a right to prove conduct, in the course of making its case, that is not specifically charged as an ethics violation. Bar’s Response at 5. Consistent with Simon’s motion and the Bar’s agreement, the Panel ruled that the Bar was limited to establishing theories of violation set forth in the pleadings of record. Trial Tr. at 8:8–10.

g. Exclude the metadata.

Mr. Simon moved to exclude the metadata regarding the May 24, 2010 memo, or make it subject to an adverse inference based on spoliation of the evidence and at least Oregon Evidence Code 311(1)(c). Simon Trial Memo at 45–47. Mr. Simon objected that the metadata should be excluded because it is more prejudicial than probative. Simon Trial Memo at 45 (citing OEC 403; *Ostrander v. All. Corp.*, 181 Or App 283, 293, 45 P3d 1031, *rev den*, 335 Or 104 (2002)). Mr. Simon also objected that the metadata should be excluded as hearsay; that is, an out-of-court statement made by the computer that created the metadata. Simon Trial Memo at 46 (citing OEC 801; *State v. Causey*, 265 Or App 151, 154, 333 P3d 345 (2014)). Further, Simon objected because the metadata is appended to the document and is not data from the original document, in addition to being a disallowed duplicate of the underlying document. Simon Trial Memo at 46 (citing OEC 1001(2); OEC 1003(2)). The Bar disagreed, and argued that each of Simon’s evidentiary theories was in error. Bar’s Response at 6–7. The Bar argued, for example, that the rules of spoliation should not apply because they apply to the bad acts of a party to the proceeding, but Simon did not allege bad acts by the Bar. Bar’s Response at 6 (citing, *e.g.*, *Leon v. IDX Sys. Corp.*, 464 F3d 951, 958 (9th Cir 2006)). The Panel was persuaded by the Bar’s comments, and allowed the document metadata to be presented as evidence. Trial Tr. at 9:3–5.

h. Exclude evidence of the outcome of the underlying fee litigation.

Finally, Simon moved to prevent Bar counsel “from introducing evidence of the outcome of the underlying fee litigation.” Simon Trial Memo at 47–48. Initially, Simon was concerned that the offered materials do not bear on the elements of the violations alleged in

this case. Simon Trial Memo at 47–48. Mr. Simon also argued that the use of conclusions from the fee litigation (when the burden of proof is a preponderance of the evidence) would be reversible error in this proceeding (when the burden of proof is clear and convincing evidence). Simon Trial Memo at 47–48 (citing *Cook v. Michael*, 214 Or 513, 525, 330 P2d 1026 (1958)). Finally, Simon argued that the evidence of the judgment in the fee litigation would create confusion and prejudice the Panel against Simon, despite the earlier outcome not having any preclusive effect. Simon Trial Memo at 48 (citing *Shuler v. Distribution Trucking Co.*, 164 Or App 615, 625, 994 P2d 167 (1999), *rev den*, 330 Or 375 (2000)). The Bar argued that evidence from the underlying fee litigation was relevant and should be admitted. Bar’s Response at 7. The Bar asserted that even if the findings in the underlying trial should not be given precedential effect, they should at least be taken into consideration and given the appropriate weight once heard. Bar’s Response at 7. The Panel found the Bar’s arguments persuasive and allowed evidence of the outcome of the fee litigation, to be given the necessary weight when presented. Trial Tr. at 9:11–14.

## 2. Pretrial rulings

In addition to the motions *in limine* described above, the Panel was presented with other evidentiary issues at the start of trial. From an evidentiary perspective, the significant issue was Simon’s query whether the trial evidence would consist of entire transcripts of depositions or hearings, as offered at the opening of trial, or whether the evidence would only consist of designations and counter-designations of testimony. The Bar preferred to submit each entire transcript into the record for the sake of completeness and context on review. Trial Tr. at 9:19–12:17. The Panel ruled that the entire offered transcripts would remain of record as exhibits, with the parties instructed to highlight the most relevant portions during the course of trial or at the close of evidence. Trial Tr. at 12:19–24, 14:7–14.

Based on the Panel’s decisions on the motions *in limine* and relevant precedent, the four causes of complaint described above, and the issues alleged therein, are the violations and transactions the Panel considered in this trial. *In re Magar*, 296 Or at 806 n 3 (“[A]n accused lawyer must be put on notice not only of the disciplinary rule that he is charged with violating but of the conduct constituting the violation.”); *In re Chambers*, 292 Or at 676; *In re Ainsworth*, 289 Or at 487. The Panel did not consider violations or conduct not pled in the Second Amended Formal Complaint.

## B. First Cause of Complaint: QPRT Matter

### 1. Alleged Violation of Oregon RPC 1.7(a) (Current-Client Conflict of Interest)

The Panel is of the opinion that the Bar failed to establish, by clear and convincing evidence, that Simon engaged in a current-client conflict of interest, in violation of Oregon RPC 1.7(a), under its First Cause of Complaint.

Oregon RPC 1.7(a), in relevant part, recites:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client;  
[or]
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer[.]

As described above, the Bar’s conclusion is that Simon violated Oregon RPC 1.7(a) because the *Travelers* litigation sought to void the transfer of the Summerville property from Paul to the QPRT, and Simon accused one client, Tom, on behalf of another client, Paul, of engaging in malfeasance regarding his use of the Frontier loan proceeds secured by the Summerville property, owned by the QPRT. The Bar’s accusations are not a model of clarity, however, and it is unclear exactly when the wrongdoing occurred, and whether it relates to Simon’s alleged representation of Tom, individually, or Tom, as trustee of the QPRT. These roles must be considered distinctly because, for conflicts purposes, representation of a trustee is, in actuality, representation of the underlying entity, and not the individual. *See In re Campbell*, 345 Or 670, 681, 202 P3d 871 (2009) (“When a lawyer represents a corporation, the lawyer represents, for the purpose of conflict of interest analysis, the entity, not the person who manages the entity. *See In re Banks*, 283 Or 459, 469, 584 P2d 284 (1978) (‘[t]he corporation usually is considered an entity[,] and the attorney’s duty of loyalty is to the corporation and not to its officers, directors or any particular group of stockholders’).”).

It is not clear whether the Bar intends to refer to Tom, individually, or Tom, as trustee of the QPRT. But regardless of the reference, the Bar has not established a violation by clear and convincing evidence.

- a. The Bar’s theory fails if it requires Mr. Simon’s representing Tom Brenneke, the individual.

The Bar’s theory of violation is premised on the notion that Tom was accused of committing “malfeasance” with the proceeds of the Frontier loan. Compl. ¶ 12. Under the circumstances, malfeasance in handling funds for investment is something that could only have been done by Tom as an individual, and not as trustee of the QPRT, because handling of investment funds was not among Tom Brenneke’s duties as trustee. *See* Ex. 2 at 7 (trustee empowered to orderly administer the QPRT); Ex. at 2–3 (administering the QPRT involved such tasks as holding and maintaining the Summerville residence as a personal residence, paying expenses related to the residence, and distributing income to the Transferor of the trust). Therefore, the only possible malfeasance had to be the result of Tom Brenneke’s actions as an individual.

Consistent with this theory, the Bar’s allegations state that Simon “represented [Tom Brenneke] individually in the Travelers litigation.” Compl. ¶ 11. The Bar’s allegations also state, “Simon’s accusations [of malfeasance] against *his client, Thomas Brenneke*” demonstrate direct adversity. Compl. ¶ 12 (emphasis added). Under this reading of the Bar’s theory, then, both Paul and Tom, individually, had to be clients of Simon at the same time for an ethical violation to occur. *See* Oregon RPC 1.7(a)(1) (“the representation of *one client* will be directly adverse to *another client*”) (emphasis added).

But this premise is directly contrary to the documentary and testimonial evidence. First, Tom testified that Simon was not his personal lawyer. *See* Trial Tr. (Tom Brenneke) at 353:20–24 (Q: You’ve never really thought of [Simon] as your lawyer with the exception of when he has very specifically represented you in your capacity as trustee of the QPRT? A: *He’s not my personal lawyer.*) (emphasis added); *see also* Ex. 245 at 33:7–16. Second, correspondence between Simon and Tom makes clear that they both understood Simon to represent Tom only as the trustee for the QPRT. *See* Ex. 94 at 1 (Tom email to Simon, dated 11/22/2010: “*As attorney for the Paul Brenneke QPRT*, I request that you please provide an analysis of options for the Trust[.]” (emphasis added); Simon email to Tom, dated 11/22/2010: “*I am the counsel for you, the Trustee, in the Travelers v QPRT case.*” (emphasis added)).

As noted above, a violation of Oregon RPC 1.7(a) requires the representation of two current clients, and that the representation of one be “directly adverse to another” (RPC 1.7(a)(1)) or be “materially limited by” responsibilities to another (RPC 1.7(a)(2)). Here, however, there is no clear and convincing evidence that Tom, individually, was ever one of the two necessary clients. Thus, if the Bar’s theory of violation relies on Simon’s representing Tom, individually, to establish a conflict between current clients, the Bar’s theory fails.

- b. The Bar’s theory fails if it relies on Mr. Simon’s representing Tom Brenneke, the trustee.

Alternatively, the Bar’s theory of violation could be analyzed under a scenario in which the malfeasance was committed by Tom, the trustee. In this case, the QPRT would be the relevant client for purposes of a conflicts analysis, however unlikely that may be. But even supposing this to be true, the Bar fails to prove a theory of violation by clear and convincing evidence.

If Simon’s client for purposes of the current-client conflicts analysis is deemed to be the QPRT, through Tom, the trustee, then the Bar’s theory of violation fails for lack of the necessary adversity before the involuntary bankruptcy petition was filed.

The Bar argues that Paul Brenneke’s allegations of malfeasance against Tom, the trustee, show that Paul and Tom Brenneke’s interests were directly adverse and that Simon’s continuing to represent each one of them was materially limited by responsibilities he owed to the other. The Bar argues that Simon represented both Paul and the QPRT, through Tom,

in the *Travelers* litigation, and that he did so in the absence of required informed consent, confirmed in writing, from both Tom and Paul Brenneke.

The Bar's case fails on three grounds. First, the Bar failed to establish that Paul and the QPRT's interests were adverse during the simultaneous representation in the *Travelers* litigation. Second, the Bar failed to establish that Simon's representation of either Paul or Tom was materially limited by Simon's responsibilities to another or by a personal interest. Third, the Bar failed to establish that Paul and Tom, as trustee of the QPRT, did not give informed consent, confirmed in writing.

Regarding the required adversity, the Bar's evidence regarding the *Travelers* litigation does not establish that Paul and the QPRT's interests were directly adverse. Whether an actual conflict exists depends on the clients' objective interests. *In re Cohen*, 316 Or 657, 662, 853 P2d 286 (1993). The Bar did not establish that Tom, the trustee's, objective interest in the *Travelers* litigation was contrary to Paul's. In fact, it makes more sense to conclude that Paul and Tom had aligned interests in *Travelers*: from beginning to end of the case, they were both on the side of defending the most significant asset of the QPRT, the Summerville residence.

Next, the Bar did not establish that Simon's representation of Paul or Tom was, or would be, materially limited by a responsibility to another or to an interest of Simon. In fact, the evidence shows just the opposite. As described above, Paul and Tom, the latter as trustee of the QPRT, both had an interest in keeping the Summerville residence in the QPRT, against an attempt by *Travelers* to pull the residence out. Keeping the residence in the QPRT would reinforce the QPRT's possession of its most significant asset and, importantly, maintain the residence's availability as a home for Paul and his family. And if there is anything to which Simon was more dedicated than the safety and comfort of Paul Brenneke's minor children, the Panel did not see it. Mr. Simon's primary focus appeared always to be preserving the Summerville residence for Paul Brenneke's family, and there is no evidence that any circumstance caused him, or could have caused him, to waver in this goal. The evidence shows that Simon was continually staunch in his efforts to resolve the *Travelers* litigation, even in the midst of epic disputes between the brothers Brenneke, and between Simon and Tom over the former's entitlement to attorney fees from the Sperry matter.

Third, the Bar failed to establish that Paul and Tom, as trustee of the QPRT, did not give informed consent, confirmed in writing. The evidence shows that Simon educated Paul, Jimmy Drakos (trustee of the Z&A Trust), and Tom (trustee of the QPRT) about the benefits of, and potential conflicts involved in, his representing all three of them in the *Travelers* litigation. On January 6, 2011, during the course of the litigation, Simon asked Paul, Jimmy, and Tom if they would "all agree to sign a consent to allow [him] to continue to represent the QPRT in the *Travelers* case." Ex. 127 at 1. Tom immediately replied "OK," signaling his assent to the arrangement. While Paul and Jimmy eventually signed formal consent documents, Tom did not. The Panel does not think, however, that this fact negates the assent by

the QPRT's trustee, Tom, that Simon continue his representation. The Bar failed to prove otherwise by clear and convincing evidence.

2. Alleged Violation of Oregon RPC 1.9(a) (Former-Client Conflict of Interest)

The Panel is of the opinion that the Bar established, by clear and convincing evidence, that Simon engaged in a former-client conflict of interest, in violation of Oregon RPC 1.9(a), under its First Cause of Complaint.

Under Oregon RPC 1.9(a), “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.”

The Bar argues that Simon violated Oregon RPC 1.9(a) by representing the QPRT’s creditors in the 2011 involuntary bankruptcy proceeding because that proceeding was substantially related to Simon’s prior representation of Tom, during which time Tom allegedly committed malfeasance relating to the QPRT’s assets. The Bar further argues that Simon’s representation of the QPRT’s creditors in the involuntary bankruptcy proceeding was materially adverse to Tom Brenneke’s interests because it attacked his actions and sought to hold him responsible for conduct undertaken as trustee of the QPRT, when Simon represented the QPRT.

- a. The Bar’s theory fails if it requires Mr. Simon’s representing Tom Brenneke, the individual.

As discussed above, if the Bar’s theory of violation is premised on the notion that Tom was, individually, a former client of Simon, it fails.

Consistent with this theory, the Bar’s allegations state that “[i]n March 2011, Simon moved to withdraw as Thomas Brenneke’s lawyer in the Travelers matter.” Compl. ¶ 15. The Bar’s allegations also state, “Simon filed an involuntary bankruptcy petition against QPRT accusing Thomas (i.e., now his former client).” Compl. ¶ 15. Further, the Bar alleges that “Simon’s representation of the QPRT’s creditors in the involuntary bankruptcy proceeding was substantially related to his prior representation of Thomas Brenneke[.]” Compl. ¶ 18.

But as noted above, this premise is contrary to the documentary and testimonial evidence, which establishes that neither Simon nor Tom considered Simon to be Tom’s personal lawyer. *See* Trial Tr. (Tom Brenneke) at 353:20–24; Ex. 94 at 1.

As noted above, analysis of a violation of Oregon RPC 1.9(a) begins with establishing that the representation of one client occurs “in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client.” Here, however, there is no clear and convincing evidence that Tom, individually, was “the former client.” Thus, if the Bar’s theory of violation relies on Simon’s representing Tom,

individually, to establish a conflict between a current and a former client, the Bar's theory fails.

- b. The Bar's theory succeeds if it relies on Mr. Simon's representing Tom Brenneke, the trustee of the QPRT.

Alternatively, the Bar's theory of violation could be analyzed under a scenario in which the former client is the QPRT, as represented by Tom, the trustee. In this case, the Bar established a violation of Oregon RPC 1.9(a) by clear and convincing evidence.

Mr. Simon represented the QPRT, through Tom, its trustee, in the *Travelers* litigation. It is well understood that a representation of an entity, such as a trust, occurs through its manager (such as the trustee), as noted above. See *In re Campbell*, 345 Or at 681 ("When a lawyer represents a corporation, the lawyer represents, for the purpose of conflict of interest analysis, the entity, not the person who manages the entity. See *In re Banks*, 283 Or [at 469] ('[t]he corporation usually is considered an entity[,] and the attorney's duty of loyalty is to the corporation and not to its officers, directors or any particular group of stockholders')."). In this situation, the lawyer must treat the trustee as the lawyer's client, and take direction from him or her. *In re Campbell*, 345 Or at 681 ("in representing [an] entity, the lawyer generally must follow [the representative's] directives" (citing RPC 1.13(a))).

Under Oregon RPC 1.9(a), a "lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing." Here, the Bar established, by clear and convincing evidence, each of the necessary elements for a former-client conflict of interest.

For there to be a conflict between an attorney and a former client, "the former client's interests [must] pertain to the matter in which the lawyer previously represented the former client." *In re Hostetter*, 348 Or 574, 584, 238 P3d 13 (2010). The root issue is whether the former client's interest in relation to the earlier representation is adverse to the current client's interest in the new representation. *In re Ellis*, 356 Or at 753. Here, a former-client conflict existed, as made clear by an examination of the terms of Oregon RPC 1.9(a).

First, Simon formerly represented the QPRT, through its trustee, in the *Travelers* litigation. Mr. Simon then represented a number of creditors in the involuntary bankruptcy petition filed against the QPRT. Further, the *Travelers* litigation and the involuntary bankruptcy litigation (which prevented Bank of America from foreclosing on, and Tom, the trustee, from selling, the Summerville residence) were "substantially related" because they both involved a dispute over whether title to the Summerville residence would stay in the QPRT, or it would be taken out and foreclosed upon. Further, the interests of the bankruptcy creditors were materially adverse to the interests of the debtor QPRT because the former wanted to force resolution of their debts against the latter, even if the hidden motive of the

creditors was to prevent Bank of America’s foreclosure. In the face of these facts, there is no evidence that the QPRT and the bankruptcy creditors gave informed consent, confirmed in writing to Simon’s representing the creditors in the bankruptcy. Indeed, there is strong evidence that the QPRT, through Tom, would never have given that consent because he wanted to sell the Summerville residence. Ex. 142.

Mr. Simon argues that there was no adversity and thus no conflict. Simon argues that when he represented Tom as the QPRT trustee in the *Travelers* litigation, Tom Brenneke’s interest was the preservation of the QPRT’s assets, including the Summerville residence. Similarly, the involuntary bankruptcy was intended to, and did, head off the Bank of America foreclosure against the Summerville residence. Mr. Simon therefore urged the Panel to find that these interests are not adverse, and are actually aligned. Simon’s Proposed Findings of Fact and Conclusions of Law at 11–12 (citing *In re Hostetter*, 348 Or at 584; *In re Ellis*, 356 Or at 753). The Panel did not, however, find this argument persuasive because it did not consider the hidden motive of the bankruptcy creditors to be the relevant interest for the conflict test.

**C. Second Cause of Complaint: Sperry Matter—Alleged Violation of Oregon RPC 1.5(a) (Charging an Illegal or Excessive Fee)**

The Panel is of the opinion that the Bar established, by clear and convincing evidence, that Simon charged an illegal or excessive fee, in violation of Oregon RPC 1.5(a), and dishonest conduct, in violation of Oregon RPC 8.4(a)(3), under its Second Cause of Complaint.

The Bar alleges that Simon violated Oregon RPC 1.5(a) because he charged or collected a clearly excessive fee, which is also dishonest conduct in violation of Oregon RPC 8.4(a)(3). Under Oregon RPC 1.5(a), “[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.” Under Oregon RPC 8.4(a)(3), “[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law[.]”

To establish that Simon charged Sperry an illegal or excessive fee, the Bar must show that “it is *highly likely* that [Sperry] did not agree to pay” the fee. *See In re Campbell*, 345 Or at 685 (emphasis added).

The Panel is unaware of any documentary evidence establishing the amount of the fee that Sperry agreed to pay Mr. Durkheimer or Simon before they began working for that entity, or the rate at which the fee would be earned.<sup>5</sup> Mr. Simon argues that numerous

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<sup>5</sup> Mr. Simon asserts that he cannot be found to have committed a violation when the Bar declined to charge Mr. Durkheimer for receiving his fee. But the Panel has no information regarding the grounds on which the Bar finally resolved its investigation of Mr. Durkheimer, and therefore cannot reach this conclusion.



documents establish his authority to disburse funds to Mr. Durkheimer and himself, but none of those documents establish that Sperry, through Tom,<sup>6</sup> agreed to pay the fee. Each of the documents cited by Simon in his Written Closing Argument in support of his authority to disburse the money suffers from a shortcoming:

Ex. 50: A ledger, dated March 9, 2010, with an entry for \$75,000 owed to John Durkheimer. But the ledger pre-dates Mr. Durkheimer's invoice by more than three weeks (see Ex. 52, dated March 31, 2010).

Ex. 56: Memo from Simon asserting that Tom authorized payment.

Ex. 61: Mr. Simon asserting that he is in charge of resolving the liquidation of Sperry, but not addressing the Durkheimer payment.

Ex. 62: 7/1/2010 email from Simon to Tom, attaching spreadsheet showing deployment of settlement funds.

Ex. 62B: 7/1/2010 email from Tom, questioning why Mr. Durkheimer was paid, and 7/2/2010 response from Simon, asserting that Mr. Durkheimer gave bankruptcy advice.

Ex. 70: 7/27/2010 email from Simon to Paul and Tom, stating that Simon paid Mr. Durkheimer for bankruptcy work. This email states that the work was done "at [Simon's] request for Sperry Van Ness."

Ex. 74: 8/10/2010 and 8/11/2010 emails between Tom and Simon, in which Tom expressed a desire to review Mr. Durkheimer's payment, and Simon stated that the issue was discussed in 2008, 2009, and a recent memo.

Ex. 105: 12/8/2010 emails between Simon and Tom, in which Tom relays a discussion he had with Mr. Durkheimer, who allegedly described his payment as excessive, and Simon responds that the arrangement with Mr. Durkheimer was approved in a December 2008 meeting between Simon, and Paul and Tom Brenneke. Mr. Simon's email states that he, not Tom, "settled on a fee with [Mr. Durkheimer] accordingly."

Ex. 113: 12/9/2010 email from Jimmy Drakos to Mr. Durkheimer, asserting that Tom was "fired from all positions with SVN RES Inc.," and that the payments to Mr. Durkheimer and Simon were approved.

Ex. 117: 12/23/2010 email from Tom to Simon, asserting that Tom never authorized the payment to Mr. Durkheimer. Mr. Simon expresses his disagreement.

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<sup>6</sup> Mr. Simon asserts that the fee could be authorized by Tom, Paul Brenneke, or Jimmy Drakos, but the Sperry partnership documents do not support this assertion; only Sperry's General Partner, which was controlled by Tom Brenneke, could make such decisions. Ex. 24; *see also* Ex. 245 at 117:12–15.

Ex. 139: 1/22/2011 email from Paul to Tom, asserting that Tom was aware of all payments from escrow and agreed to them, having given Paul and Simon authority to wrap up Sperry matters.

Mr. Simon's Written Closing Argument at 23. Contrary to this evidence, Tom testified that he did not authorize payment to Mr. Durkheimer or Simon. Trial Tr. at 352:12–19; *see also* Trial Tr. at 379:19–380:4;<sup>7</sup> Trial Tr. 378:1–3;<sup>8</sup> Ex. 245 at 43:5–13.<sup>9</sup> Mr. Simon asserts that Tom testified that Simon was authorized to make payments by either Tom or Paul, *see* Trial Tr. at 380:19–381:2,<sup>10</sup> but the Panel thinks the testimony is less than clear on this point. Although it could be understood in this manner, it could also be understood to confirm that Simon controlled the logistics of the transfers, rather than the amounts and recipients. Ex. 245 at 73:3–11 (describing authority over logistics). On the other hand, Simon testified, consistent with the email exhibits cited above, that Mr. Durkheimer's fee was pre-approved in November 2008. Ex. 226 (Simon 8/26/2015 Depo Tr.) at 80:12–81:11. According to Mr. Durkheimer, Simon told him that the fee was approved by Jimmy Drakos and “at least one of the Brennekes,” though he did not say which. Ex. 223 at 4.

Given the available evidence, the Panel concludes that the Bar established by clear and convincing evidence that it is highly likely that Sperry, through Tom, did not agree to pay the \$75,000 fee. *In re Campbell*, 345 Or at 685. In none of the correspondence and testimony described above is there even a suggestion from Tom, in Tom's words, that Sperry agreed to pay this fee to Mr. Durkheimer. Instead, the correspondence revolves around Tom questioning the fee, beginning shortly after it was paid, and Simon and others arguing that it had already been discussed and approved. There is no direct evidence that Sperry agreed to pay, or authorized, the fee. Simon asserts, alternatively, that under Oregon RPC 1.5(a), the fee was not “clearly excessive” because it was reasonable under the circumstances. Mr. Simon's Proposed Findings of Fact and Conclusions of Law at 13 (citing *In re Gastineau*, 317 Or 545, 550–51, 857 P2d 136 (1993)). But the first step in making this argument is to establish that a fee was approved. There is no testimonial or documentary evidence from

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<sup>7</sup> Question by Ms. Bevaqua-Lynott; answer by Tom Brenneke: “Q. The \$75,000 to Durkheimer, before it was paid, did you ever have any discussions with Mr. Drakos or Mr. Brenneke, Paul Brenneke, about—that you agreed that that money should be paid to Mr.—A. Never had any discussions.”

<sup>8</sup> Question by the Panel; answer by Tom Brenneke: “MR. MARTIN: So [Mr. Simon] had the authority to disburse but he was supposed to check with you first? THE WITNESS: Absolutely.”

<sup>9</sup> As noted, the Panel did not find Tom's demeanor as impressive as those of other witnesses, but the Panel's hesitation was not sufficient to disturb its conclusion regarding this violation, in view of other evidence.

<sup>10</sup> Questions by Mr. Williams; answers by Tom Brenneke: “Q. Okay. [Mr. Simon] had the authority to give instructions to Williams & Jensen, where the funds were at, to tell them how to disburse money by wire transfer. That was one of the things he was charged to do? A. Yes. He had that relationship with them. Q. Okay. And in terms of how he got approval to make those transfers, he talked to you and/or Paul? A. Correct.”

Tom, who was ultimately in charge of Sperry, that he approved Mr. Durkheimer’s fee at all, regardless of whether the amount is otherwise appropriate.

In light of the finding that the payment to Mr. Durkheimer was not authorized, and was therefore excessive, the Panel further concludes that Simon’s payment to Mr. Durkheimer was dishonest.<sup>11</sup> First, Simon, by his admission, took back \$25,000 of the payment to Mr. Durkheimer and applied it to his account at Stoel Rives, but did so long before he submitted a bill for the work he did at this time. *See* Ex. 223 at 3 (describing May 2010 transfer to Stoel); Ex. 81 (9/2/2010 invoice). This strikes the Panel as a sort of self-help that cannot be condoned. Second, Simon argues that misrepresentation misconduct only occurs when an attorney makes a misrepresentation, directly or by omission, that is “knowing, false, and material.” Written Closing Argument at 13 (quoting *In re Gatti*, 356 Or 32, 52, 333 P3d 994 (2014)). Mr. Simon argues that under the circumstances, his actions were simply a mistake based on Paul Brenneke’s apparent authority, and were therefore not “knowing.” Written Closing Argument at 13–14. The Panel does not agree. The Sperry partnership documents clearly lay out that Tom was the head of the general partnership in charge of the partnership’s operations, *see* Ex. 24, and Simon testified that he knew Tom was ultimately legally in charge, even if Paul might have been running things day-to-day. Trial Tr. at 155:8–24.

**D. Third Cause of Complaint: Alleged Violation of Oregon RPC 1.7(a) (self-interest conflict of interest) for *Simon v. Brenneke Fee Litigation***

The Panel is of the opinion that the Bar failed to establish, by clear and convincing evidence, that Simon engaged in a self-client conflict of interest, in violation of Oregon RPC 1.7(a), under its Third Cause of Complaint.

Under Oregon RPC 1.7(a)(2),

a lawyer shall not represent a client if the representation involves a current conflict of interest.

A current conflict of interest exists if:

....

- (2) there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer[.]

The Bar alleges that Simon had a self-interest conflict of interest, in violation of Oregon RPC 1.7(a)(2), when he continued to represent Tom, as trustee for the QPRT, after recognizing that he would need to litigate his fee dispute with Sperry, and Tom, personally, and filed litigation against them for that purpose.

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<sup>11</sup> Although the Bar does not allege it as a violation, the Panel notes that it was also arguably dishonest conduct for Simon to pay Mr. Durkheimer the \$75,000 fee with the intent to take back \$25,000 for Simon’s benefit, as a way to hide the latter payment from Jim Mercer, the attorney for Mr. Sperry and Mr. Van Ness. Ex. 56 at 1; Ex. 226 (Simon 8/26/2015 Tr.) at 81:21–82:18.

A typical self-interest conflict arises when an attorney puts his or her financial interest ahead of the client's. An exemplary case is one involving a contingent fee or a real estate commission. See *In re Gatti*, 356 Or at 53; *In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999); *In re Gildea*, 325 Or 28, 936 P2d 975 (1997). But even in the exemplary case, the possibility of a conflict does not pose a "significant risk" that the lawyer will actually give priority to his or her financial interest. See ABA Model RPC 1.7, cmt [8] (explaining that "[t]he mere possibility of subsequent harm" does not constitute a significant risk; there must be a "likelihood that a difference in interests will eventuate").

Here, the evidence shows that, in fact, Simon repeatedly ignored his financial interests in favor of representing his clients, often working for free. Indeed, to the extent one can use hindsight to determine whether a risk of conflict existed, the results from the *Travelers* litigation, in which the QPRT was dismissed through Simon's actions, see Ex. 38B at 6, suggests that there was no conflict.

Further, the Bar's Formal Ethics Opinions suggest that a fee dispute during litigation is not inherently a conflict of interest, because an attorney may not withdraw simply because fees are not being paid. See OSB Formal Ethics Op No 2005-1. In this situation, an unpaid fee, standing alone, is not sufficient to create a conflict of interest, and an attorney must continue to diligently represent his or her client. OSB Formal Ethics Op No 2005-1. Given these guidelines and the actual facts of Simon's representation of the QPRT, the Panel cannot conclude that there was a significant risk that Simon's representation of the QPRT would be materially limited by his fee litigation against Tom Brenneke.

**E. Fourth Cause of Complaint: Alleged Violation of Oregon RPC 8.4(a)(3) (dishonest conduct) for Creating a Fraudulent Document**

The Panel is of the opinion that the Bar failed to establish, by clear and convincing evidence, that Simon engaged in a misrepresentation and dishonest conduct, in violation of Oregon RPC 8.4(a)(3), under its Fourth Cause of Complaint.

As noted above, under Oregon RPC 8.4(a)(3), "[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]"

The Bar alleges that Simon is guilty of misrepresentation and dishonesty because he knowingly and falsely testified that Tom approved Simon's paying Mr. Durkheimer, and "produced a memo that he claimed to have written and sent to Thomas Brenneke on or about May 24, 2010," corroborating this fact, which was fraudulently created to serve as false evidence. Compl. ¶ 34.

Resolution of this dispute centers on whether the Bar supported its allegation that Simon fraudulently created the May 2010 memo (Ex. 56) to support the legitimacy of his payments to Mr. Durkheimer and himself.

To support its theory that the May 2010 memo was fraudulently created, the Bar relied primarily on the trial testimony of Mr. Howe. As noted above, the Panel found Mr. Howe credible. Mr. Howe testified that the PDF version of the May 2010 memo, used as evidence in this litigation, was created by direct conversion from Microsoft Word. Trial Tr. (Howe) 405:11–12. Mr. Howe arrived at this conclusion by reviewing various physical characteristics of the memo, and analyzing the metadata that accompanies the PDF file. Trial Tr. (Howe) 396:9–400:24, 401:23–403:12; *see generally* Ex. 244.

On cross-examination, however, Mr. Howe forthrightly stated that the metadata for the PDF produced as evidence in this case, and in Simon’s earlier fee litigation, does not say anything about when Simon created the underlying Microsoft Word version of the memorandum. Trial Tr. (Howe) 407:16–18 (Q: Does your analysis tell you anything about when the underlying Word document was created? A: No.).

The Bar also supports its theory with testimonial evidence from Tom regarding the existence of the memorandum. Tom testified that he never saw the May 24 memo in May 2010. Ex. 221 (Tom Brenneke 9/14/2012 Tr.) at 131:1–7. On the other hand, Simon testified that the memo was created in May 2010, on or about May 24. Ex. 226 (Simon 8/26/2015 Tr.) at 91:2–8. Mr. Simon also testified that he did not hand the memo to Tom, and may have simply placed it on his chair, or left Tom to find it in intra-office mail. Ex. 226 (Simon 8/26/2015 Tr.) at 93:2–18. These conflicting accounts are not clear and convincing evidence that the May 24, 2010 memo was created sometime other than on or near that date. The evidence is just as consistent with Simon creating a memo on or about May 24, 2010, that never reached its intended recipient.

Thus, the Bar offered no clear and convincing evidence of when the document of interest was actually written. The evidence from the Bar merely established the date when the Microsoft Word document was converted into a PDF document: December 8, 2010. The Bar needed to establish, however, that the underlying Word document was created on a date other than (and likely later than) May 24, 2010. This, the Bar did not do.

The Panel concludes that the available evidence is not clear and convincing proof that Simon created the May 24, 2010 memo sometime later in 2010 to support his story regarding the payments to Mr. Durkheimer and himself. Although the Bar’s evidence is intriguing in some parts, it fails by a significant margin to establish a case of dishonest conduct.<sup>12</sup> The Panel therefore does not find a violation of Oregon RPC 8.4(a)(3) under the Fourth Cause of Complaint.

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<sup>12</sup> The Panel recognizes that Simon had more than one “creation story” regarding the PDF version of the May 24, 2010 memo, but the Panel did not consider that clear and convincing evidence of misconduct regarding the underlying Word version.

## F. Affirmative Defenses

Mr. Simon asserted a number of affirmative defenses to the Bar's allegations of wrongdoing, as set forth below. The Panel does not find the affirmative defenses persuasive, and therefore does not alter its findings of violations.

### 1. To the First Cause of Complaint: Exigent Circumstances—QPRT—Bankruptcy Petition

Mr. Simon asserts, in defense of the First Cause of Complaint, that his actions were defensible on the grounds of exigent circumstances; that is to say, Simon was required to act promptly in filing an involuntary bankruptcy against the QPRT, or risk losing the Summerville residence to foreclosure. Ans. ¶ 35. The Panel is not aware of any case that has applied this defense to a disciplinary action, and therefore declines to accept it.

### 2. To the First and Third Causes of Complaint: Impossibility—Conflicts of Interest—QPRT and Attorney Fee Litigation

Mr. Simon asserts a defense of impossibility to the First and Third Causes of Complaint, stating that “[a]t no point during the time period of January 3, 2011 onward did Tom Brenneke alert Simon to any interests of Tom Brenneke’s, either personal or in his capacity as Trustee, from which Simon could perform an ethical analysis consistent to that alleged by the Bar.” Ans. ¶ 36.

### 3. To the Second Cause of Complaint: Impossibility—Excessive Fee—QPRT and Fee Litigation

Mr. Simon asserts that he could not have paid an “excessive” fee under the Second Cause of Complaint because the Bar investigated Mr. Durkheimer under the same disciplinary rule, and “exonerated him” for “receipt” of the “excessive fee.” Ans. ¶ 37. The Panel cannot accept this defense because the Panel has not received the details of any alleged exoneration, as noted previously.

### 4. To the Second and Fourth Causes of Complaint: Spoliation—Sperry and Fabrication Matters

Mr. Simon asserts a defense of spoliation, because Tom, the initial complainant in this disciplinary action, had exclusive custody and control of the documents and materials on which Simon bases, or would base, his defense. Ans. ¶¶ 38-41. Thus, according to Simon, because Tom has not turned over all relevant materials in his possession to Simon, or may have destroyed them, the Bar should be prevented from pursuing any claim when the absence of the spoiled evidence prevents an adequate defense. Ans. ¶¶ 38-41. The Panel is unaware of a case when the court entertained such a defense, and therefore declines to accept it here.

5. To the Second Cause of Complaint: Applicable Law—Sperry Matter

Mr. Simon asserts that California law applies to the Second Cause of Complaint, and the Bar should therefore not be allowed to prosecute that claim because it did not cite the appropriate law. Ans. ¶ 42; Simon Trial Memorandum at 19–20. The Panel believes that it is proper to apply Oregon disciplinary rules. BR 1.4(b)(2)(B).

6. To the First, Second, and Third Causes of Complaint: Failure to State a Claim

Mr. Simon argues that the First, Second, and Third Causes of Complaint fail to state a claim upon which relief can be granted because they inadequately recite various elements of the rules allegedly violated. Ans. ¶¶ 43-46. The Panel disagreed, and found the Bar’s causes of complaint sufficient.

7. To the First, Second, and Third Causes of Complaint: Failure to State a Claim as a Denial of Due Process

Mr. Simon argues that the First, Second, and Third Causes of Complaint fail to state a claim upon which relief can be granted, to such an extent that they are a violation of due process. Ans. ¶¶ 47-48. The Panel disagreed, and found the Bar’s causes of complaint constitutionally adequate.

8. To the Second Cause of Complaint: Estoppel

Mr. Simon asserts that the Bar is estopped from arguing that Simon charged an illegal or excessive fee, as alleged in the Second Cause of Complaint. According to Simon, the Bar is estopped from this argument because it investigated Mr. Durkheimer “on exactly this issue and exonerated him for ‘receipt’ of the ‘excessive fee.’” Ans. ¶ 37. According to Simon, it would therefore be impossible for him to have paid an excessive fee. Ans. ¶ 37. The Panel does not find Simon’s argument persuasive. As discussed above, the Panel concludes that Simon charged an excessive fee, consistent with the language of Oregon RPC 1.5(a). The Panel is not informed of the details of how the Bar resolved its investigation of Mr. Durkheimer. There is thus no obvious inconsistency between concluding that Simon acted wrongfully in the way that he procured the \$75,000 that went to Mr. Durkheimer, and finding that Mr. Durkheimer was not wrong to receive the money.

**G. Conclusion**

Based on the foregoing discussion, the Panel holds that the Bar carried its burden of proving, by clear and convincing evidence, that Simon violated Oregon RPC 1.9(a), as alleged in the First Cause of Complaint, and Oregon RPC 1.5(a) and Oregon RPC 8.4(a)(3), as alleged in the Second Cause of Complaint.

**V. SANCTION**

In determining the appropriate sanction, we are to follow the ABA *Standards for Imposing Lawyer Sanctions* (“Standards”). *In re Kimmell*, 332 Or 480, 487, 31 P3d 414

(2001) (citing *In re Jaffee*, 331 Or 398, 408, 15 P3d 533 (2000)). Under the *Standards*, we consider the following factors: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Standards* § 3.0. Analysis of the first three factors establishes a “presumptive sanction,” which is then adjusted by “the presence of aggravating or mitigating circumstances.” *In re Jaffee*, 331 Or at 409 (citing *Standards* § 3.0 and *Standards* §§ 5–6). As a final step, “we consider whether that adjusted sanction is consistent with Oregon case law.” *In re Jaffee*, 331 Or at 409 (citing *In re Huffman*, 328 Or 567, 587–88, 983 P2d 534 (1999)).

### **A. Nature of the Duty Violated**

In this case, based on the panel’s conclusions described above, Simon is guilty of violating duties owed to his former client to avoid conflicts of interest, and charging a client an illegal or excessive fee. These violations fall under *Standards* § 4.3: Failure to Avoid Conflicts of Interest, and *Standards* § 7.0: Violations of Other Duties Owed as a Professional.

### **B. Mental State**

The *Standards* explain that an act is done with “intent” if it is done with a “conscious objective or purpose to accomplish a particular result.” *Standards* at 8. The *Standards* explain that an act is done with “knowledge” when it is 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* at 8. The ABA Standards explain that an act is done with “negligence” when a lawyer fails to “heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 8.

In this case, the Panel does not find that the accused acted intentionally; that is, the Panel does not believe that Simon acted with the conscious objective or purpose to either engage in a former-client conflict, or charge an illegal or excessive fee. The Panel believes, instead, that Simon acted either negligently or with knowledge with respect to all the charges. In particular, the Panel finds that the circumstances described above establish that Simon knew of the conflict of interest. Further, the Panel finds that the circumstances described above establish that Simon acted negligently or with knowledge regarding his authority to make payments to Mr. Durkheimer and himself.

### **C. Injury**

According to the *Standards*, the “purpose of lawyer discipline proceedings is to protect the public and the administration of justice[.]” *Standards* § 1.1.

Here, Simon knowingly entered into an engagement that resulted in a conflict of interest, harming his former client, and dealt negligently with the funds used for the Sperry windup, disbursing money without clear authority to do so. Mr. Simon was also previously



disciplined for violations of the Bar’s Rules of Professional Conduct. Mr. Simon’s prior discipline was not, however, for violations involving conflicts of interest or charging an illegal or excessive fee.

For these violations, and before considering aggravating and mitigating factors, the *Standards* provide:

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

....

7.3 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.

Thus, before considering any aggravating and mitigating factors, the *Standards* suggest that either suspension or reprimand would be an appropriate sanction in this case.

#### **D. Aggravating and Mitigating Circumstances**

##### 1. Aggravating Factors

The aggravating factors present in this case are:

- (a) prior disciplinary offenses;
- (c) a pattern of misconduct;
- (d) multiple offenses; and
- (i) substantial experience in the practice of law (the accused was admitted to practice in 1990).

*Standards* § 9.22(a), (c), (d), and (i).

Although not listed in the *Standards*, the Panel also considered it an aggravating factor that Mr. Simon advertised on his letterhead his status as a “Former Member, Oregon State Bar Ethics Committee.” *See, e.g.*, Ex. 18.

##### 2. Mitigating Factors

The mitigating factors present in this case are:

- (e) “full and free disclosure to disciplinary board or cooperative attitude toward proceedings”;<sup>13</sup>
- (l) remorse;<sup>14</sup> and

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<sup>13</sup> The Panel did not expect Mr. Simon’s cooperativeness to be boundless, given his right to fully contest these proceedings.

(m) remoteness of prior offenses.

*Standards* § 9.32(e), (l), and (m).

The Panel views the aggravating factors as outweighing the mitigating ones, and therefore, before reviewing the case law, concludes that a suspension would be the more appropriate sanction for the established violations.

### **E. Oregon Case Law**

It is understood that “case-matching in the context of disciplinary proceedings ‘is an inexact science,’” especially when the analysis involves multiple violations in multiple factual scenarios. *In re Hostetter*, 348 Or at 602 (quoting *In re Stauffer*, 327 Or 44, 70, 956 P2d 967 (1998)). The Oregon Supreme Court’s case law can still, however, “provide some guidance” and help “demonstrate the appropriateness of the suspension in this case.” *In re Hostetter*, 348 Or at 602.

In *Hostetter*, for example, the court affirmed a 150-day suspension when an attorney violated the rule against former-client conflicts of interest (RPC 1.5(a)) and committed misrepresentations in violation of RPC 8.4(a)(3). *In re Hostetter*, 348 Or at 598–604. The court found as aggravating factors the attorney’s multiple offenses, substantial experience, and prior disciplinary offenses. *In re Hostetter*, 348 Or at 601–02. Considering the aggravating factors, the court found that the attorney had a cooperative attitude toward the disciplinary process and had an excellent reputation in the community. *In re Hostetter*, 348 Or at 602. Here, Simon committed similar types of violations, displayed the cooperativeness that might be expected, but there was only minimal commentary on his reputation.

Similarly, in *In re Campbell*, 345 Or 670, the court imposed a 60-day suspension for engaging in a former-client conflict of interest and charging an excessive fee. The attorney’s violation was aggravated by having committed multiple violations, being subject to prior discipline, and having a selfish motive. *In re Campbell*, 345 Or at 688–89. The violation was mitigated by the attorney’s cooperative attitude and there being no evidence of actual harm to the client. *In re Campbell*, 345 Or at 689. Here, Simon engaged in similar wrongdoing, and also committed multiple violations and was subject to prior discipline. On the other hand, Simon’s actions caused Sperry to suffer an actual harm in the form of paying tens of thousands of dollars’ worth of attorney fees, which it only mitigated through later litigation. In addition, Simon’s acting on a former-client conflict arguably caused Tom to resign as trustee of the QPRT, when he might not have done so otherwise.

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<sup>14</sup> Unprompted, and even before issuance of the Panel’s opinion in this case, Mr. Simon called his actions surrounding his clawback of a portion of the Durkheimer fee, the “most reprehensible thing” he has done in his professional life. Trial Tr. at 220:13. The Panel considers this to be evidence of Simon’s self-reflection and remorse.

Finally, in *In re Obert*, the court imposed a sanction of a six-month suspension when the attorney violated several ethical rules, including charging an excessive fee. *In re Obert*, 352 Or 231, 263–64, 282 P3d 825 (2012). There, the court found that the attorney caused actual injury to his clients, the Bar, the legal system, and the legal profession. In mitigation, the court noted that, in one matter, the attorney “fully and freely disclosed all relevant information to the disciplinary board and fully cooperated with [the] investigation.” *In re Obert*, 352 Or at 261. The attorney also “presented evidence of his good reputation in the community.” *In re Obert*, 352 Or at 262. The aggravating factors, which the court held outweighed those cited in mitigation, included: a history of prior disciplinary offenses, a pattern of misconduct, committing multiple offenses, and substantial experience in the practice of law. *In re Obert*, 352 Or at 261. Here, the aggravating factors are similar, and there are similar mitigating factors. On the other hand, Simon caused actual injury of much greater financial extent (tens of thousands of dollars versus \$1,200 in *In re Obert*).

Taking into account the factors above, the trial panel concludes that a suspension is the appropriate sanction in this case, and that it should extend 185 days.

## VI. CONCLUSION AND DISPOSITION

The Panel concludes that Mr. Simon violated the prohibition against engagements that result in a former-client conflict of interest, and charging an illegal or excessive fee. Considering the facts of these violations and the factors used to determine the appropriate sanction, the Panel believes that Mr. Simon should be suspended for 185 days.

IT IS SO ORDERED.

Dated: July 22, 2016.

/s/ Bryan D. Beel

Bryan D. Beel, Esq., Trial Panel Chairperson

/s/ Dylan M. Cernitz

Dylan M. Cernitz, Esq., Trial Panel Member

/s/ Charles A. Martin

Charles A. Martin, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 15-78 and 15-79  
)  
SHANNON M. KMETIC, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Wayne Mackeson  
Disciplinary Board: None  
Disposition: Violation of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.1(a)(2). Stipulation for Discipline. Six-month suspension, all but 30 days stayed, two-year probation.  
Effective Date of Order: November 1, 2016.

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Shannon M. Kmetic is suspended for six (6) months, with all but thirty (30) days of the suspension stayed, pending her successful completion of a two-year term of probation on the terms and conditions set forth in the stipulation, effective November 1, 2016, or ten (10) days after the date below, whichever is later, for violations of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.1(a)(2).

DATED this 5th day of October, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Kelly Harpster  
Kelly Harpster  
Region 7 Disciplinary Board Chairperson

## STIPULATION FOR DISCIPLINE

Shannon M. Kmetic, attorney at law (“Kmetic”), 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.

Kmetic 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 her office and place of business in Clackamas County, Oregon.

3.

Kmetic 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 11, 2015, a Formal Complaint was filed against Kmetic pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.15-1(a) (failure to segregate and safeguard client funds), RPC 1.15-1(c) (failure to deposit and maintain client funds in trust), and RPC 8.1(a)(2) (failure to respond to a lawful demand for information from 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.

### General Facts

5.

At all times relevant herein, Kmetic maintained a lawyer trust account as specified and required by the Oregon Rules of Professional Conduct for the deposit and maintenance of client funds in the course of her practice of law at Columbia Bank, account ending 9583 (“Lawyer Trust Account”).

**The Columbia Bank Overdraft 1**

**Case No. 15-78**

**Facts**

6.

On April 1, 2014, Kmetic received from a client (“Ellars”) a \$300 advance cash payment (“Ellars funds”) for legal fees. On April 5, 2014, Kmetic received from another client, Craig Mowry (“Mowry”), a \$1,000 advance cash payment (“Mowry funds”) for legal fees. Kmetic did not deposit either the Ellars funds or the Mowry funds directly into her Lawyer Trust Account.

7.

Kmetic believes that on April 10, 2014, she deposited both the Ellars funds and the Mowry funds, totaling \$1,300, into her personal bank account at Key Bank. Key Bank has no record of a cash deposit of \$1,300 on that date.

8.

On April 10, 2014, Kmetic deposited two checks totaling \$1,600 into her Lawyer Trust Account. One of the checks, drawn on her personal account at Key Bank, was in the amount of \$1,300, and allegedly represented the Ellars funds and the Mowry funds (“\$1,300 personal check”).

9.

On April 10, 2014, Kmetic drafted check number 115 in the amount of \$1,646 (“check 115”) payable from her Lawyer Trust Account. Check 115 was not related to either Ellars’s or Mowry’s legal matters. At the time that Kmetic drafted check 115, her Lawyer Trust Account did not contain sufficient client funds to cover check 115. Columbia Bank honored check 115 and disbursed \$1,646 from Kmetic’s Lawyer Trust Account, leaving a balance of \$72.80.

10.

On April 14, 2014, Kmetic’s \$1,300 personal check was dishonored by Key Bank on the basis of “uncollected funds,” and Columbia Bank reversed that portion of the April 10, 2014 deposit, drawing on the remaining funds in the Lawyer Trust Account and leaving a balance of -\$1,227.20.

### **Violations**

11.

Kmetic admits that, by her failure to segregate and safeguard the Ellars funds and Mowry funds, as well as by her failure to segregate and safeguard the client's funds represented by check 115, she violated RPC 1.15-1(a).

12.

Kmetic further admits that, by her failure to deposit and maintain the Ellars funds and Mowry funds in trust and her failure to maintain the client's funds in trust represented by check 115, she violated RPC 1.15-1(c).

### **The Columbia Bank Overdraft 2**

#### **Case No. 15-79**

#### **Facts**

13.

On May 8, 2014, check numbers 116 and 117, in the amounts of \$273 and \$150, respectively, were presented for payment from Kmetic's Lawyer Trust Account against balance of \$5 ("May overdrafts"). Columbia Bank honored the checks, disbursing \$423 from Kmetic's Lawyer Trust Account, and charged overdraft fees of \$33 for each check, leaving a balance of -\$484.

14.

On May 12, 2014, Kmetic transferred \$550 into her Lawyer Trust Account from an unknown source, to remediate the overdraft.

15.

On May 16, 2014, Disciplinary Counsel's Office ("DCO") requested that Kmetic provide an explanation regarding the May overdrafts. While Kmetic did provide some response, she did not substantively respond until on or about August 10, 2014, despite follow up inquiries in July and August, requesting that she do so.

16.

By letters to Kmetic dated September 26, 2014, November 14, 2014, April 2, 2015, and May 6, 2015, DCO made and reiterated specific requests for explanation and documentation regarding the May overdrafts. Kmetic acknowledged these letters but, believing that she had previously responded to DCO to the best of her ability, did not provide the requested explanation or documentation.

### Violations

17.

Kmetic admits that, by her failure to segregate and safeguard the clients' funds represented by check 116 and check 117, she violated RPC 1.15-1(a).

18.

Kmetic also admits that, by her failure to maintain the clients' funds represented by check 116 and check 117, she violated RPC 1.15-1(c).

19.

Kmetic further admits that her failure to ensure that she had fully and completely responded to DCO's inquiries violated RPC 8.1(a)(2).

### Sanction

20.

Kmetic 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 Kmetic'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.

- a. **Duty Violated.** Kmetic violated her duties to her clients to protect and properly deal with client property. *Standards* § 4.1. The *Standards* provide that the most important ethical duties are those obligations that a lawyer owes to clients. *Standards* at 5. Kmetic also violated her duty as a professional to ensure that she had fully responded to inquiries from disciplinary authorities. *Standards* § 7.0.
- b. **Mental State.** Kmetic acted knowingly with respect to her mishandling of client funds. "Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Standards* at 9. Kmetic acted negligently with respect to her failure to more fully respond to inquiries from DCO. "Negligence' is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Standards* at 9.



- c. **Injury.** Injury can be potential or actual. *Standards* § 3.0; *Standards* at 9; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Kmetic’s failure to use appropriate accounting procedures caused actual and potential injury to her clients as it created a risk that the clients’ funds would not be timely paid out to the appropriate persons in the correct amounts. Additionally, by failing to comply with the trust account rules, Kmetic “caused actual harm to the legal profession.” *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A pattern of misconduct. *Standards* § 9.22(c). Despite her awareness of the proper procedures, Kmetic mishandled and failed to properly account for client funds on more than one occasion. See *In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).
  2. Multiple offenses. *Standards* § 9.22(d).
  3. Substantial experience in the practice of law. *Standards* § 9.22(i). Kmetic has been admitted in Oregon since 1996.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior discipline. *Standards* § 9.32(a).
  2. Absence of a dishonest motive. *Standards* § 9.32(b).
  3. Personal or emotional problems. *Standards* § 9.32(c). Kmetic was reportedly experiencing personal and emotional problems, including severe financial stressors and mental health concerns, at the time of the misconduct in these matters.

21.

Under the *Standards*, “[s]uspension 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.” *Standards* § 4.12. A “[r]eprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional [such as responding to a Bar investigation], and causes injury or potential injury to a client, the public, or the legal system.” *Standards* § 7.3. Given that the aggravating and mitigating factors are in equipoise, a suspension is the presumptive sanction under the *Standards*.

22.

Like the *Standards*, Oregon cases suggest that a suspension is warranted for Kmetic’s conduct. *In re Obert*, 352 Or at 262 (court held that the usual sanction for violation of RPC 1.15-1 is a suspension of between 30 and 60 days); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (experienced attorney’s single unintentional mishandling of client trust account

warranted 60-day suspension). Kmetic has several such violations. The court in *Obert* also wrote that violation of RPC 8.1(a)(2) can result in a public reprimand or up to a 60-day suspension. The attorney in *Obert* was suspended for six months. An overall suspension of six months appears appropriate here as well. *See, e.g., In re Soto*, 26 DB Rptr 81 (2012) (attorney whose conduct was mitigated by personal and emotional problems was suspended for seven months when she failed to deposit client funds in trust. She also repeatedly deposited her own funds into trust, to pay her own bills and those of clients); *In re Bertoni*, 26 DB Rptr 25 (2012) (attorney suspended for 150 days when he negligently withdrew client funds from his law firm's trust account before the funds were earned, failed to maintain complete trust account records, periodically deposited his own funds into the firm trust account in amounts that exceeded bank service charges and minimum balance requirements, and was unable to distinguish client money from his own money); *In re Oh*, 23 DB Rptr 25 (2009) (attorney suspended for eight months when he failed to deposit client funds into a trust account despite a fee agreement specifying that he would do so; attorney also failed to deposit into trust funds paid by the client in advance for expenses); *In re Levie*, 22 DB Rptr 66 (2008) (attorney suspended for six months for intentionally using his trust account as his own personal account, depositing his own funds, and paying personal and business expenses directly from that account in order to shield those funds from creditors); *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (attorney was suspended for one year when it was determined that he failed to reconcile his monthly trust account statements or maintained a trust account ledger to keep track of client funds and was negligent in his trust accounting practices); *In re Goyak*, 19 DB Rptr 179 (2005) (attorney who deposited and maintained personal funds in his trust account and failed to maintain required trust account records was suspended for six months); *In re Koessler*, 18 DB Rptr 105 (2004) (attorney suspended for six months when she failed to deposit a retainer into trust, failed to maintain any records of the funds, and failed to render an accounting for them, among neglect and other charges).

23.

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 that 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.

24.

Consistent with the *Standards* and Oregon case law, the parties agree that Kmetic shall be suspended for six (6) months for her violations of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.1(a)(2), with all but thirty (30) days of the suspension stayed, pending Kmetic's successful completion of a two-year term of probation. The sanction shall be effective

November 1, 2016, or ten (10) days after approval by the Disciplinary Board, whichever is later (“effective date”).

25.

Kmetic’s license to practice law shall be suspended for a period of thirty (30) days beginning November 1, 2016, or ten (10) days after approval by the Disciplinary Board, whichever is later (“actual suspension”), assuming all conditions have been met. Kmetic understands that reinstatement is not automatic and that she cannot resume the practice of law until she 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 Kmetic re-attains her active membership status with the Bar, Kmetic shall not practice law or represent that she is qualified to practice law, shall not hold herself 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.

26.

Probation shall commence upon the date Kmetic is reinstated to active membership status (“commencement date”) and shall continue for a period of two (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, Kmetic shall abide by the following conditions:

- (a) Kmetic will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with her probationary terms.
- (b) Kmetic 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, Kmetic shall attend not less than eight (8) MCLE accredited programs, for a total of twenty-four (24) hours, which shall emphasize law practice management, case management, time management, client communications, appropriate fee agreements, and trust account management. These credit hours shall be in addition to those MCLE credit hours required of Kmetic for her normal MCLE reporting period. The Ethics School requirement does not count towards the twenty-four (24) hour requirement.
- (d) Upon completion of the CLE programs described in paragraph 26(c), and prior to the end of her period of probation, Kmetic shall submit an Affidavit of Compliance to DCO.
- (e) At least once during each month of the period of probation, Kmetic shall review all active client files to ensure that she has appropriate fee agreements for the type of matter and funds in her possession related to that client file.

- (f) During the period of probation, Kmetic 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 and reconcile at least once each month her trust account records and client ledgers with her monthly lawyer trust account bank statements.
- (g) For the period of probation, Kmetic will employ a bookkeeper—approved in advance by DCO—to assist in the monthly reconciliation of her 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, Kmetic shall arrange for an accountant to conduct an audit of her lawyer trust account and to prepare a report of the audit for submission to DCO within 30 days thereafter.
- (i) Leonard J. Kovac shall serve as Kmetic’s probation supervisor (“Supervisor”). Kmetic shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Kmetic’s clients, the profession, the legal system, and the public.
- (j) Beginning with the first month of the period of probation, Kmetic shall meet with Supervisor in person at least once a month for the purpose of:
  - (1) Allowing her Supervisor to review the status of Kmetic’s law practice and her 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 twenty percent (20%) of her current caseload, whichever is greater, to determine whether Kmetic is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect her clients’ interests upon the termination of employment.
  - (2) Permitting her Supervisor to inspect and review Kmetic’s accounting and record keeping systems to confirm that she is reviewing and reconciling her lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Kmetic agrees that her Supervisor may contact and obtain information from all employees and independent contractors who assist Kmetic in the review and reconciliation of her lawyer trust account records to facilitate the inspection and review required by this provision.

- (k) Kmetic authorizes her Supervisor to communicate with DCO regarding Kmetic's compliance or noncompliance with the terms of her probation and to release to DCO any information DCO deems necessary to permit it to assess Kmetic's compliance.
- (l) Within seven (7) days of the commencement date, Kmetic 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. Kmetic shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (m) Kmetic 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, utilizing and documenting appropriate fee agreements, and engaging in effective trust account accounting and management. No later than thirty (30) days after recommendations are made by the PLF, Kmetic shall adopt and implement those recommendations.
- (n) No later than sixty (60) days after recommendations are made by the PLF, Kmetic shall provide DCO a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of her consultation(s) with the PLF, identifying the recommendations that she has adopted and implemented, and identifying any specific recommendations she has not implemented and explaining why she has not adopted and implemented those recommendations.
- (o) A member of the State Lawyer's Assistance Committee ("SLAC") or such other person approved by DCO in writing shall monitor Kmetic's probation ("Monitor"), and Kmetic agrees to enter into and comply with the terms of a Monitoring Agreement with SLAC. Kmetic shall notify SLAC within fourteen (14) days of the effective date of:
  - (1) the existence and contents of this Stipulation for Discipline;
  - (2) the history and status of any mental health issues, Oregon Attorney Assistance Program ("OAAP") treatment or programs in which Kmetic has participated or is participating; and
  - (3) discuss with SLAC whether and how to modify her current treatment plan to best accomplish the objectives of Kmetic's probation.

- (p) Prior to the probationary period, Kmetic shall arrange for and meet with a mental health care professional acceptable to DCO and Kmetic's Monitor, to evaluate Kmetic and develop a course of treatment, if appropriate. Kmetic shall arrange for and meet with her current treatment provider or another health care professional acceptable to DCO and Monitor to implement a course of treatment that will address any identifiable concerns.
- (q) Kmetic shall meet with Monitor as often as recommended by SLAC, and shall comply with all reasonable requests and recommendations made by SLAC to supplement her treatment and to promote compliance with this Stipulation for Discipline and as necessary for the purpose of reviewing Kmetic's compliance with the terms of the probation. Kmetic shall cooperate and shall comply with all reasonable requests of SLAC that will allow SLAC and DCO to evaluate her compliance with the terms of this Stipulation for Discipline.
- (r) Kmetic authorizes Monitor to communicate with DCO regarding Kmetic's compliance or noncompliance with the terms of her probation and to release to DCO any information DCO deems necessary to permit it to assess Kmetic's compliance.
- (s) Kmetic shall continue regular treatment sessions with her current treatment provider or another treatment provider determined by SLAC to be appropriate.
- (t) Kmetic agrees that, if SLAC is alerted to facts that raise concern that she may be violating her requirements as described in paragraph 37(o) above, she will participate in a further evaluation at the request and direction of SLAC.
- (u) Kmetic shall continue to attend regular counseling/treatment sessions with her treatment provider or the approved health care professional as recommended or prescribed for the entire term of her probation. Kmetic shall obtain and take or continue to take, as prescribed, any health-related medications.
- (v) Kmetic shall not terminate her counseling/treatment or reduce the frequency of her counseling/treatment sessions without first submitting to DCO a written recommendation from her treatment provider or the health care professional that her counseling/treatment sessions should be reduced in frequency or terminated. In the absence of such a written recommendation, Kmetic acknowledges that she cannot terminate her counseling/treatment or reduce the frequency of her counseling/treatment sessions absent an independent evaluation by a second professional acceptable to DCO and Monitor that confirms the termination or reduction is medically appropriate.

- (w) Kmetic consents to the release of information by her treatment provider, mental health or substance abuse treatment program or provider, OAAP, AA, NA, or any designee, to SLAC and to DCO, regarding her treatment plan, her progress under that plan, and her compliance with the terms of this Stipulation for Discipline; waives any privilege or right of confidentiality to permit such disclosure; and agrees to execute such releases as may be required by such providers upon request by Supervisor, Monitor, SLAC or DCO. Kmetic acknowledges and agrees that SLAC shall promptly report to DCO any violation of the terms of this Stipulation for Discipline.
- (x) On a monthly basis, on dates to be established by Disciplinary Counsel beginning no later than thirty (30) days after the commencement date, Kmetic shall submit to DCO a written "Compliance Report," approved as to substance by her Supervisor and Monitor, advising whether Kmetic is in compliance with the terms of this Stipulation for Discipline, including:
  - (1) The dates and purpose of Kmetic's meetings with Supervisor and Monitor.
  - (2) The number of Kmetic's active cases and percentage reviewed in the audit with Supervisor per paragraph 37(j) and the results thereof.
  - (3) Whether Kmetic has completed the other provisions recommended by Supervisor, if applicable, and complied with requests by Monitor.
  - (4) Whether Kmetic has not complied with any term of probation in this Stipulation for Discipline and, in that event, reason for the noncompliance, and the steps taken to correct the noncompliance.
- (y) Kmetic is responsible for any costs incurred by her in complying with the requirements under the terms of this Stipulation for Discipline and the terms of probation.
- (z) Kmetic's failure to comply with any term of this Stipulation for Discipline, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Supervisor, Monitor, or SLAC shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (aa) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (bb) The SPRB's decision to bring a formal complaint against Kmetic for unethical conduct that occurred or continued during the period of her probation shall constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

27.

Kmetic 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, Kmetic has arranged for Leonard J. Kovac, an active member of the Bar, to either take possession of or have ongoing access to Kmetic's client files and serve as the contact person for clients in need of the files during the term of her suspension. Kmetic represents that Leonard J. Kovac has agreed to accept this responsibility.

28.

Kmetic 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. Kmetic 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.

29.

Kmetic 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. This requirement is in addition to any other provision of this agreement that requires Kmetic to attend or obtain continuing legal education (CLE) credit hours.

30.

Kmetic 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 Kmetic is admitted: None.

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 8th day of September, 2016.

/s/ Shannon M. Kmetic

Shannon M. Kmetic

OSB No. 963302

APPROVED AS TO FORM AND CONTENT:

/s/ Wayne Mackeson

Wayne Mackeson

OSB No. 823269

EXECUTED this 15th day of September, 2016.

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. 16-99 and 16-100  
)  
GERALD NOBLE, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Frederic E. Cann  
Disciplinary Board: None  
Disposition: Violation of RPC 1.8(a), RPC 1.15-1(a), and RPC 1.15-1(c). Stipulation for Discipline. 60-day suspension.  
Effective Date of Order: June 7, 2018

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Noble is suspended for 60 days, effective on June 7, 2018, at the conclusion of his current two-year suspension, and prior to the commencement of his period of probation, for violation of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.8(a).

DATED this 27th day of September, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Gerald Noble, attorney at law (“Noble”), 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.

Noble was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 7, 2010, and has been a member of the Bar since that time, having his office and place of business in Multnomah County, Oregon.

3.

Noble is currently suspended for unrelated disciplinary violations as of June 6, 2016, for four years, two years stayed, pending successful completion of a two-year probation. *In re Noble*, 30 DB Rptr 116 (2016) (“*Noble I*”).

4.

Noble 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).

5.

On July 9, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Noble for alleged violations of RPC 1.15-1(a) (failure to safeguard and keep separate client property), RPC 1.15-1(c) (failure to deposit and maintain client funds in trust until earned), and RPC 1.8(a) (business transaction with a client without required disclosures) 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

6.

Prior to December 2015, Noble entered into a written fee agreement with a litigation client that allowed him to advance costs (“client loan”), which would only be repaid if the case were successful. However, the fee agreement did not specify the terms of such a loan, if it should occur. Specifically, the fee agreement did not address:

- (1) whether the transaction and terms of any client loan were fair and reasonable to the client and fully disclosed in a manner that could be reasonably understood by the client;
- (2) the desirability of seeking advice of independent counsel on the client loan; and
- (3) the essential terms of the client loan and the Noble's role in the transaction, including whether Noble was representing the client in the client loan.

7.

During the representation, Noble determined that he needed to advance costs related to the client's legal matter. As Noble did not maintain any other operating checking accounts, he placed \$400 of his own funds in his lawyer trust account that represented the proceeds of the loan to his client ("client loan proceeds"). The client loan proceeds became client funds upon their deposit into Noble's lawyer trust account.

8.

In the course of preparing for trial, Noble wrote a number of checks for witness fees and other costs from the client loan proceeds.

9.

After trial was over and the client's case was concluded in December 2015, Noble withdrew the remaining client loan proceeds from his trust account. As the case was not successful, Noble kept the remaining client loan proceeds for himself. Noble did not realize that there were several outstanding witness fee checks that had not been negotiated when he withdrew the remaining client loan proceeds from the trust account.

10.

On February 9, 2016, prior to the start of his present disciplinary suspension, a check for \$80 was presented for payment on his lawyer trust account against a zero balance. The check was honored by the bank, which overdrew the account by \$80. Noble notified the Bar of this overdraft by email on February 10, 2016. An overdraft notification was received from Bank of America on February 16, 2016.

11.

On March 3, 2016, a check for \$40 was presented for payment on Noble's lawyer trust account against a zero balance. The check was again honored by the bank and overdrew the account by \$40.

## Violations

12.

Noble admits that, by removing the remaining client loan proceeds from trust, he failed to safeguard client property and removed client funds from trust before they were earned, in violation of RPC 1.15-1(a) and (c).

13.

Noble further admits that his lack of explanation about possible terms of the client loan and its possible repayment amounted to a business transaction with his client that violated RPC 1.8(a), because he failed to obtain informed consent confirmed in writing, and failed to provide necessary disclosures.

## Sanction

14.

Noble 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 Noble’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.

- a. **Duty Violated.** Noble violated his duty to clients to preserve client property. *Standards* § 4.1. He also violated his duty to clients to avoid conflicts of interest by entering into business transactions with them, without adequate disclosures. *Standards* § 4.3. The *Standards* presume that the most important ethical duties are those that a lawyer owes to clients. *Standards* at 5.
- b. **Mental State.** Noble acted negligently and knowingly. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9.

Noble knowingly entered into an improper business transaction with his client, particularly because, at the time that he entered into that transaction, he was being prosecuted by the Bar for the same violation in connection with his taking loans from other clients.

Noble knowingly removed client funds from trust but negligently believed that he was permitted to do so at the conclusion of trial.

- c. **Injury.** When determining injury, both actual and potential injury may be considered. *Standards* at 9; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992).

Noble’s failure to use appropriate accounting procedures caused actual and potential injury to his client, as it created a risk that the client’s funds would not be timely paid out to the appropriate persons in the correct amounts, and that actually occurred but for the bank’s election to pay those NSF checks. Additionally, by failing to comply with the trust account rules, Noble “caused actual harm to the legal profession.” *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012).

Noble’s loan to his client with no specific written agreement caused potential injury insofar as the fee agreement indicates that the client is ultimately responsible for any advanced costs but does not address the terms of repayment, any interest that may be charged, or time frames for repayment.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior record of discipline. *Standards* § 9.22(a). This aggravating factor refers to offenses that have been adjudicated prior to imposition of the sanction in the current case. Accordingly, Noble’s recent four-year suspension in *In re Noble*, 30 DB Rptr 116 (2016) (“*Noble I*”), also in part for trust account violations and improper business transactions with clients, does count as prior discipline to some extent. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997). However, its weight in aggravation is diminished by the fact that Noble’s misconduct in the present matter pre-dated the imposition of that suspension. *See In re Kluge*, 335 Or 326, 351, 66 P3d 492 (2003) (fact that accused lawyer not sanctioned for offenses before committing the offenses at issue in current case diminishes weight of prior offense); *In re Huffman*, 331 Or 209, 227–28, 13 P3d 994 (2000) (relevant timing of current offense in relation to prior offense is pertinent to significance as aggravating factor); *see also In re Starr*, 326 Or 328, 347–48, 952 P2d 1017 (1998), *reinstatement den*, 330 Or 385 (2000) (weight of prior discipline somewhat diminished because it occurred at roughly the same time as events giving rise to the present proceeding—that is, the subsequent misconduct did “not reflect a disregard of an earlier adverse ethical determination”).
  2. A pattern of misconduct. *Standards* § 9.22(c). Noble mishandled client funds and engaged in business transactions with a client in a fashion similar to his prior discipline for the same violations. *See In re*

*Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).

3. Multiple offenses. *Standards* § 9.22(d).

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

1. Timely good-faith effort to rectify the consequences of his misconduct. *Standards* § 9.32(d). When Noble learned of the circumstances that led to the overdrafts of his lawyer trust account, in addition to correcting the overdrafts, he reviewed his systems and added categories to his client ledger cards to better track when checks written on behalf of the client had cleared.
2. Full and free disclosure and cooperative attitude in these proceedings. *Standards* § 9.32(e). Noble reported the first overdraft before the bank notified the Bar and timely cooperated with requests for information related to the investigation of his conduct.
3. Remorse. *Standards* § 9.32(l). Noble has expressed remorse that he did not sooner appreciate the proper handling of client funds.

15.

Under the *Standards*, “[s]uspension 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. Similarly, a “[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” *Standards* § 4.32.

16.

Oregon cases are in accord. *In re Obert*, 352 Or at 262 (court held that the usual sanction for violation of RPC 1.15-1 is a suspension of between 30 and 60 days); *see also In re Cauble*, 27 DB Rptr 288 (2013) (attorney was suspended for 45 days when, relying upon direction from one client as spokesperson for a group of clients, who were involved in litigation in which the first client was not a party, the attorney used funds advanced by the group to pay past-due legal fees owed only by the first client); *In re Ireland*, 26 DB Rptr 47 (2012) (attorney suspended 30 days when she failed to deposit client funds in trust upon receipt; even if attorney mistakenly believed, as she asserted, that the money was a gift from the client and not payment for future legal services, she did not deposit the funds into trust once she learned that her belief was incorrect); *In re Peterson*, 348 Or 325, 232 P3d 940 (2010) (attorney who kept poor trust accounting records and failed to maintain individual client ledgers or reconcile his monthly trust account bank statements with internal records, was suspended for 60 days following an overdraft on his trust account. Attorney also improperly removed client funds from trust without a written agreement with the clients

allowing him to do so); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (experienced attorney's single unintentional mishandling of client trust account warranted 60-day suspension).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that Noble shall be suspended for 60 days for his violations of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.8(a), with the period of suspension to commence on June 7, 2018, at the conclusion of his current two-year suspension in *Noble I*, and prior to the commencement of the period of probation, as defined in that Stipulation for Discipline.

18.

Noble 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, Noble has arranged for Frederic Cann ("Cann"), Cann Lawyers PC, 851 SW 6th Avenue, Ste. 1500, Portland, OR 97204, an active member of the Bar, to either take possession of or have ongoing access to Noble's client files and serve as the contact person for clients in need of the files during the term of his suspension. Noble represents that Cann has agreed to accept this responsibility. The custodian for Noble's files may be changed from Cann to another active Oregon lawyer during the term of Noble's actual or imposed stayed suspension with ten (10) days prior written notice to DCO.

19.

Noble 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. Noble also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

20.

Noble 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. This requirement is in addition to any other provision of this agreement that requires Noble to attend or obtain continuing legal education (CLE) credit hours.

21.

Noble 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. Noble also represents that he will be reporting the disposition



of this matter to all other jurisdictions with which he is affiliated. Other jurisdictions in which Noble is known to be admitted: US District Court for the District of Oregon and US Court of Appeals for the 9th Circuit.

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 7th day of September, 2016.

/s/ Gerald Noble

Gerald Noble

OSB No. 104634

APPROVED AS TO FORM AND CONTENT:

/s/ Frederic E. Cann

Frederic E. Cann

OSB No. 781604

EXECUTED this 21st day of September, 2016.

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. 16-67  
)  
MICHAEL R. SANDOVAL, )  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: Christopher R. Hardman  
Disciplinary Board: None  
Disposition: Violation of RPC 3.5(b). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: October 14, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Sandoval is publicly reprimanded, for violation of RPC 3.5(b).

DATED this 14th day of October, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Michael R. Sandoval, attorney at law (“Sandoval”), 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.

Sandoval was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 9, 1981, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On May 21, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Sandoval for his alleged violation of RPC 3.5(b) (*ex parte* communications on the merits of an action) 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 June 22, 2015, Sandoval received an email from a petitioner/opposing party in a protective proceeding seeking the appointment of a fiduciary. The content and tone of the email were alarming to Sandoval in part because the petitioner had terminated his attorney alleging improper conduct between the petitioner’s attorney and Sandoval; the petitioner’s email informed Sandoval that he intended to retain a new attorney. In response, Sandoval sent a letter to the court implying that the petitioner was unstable and unfit to serve as a conservator or guardian. Sandoval did not discuss his concerns or vet the claims made to the court with any person in the mental health profession before presenting them to the court.

6.

Sandoval believed that the petitioner was not represented and mistakenly believed that the petitioner could not appear in this matter without representation. Sandoval further

erroneously believed that, in the absence of counsel, he was not required to copy the petitioner on his communications to the court.

7.

Sandoval did not copy the petitioner/opposing party on his communications with the court, but thereafter provided them to the petitioner's attorney once Sandoval became aware that the petitioner was represented by counsel.

### **Violations**

8.

Sandoval admits that his *ex parte* correspondence to the court was on the merits of the cause but not authorized by law or court order, and thus violated RPC 3.5(b).

### **Sanction**

9.

Sandoval 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 Sandoval'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.

- a. **Duty Violated.** Sandoval violated his duty to the legal system to avoid improper communications with individuals in the legal system. *Standards* § 6.3.
- b. **Mental State.** Sandoval was negligent in recognizing and fulfilling his obligation to contemporaneously copy the opposing party in his communications with the court. 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* at 9.
- c. **Injury.** Injury can be either potential or actual. *Standards* § 3.0; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). In this case, Sandoval's communication caused potential injury insofar as it could have influenced the court to act against the petitioner's interests without giving him the opportunity to respond.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Vulnerability of victim. *Standards* § 9.22(h). The petitioner was a lay person who was unfamiliar with court process and ill-equipped to

handle legal issues surrounding due process that should have been afforded to him.

2. Substantial experience in the practice of law. *Standards* § 9.22(i). Sandoval has been licensed to practice in Oregon since 1981.

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

1. Absence of a prior record of discipline. *Standards* § 9.32(a).
2. Full and free disclosure in the disciplinary investigation. *Standards* § 9.32(e).

10.

Under the *Standards*, a public “[r]eprimand 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.

11.

Case law is in accord for negligent *ex parte* communications that did not have a measurable effect on the outcome of the proceedings. *See, e.g., In re Jaspers*, 28 DB Rptr 211 (2014) (attorney reprimanded when he filed for an *ex parte* emergency custodial order that did not meet the statutory requirements and thus was not “authorized by law”); *In re Mercer*, 24 DB Rptr 240 (2010) (reprimand for attorney who personally presented a form of judgment to the court for signature without informing opposing counsel, who had objected, of the date when the matter would be heard); *In re McGavic*, 22 DB Rptr 248 (2008) (reprimand when attorney’s office negligently submitted a form of judgment to the court without serving opposing counsel with a copy); *In re Aylworth*, 22 DB Rptr 77 (2008) (reprimand when, after acknowledging to opposing counsel that the defendant was entitled to recover attorney fees and costs, attorney submitted to the court a judgment of dismissal without costs to either party; a judgment that was later set aside when opposing counsel learned of it).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Sandoval shall be publicly reprimanded for violation of RPC 3.5(b), the sanction to be effective upon approval by the Disciplinary Board.

13.

Sandoval 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.

Sandoval 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 Sandoval is admitted: None.

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 13th day of September, 2016.

/s/ Michael R. Sandoval

Michael R. Sandoval

OSB No. 810229

EXECUTED this 6th day of October, 2016.

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. 16-90  
)  
MARIANNE G. DUGAN, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3 and RPC 1.4(a). Stipulation for  
Discipline. Public reprimand.  
Effective Date of Order: October 20, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Marianne G. Dugan is publicly reprimanded for violation of RPC 1.3 and RPC 1.4(a).

DATED this 20th day of October, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

/s/ Jet Harris  
Jet Harris, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Marianne G. Dugan, attorney at law (“Dugan”), 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.

Dugan was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1993, and has been a member of the Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

Dugan 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 9, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Dugan for alleged violations of RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (duty to keep client reasonably informed of the status of a matter and comply with reasonable requests for information) 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.

Stephanie Shorb (“Shorb”) retained Dugan in August 2012 to develop a claim and make demand on the Oregon Health Authority (“OHA”) and the Lane Individual Practice Association for the wrongful death of her daughter. After researching and drafting a demand letter, and sending tort claims notices to the appropriate agencies, almost two years passed before Dugan took substantive action for Shorb.

6.

During this nearly two-year period, Dugan received multiple inquiries from Shorb urging action or requesting a status report, many of which went unanswered. In light of



Dugan's frequent promises to finish and send the demand within the next few days, Shorb's repeated follow-up inquiries were reasonable.

7.

Dugan did eventually prepare and file a civil complaint against OHA in November 2014, in advance of the statute of limitations, and the matter was resolved in November 2015.

### **Violations**

8.

Dugan admits that by failing to take constructive action to advance her client's legal objective over a nearly two-year period, she neglected a legal matter entrusted to her, in violation of RPC 1.3. Dugan further admits that her failures to respond to Shorb's requests for information about the status of her matter violated RPC 1.4(a).

### **Sanction**

9.

Dugan 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 Dugan'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.

- a. **Duty Violated.** Dugan violated her duty to her client to act with reasonable diligence and promptness in representing her, including the duty to adequately communicate with her. *Standards* § 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5.
- b. **Mental State.** There are three recognized mental states under the *Standards*. "Intent" is the conscious objective or purpose to accomplish a particular result." *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Standards* at 9. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9.

Initially, Dugan's inattention to Shorb's legal claims may have been negligent. However, within a short period of time, Shorb's inquiries on the status of the matter made Dugan's avoidance of the matter knowing. Dugan then also knowingly failed to respond to Shorb's requests for information.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Dugan’s failure to communicate with Shorb resulted in actual injury in the form of frustration and anxiety. *See In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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). The neglect itself also resulted in potential injury to Shorb’s legal matter but not actual injury, as the matter was filed before Shorb’s rights were adversely impacted and a settlement was achieved.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A prior record of relevant discipline. *Standards* § 9.22(a). In 2012, Dugan was publicly reprimanded for a violation of RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). *In re Dugan*, 26 DB Rptr 277 (2012). In that matter, Dugan submitted a declaration in support of her motion for summary judgment without more completely verifying the accuracy of the assertions it contained.
  2. Substantial experience in the practice of law. *Standards* § 9.22(i). Dugan was admitted to practice law in Oregon in 1993.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a selfish or dishonest motive. *Standards* § 9.32(b).
  2. Personal or emotional problems. *Standards* § 9.32(c). Dugan reportedly experienced a significant personal trauma that rendered it difficult for her to focus on her legal practice for a period of the time that she delayed in attending to Shorb’s legal matter or responding to her inquiries.
  3. Cooperative attitude toward disciplinary investigation and proceedings. *Standards* § 9.32(e).
  4. Remorse. *Standards* § 9.32(i). Dugan has expressed remorse and apologized for the unusually long delay in advancing Shorb’s claim.

10.

Under the *Standards*, public “[r]eprimand 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 fails to perform services for a client and causes injury or potential injury to a client.” *Standards* § 4.42(a). On balance, Dugan’s mitigating factors outweigh those in aggravation and support that a reprimand is a sufficient sanction for her misconduct in this matter.

11.

Oregon cases likewise provide that a public reprimand is appropriate for Dugan’s violations, when mitigation outweighs aggravation. *See, e.g., In re Bryant*, 25 DB Rptr 167 (2011) (attorney with more mitigation than aggravation was reprimanded when he failed to timely file a request for a hearing in a child support administrative proceeding, failed to communicate a settlement proposal to his client or respond to the proposal, failed to appeal the order, and failed to respond to the client’s requests for information); *In re Slininger*, 25 DB Rptr 8 (2011) (attorney who failed to respond to his incarcerated client’s requests to correct an error in the criminal judgment was reprimanded when his inaction resulted in his client serving a longer sentence, having been wrongfully denied credit for good time, but when attorney had substantial mitigation); *In re Pieretti*, 24 DB Rptr 277 (2010) (respondent-attorney with greater mitigation was reprimanded when, after his personal-injury client agreed to abate the case in order to submit the dispute to arbitration, respondent took no further action over several years, resulting in dismissal of the case).

12.

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

13.

Dugan 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.

14.

Dugan 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 Dugan is admitted: United States Supreme Court, United States Court of Federal Claims, United States District Court of Oregon, United States District Court for the Third Circuit, United States District Court for the Sixth Circuit, United States District Court for the Eighth Circuit, United States District Court for the Ninth Circuit, Federal Circuit Court of Appeals, and Eastern and Western Districts of Michigan.

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 13th day of September, 2016.

/s Marianne G. Dugan

Marianne G. Dugan

OSB No. 932563

EXECUTED this 21st day of September, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey, OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-63  
)  
ERIC EINHORN, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Lorena M. Reynolds, Chairperson  
James K. Walsh  
Charles H. Martin, Public Member  
Disposition: Violation of RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 8.4(a)(3). Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: October 22, 2016

**TRIAL PANEL OPINION**

**INTRODUCTION**

In this disciplinary proceeding the Accused, Eric Einhorn (“Einhorn”), has been charged with eight violations of the Rules of Professional Conduct (“RPC”). On April 22, 2016, the Trial Panel Chairperson entered an order of default against Einhorn. A trial panel was appointed, consisting of Lorena Reynolds, Chair; James K. Walsh, attorney member; and Charles Martin, public member. On August 12, 2016, the trial panel convened and reached the following decision and recommendation.

The trial panel first determined whether the allegations of the Formal Complaint constituted a violation of the disciplinary rules and then determined a recommendation for sanction. BR 5.8(a). *See In re Koch*, 345 Or 444, 198 P3d 910 (2008); *In re Kluge*, 332 Or 251, 253, 27 P3d 102 (2001). Based on Einhorn’s default, the allegations of the Formal Complaint were deemed to be true. BR 5.8(a). The trial panel decided that the facts set forth in the Formal Complaint established violations of the rules by clear and convincing evidence and that the appropriate sanction to be imposed was disbarment.

## SUMMARY OF FACTS AND VIOLATIONS

Einhorn was charged with neglect of a legal matter in violation of RPC 1.3; failing to adequately communicate with his client in violation of RPC 1.4(a); charging or collecting an excessive fee in violation of RPC 1.5(a); failing to safeguard and segregate client funds in a trust account in violation of RPC 1.15-1(a); failing to deposit and maintain client funds in a trust account, to be withdrawn only as fees are earned in violation of RPC 1.15-1(c); failing to promptly deliver to clients property that clients are entitled to receive and upon request by the client to promptly render a full accounting for the property in violation of RPC 1.15-1(d); knowingly failing to respond to a lawful demand for information from a disciplinary authority in violation of RPC 8.1(a)(2); and engaging in conduct involving dishonesty in violation of RPC 8.4(a)(3).

The relevant facts were deemed to be true:

In May 2014, Elizabeth Gregory (“Gregory”) retained Einhorn to help her resolve marital property issues that remained from her dissolution of marriage proceeding. On or about June 9, 2014, Gregory’s father, Gregory Alexander (“Alexander”), paid Einhorn a \$3,000 retainer. Einhorn did not deposit the \$3,000 into his lawyer trust account; he, instead, negotiated it.

Other than the initial meeting with Gregory, and a few early exchanges of emails on the terms of the representation, Einhorn took no action on Gregory’s legal matter. In and between June 2014 and February 2015, Gregory and Alexander made multiple attempts to contact Einhorn, asking about the status of Gregory’s legal matter and requesting additional information. Einhorn’s phone was disconnected and he failed to respond to Gregory’s or Alexander’s inquiries.

After receiving no response from Einhorn, Gregory terminated Einhorn’s representation and requested that Einhorn provide them with an accounting and refund of the unearned portion of her retainer. Einhorn did not respond and failed to make a refund of unearned fees or make an accounting.

Alexander complained to the Bar and on February 13, 2015, Assistant General Counsel Scott A. Morrill (“Morrill”) with the Oregon State Bar Client Assistance Office (“CAO”) requested Einhorn’s response. Einhorn failed to respond to CAO attempts to obtain his response to the complaint. It appeared that Einhorn had essentially walked away from his legal practice without giving notice to his client. CAO referred the complaint to Disciplinary Counsel’s Office (“DCO”) on February 20, 2015.

On February 27, 2015, DCO requested Einhorn’s response to Gregory’s complaint. When Einhorn failed to respond, DCO reiterated its request in letters sent by certified mail on March 7, 2015, and April 22, 2015, which Einhorn received. Einhorn did not respond.

Einhorn signed a certified mail receipt for the April 22, 2015, letter sent to his record address, and another on May 18, 2015. In those letters, Disciplinary Counsel warned Einhorn that a failure to respond could violate RPC 8.1(a)(2), but he did not respond. Pursuant to BR 7.1, Disciplinary Counsel petitioned the Disciplinary Board for Einhorn's suspension and notified Einhorn of this action at his record address.

On or about October 13, 2015, both Disciplinary Counsel and the DCO Investigator, Lynn Bey-Roode, contacted Einhorn by telephone. Einhorn promised to provide a response to DCO inquires, but failed to do so.

### FINDINGS AND REASONING

Because the trial panel finds the Accused guilty of impropriety with client funds and fees and dishonesty, and the sanction recommended for this violation is that of disbarment, sanctions for the other charges will not be addressed as they are moot.

#### **RPC 1.5/RPC 1.15-1 (a)–(c)—Impropriety with client funds and fees**

RPC 1.5(a) prohibits lawyers from entering into agreements for, charging, or collecting an illegal or clearly excessive fee.

RPC 1.15-1(a) requires a lawyer to hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property.

RPC 1.15-1(c) requires a lawyer to deposit into trust legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless earned on receipt or nonrefundable.

RPC 1.15-1(d) provides:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Einhorn was required to return Gregory's unearned retainer. When she made the request, Einhorn was required to promptly render a full accounting. *See In re Eakin*, 334 Or 238, 48 P3d 147 (2002); *In re Bennett*, 331 Or 270, 14 P3d 66 (2000); *In re Balocca*, 342 Or 279, 291–93, 151 P3d 154 (2007); *In re Schaffner*, 325 Or 421, 939 P2d 39 (1997). He therefore violated RPC 1.15-1(d).

When Einhorn collected Gregory's retainer and negotiated it before he earned any fees, he violated RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c). The Oregon Rules of Professional Conduct require lawyers to maintain client funds in the lawyer's trust account until earned. *In re Balocca*, 342 Or at 287–88; *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994).

Despite this requirement, Einhorn collected an advance payment of fees and endorsed the \$3,000 check, did not deposit it into trust and, after not completing the work, never returned the unearned portion of the retainer. This constituted a failure to hold Gregory's property separate from Einhorn's own property, a failure to maintain unearned fees in trust until earned, a failure to return unearned fees after he abandoned work, and, because he did not return the unearned portion of the fee, charging and collecting an excessive fee in view of the work performed, in violation of RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), and 1.15-1(d).

#### **RPC 8.4 (a)(3)—Dishonesty**

RPC 8.4(a)(3) prohibits a lawyer from engaging in conduct involving dishonesty. Knowing conversion of client funds is dishonesty. *In re Martin*, 328 Or 177, 186, 970 P2d 638 (1998). Taking money before it is earned is conversion. *In re Martin*, 328 Or at 188.

The trial panel finds that Einhorn either intended to convert client funds when he failed to deposit Gregory's retainer into trust or knew that his conduct was culpable. *In re Peterson*, 348 Or 325, 335, 232 P3d 940 (2010). The Bar has met the burden of proof. The trial panel specifically finds, based on the evidence and reasonable inferences that can be drawn from that evidence, that Einhorn took and withheld Gregory's funds with the "intent to appropriate that property to himself." *In re Holman*, 297 Or 36, 66, 682 P2d 243 (1984).

In September 2014, Einhorn was sanctioned for failure to refund the unearned portion of a retainer in violation of RPC 1.15-1(d). Therefore, at the time Einhorn agreed to represent Gregory in May 2014, while that previous case was pending, he was well aware that it was unethical to fail to return an unearned retainer. Because of Einhorn's knowledge of this requirement, along with his failure to deposit the funds in trust, the trial panel concludes that Einhorn knew that his failure to refund Gregory's retainer was culpable in some respect, even in the unlikely event that he did not know it was a precise violation of RPC 8.4(a)(3).

#### **SANCTION**

Einhorn breached duties he owed to Gregory when he improperly handled her funds. *ABA Standards for Imposing Lawyer Sanctions* ("Standards") §§ 4.4, 4.1. He breached his duty to maintain his personal integrity when he engaged in conduct involving dishonesty. *Standards* § 5.1. In this case, the trial panel finds that disbarment is necessary to protect the public and the integrity of the profession, *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998), and that Einhorn is a threat to the profession. *In re Bourcier*, 325 Or 429, 436–37, 939 P2d 604 (1997). Under these circumstances, it is appropriate that he be disbarred and the trial panel recommends disbarment. *See In re Pierson*, 280 Or 513, 571 P2d 907 (1977); *In re Hannon*, 214 Or 51, 324 P2d 753 (1958); *In re Collier*, 240 Or 617, 403 P2d 380 (1965); *In re McCormick*, 281 Or 693, 576 P2d 371 (1978); *In re Robeson*, 293 Or 610, 652 P2d 336 (1982); *In re Eads*, 303 Or 111, 734 P2d 340 (1987); *In re Benjamin*, 312 Or 515, 823 P2d 413 (1991); *In re Biggs*, 318 Or 281; *In re Martin*, 328 Or 177; *In re Parker*, 330 Or 541, 9 P3d 107 (2000); *In re Balocca*, 342 Or 279.



**1. Mental State.**

Einhorn's conduct persisted over a significant period of time, even after Gregory attempted to contact him multiple times. His conversion of her funds was deliberate and intentional and his refusal to refund unspent funds was also intentional. Based on his previous involvement in the disciplinary process, Einhorn also knew he had a 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).

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

Alexander and Gregory were actually injured to the extent that they paid for services that Gregory did not receive. Einhorn's failure to provide diligent representation meant that his client did not obtain a resolution to her legal issue or a refund of her money. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

**3. Preliminary Sanction.**

Because Einhorn knowingly converted Gregory's property and caused injury to Gregory and Alexander, he should be disbarred and the trial panel recommends as such. *Standards* §§ 4.1, 4.41, 7.1.

**4. Aggravating Circumstances.**

Einhorn's prior disciplinary history is an aggravating factor in this case. *Standards* § 9.22(a). In April 2009, Einhorn was admonished for neglect of a legal matter in violation of RPC 1.3 and failure to keep a client informed in violation of RPC 1.4(a). In November 2014, Einhorn was suspended for one year for neglect of a legal matter in violation of RPC 1.3, failure to keep a client reasonably informed in violation of RPC 1.4(a), conflict of interest in violation of RPC 1.7(a)(2), failure to return client funds in violation of RPC 1.15-1(d), and failure to respond to a lawful inquiry of a disciplinary counsel in violation of RPC 8.1(a)(2).

Einhorn's selfish and dishonest behavior is an aggravating factor. *Standards* § 9.22(b).

Einhorn behaved selfishly and dishonestly in misappropriating the funds Alexander gave him and selfishly in the Bar's investigation and this formal proceeding in order to avoid or delay facing the consequences of his misconduct.

Einhorn's longstanding pattern of misconduct is an aggravating factor. *Standards* § 9.22(c). Einhorn's prior violations for neglect and inadequate communication are remarkably similar to those in this case and exemplify Einhorn's casual attitude toward his ethical obligations.

Einhorn's multiple violation of rules is an aggravating factor. *Standards* § 9.22(d). Einhorn violated multiple rules involving different duties owed to his client and the profession.

*Standards* § 9.22(e). Einhorn's bad-faith obstruction of the disciplinary proceeding is an aggravating factor. Einhorn ignored disciplinary inquiries and knowingly or intentionally failed to provide information in response to disciplinary inquiries.

Einhorn's substantial experience in the practice of law is an aggravating factor. *Standards* § 9.22(i). Einhorn has been licensed in Oregon since July 10, 2002.

**5. MITIGATING FACTORS**

There are no mitigating factors.

**6. Conclusion**

The trial panel finds Einhorn guilty of RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.4(a)(3). Based on the foregoing findings and conclusions, it is hereby recommended that the Accused be disbarred.

Dated: August 17, 2016

/s/ Lorena Reynolds

Lorena Reynolds  
OSB No. 981319  
Trial Panel Chairperson

/s/ James Walsh

James Walsh  
OSB No. 863120  
Trial Panel Member

/s/ Charles Martin

Charles Martin,  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 15-130  
)  
SHAWN E. ABRELL, )  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: None  
Disciplinary Board: Courtney C. Dippel, Chairperson  
Sean C. Currie  
Stephen D. Butler, Public Member  
Disposition: Violation of RPC 3.3(a)(1), RPC 3.4(c), RPC 5.5(a),  
RPC 8.1(a)(2), and RPC 8.4(a)(3). Trial Panel Opinion.  
One-year suspension.  
Effective Date of Opinion: November 2, 2016

**TRIAL PANEL OPINION**

This matter came regularly before a trial panel of the Disciplinary Board consisting of Courtney C. Dippel, Chair; Sean C. Currie, Esq.; and public member Stephen D. Butler (the “Trial Panel”) on August 5, 2016. Theodore Reuter represented the Oregon State Bar (the “Bar”). Shawn E. Abrell (the “Accused”) did not answer or otherwise appear in this matter.

The Trial Panel has considered the factual allegations in the Complaint, the Bar’s Sanctions Memorandum and supporting exhibits (the “Memorandum”), 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”) 3.3(a)(1), RPC 3.4(c), RPC 5.5(a), RPC 8.1(a)(2), and RPC 8.4(a)(3). We further determine that the Accused should be suspended from the practice of law for a period of one year (12 months).

**INTRODUCTION**

Unlike most of the disciplinary cases that come before us, this case involves a lawyer not licensed in Oregon, but who appeared in Oregon proceedings and provided legal services without authority in the state.

The Complaint: The Bar filed a Formal Complaint against the Accused on February 25, 2016 claiming violations of the RPCs. On March 16, 2016, a copy of the Formal Complaint and Notice to Answer served upon the Accused by substitute service at his Hawaii address, the address on file with the Washington State Bar. A copy of the Formal Complaint and Notice to Answer were further mailed to the Accused at the same address on March 17, 2016.

In its First Cause of Complaint, the Bar alleged that the Accused violated RPC 3.3(a)(1), (knowingly disobeyed the rules of a tribunal), RPC 3.4(c) (practiced in a jurisdiction in violation of the rules of that jurisdiction), RPC 5.5(a) (unauthorized practice of law), and RPC 8.4(a)(3) (engaged in conduct involving dishonesty and misrepresentation reflecting adversely on his fitness to practice law).

In its Second Cause of Complaint, the Bar alleged that the Accused violated RPC 8.1(a)(2) for knowingly falling to respond to a lawful demand for information from a disciplinary authority.

The Bar's Motion and Order for Default: After service of the Formal Complaint, the Accused failed to answer or otherwise appear in this matter. As a result, the Bar mailed the Accused a Notice of Intent to Take Default on April 5, 2016, notifying him it would seek a default against him if he did not respond. The notice was not returned to the Bar. On April 21, 2016, the Bar moved for an Order of Default. On May 4, 2016, Mr. Ronald W. Atwood, the Region 5 Chairperson, granted the Order of Default and signed the Order. The Order of Default found the Accused in default for failure to file an answer or otherwise appear. Because the Accused did not answer or otherwise appear, the allegations in the Bar's Complaint were deemed true.

Sanctions Briefing: Based upon the Order of Default, on June 27, 2016, the Trial Panel requested that the parties submit any arguments regarding appropriate sanctions to be made in writing by August 5, 2016 pursuant to BR 5.8(a) and BR 2.4(h).

The Bar submitted its Sanctions Memorandum on August 5, 2016, along with supporting exhibits. The Accused submitted nothing.

### **FINDINGS OF FACT**

The Accused makes the following findings of fact:

#### **The Accused's Residency and Law License**

The Accused was admitted to the Washington State Bar in December 2008 but is currently suspended in Washington for "MCLE Non Compliance, No Insurance Form, No Trust Account Form, Non Payment of Fees." His address on record with the Washington State Bar is "Shawn E. Abrell, Attorney at Law, 84-887 Moua Street, Waianae, Hawaii 96792-1927." The Accused is not a member of the Hawaii State Bar Association or any state

or jurisdiction other than Washington. The Accused has never been admitted to practice law in Oregon.

### **The Turrittin Matter**

Beginning no later than August 2013, the Accused acted as counsel for Judith Hill<sup>1</sup>; in a dispute pending in the United States District Court for the District of Oregon over her father's estate<sup>2</sup>. The Accused was granted *pro hac vice* admission in federal court for this matter, with Oregon attorney Tyl Bakker ("Bakker") acting as local counsel. The federal court matter settled in August 2014.

In November 2014, the Accused filed a separate lawsuit in Multnomah County Circuit Court to pressure the opposing party to comply with the federal court settlement. The Accused signed the complaint using his Washington State Bar number over a caption reading "*pro hac vice* applied/pending, Tyl Bakker, LLC." In reality, the Accused had not applied for *pro hac vice* admission in the Multnomah County Circuit Court or asked that Bakker act as local counsel in that case.

### **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 true by virtue of the Order of Default. BR 5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). Determinations as to whether the facts deemed true by virtue of the default constitute violations of the disciplinary rules, and if so, what sanctions may be appropriate remained for the Trial Panel. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008); *see also In re Kluge*, 332 Or 251 (describing the two-step process).

The Trial Panel finds that the Accused violated each rule alleged by the Bar. We discuss each of the causes of complaint in turn based on the RPCs violated, as follows:

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<sup>1</sup> The Bar's Memorandum states that the Accused "represented [Melisande] Turrittin" in the federal court action. (Memorandum, p. 3). The federal court complaint and the state court complaint each indicate that the Accused represented Judith Hill. (Memorandum, Ex. 5, p. 6; Complaint, ¶ 3).

<sup>2</sup> The Bar's Memorandum states that Ms. Hill was "one of two sisters involved in a contentious dispute over their father's estate." (Memorandum, p. 3). The federal court complaint and the state court complaint each indicate that Ms. Hill was not one of two sisters, but attorney-in-fact for her co-plaintiff. (Memorandum, Ex. 5, pp. 2, 8). Ms. Hill's relationship to the federal court defendants is unclear.

**A. The Accused Violated Both RPC 3.3(a)(1) (candor toward the tribunal) and RPC 8.4(a)(3) (dishonesty and misrepresentation).**

RPC 8.4(a)(3) prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentations that reflects adversely on the lawyer’s fitness to practice law.” RPC 3.3(a)(1) prohibits lawyers from making false statements of fact or law to a tribunal. Both of these disciplinary rules are violated when a lawyer knowingly makes material misrepresentations. Misrepresentations may be made affirmatively or by omission. *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (lawyer who failed to disclose to client that case had been dismissed was guilty of misrepresentation by omission).

In this case, the Accused made two representations to the Multnomah County Circuit Court that he knew to be untrue when made. Specifically: (1) he represented that he had applied for *pro hac vice* admission in the Multnomah County case, and (2) that Bakker had agreed to act as local counsel for that purpose. Neither of these representations were true and the Accused knew them to be untrue at the time he represented them to the court. The Accused’s conduct thus violated RPC 3.3(a)(1) and RPC 8.4(a)(3); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (attorney violated both rules when he falsely represented to the court in a domestic relations matter that burglaries at his office were the reason he was unable to proceed with the case in a timely manner).

**B. The Accused Violated RPC 3.4(c) (disobeying an obligation under the rules of a tribunal).**

RPC 3.4(c) prohibits an attorney from knowingly violating a rule of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.

In this case, the Accused appeared before the Multnomah County Circuit Court without being properly admitted. Moreover, the Accused knew admission was necessary because he had previously applied for and obtained *pro hac vice* admission in federal court. His false representation to the Multnomah County Circuit Court that he had already applied for *pro hac vice* admission in that court further indicates that he knew it to be necessary. The Accused’s appearance in Multnomah County Circuit Court without being admitted violated RPC 3.4(c); see, e.g., *In re Magar*, 337 Or 548 (attorney violated former rule when he issued subpoenas in a proceeding when he was not an active member of the bar).

**C. The Accused Violated RPC 5.5(a) (unauthorized practice of law)**

RPC 5.5(a) prohibits practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. The practice of law has been defined by the Oregon Supreme Court to include: “consultation, explanation, recommendation or advice or other assistance in selecting particular forms” or suggesting how they should be used in a particular instance. *Oregon State Bar v. Gilchirst*, 272 Or 552, 563–64, 538 P2d 913 (1975). The “practice of law” also includes “the drafting or selection of documents and the giving of

advice” in regard to such documents any time informed or trained discretion must be exercised to meet the needs of the persons being served. *Oregon State Bar v. Sec. Escrows, Inc.*, 233 Or 80, 89, 377 P2d 334 (1962). Oregon statutes prohibit a person from practicing law in this state unless that person is an active member of the Oregon State Bar or falls into an appropriate exception to that requirement. *See, e.g.*, ORS 9.160.

The Accused is not an active member of the Oregon State Bar, nor was he admitted *pro hac vice* at the time that he filed a complaint on behalf of a client in Multnomah County Circuit Court. Therefore, the Accused violated RPC 5.5(a). *See In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to as modified on recons.*, 347 Or 529, 225 P3d 41 (2010) (attorney violated rule when he failed to withdraw from representing a number of clients in legal matters after his disciplinary suspension became effective).

**D. The Accused Violated RPC 8.1(a)(2) (failure to respond to a disciplinary authority)**

An attorney violates RPC 8.1(a)(2) when he knowingly fails to respond to a lawful demand for information from a disciplinary authority, unless the request requires the disclosure of information otherwise protected by RPC 1.6.

The Bar’s Disciplinary Counsel’s Office (“DCO”) is a disciplinary authority that made several written requests to the Accused for information in response to a complaint. These inquiries were received by the Accused and put him on notice of his obligation to respond. The Accused did not object on the basis of any privilege and did not substantively respond to DCO’s requests for information. The Accused thus violated RPC 8.1(a)(2). *See In re Obert*, 352 Or 231, 282 P3d 825 (2012) (attorney failed to respond to numerous requests from the Bar about an ethics complaint until subpoenaed to do so); *In re Paulson*, 346 Or 676 (in response to Bar inquiries, attorney failed to respond or responded incompletely and insubstantially, asserting that the underlying complaint was without merit); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons.*, 345 Or 652, 202 P3d 165 (2009) (Attorney refused to respond to questions posed by DCO concerning an allegation that attorney obtained a loan from an elderly client, asserting that the Bar had no jurisdiction because the woman was a friend, not a client. The court found that the lawfulness of the Bar’s demand for information does not depend on the Bar being correct that there was a violation; the bar has authority to investigate when it is presented with factual allegations that raise an arguable complaint of misconduct.).

**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.**

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: (1) the duty violated, (2) the lawyer’s mental state, and (3) the actual or potential injury caused by the conduct. *Standards* § 3.0. Once these factors are analyzed, the Trial Panel makes a preliminary determination of sanctions, after which it adjusts the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances.

**B. Duty Violated.**

The Accused violated his duties to the legal system to refrain from making false statements to the court and to avoid abuse to the legal process. *Standards* §§ 6.1, 6.2. The Accused also violated his duties to the profession to cooperate with disciplinary investigations and to refrain from practicing where he was not licensed to do so. *Standards* § 7.0.

**C. Mental State.**

“Intent” is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result.<sup>3</sup> “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 7. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 7.

The Bar may rely upon the facts alleged in the complaint to establish the mental state of an accused lawyer. *In re Kluge*, 332 Or at 262. The trial panel finds that the Accused acted knowingly and intentionally in all respects.

The Accused acted with knowledge that his statements to the court were not true at the time he made them. Similarly, the Accused knew that he was not admitted when he inserted himself into the unauthorized practice of law in Multnomah County Circuit Court. The Accused also acted knowingly and intentionally in failing to respond to and cooperate with the Bar’s inquiries.

**D. 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* at 6; *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.” *Standards*

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<sup>3</sup> Editor’s note: The *Standards* define *intent* as “the conscious objective or purpose to accomplish a particular result.” *Standards* at 7.



at 7. *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 7.

A lawyer’s failure to respond to disciplinary inquiries causes actual and potential injury to both the legal profession and the public by undermining the Bar’s authority, unnecessarily consuming the Bar’s time, and by delaying the resolution of the discipline matter. See *In re Miles*, 324 Or 218, 222–23, 23 P2d 1219 (1996); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997); *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). As a result of the Accused’s failure to respond, DCO expended additional time and resources pursuing the matters, and completion of the investigation was delayed.

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

In consideration of all factors of duty, mental state, and injury (and absent aggravating or mitigating circumstances), the following *Standards* appear to apply:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

#### *Standards* § 6.12

Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

#### *Standards* § 6.22

Suspension is also generally appropriate when a lawyer knowingly engages in conduct that [violates] a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

#### *Standards* § 7.2

It should be noted that the *Standards* also provide that when a suspension is the appropriate disposition, the length of the suspension is presumptively six months in length and requires formal reinstatement. *Standards* § 2.3; Commentary.

#### **F. Aggravating and Mitigating Circumstances.**

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

1. A selfish motive. *Standards* § 9.22(b). The Accused's false statements to the court during the Multnomah County Circuit Court case and noncooperation with the Bar were designed to benefit him directly, avoid negative consequences, or both.
2. A pattern of misconduct. *Standards* § 9.22(c). The Accused's failure to apply for proper admission, fully inform the Multnomah County Circuit Court, and his inaction in responding to the Bar collectively show a pattern of neglect, avoidance, and disregard for client matters and professional obligations. *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Schaffner*, 325 Or at 427.
3. Multiple offenses. *Standards* § 9.22(d).
4. Refusal to acknowledge the wrongful nature of his misconduct. *Standards* § 9.22(g). The Accused's refusal to respond also constitutes a failure to acknowledge his wrongdoing. *In re Schaffner*, 325 Or at 427 (attorney's failure to respond or cooperate constituted a failure to acknowledge any wrongdoing).
5. Substantial experience in the practice of law. *Standards* § 9.22(i). The Accused was first licensed in Washington in 2008.

The sole mitigating factor recognized by the *Standards* is the absence of a prior disciplinary record. *Standards* § 9.32(a).

The aggravating factors outweigh the one in mitigation both in number and severity and, on balance, justify an increase in the degree of presumptive discipline to be imposed. *Standards* § 9.21. Accordingly, a significant period of suspension is warranted.

#### **G. Oregon Case Law.**

Sanctions in disciplinary matters are not intended to penalize a 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). "[A]ppropriate discipline deters unethical conduct." *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

##### *False Representations to the Court*

The court does not look favorably on misrepresentations to the courts; suspensions of at least several months typically result. *See, e.g., In re Jackson*, 347 Or 426 (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 Lawrence*, 337 Or 450, 98 P3d 366 (2004) (Attorney was suspended for 90 days when her firm represented a client charged with domestic violence. Attorney gave legal advice to the victim and assisted

in preparing an affidavit for the victim to use in seeking the dismissal of the charge against the firm's client. Thereafter, the attorney misrepresented to the judge whether she had given legal advice to the victim and concealed material information about the extent of her contact with the victim.); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (attorney who 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 was suspended for 120 days); *In re Kluge*, 335 Or 326, 66 P3d 492 (2003) (attorney was suspended for two years after he presented to one judge a motion to disqualify another judge without informing the motions judge that the judge to be disqualified had already made a substantive ruling in the case; attorney also violated the rule by intentionally not giving notice of the motion to opposing counsel or the judge he sought to disqualify).

Based upon the case law, the Trial Panel believes a two-year suspension is appropriate. The Accused had a pattern of misrepresentations over a significant period of time.

*Knowingly Disobey the Rules of Tribunal*

There are relatively few Oregon Supreme Court cases that address this rule violation or its predecessor. However, in *In re Chase*, 339 Or 452, 461, 121 P3d 1160 (2005), in suspending the lawyer for 30 days, the court held that a suspension of at least some duration was required for knowing failures to comply with court rules and orders. *See also In re Magar*, 337 Or 548 (attorney suspended for one year for issuing subpoenas when he was not an active member of the bar); *In re Rhodes*, 331 Or 231, 13 P3d 512 (2000) (attorney was suspended for two years as a result of two contempt orders stemming from his dissolution and his subsequent noncooperation with the Bar).

The Trial Panel finds that there is no difference between a lawyer issuing subpoenas when he was not an active member of the bar and the Accused's conduct herein in which he repeatedly submitted documents to the court using another attorney's license without that attorney's knowledge or authorization. The Trial Panel believes that a one-year suspension is appropriate for this conduct.

*Unlawful Practice*

There is not extensive case law on the appropriate term of sanction in similar situations; however, when the court has found that a lawyer engaged in the practice of law in violation of the rules of the profession, it has always imposed a suspension or disbarment. *See, e.g., In re Koliha*, 330 Or 402, 9 P3d 402 (2000) (one-year suspension for lawyer who filed pleadings and appeared in court on behalf of a client during suspension; lawyer also failed to cooperate in Bar investigation); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001) (three-year suspension for violations including unlawful practice of law and misrepresentations associated with it despite the absence of prior discipline); *In re Paulson*, 346 Or 676 (lawyer disbarred for violations including filing a number of motions and an amended complaint on the first day of his suspension); *In re Jaffee*, 331 Or 398, 15 P3d 533 (2000) (lawyer dis-

barred for conduct including performing legal services for a month when he knew he was suspended); *In re Devers*, 328 Or 230, 974 P2d 191 (1999) (lawyer with extensive prior discipline history disbarred when he knowingly practiced law while suspended for several months).

The Trial Panel finds that a two-year suspension for this violation is appropriate.

*Failure to Respond to a Disciplinary Authority*

Lawyers who fail to cooperate with disciplinary authorities are recognized as a threat to the profession and the public, and generally receive terms of suspension. *In re Bourcier*, 325 Or at 436–37. *See also In re Hereford*, 306 Or 69, 756 P2d 30 (1988) (126-day suspension for noncooperation alone; attorney found not guilty of all other charges).

The court has repeatedly held that the “failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation.” *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000). The court has also emphasized that it has no tolerance for violations of this rule. *In re Miles*, 324 Or at 222–23 (although no substantive charges were brought, the court imposed a 120-day suspension and required formal reinstatement for noncooperation with the Bar). In *Miles*, the attorney failed to respond to inquiries from DCO, failed to respond to the Bar’s formal complaint, did not appear at trial, and a default was entered against her. *See also In re Arbuckle*, 308 Or 135, 775 P2d 832 (1989) (two-year suspension when attorney with no prior discipline failed to return client property and respond to the Bar).

A four-month suspension for this conduct is appropriate.

*Collective Conduct*

If the Accused were sanctioned in the aggregate for his separate violations, as indicated above, he would face a suspension of approximately three years. However, based upon the Bar’s request for a suspension of between six months and one year, and after evaluating the ABA *Standards*, the factors in this case, and Oregon case law, the Trial Panel concludes a suspension of one year is the appropriate sanction.

**DISPOSITION**

In light of the foregoing, the Accused shall be suspended from the practice of law for a period of one year.

Respectfully submitted this 1st day of September 2016.

/s/ Courtney C. Dippel

Courtney C. Dippel, Trial Panel Chairperson

/s/ Sean C. Currie

Sean C. Currie, Trial Panel Member

/s/ Stephen D. Butler

Stephen D. Butler, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 15-88, 16-50, 16-51,  
) and 16-51a  
RANKIN JOHNSON IV, ) SC S064371  
)  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: Calon Nye Russell  
Disciplinary Board: None  
Disposition: Violation of RPC 1.1, RPC 1.2(a), RPC 1.3, RPC  
1.4(a), RPC 1.16(d), and RPC 8.4(a)(4). Stipulation for  
Discipline. Four-year suspension, 30 months stayed,  
three-year probation.  
Effective Date of Order: November 13, 2016

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. Effective 10 days after the issuance of this order, the accused is suspended from the practice of law in the State of Oregon for a period of four years, 30 months of which is stayed pending the accused's successful completion of a three-year period of probation. Probation shall commence upon the date the accused is reinstated to active membership in the Oregon State Bar and shall end on the day prior to the third-year anniversary of the commencement date. During the period of probation, the accused shall abide by the conditions set out in the Stipulation for Discipline. The accused's failure to comply with any term of the Stipulation for Discipline shall constitute a basis for revocation of probation and imposition of the stayed portion of the suspension.

/s/ Thomas A. Balmer 11/03/2016 7:35 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

## STIPULATION FOR DISCIPLINE

Rankin Johnson, IV, attorney at law (“Johnson”), 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.

Johnson was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 25, 1996, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On October 2, 2015, a Formal Complaint was filed against Johnson pursuant to the authorization of the State Professional Responsibility Board (“SPRB”) alleging violations of RPC 1.2(a) and RPC 1.4(a) of the Oregon Rules of Professional Conduct (“RPC”) in Case No. 15-88. On or about April 9, 2016, the SPRB authorized a formal complaint in Case No. 16-50 (alleging violations of RPC 1.1, RPC 1.3, and RPC 8.4(a)(4)), Case No. 16-51 (alleging violations of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4)), and Case No. 16-51a (alleging violations of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4)). These matters were consolidated. 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.

### **Coon matter—Case No. 15-88**

#### **Facts**

5.

Johnson was appointed to represent James Coon (“Coon”) with respect to an appeal of a postconviction case. Incident to that representation, Johnson communicated with a prosecutor who informed him that she intended to move for an amendment to the trial court judgment in the original criminal conviction. Coon informed Johnson that he (Coon) objected to the amendment. Although he was appointed as appellate counsel, Johnson communicated with the prosecutor and the trial court regarding the amendment but failed to timely com-

communicate Coon's objections to the amendment to either the court or the prosecutor. Johnson sent a letter to the court and the prosecutor regarding Coon's objections on November 26, 2013, but the amendment had been entered the day before (November 25, 2013). As a result, the amended judgment was entered against Johnson's client without consideration of Coon's objection.

### **Violations**

6.

Johnson admits that by positioning himself as the point of contact between Coon and the prosecuting attorneys and then failing to communicate to Coon the timing of the proposed amended judgment and failing to communicate Coon's objection to opposing counsel or the court in a timely fashion, he failed to abide by his client's directives in violation of RPC 1.2(a), and failed to keep his client reasonably informed about the status of his matter in violation of RPC 1.4(a).

### **Arreola matter—Case No. 16-50**

#### **Facts**

7.

Filemon Arreola retained Johnson to act as his attorney on his postconviction relief appeal to the Oregon Supreme Court. Johnson missed the deadline to file the petition and the extended deadline that he had requested due to a calendaring error.

### **Violations**

8.

Johnson admits that his failure to manage his calendar in this instance is part of a large pattern of poor office management and neglect through which he failed to provide Arreola competent representation in violation of RPC 1.1, neglected his legal matter in violation of RPC 1.3, and engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

### **Specht matter—Case No. 16-51**

#### **Facts**

9.

An attorney for the Oregon Supreme Court filed a complaint against Johnson regarding a series of calendaring errors and procedural mistakes that Johnson made over the course of two years at the Oregon Court of Appeals and Oregon Supreme Court. These errors included petitioning for Oregon Supreme Court review of appellate commissioner decisions rather than seeking reconsideration on at least two occasions, missing filing deadlines and extended filing deadlines for opening briefs and petitions for review, at least one failure to



respond to a dispositive motion, and submission of filings ultimately dismissed under ORS 138.050(1). Johnson attributes the majority of these errors to an email malfunction that resulted in Johnson not receiving correspondence from the court in mid-2014. However, Johnson did not use a backup system for calendaring or tracking the obligations at issue. These errors affected at least nine cases and either impacted the court's processing of the appeals or, in some cases, resulted in his clients' petitions for review being dismissed without a hearing on the merits of the petitions.

### **Violations**

10.

Johnson admits that his pattern of repeated failures to ascertain and confirm deadlines and his failure to properly research and comply with the procedures for seeking review failed to provide his clients with competent representation in violation of RPC 1.1, caused him to neglect their legal matters in violation of RPC 1.3, and resulted in prejudice to the administration of justice in violation of RPC 8.4(a)(4). In one instance, Johnson acknowledges that he violated RPC 1.16(d), by failing to safeguard his client's appeal upon termination of his representation. Johnson further admits that he violated RPC 1.4(a), by not promptly communicating or adequately with his clients about the untimeliness of his efforts.

### **Mesta Matter—Case No. 16-51a**

#### **Facts**

11.

Luis Mesta ("Mesta") filed his own separate complaint for Johnson's failure to timely file a petition for review at the Oregon Supreme Court. In that instance, Johnson's neglect resulted in Mesta losing his opportunity to have the Oregon Supreme Court consider his petition for review.

#### **Violations**

12.

Johnson admits that his conduct in representing Mesta is part of a larger pattern of failing to follow basic court rules and comply with deadlines by which he failed to provide Mesta with competent representation in violation of RPC 1.1, neglected his legal matter in violation of RPC 1.3, and resulted in prejudice to the administration of justice in violation of RPC 8.4(a)(4).

#### **Sanction**

13.

Johnson 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* ("*Stan-*

*dards*”). The *Standards* require that Johnson’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.

- a. **Duty Violated.** Johnson admits that his conduct violated his duty to act diligently on behalf of his client, *Standards* § 4.4, his duty to provide competent representation, *Standards* § 4.5, and his duty to refrain from abusing the legal process, *Standards* § 6.2.
- b. **Mental State.** Johnson’s failures in this matter were negligent, that is, he failed to heed a substantial risk that circumstances existed or a result would follow, which was a deviation from the standard or care that a reasonable lawyer would exercise in the situation.
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury are taken into account. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992).

Johnson’s actions caused both actual and potential injury to his clients, several of whom lost their opportunity to present their case to the Oregon Court of Appeals or the Oregon Supreme Court based on Johnson’s inaction. His repeated use of requests for extension and filing of deficient documents, which he failed to correct, also actually injured and unduly burdened the court.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior discipline. *Standards* § 9.22(a). Johnson was previously publicly reprimanded for negligently making false statements to the court about having lost contact with his client and then withdrawing from the matter, in violation of DR 1-102(A)(4)—*current* RPC 8.4(a)(4)—(conduct prejudicial to the administration of justice) and DR 2-110(A)(2)—*current* RPC 1.16(d)— (improper withdrawal). *In re Johnson*, 17 DB Rptr 185 (2003). Both of these violations are also at issue in this proceeding.

In addition, Johnson was suspended for six months in 2010 for violations of RPC 1.3 (neglect), RPC 1.4(a) (inadequate client communication), and RPC 8.4(a)(3) (misrepresentations) in connection with his handling of a postconviction appeal. *In re Johnson*, 24 DB Rptr 127 (2010). Those charges are also among those alleged in this proceeding.
  2. A pattern of misconduct. *Standards* § 9.22(c).
  3. Multiple offenses. *Standards* § 9.22(d).

4. Vulnerability of victims. *Standards* § 9.22(h). Johnson’s clients were incarcerated, making it more difficult for them to contact Johnson, find other counsel, or act on their own behalf.
  5. Substantial experience in the practice of law. *Standards* § 9.22(i). Johnson has been licensed to practice law in Oregon since 1996, and practices primarily in the area of criminal defense appellate and posttrial proceedings.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest motive. *Standards* § 9.32(b).
  2. Full and free disclosure and cooperation in the disciplinary proceeding. *Standards* § 9.32(e).
  3. Remorse. *Standards* § 9.32(l). Johnson has expressed regret over his actions and the corresponding results on his clients and the administration of justice.

14.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or engages in a pattern of neglect and causes injury or potential injury to a client, or 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* §§ 4.42(b), 6.22. Aggravating factors outweigh Johnson’s mitigation, both in weight and severity, and support the imposition of a suspension.

15.

Oregon case law suggests that a lengthy suspension is required for Johnson’s neglect and failures to communicate, in light of his prior reprimand and six-month suspension for the same rule violations. See *In re Cohen*, 330 Or 489, 506, 8 P3d 953 (2000). Johnson’s repetition of the same type of misconduct significantly impacts the severity of what might otherwise be an appropriate sanction without such prior discipline. See *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997); *In re Cohen*, 330 Or at 506.

Cases with similar violations and aggravating factors have merited suspensions of a year or more. See, e.g., *In re Meyer*, 328 Or 220, 970 P2d 647 (1999) (one-year suspension for single neglect charge with aggravating factors similar to Johnson’s); *In re Knappenberger*, 340 Or 573, 586, 135 P3d 297 (2006) (one-year suspension for neglect violation in one client matter when lawyer’s record of discipline demonstrated he was “careless with respect to his ethical obligations” (internal quotation omitted)); *In re Schaffner*, 325 Or 421, 939 P2d 39 (1997) (two-year suspension for neglect of one client matter in conjunction

with failure to initially cooperate with Bar investigation, where prior discipline for similar misconduct). Because there are multiple matters at issue in this proceeding, a greater sanction is warranted. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (1999) (four-year suspension for neglect of four different client matters when aggravating factors outweighed mitigating ones); *In re Sheasby*, 29 DB Rptr 41 (2015) (four-year suspension by trial panel when lawyer neglected two patent matters and had significant aggravation).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that Johnson shall be suspended for four years, with 30 months stayed, pending Johnson's successful completion of a three-year period of probation for Johnson's violations of RPC 1.2(a) and RPC 1.4(a) in Case No. 15-88; RPC 1.1, RPC 1.3, and RPC 8.4(a)(4) in Case No. 16-50; RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4) in Case No. 16-51; and RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4) in Case No. 16-51a, the sanction to be effective the later of 10 days after this stipulation is approved by the Oregon Supreme Court or October 15, 2016 or as otherwise ordered by the court.

17.

Probation shall commence upon the date Johnson is reinstated to active membership status in the Oregon State Bar and shall continue for a period of three years, ending on the day prior to the third-year anniversary of the commencement date (the "period of probation"). During the period of probation, Johnson shall abide by the following conditions:

- (a) Johnson will communicate with the Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Johnson 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, Johnson shall attend not less than 10 continuing legal education ("CLE") accredited programs, for a total of 36 hours, all of 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 Johnson for his normal MCLE reporting period. In order to promote ongoing learning and reinforce new skills and recommended techniques, no more than 10 credit hours will be applied to the total 36-hour obligation in any one year of the probation (a year counting from the start of the probationary period for 12 months).

- (d) Upon completion of the CLE programs described in paragraph 17(c), and prior to the end of his period of probation, Johnson shall submit an Affidavit of Compliance to DCO.
- (e) Every month for the period of probation, Johnson shall review all active 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.
- (f) A person to be selected by Johnson, and approved by DCO, at least 30 days prior to the beginning of the probationary period shall serve as Johnson's probation supervisor ("Supervisor"). Johnson 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 Johnson's clients, the profession, the legal system, and the public.
- (g) Beginning with the first month of the period of probation, Johnson shall meet with his Supervisor in person at least once a month for the purpose of:
  - (1) Allowing his Supervisor to review the status of Johnson'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 files or twenty percent (20%) of his current case-load, whichever is greater, to determine whether Johnson 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 Johnson'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. Johnson agrees that his Supervisor may contact all employees and independent contractors who assist Johnson in the review and reconciliation of his lawyer trust account records.
- (h) Johnson authorizes his Supervisor to communicate with DCO regarding Johnson's compliance or noncompliance with the terms of his probation and to release to DCO any information DCO deems necessary to permit it to assess Johnson's compliance.
- (i) Within seven days of the start of his probationary period, Johnson 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. Johnson shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.

- (j) Johnson shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for effective trust account management, 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, Johnson shall adopt and implement those recommendations.
- (k) No later than 60 days after recommendations are made by the PLF, Johnson 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.
- (l) On a monthly basis, on dates to be established by Disciplinary Counsel beginning no later than 30 days after his reinstatement to active membership status, Johnson shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Johnson is in compliance with the terms of this Stipulation for Discipline, including:
  - (1) The dates and purpose of Johnson's meetings with Supervisor.
  - (2) The number of Johnson's active cases and percentage reviewed in the audit with Supervisor per paragraph 17(g) and the results thereof.
  - (3) Whether Johnson has completed the other provisions recommended by Supervisor, if applicable.
  - (4) The status of Johnson's activity and compliance with PLF recommendations.
  - (5) In the event Johnson 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.
- (m) Johnson is responsible for any costs required under the terms of this stipulation and the terms of probation.

- (n) Johnson'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.
- (o) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (p) The SPRB's decision to bring a formal complaint against Johnson for unethical conduct that occurred or continued during the period of his suspension or probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension, whether or not Johnson has completed the period of actual suspension, yet sought reinstatement, or has completed some part of his period of probation.
- (q) To the extent that subparagraphs (g) and (l) of paragraph 17 impose monthly requirements, those requirements shall become bi-monthly after the 21 consecutive months in which Johnson is in full compliance with the foregoing provisions. Despite the previous sentence in this subparagraph, every month for the period of probation, Johnson shall review all active 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 and must report to the Bar that he is in compliance with that provision on a monthly basis.

18.

Johnson 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, Johnson will take appropriate steps to withdraw from his court-appointed cases and to notify his clients of that withdrawal before his suspension takes effect. In addition, before his suspension takes effect, as to his retained active cases, Johnson will take appropriate steps to either withdraw from representation or deliver those files to David Celuch, an active member of the Bar, with the expectation that he will either substitute in as attorney of record with consent of the client or insure that the file is returned to the client or another attorney to whom he is directed by the client to deliver the file. Johnson shall notify each client appropriately of which step is taken. Johnson has arranged for Leah Johnson, an active member of the Bar, to either take possession of or have ongoing access to Johnson's closed client files and serve as the contact person for clients in need of the files during the term of suspension. Johnson represents that David Celuch and Leah Johnson have agreed to accept this responsibility.

19.

Johnson 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. Johnson also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

20.

Johnson 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. This requirement is in addition to any other provision of this agreement that requires Johnson to attend or obtain CLE credit hours.

21.

Johnson 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 Johnson is admitted: District of Oregon, Ninth Circuit, United States Supreme Court.

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

EXECUTED this 15th day of September, 2016.

/s/ Rankin Johnson, IV

Rankin Johnson, IV

OSB No. 964903

EXECUTED this 19th day of September, 2016.

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 Nos. 12-130, 13-26, and 14-65  
) SC S064124  
ERIC M. BOSSE, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC  
1.15-1(d), RPC 8.1(a)(1), RPC 8.1(a)(2), and RPC  
8.4(a)(4). No Contest Plea. 24-month suspension.  
Effective Date of Order: November 21, 2016

**ORDER GRANTING STIPULATED MOTION TO DISMISS AND  
ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The stipulated motion to dismiss filed by the accused and the Oregon State Bar is granted.

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 24 months, effective November 21, 2016.

/s/ Thomas A. Balmer 11/03/2016 8:04 AM  
Thomas A. Balmer  
Chief Justice, Supreme Court

## **NO CONTEST PLEA**

Eric M. Bosse, OSB No. 870260, attorney at law (“Bosse”), and the Oregon State Bar (“Bar”) hereby agree to the following matters pursuant to Bar Rule of Procedure 3.6(b).

### **RECITALS**

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.

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

3.

Bosse enters this no-contest plea freely, voluntarily, and with the opportunity to seek advice from counsel. This no-contest plea is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 21, 2015, a Second Amended Formal Complaint was filed against Bosse pursuant to authorization of the State Professional Responsibility Board (“SPRB”), stating five causes of complaint collectively alleging violations of RPC 1.3 (neglect of a legal matter) (two counts), RPC 1.4(a) (failing to keep a client reasonably informed about the status of a matter or to promptly respond to a client’s reasonable requests for information), RPC 1.5(a) (collecting a clearly excessive fee), RPC 1.15-1(d) (failing to deliver funds a client is entitled to receive or to render a full accounting promptly upon request), RPC 8.1(a)(1) (knowingly misstating a material fact in a Bar investigation), and RPC 8.1(a)(2) (knowingly failing to respond to a lawful demand for information in a Bar investigation) (three counts), and RPC 8.4(a)(4) (engaging in conduct prejudicial to the administration of justice).

5.

On April 18, 2016, a Disciplinary Board Trial Panel issued an opinion finding that Bosse violated the RPCs as alleged in the five causes of complaint and imposing a 24-month suspension. A copy of that opinion is attached hereto as Exhibit 1 and incorporated by this reference.

6.

On June 6, 2016, Bosse filed a petition for review with the Oregon Supreme Court and on September 7, 2016, he filed his opening brief. The matter is currently pending with the court.

7.

Bosse has no prior record of reprimand, suspension, or disbarment.

**No Contest Plea**

8.

Bosse does not desire further to defend against the Second Amended Formal Complaint or further to seek review by the Oregon Supreme Court of the findings made and sanction imposed by the trial panel.

9.

Bosse agrees to accept a 24-month suspension from the practice of law in exchange for this no-contest plea.

**Sanction**

10.

Bosse and the Bar agree that Bosse shall be suspended for 24 months, effective November 21, 2016, or upon the court's approval of this no-contest plea, whichever occurs later.

11.

Bosse 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. Bosse represents that he has consulted Professional Liability Fund practice management advisors for guidance on closing his practice and returning files to clients.

12.

Bosse 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. Bosse 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.

13.

Bosse 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 the denial of his reinstatement.

14.

Bosse represents that he not admitted to practice law in any other jurisdictions, whether his current status is active, inactive, or suspended.

15.

This no-contest plea is to be submitted to the Oregon Supreme Court for consideration pursuant to the terms of BR 3.6(e).

EXECUTED this 12th day of October, 2016.

/s/ Eric M. Bosse

Eric M. Bosse

OSB No. 870260

OREGON STATE BAR

By: /s/ Susan R. Cournoyer

Susan R. Cournoyer

OSB No. 863381

Assistant Disciplinary Counsel

## **TRIAL PANEL OPINION**

### **INTRODUCTION**

The Oregon State Bar (the “Bar”) alleged that in three separate matters, Eric M. Bosse (“Respondent”) committed 10 violations of the Rules of Professional Conduct.

Respondent was admitted to the Bar in April 1987. The Bar filed a Formal Complaint in February 2013 in Case No. 12-130. Respondent accepted service of the Formal Complaint in mid-May 2013, and timely filed an answer in that proceeding.

On July 2, 2013, the Bar filed an Amended Formal Complaint adding Case Nos. 13-26 and 12-130. The Amended Formal Complaint was served by U.S. mail upon Respondent. Respondent timely filed an answer in that proceeding.

In mid-October 2013, Respondent entered into a diversion agreement as a stipulated resolution for Case Nos. 12-130 and 13-26. After the Respondent’s diversion began, the Bar received a new complaint about his conduct. Following an investigation, the SPRB found

that Respondent violated the RPCs and authorized a third formal proceeding in Case No. 14-65. As a result, the Respondent's diversion was revoked. All three cases were consolidated.

The Bar filed a Second Amended Formal Complaint on October 21, 2015, which included the three cases at issue here. Respondent was contemporaneously served by mail with a copy of the Second Amended Formal Complaint at his address on record with the Bar. The mail was not returned as undeliverable. On October 26, 2015, Respondent was served by U.S. mail at his address on record with the Bar notifying him he had until November 9, 2015 to respond to the Second Amended Formal Complaint. Respondent failed to file an answer and otherwise did not appear.

On November 17, 2015 the Bar advised Respondent of the OSB's intent to take a default if he did not file an answer by the close of business on November 30, 2015.

Meanwhile, on November 23, 2015, the Trial Panel Chair corresponded with the Bar and with Respondent to attempt to coordinate a trial date; Respondent did not reply. A trial date was set for March 17, 2015.

On December 15, 2015, the Trial Panel Chairperson granted the Bar's December 10, 2015 Motion for Order of Default.

### **BURDEN OF PROOF/EVIDENTIARY STANDARD**

The Bar has the burden of establishing an attorney's misconduct 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) (internal quotation omitted).

### **FINDINGS OF FACT**

1. In light of the respondent'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 Formal Complaint, the Amended Formal Complaint, and the Second Amended Formal Complaint and adopts those allegations as its Findings of Fact in this matter. BR 5.8(a).
2. By reason of entry of the Order of Default, the Respondent is deemed to have violated the following Oregon Rules of Professional Conduct ("RPC"): RPC 1.3, RPC 1.4, RPC 1.5, RPC 1.15-1(d), RPC 8.1(a)(1), RPC 8.1(a)(2), and RPC 8.4(a)(4).

### **CONCLUSIONS OF LAW**

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* ("Standards"), in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993). The *Standards* establish the

framework to analyze Accused's conduct, including: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the conduct, and (4) the existence of aggravating and mitigating factors. *Standards* § 3.0.

## 1. Duty Violated

- A. Case No. 12-130: In this case, sometime prior to October 2011, the client retained Respondent to defend it in a foreclosure matter filed in Yamhill County Circuit Court. The plaintiff in the foreclosure case was represented by an attorney ("Childs"). In October 2011, to resolve the matter, Respondent offered to provide a written proposal for a deed in lieu of foreclosure, but failed to do so. After several unsuccessful attempts to contact Respondent, Childs filed a motion for summary judgment and served it on Respondent. Respondent did not file a response on his client's behalf, or contact Childs. The court set a hearing date, and Childs again attempted numerous times to contact Respondent by telephone and email. Respondent did not respond and failed to appear at the hearing. After the court and Childs unsuccessfully tried to contact Respondent, the court granted Childs's motion for summary judgment. Respondent did not respond or explain his failure to appear. When Childs submitted a proposed order, Respondent objected and requested a hearing. The court scheduled the hearing for the next day, but again Respondent failed to appear.
- a) Respondent's failure to: (1) submit the promised settlement proposal to Childs, (2) appear at two different court hearings, and (3) respond to both the court's and opposing counsel's attempts to communicate with him regarding the case was neglect of a client's legal matter in violation of RPC 1.3.
  - b) The effect of the Respondent's conduct was prejudicial to the administration of justice. His multiple omissions caused great potential harm to his client's substantive interests, and prejudiced the court's procedural interests. His multiple failures to act caused actual or potential harm to his client, the opposing party, and the procedural functioning of the court. Therefore, he violated RPC 8.4(a)(4).
  - c) The Respondent failed to cooperate with the Bar's investigation of the complaint it received in connection with the Respondent's conduct in this case. The Respondent communicated with the staff of the Disciplinary Counsel's Office ("DCO") on a few occasions, but thereafter, he failed to respond to the letters sent by the DCO, one of which reminded him of his duty to substantively respond in writing. The evidence shows that the Respondent received the Bar's letters and was

aware of his duty respond. His failure to respond violated RPC 8.1(a)(2).

B. Case No. 13-26: In November 2012 the DCO began investigating potential misconduct in connection with the Respondent's former firm's tax filings and obligations. The DCO sent him a letter seeking a response to specific questions and then sent him a subsequent letter reminding him of his duty to respond. The Respondent failed to respond to the DCO's letters and his knowing failure to respond was a failure to cooperate with a disciplinary investigation.

(a) The Respondent's failure to cooperate with a disciplinary investigation violated RPC 8.1(a)(2).

C. Case No. 14-65: Here, a client retained the Respondent to defend her in a collection matter. The client gave the Respondent \$2,500 in cash and received a handwritten receipt. There was no written fee agreement. The Respondent filed an answer on the client's behalf, but thereafter spoke with the client a couple of times and performed no further work on the case.

The plaintiff's attorney ("Plaintiff") filed a summary judgment motion and then agreed to a deferral of a ruling on the motion and to a reset of the arbitration hearing a number of times based on assurances of the Respondent. In mid-October 2012, the Respondent and Plaintiff reached a tentative settlement. Relying on the tentative settlement, the Plaintiff cancelled the imminent arbitration and mailed a proposed stipulated judgment to the Respondent. The Respondent did not return the proposed judgment, however he informed his client that the Plaintiff had made a fair settlement offer.

The Respondent then failed to respond to the client's request for details regarding the terms of the settlement. He did, however, ask the client for another \$2,000. Because he was unwilling to provide an itemized bill, the client sent him \$500 instead of the \$2,000 he requested. The Respondent did not deposit the funds in trust.

By December 2012 the Respondent had still not returned the proposed judgment to the Plaintiff. Therefore, after notice to the Respondent, the Plaintiff moved to reinstate the case. A new hearing was set for mid-March 2013. In March and April 2013 the Respondent told Plaintiff that he would meet with his client within the next couple of days and would return the signed proposed judgment within the next couple of days or weeks. In reliance on the Respondent's promises, the Plaintiff set over the March 2013 hearing and held off reactivating the case.

During all of 2012 and 2013, the Respondent failed to notify his client of his receipt of the proposed judgment, provide her with the proposed judgment, or explain its terms to her.

As a result of the Respondent's neglect, the opposing party obtained summary judgment against the client and a garnishment was issued against the client. The Respondent did not communicate with his client about these developments and he took no further action in the case. After being served with the garnishment the client contacted the Respondent. He promised to look into the situation, but he never followed up with the Plaintiff, and took no steps on his client's behalf to remedy the garnishment.

The Respondent failed to: (1) respond to his client's inquiries about the case, (2) respond to her request for an accounting, (3) communicate with the client and the Plaintiff, and (4) refund any of the client's funds.

Thereafter, between December 2013 and March 2014, both the Bar's Client Assistance Office and the DCO notified the Respondent of the client's allegations in this matter. In a cursory response, the Respondent acknowledged receiving the Bar's communications, but did not otherwise address the substance of the concerns or respond to specific questions.

Similar to his conduct in his client's case, the Respondent made promises to the Bar to provide information they requested and to respond to letters from the Bar, but then he failed to follow through.

Finally, the Respondent made misrepresentations to the Bar in his cursory response. He claimed that the client did not communicate with him for over a year, that he had tried unsuccessfully to reach her by telephone during that time; and, that she had disappeared and he did not know how to find her. He knew his statements were untrue. The client's contact information had not changed since she retained him and it was she who had tried unsuccessfully to reach him.

- a) The Respondent's failure to act and failures to act diligently constituted serious neglect of a legal matter in violation of RPC 1.3.
- b) The Respondent's failure to adequately communicate with his client and his failure to respond to her reasonable inquiries or inform her of the status of her case was a violation of RPC 1.4(a).
- c) The Respondent collected funds from his client and kept all of the money he received from her, but he failed to provide the requested services and failed to complete the representation. His failure to return



unused portions of the fee knowing he had not completed the representation was clearly an excessive fee in violation of RPC 1.5(a).

- d) The Respondent's failure to account for and return client funds upon request violated RPC 1.15-1(d).
- e) The Respondent's failure to cooperate with the Bar's investigation violated RPC 8.1(a)(2).
- f) The Respondent's misrepresentations to the Bar during its investigation violated RPC 8.1(a)(1).

## **2. Lawyer's Mental State**

- A. The Trial Panel relies on the facts alleged in the complaint to establish the mental state of the Respondent. *In re Kluge*, 332 Or 251, 262, 27 P3d 102 (2001). Based on the facts, the trial finds that Respondent acted knowingly and intentionally in all respects including making false representations to the Bar during its inquiry into Case No. 14-65. *See In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1998) (lawyer's mental state can be inferred from the facts).

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

- A. For the purpose of determining an appropriate disciplinary sanction, both actual and potential injury are taken into account. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). In each of the cases Respondent caused potential and actual harm to his clients, the court or both. In addition, his failure to fully, timely, and truthfully cooperate with the Bar's investigations of his conduct caused actual injury to both the legal profession and to the public. *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

## **4. Aggravating and Mitigating Circumstances**

- A. The Trial Panel agrees that all of the following factors, which are recognized as aggravating under the *Standards*, exist in this case:
  - a) A dishonest and selfish motive. *Standards* § 9.22(b). The Respondent's failure to return his client's funds, and his false statements to the Bar during its investigation were designed to benefit him directly, avoid negative consequences, or both;
  - b) A pattern of misconduct. *Standards* § 9.22(c). The Respondent's neglect of matters, failures to communicate, failures to account for or return client funds, avoidance of Bar inquiries, and misrepresentations to the Bar, all demonstrate a pattern of neglect and avoidance, as well as a disregard for client matters and professional obligations. *In re*

*Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Schaffner*, 325 Or at 427;

- c) Multiple offenses. *Standards* § 9.22(d);
- d) Substantial experience in the practice of law. *Standards* § 9.22(i). The Respondent has practiced continuously in Oregon since 1987, except for the time between 1992 and 1995;
- e) Indifference to making restitution. *Standards* § 9.22(j). The Respondent was aware of his obligation to repay his client and he failed to repay any portion of the amount owed;
- f) The Respondent has generally failed to participate in this formal proceeding;
- g) The sole mitigating factor in this matter is the absence of a prior disciplinary record. *Standards* § 9.32(a).

### SANCTION

Sanctions in disciplinary matters are not intended to penalize a 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 numerous aggravating factors weighted against the single mitigating factor justify an increase in the degree of presumptive discipline to be imposed. *Standards* § 9.21.

Accordingly, the Trial Panel concludes the Respondent shall be suspended from the practice of law for a 24-month period. Further, in light of the need to protect the public, the legal system, and the integrity of the profession, the Trial Panel orders that at the conclusion of the 24-month suspension, the Respondent shall be subject to formal reinstatement pursuant to BR 8.1.

Dated this 6th day of April, 2016.

/s/ Kathy Proctor  
Kathy Proctor, Trial Panel Chairperson

/s/ Allen Reel  
Allen Reel, Trial Panel Member

/s/ Loni Bramson  
Loni Bramson, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 16-29
	)	
RICK INOKUCHI,	)	
	)	
Accused.	)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.4(a), RPC 1.4(b), RPC 5.5(a), and RPC 8.1(a)(2). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	November 21, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Rick Inokuchi is suspended for 60 days, effective November 21, 2016, or 10 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.4(a), RPC 1.4(b), RPC 5.5(a), and RPC 8.1(a)(2).

DATED this 4th day of November, 2016.

/s/ Robert A. Miller  
 Robert A. Miller  
 State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Rick Inokuchi, attorney at law (“Inokuchi”), 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.

Inokuchi was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 14, 1984, and has been a member of the Bar continuously since that time, having his office and place of business in Curry County, Oregon.

3.

Inokuchi 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 10, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Inokuchi for alleged violations of RPC 1.4(a) (duty to promptly comply with client’s reasonable requests for information), RPC 1.4(b) (duty to explain a matter sufficient to permit the client to make informed decisions), RPC 5.5(a) (unlawful practice of law), and RPC 8.1(a)(2) (failure to respond to Disciplinary Counsel’s Office (“DCO”) inquiries). 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 March 4, 2015, Inokuchi was appointed to represent Randy Joe Cummings (“Cummings”) in a criminal matter. During his representation, Inokuchi did not respond to Cummings’s multiple requests for information regarding his case, including defense issues related to funding for a private investigator and subpoenas for trial witnesses.

6.

In December 2015, DCO received a complaint from Cummings about Inokuchi’s conduct. Thereafter, DCO requested Inokuchi’s response to Cummings’s complaint by first-class mail and email. Inokuchi knowingly did not respond to either correspondence. Inokuchi similarly knowingly failed to respond to January 2016 follow-up correspondence from DCO,

sent by both first class and by certified mail, return receipt requested. As a result, Inokuchi was administratively suspended on April 18, 2016, pursuant to BR 7.1.

7.

On April 20, 2016, Inokuchi filed a Compliance Affidavit that admitted that during the time he was suspended on April 19 and 20, 2016, he engaged in the practice of law; specifically, he made court appearances for nine clients.

### **Violations**

8.

Inokuchi admits that by failing to respond to Cummings's reasonable requests for information and provide him necessary information, he violated RPC 1.4(a) and 1.. Inokuchi also admits that by practicing law while he was suspended pursuant to BR 7.1, he violated RPC 5.5(a). Inokuchi further admits that by knowingly failing to respond to lawful demands for information from a disciplinary authority, he violated RPC 8.1(a)(2).

### **Sanction**

9.

Inokuchi 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 Inokuchi'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.

- a. **Duty Violated.** Inokuchi violated his duty to Cummings to represent him diligently by failing to communicate with him over the course of the representation. *Standards* § 4.0. Inokuchi violated his duties to the profession to refrain from unlawful practice and to cooperate in the investigation of professional misconduct by the Bar. *Standards* § 7.0.
- b. **Mental State.** There are three recognized mental states under the *Standards*. "Intent" is the conscious objective or purpose to accomplish a particular result." *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Standards* at 9. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9.

Inokuchi did not act intentionally, rather Inokuchi's conduct in this matter was negligent and knowing. Initially, Inokuchi may have negligently failed to

communicate with his client. However, by remaining unresponsive to repeated requests for information, Inokuchi knowingly failed to communicate with both his client and DCO.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). The lack of communication caused actual injury in the form of client anxiety and frustration. *See In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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*). Inokuchi's knowing refusal to cooperate 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 prevented the Bar from fulfilling 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); *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). Inokuchi failed to respond to his client's multiple requests for updates and information. After his client complained to the Bar, Inokuchi failed to respond to lawful requests for information from disciplinary authorities.
  2. Substantial experience in the practice of law. *Standards* § 9.22(i). Inokuchi was admitted in 1984.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
  2. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
  3. Full and free disclosure to disciplinary counsel. *Standards* § 9.32(e). Inokuchi immediately contacted and cooperated with the Bar when he was notified by the circuit court that he had been suspended.
  4. Remorse. *Standards* § 9.32(e). Inokuchi has expressed remorse for his conduct in this matter. Inokuchi appreciates that by ignoring disciplinary authorities' requests for information in the investigation of this

matter, he adversely impacted the Bar’s time and resources, and prevented the Bar from fulfilling its responsibility to protect the public.

10.

Under the ABA *Standards*, “[r]eprimand 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. “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.

11.

Oregon cases hold that a reprimand would likely be the sufficient result if Inokuchi’s only violations involved client communication. *See, e.g., In re Maloney*, 24 DB Rptr 194 (2010) (attorney reprimanded for failing to communicate with criminal appellate client despite numerous inquiries from him asking about the status of his legal matter); *In re Langford*, 19 DB Rptr 211 (2005) (attorney reprimanded 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); *In re Gregory*, 19 DB Rptr 150 (2005) (attorney reprimanded when he ignored requests from his former client and her new counsel for the client’s file and the unearned portion of her retainer, until the client filed a complaint with the Bar).

12.

Although relatively short periods of unlawful practice can sometimes result in reprimands, when the lawyer has been willfully ignorant to the Bar’s attempts to communicate with him, or otherwise defiantly engages in the practice of law, a suspension is more common. *See, e.g., In re Foster*, 29 DB Rptr 35 (2015) (30-day suspension when, after a trial panel decision suspending her for unlawful practice and at a time when attorney was also administratively suspended, she held herself out to the public in television and internet advertising as an attorney at law and otherwise expressed or implied to the public that she was authorized to practice law in Oregon).

13.

The court has repeatedly held that the “failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation.” *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000); *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997). The court has also emphasized that it has no patience for violations of this rule. *In re Miles*, 324 Or at 222–23 (although no substantive charges were brought, attorney was suspended for 120 days for noncooperation with the Bar); *see also In re Schaffner*, 323 Or 472 (attorney suspended for 120 days; 60 each for his neglect and his failure to cooperate with the Bar).

14.

Consistent with the *Standards* and Oregon case law, and taking into account that Inokuchi's mitigation outweighs his aggravation, the parties agree that Inokuchi shall be suspended for 60 days for his violations of RPC 1.4(a), RPC 1.4(b), RPC 5.5(a), and RPC 8.1(a)(2); the sanction to be effective November 21, 2016, or 10 days after approval by the Disciplinary Board, whichever is later.

15.

Inokuchi 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, Inokuchi has arranged for M. John Spicer (94211 Gauntlett Street, PO Box 645, Gold Beach, OR 97444), an active member of the Bar, to either take possession of or have ongoing access to Inokuchi's client files and serve as the contact person for clients in need of the files and appearances by counsel during the term of his suspension. Inokuchi represents that M. John Spicer has agreed to accept this responsibility.

16.

Inokuchi 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. Inokuchi 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.

Inokuchi 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.

Inokuchi 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 Inokuchi is admitted: California.

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 31st day of October, 2016.

/s/ Rick Inokuchi

Rick Inokuchi

OSB No. 842536

EXECUTED this 2nd day of November, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 16-121  
 )  
SARAH A. BALDWIN, )  
 )  
Accused. )

Counsel for the Bar: Susan R. Cournoyer  
Counsel for the Accused: Kim E. Hoyt  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(c)(3) and RPC 1.15-1(c).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: November 14, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Baldwin is publicly reprimanded, for violation of RPC 1.5(c)(3) and RPC 1.15-1(c).

DATED this 14th day of November, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

/s/ James Edmonds  
James Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Sarah A. Baldwin, attorney at law (“Baldwin”), 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.

Baldwin was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 22, 2005, and has been a member of the Bar continuously since that time, having her office and place of business in Marion County, Oregon.

3.

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

4.

On September 10, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Baldwin for alleged violations of RPC 1.5(c)(3) and RPC 1.15-1(c) 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 February 2014, a client retained Baldwin to represent her in three criminal matters. Pursuant to their written fee agreement, the client paid a \$2,000 retainer, designated as a “minimum *non-refundable fee*” (emphasis in original), to be applied toward the overall fee for the representation. Baldwin agreed to bill for fees earned in excess of this retainer on a monthly basis.

6.

Baldwin’s fee agreement did not explain that the nonrefundable fee would not be deposited into her trust account or that the client could discharge her at any time, in which event the client might be entitled to a refund of all or part of the fee if the services for which the fee was paid had not been completed.

7.

Baldwin did not deposit the fee into her trust account, but instead treated it as earned upon receipt and placed it directly into her business account.

8.

Over the next several months, Baldwin worked 38.8 hours, at a \$60 hourly rate, to earn the fee.

### **Violations**

9.

Baldwin admits that, by collecting a nonrefundable fee pursuant to an agreement that did not disclose that the fee would not be placed into her trust account or explain that, if the client discharged her, the client may be entitled to a refund, she violated RPC 1.5(c)(3). Further, by failing to deposit the advance fee into her trust account upon receipt, to be withdrawn only as fees were earned or expenses incurred, Baldwin violated RPC 1.15-1(c).

### **Sanction**

10.

Baldwin 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 Baldwin’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.

- a. **Duty Violated.** The *Standards* approach fee-related misconduct as violations of a duty owed as a professional. Also, by failing to deposit an advance fee into trust, Baldwin violated a duty owed to her client.
- b. **Mental State.** Baldwin acted negligently in failing to realize that her fee agreement did not comply with RPC 1.5(c)(3) or that, as a result, she was required to deposit the advance fee into trust. Negligence is defined as the failure “to heed a substantial risk that circumstances exist or that a result will follow,” which failure deviates from the standard of care a reasonable lawyer would exercise in the situation. *Standards* at 9.
- c. **Injury.** Baldwin’s failure did not result in any actual injury to her client, as she fulfilled her obligations under the fee agreement and completed the representation to conclusion. However, the client was exposed to potential injury in that she was not informed that she could discharge Baldwin and receive a refund of any unearned portion of the advance fee. Furthermore, Baldwin’s collecting the advance fee before it was earned exposed the client

to potential injury in the event that Baldwin was unable to complete the representation or the client decided to discharge her.

d. **Aggravating Circumstances.** There is one aggravating factor:

1. Prior discipline. *Standards* § 9.22(a). Baldwin was admonished in 2013 for charging an excessive fee. Letters of admonition may be viewed as an aggravating factor when they involve similar misconduct. *In re Cohen*, 330 Or 489, 500–01, 8 P3d 953 (2000). *See also Standards* § 8.3(b) (reprimand is generally appropriate when a lawyer “has received an admonition 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”).

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

1. Absence of dishonest or selfish motive. *Standards* § 9.32(b);
2. Timely good-faith effort to rectify consequences of misconduct (*Standards* § 9.32(d)). Baldwin modified her fee-agreement forms to comply with RPC 1.5(c)(3) and made appropriate disclosures to, and obtained consent from, six other clients who had previously paid nonrefundable fees under the noncompliant agreement; and
3. Full and free disclosure. *Standards* § 9.32(e).

11.

Under the *Standards*, public reprimand is generally appropriate when a lawyer negligently engages in conduct that violates such a duty owed as a professional, “and causes injury or potential injury to a client, the public, or the legal system.” *Standards* § 7.3. Public reprimand is also appropriate “when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.” *Standards* § 4.13.

12.

Decisions of the Disciplinary Board are in accord. *See In re Grimes*, 25 DB Rptr 242 (2011) (lawyer reprimanded for violations of RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c)); *In re McElroy*, 25 DB Rptr 224 (2011) (lawyer reprimanded for violations of RPC 1.15-1(a) and RPC 1.15-1(c)); *In re Coran*, 24 DB Rptr 269 (2010) (lawyer reprimanded for violations of RPC 1.5(c)(2), RPC 1.15-1(a), and RPC 1.15-1(c)); *In re Lounsbury*, 24 DB Rptr 53 (2010) (lawyer reprimanded for violations of RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d)); *In re Arneson*, 22 DB Rptr 331 (2006) (lawyer reprimanded for violations of RPC 1.15-1(d) and RPC 1.15-1(e)).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Baldwin shall be publicly reprimanded for violation of RPC 1.5(c)(3) and RPC 1.15-1(c), the sanction to be effective upon approval of this stipulation for discipline.

14.

Baldwin 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.

15.

Baldwin represents that she is not admitted to practice law in any jurisdictions other than Oregon.

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 24th day of October, 2016.

/s/ Sarah A. Baldwin

Sarah A. Baldwin  
OSB No. 051932

APPROVED AS TO FORM AND CONTENT:

/s/ Kim E. Hoyt

Kim E. Hoyt

EXECUTED this 2nd day of November, 2016.

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. 16-117
	)	
GARY I. GRENLEY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy R. Owen
Counsel for the Accused:	Mark J. Fucile
Disciplinary Board:	None
Disposition:	Violation of RPC 1.7(a). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	November 14, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Gary I. Grenley is publicly reprimanded for violation of Oregon Rule of Professional Conduct 1.7(a).

DATED this 14th day of November, 2016.

/s/ Robert A. Miller  
 Robert A. Miller  
 State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Gary I. Grenley, attorney at law (“Grenley”), 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.

Grenley was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 19, 1975, and has been a member of the Bar continuously since that time. Grenley’s office and place of business is in Multnomah County, Oregon.

3.

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

4.

On September 10, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Grenley for an alleged violation of Oregon Rule of Professional Conduct (RPC) 1.7(a)(2) (current-client conflict of interest). 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.

Robert Foege, M.D. (“Foege”) purchased a home and, after the sale, learned that the sellers had made misrepresentations regarding his new home’s water and sewer service. Foege also speculated that his real estate agent and the sellers’ agent (who both worked for John L. Scott entities) knew about the sellers’ misrepresentations and could be liable. Foege hired Grenley and, based upon the evidence then available, they decided to sue the sellers only, seeking the remedy of rescission.

6.

Grenley’s firm represents John L. Scott Realty (“JLS”) on corporate matters, although Grenley does not perform any work for JLS. Based upon Foege’s initial rescission claim against the sellers, the Engagement for Legal Services (“Engagement Agreement”) prepared by Grenley listed the sellers as adverse parties and listed the brokers and JLS as interested parties. The Engagement Agreement stated that no conflicts had been found.



7.

After filing the rescission action against the sellers, Grenley deposed the brokers. The depositions revealed information that supported the claim against the sellers and also suggested adding new claims against the brokers.

8.

Shortly following the depositions, Grenley sent a demand letter to JLS's general counsel. The letter explained the potential liability of the brokers, proposed a resolution involving JLS, and threatened litigation if an agreement could not be reached. The demand letter did not advise JLS's general counsel of the current-client conflict, nor did Grenley seek informed consent from either JLS or Foege for his continued representation of Foege.

9.

JLS's general counsel denied any liability by JLS or Foege's broker. The letter did not address the sellers' broker, who was employed by a JLS franchisee, not JLS. The general counsel expressed concern for Grenley's demand letter, and asserted that a clear conflict of interest existed because JLS was a current client of his firm. The JLS general counsel detailed the conditions under which JLS could grant Grenley a limited conflict waiver to continue to represent Foege.

10.

Following the letter from JLS's general counsel, Grenley withdrew from representing Foege and refunded all of the fees that Foege had paid. Grenley worked cooperatively with Foege to transition to new counsel.

### **Violation**

11.

Grenley admits that his failure to recognize the significant risk that his representation of Foege was materially limited by his firm's responsibilities to JLS violated RPC 1.7(a)(2).

### **Sanction**

12.

Grenley 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 Grenley'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.

- a. **Duty Violated.** Grenley violated his duty to his clients to avoid conflicts of interest. *Standards* § 4.3.

- b. **Mental State.** Grenley was negligent in failing to be aware of the significant risk that his representation of one client was materially limited by his responsibilities to another client. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). It does not appear that Foege suffered any financial harm because all of the fees and costs that he paid were refunded to him. Here, there was the potential for injury to Foege and JLS when Grenley did not recognize the current-client conflict and did not make full disclosure and seek consent from either client, prior to sending the demand letter to JLS.
- d. **Aggravating Circumstances.** Aggravating circumstances include:  
Substantial experience in the practice of law. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - a. Absence of dishonesty or selfish motive. *Standards* § 9.32(b).
  - b. Timely good-faith effort to make restitution or to rectify consequences of misconduct. *Standards* § 9.32(d). As soon as he was made aware of the conflict, Grenley withdrew and refunded all of the fees and costs paid by Foege.

13.

Under the *Standards*, public “[r]eprimand 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 [materially] adversely affect another client, and causes injury or potential injury to a client.” *Standards* § 4.33.

14.

Oregon case law also suggests that a public reprimand is the appropriate sanction. *See, e.g., In re Cohen*, 316 Or 657, 853 P2d 286 (1993) (attorney reprimanded for failing to recognize actual and potential conflicts when representing a husband and wife in a juvenile matter, while also defending husband against criminal charges involving the affected child); *In re Trukositz*, 312 Or 621, 825 P2d 1369 (1992) (attorney reprimanded for failing to recognize a conflict when he represented husband in a dissolution proceeding involving issues of child custody and support after attorney had prepared for wife a paternity affidavit naming husband the father); *In re Carey*, 307 Or 315, 767 P2d 438 (1989) (attorney reprimanded for

not recognizing actual and likely conflicts of interest when he made loans from the estates of certain legally incompetent clients to other current clients).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Grenley shall be publicly reprimand for violation of RPC 1.7(a)(2), the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

16.

Grenley 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.

Grenley 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 Grenley 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 18th day of October, 2016.

/s/ Gary I. Grenley

Gary I. Grenley  
OSB No. 751380

APPROVED AS TO FORM AND CONTENT:

/s/ Mark J. Fucile

Mark J. Fucile  
OSB No. 822625

EXECUTED this 29th day of October, 2016.

OREGON STATE BAR

By: /s/ Stacy R. Owen

Stacy R. Owen  
OSB No. 074826  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 15-85 and 15-139  
)  
EDWARD T. LECLAIRE, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2). Stipulation for Discipline. 120-day suspension, all but 30 days stayed, two-year probation.  
Effective Date of Order: November 28, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Edward T. LeClaire is suspended for 120 days, with all but 30 days of the suspension stayed pending LeClaire’s successful completion of a two-year term of probation, effective 10 days after the stipulation is approved by the Disciplinary Board for violation of RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2).

IT IS FURTHER ORDERED that Edward T. LeClaire will be subject to the formal reinstatement requirements under BR 8.1.

DATED this 18th day of November, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Edward T. LeClaire, attorney at law (“LeClaire”), 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.

LeClaire was admitted by the Oregon Supreme Court to the practice of law in Oregon on July 26, 2004, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

LeClaire 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 March 11, 2016, a Formal Complaint was filed against LeClaire pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.4(a) (duty to keep a client reasonably informed and respond to reasonable requests for information), RPC 1-15-1(d) (failure to promptly deliver to client property client is entitled to receive), and RPC 8.1(a)(2) (failure to respond to 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.

#### **Case No. 15-85**

#### **Romanos matter**

#### **Facts**

5.

On November 7, 2014, Marcus Romanos (“Romanos”) hired LeClaire to represent Romanos on an alleged probation violation. Pursuant to a written flat-fee agreement Romanos paid LeClaire \$750. LeClaire and Romanos met with Romanos’s probation officer later the same day and negotiated a resolution. After that meeting, Romanos sought to contact LeClaire to further discuss his case, and LeClaire did not respond.

6.

Over the next couple of weeks, Romanos attempted to reach LeClaire about the status of his legal matter, without success. When Romanos did not hear anything from LeClaire, Romanos was forced to reach out directly to the probation officer to determine the status of the case.

7.

Romanos called LeClaire more than a dozen times over the following month (“case inquiries”), seeking an update on the status of his legal matter, but received no substantive response.

8.

In conjunction with his case inquiries, Romanos also made numerous requests for a copy of the flat-fee agreement that Romanos signed when he retained LeClaire. LeClaire did not respond to Romanos’s requests or provide him with a copy of the flat-fee agreement.

9.

On February 5, 2015, Romanos filed a complaint with the Bar about LeClaire’s conduct. The Bar’s Client Assistance Office (“CAO”) forwarded Romanos’ complaint to LeClaire at his address of record on file with the Bar (“Record Address”), and requested his response.

10.

On March 2, 2015, LeClaire responded by letter to CAO, but thereafter did not respond to any further requests for information from CAO. After four additional inquiries to LeClaire at his Record Address went unanswered, CAO staff referred the matter to Disciplinary Counsel’s Office (“DCO”) for further investigation, and notified LeClaire of the referral (by letter to his Record Address).

11.

During June and July 2015, DCO sent two letters of inquiry to LeClaire at his Record Address by first-class mail and/or certified mail. The letters were not returned undelivered, but LeClaire 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 2015, LeClaire was administratively suspended due to his lack of cooperation.

## **Violations**

12.

LeClaire admits that by failing to notify Romanos regarding events in his case and by failing to respond to Romanos' attempts to communicate with him, he failed to sufficiently communicate with his client, in violation of RPC 1.4(a).

13.

LeClaire further admits that his failure to respond to DCO in its investigation of Romanos's complaint constituted a knowing failure to respond to a lawful demand from a disciplinary authority, in violation of RPC 8.1(a)(2).

## **Case No. 15-139**

### **Hill matter**

#### **Facts**

14.

Around August of 2011, Gerald Hill ("Hill") retained LeClaire to represent him in a felony case. Hill was found guilty and sentenced in 2012.

15.

LeClaire moved his office from Lake Oswego to Portland in 2014. He did not notify Hill of the move.

16.

LeClaire ceased active practice and closed his last open case file in June 2015, and although he notified the Professional Liability Fund ("PLF") of this, he failed to notify the Bar or update his address of record with the Bar.

17.

In or around July 2015, while Hill was working on his postconviction relief ("PCR") proceeding, Hill wrote to LeClaire at the former Lake Oswego office address requesting his file.

18.

When LeClaire did not respond to Hill's request, Hill contacted the Bar seeking assistance. In September 2015, CAO wrote to LeClaire at his Record Address, and included with its letter the correspondence from Hill in which he requested his file.

19.

LeClaire did not respond to the September 2015 correspondence from CAO, and did not provide Hill's file either to CAO or to Hill. DCO sent letters to LeClaire at his Record

Address in October and November 2015, requesting Hill's file. LeClaire did not respond, nor did he provide Hill's file to the Bar or Hill.

### Violations

20.

LeClaire admits that by failing to notify Hill of his move and by otherwise failing to respond to Hill's attempts to contact him, he failed to adequately communicate with his client, in violation of RPC 1.4(a).

21.

LeClaire also admits that his failure to provide Hill with his client file constituted a failure to promptly provide his client with property to which his client was entitled, in violation of RPC 1.15-1(d).

22.

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.1(a)(2) should be and, upon the approval of this stipulation, is dismissed.

### Sanction

23.

LeClaire 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 LeClaire'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.** LeClaire violated his duty to his clients to diligently attend to their matters, which duty includes the obligation to timely and effectively communicate with them. *Standards* § 4.4.

LeClaire likewise violated his duty to his client ("Hill") to preserve and return client property. *Standards* § 4.1. The *Standards* provide that the most important ethical duties are those that lawyers owe to their clients. *Standards* at 5.

LeClaire also violated his duty to the profession to cooperate with the Bar's investigation into his conduct. *Standards* § 7.0.

- b. **Mental State.** The *Standards* recognize three possible mental states: negligent, knowing, and intentional. *Standards* at 9.



LeClaire was initially negligent in his failure to communicate with Romanos; that is, he failed to heed a substantial risk that circumstances existed or that a result will follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. However, LeClaire’s mental state became knowing after Romanos called him and texted him numerous times with no response from LeClaire. A knowing mental state is the “conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9.

In Hill’s case, LeClaire’s failure to communicate with Hill and return Hill’s property was negligent.

LeClaire’s failures to respond to the Bar were knowing, in that he was aware at least of the pending complaint by Romanos when he ceased communicating with the Bar.

- c. **Injury.** Injury can be actual or potential. *Standards* § 3.0. LeClaire’s failure to respond to Romanos and Hill caused actual anxiety and frustration for both. *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004).

Hill may have sustained additional potential injury in the event his file contained important information that could have affected the outcome of the PCR proceeding. With no response from LeClaire, Hill had to file the PCR petition without the benefit of his file materials relating to the conviction in the underlying criminal case.

The Bar also sustained actual injury in that staff spent additional time and effort to obtain information LeClaire should have provided.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Multiple offenses. *Standards* § 9.22(d).
  - 2. Substantial experience in the practice of law (nine years at the time of the misconduct). *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of relevant prior disciplinary record. *Standards* § 9.32(a).
  - 2. Absence of a dishonest motive. *Standards* § 9.32(b).
  - 3. LeClaire demonstrated that he was experiencing personal and emotional problems at the time of some of the misconduct at issue. *Standards* § 9.32(c).

24.

Under the *Standards*, a suspension is generally appropriate when “a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.” *Standards* § 4.42. 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* § 7.2.

25.

Oregon cases also support the imposition of a suspension for neglect in action or communication, with or without a failure to respond to the Bar. Typically, a suspension of at least 60 days is the presumptive sanction for *either* failure to communicate or a failure to cooperate with the Bar; in this case there are both.

LeClaire’s failure to communicate with his client alone warrants at least a short suspension. *See, e.g., In re Murphy*, 349 Or 366, 245 P3d 100 (2010) (120-day suspension); *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (attorney suspended for 30 days for failing to respond to his personal-injury client’s status inquiries, inform the client of communications with the adverse party and with the client’s own insurer, and explain the strategy attorney decided upon regarding settlement negotiations); *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).

The court has also 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 when 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), *modified on recons*, 345 Or 652, 202 P3d 165 (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 when 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).

26.

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 that 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.

27.

Consistent with the *Standards* and Oregon case law, the parties agree that LeClaire shall be suspended for 120 days for his violations of RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2); the sanction to be effective 10 days after the stipulation is approved by the Disciplinary Board. However, all but 30 days of the suspension shall be stayed pending LeClaire's successful completion of a two-year term of probation on the conditions described below.

28.

LeClaire's license to practice law shall be suspended for a period of 30 days beginning 10 days after the stipulation is approved by the Disciplinary Board ("actual suspension"), assuming all conditions have been met. LeClaire 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. LeClaire further understands he is subject to the formal reinstatement requirements under BR 8.1. During the period of actual suspension, and continuing through the date upon which LeClaire re-attains his active membership status with the Bar, LeClaire 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.

29.

Probation shall commence upon the date LeClaire is reinstated to active membership status and shall continue for a period of two years, ending on the day prior to the second-year anniversary of the commencement date (the "period of probation"). During the period of probation, LeClaire shall abide by the following conditions:

- (a) LeClaire shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (b) Within seven days of his reinstatement date, LeClaire shall contact the PLF and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. LeClaire shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (c) LeClaire 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, LeClaire shall adopt and implement those recommendations.

- (d) No later than 60 days after recommendations are made by the PLF, LeClaire 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.
- (e) \_\_\_\_\_ (name of Probation Supervisor) shall serve as LeClaire's probation supervisor ("Supervisor"). LeClaire 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 LeClaire's clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, LeClaire shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of LeClaire'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 files to determine whether LeClaire is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
- (f) During the period of probation, LeClaire shall attend not less than eight MCLE-accredited programs, for a total of 24 hours, which shall emphasize law practice management, time management, and client management. These credit hours shall be in addition to those MCLE credit hours required of LeClaire for his normal MCLE reporting period. The Ethics School requirement does not count towards the 24 hours needed.
- (g) Each month during the period of probation, LeClaire 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, and timely providing client and third-party property, as appropriate.
- (h) On a monthly basis, on dates to be established by Disciplinary Counsel beginning no later than 30 days after his reinstatement to active membership status, LeClaire shall submit to DCO a written "Compliance Report," approved as to substance by Supervisor, advising whether LeClaire is in compliance with the terms of this agreement. In the event that LeClaire has

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

- (i) Throughout the term of probation, LeClaire shall diligently attend to client matters and adequately communicate with clients regarding their cases.
- (j) LeClaire authorizes 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 LeClaire's compliance.
- (k) LeClaire is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (l) LeClaire'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.
- (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (n) The SPRB's decision to bring a formal complaint against LeClaire for unethical conduct that occurred or continued during the period of his suspension or probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.
- (o) Within seven days of the effective date, LeClaire shall contact the State Lawyers Assistance Committee ("SLAC"). LeClaire 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.
- (p) A designee of SLAC shall serve as LeClaire's monitor ("Monitor"). LeClaire agrees to cooperate and comply with all reasonable requests made by his Monitor that SLAC or his Monitor, in his or her sole discretion, determines are designed to achieve the purpose of the diversion and the protection of LeClaire's clients, the profession, the legal system, and the public. LeClaire shall meet with his Monitor in person on a regular basis, as determined by SLAC and/or the Monitor, for the purpose of monitoring LeClaire's treatment progress.
- (q) LeClaire 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 LeClaire's treatment sessions should be reduced in frequency or terminated.

- (r) LeClaire authorizes his Monitor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement and to release to DCO any information DCO deems necessary to permit it to assess LeClaire's compliance.
- (s) LeClaire shall attend mental health treatment as determined and approved by SLAC to be appropriate, including any aftercare and therapy recommended by SLAC or LeClaire's treatment provider. LeClaire shall comply with all terms and recommendations of the treatment provider for the duration of his treatment program.
- (t) LeClaire 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 LeClaire's compliance or noncompliance with this stipulation and their treatment recommendations to SLAC and DCO. LeClaire agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (u) In the event LeClaire fails to comply with any condition of his probation, DCO may initiate proceedings to revoke LeClaire'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 LeClaire fails to comply with any condition of this stipulation, LeClaire shall immediately notify SLAC and DCO in writing.
- (w) LeClaire'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.

30.

LeClaire 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, LeClaire has arranged for \_\_\_\_\_, an active member of the Bar, to either take possession of or have ongoing access to LeClaire's client files and serve as the contact person for clients in need of the files during the term of his suspension. LeClaire represents that \_\_\_\_\_ has agreed to accept this responsibility.

31.

LeClaire 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. LeClaire 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.

32.

LeClaire 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. This requirement is in addition to any other provision of this agreement that requires LeClaire to attend or obtain continuing legal education (“CLE”) credit hours.

33.

LeClaire 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 LeClaire is admitted: Montana, Washington.

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 Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 7th day of November, 2016.

/s/ Edward T. LeClaire

Edward T. LeClaire

OSB No. 042081

EXECUTED this 9th day of November, 2016.

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. 16-65  
)  
THEODORE C. CORAN, )  
)  
Accused. )

Counsel for the Bar: Angela W. Bennett  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.7(a)(2) and RPC 1.8(e). Stipulation  
for Discipline. 120-day suspension, all but 30 days  
stayed, three-year probation.  
Effective Date of Order: December 1, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Theodore C. Coran is suspended for 120 days, with all but 30 days stayed, pending Coran's successful completion of a three-year term of probation, effective December 1, 2016 or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later, for violation of RPC 1.7(a)(2) and RPC 1.8(e).

DATED this 18th day of November, 2016.

/s/ Robert A. Miller

Robert A. Miller  
State Disciplinary Board Chairperson

/s/ James Edmonds

James Edmonds, Region 6  
Disciplinary Board Chairperson



### STIPULATION FOR DISCIPLINE

Theodore C. Coran, attorney at law (“Coran”), 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.

Coran 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.

Coran 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 15, 2016, a Formal Complaint was filed against Coran pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.7(a)(2) (current-client conflict of interest) and RPC 1.8(e) (improper financial assistance to a client). 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 of 2012, Coran began representing Jerry Rosenstiel (“Rosenstiel”) in a criminal matter, which was subsequently completed by late August, 2012.

6.

In spring of 2013, Rosenstiel proposed that Coran act as trustee of a trust to benefit Rosenstiel’s children and offered to give Coran \$500,000 and a life estate in real estate purchased for the trust in return for Coran’s services. Coran prepared a draft trust agreement in furtherance of the plan, but Rosenstiel did not immediately execute it.

7.

Also in spring of 2013, Adam Nielsen (“Nielsen”), one of Coran’s former clients, retained Coran to represent him in a probation violation matter.

8.

Thereafter, in mid-August 2013, Coran began representing Rosenstiel when he became the subject of another criminal investigation. Rosenstiel was subsequently arrested and incarcerated. While incarcerated, Rosenstiel met Nielsen, without Coran's involvement.

9.

Between mid-August 2013 and mid-October 2013, while Rosenstiel was incarcerated, Coran deposited money on Rosenstiel's "books" in the jail on multiple occasions (the "deposited funds").

10.

Coran did not require that the deposited funds be used only for court costs or the expenses of litigation, and in fact, Rosenstiel did not use the deposited funds for court costs or litigation expenses.

11.

Rosenstiel's bond was set at \$15,000. Rosenstiel proposed that Nielsen loan him the money for his bail in exchange for a \$30,000 note, as well as a truck and trailer.

12.

In September 2013, Coran met separately with Nielsen and Rosenstiel—both current clients—at the jail. Coran discussed the proposed loan with each client. Coran made multiple assurances to Nielsen regarding Rosenstiel's finances, including that Rosenstiel had substantial assets and would be able to repay the loan.

13.

Following their meeting, in part in reliance on Coran's representations about Rosenstiel, Nielsen agreed to the proposal and asked Coran to draw up a contract memorializing the terms. Coran drafted a Secured Transaction Contract (the "Contract"), which set forth the terms of Nielsen's agreement with Rosenstiel.

14.

Because Nielsen's and Rosenstiel's interests in the Contract were directly adverse, there was a significant risk that Coran's representation of Nielsen and Rosenstiel with regard to the loan transaction was materially limited by Coran's responsibilities to one or both of them. There was also a significant risk that Coran's representation of Nielsen in the loan transaction was materially limited by Coran's personal interest in finalizing the deal with Rosenstiel for Coran to act as trustee of Rosenstiel's trust.

15.

To the extent the conflict of interest Coran had in continuing to represent both Rosenstiel and Nielsen was capable of being waived, Coran failed to obtain informed consent from either Rosenstiel or Nielsen, confirmed in writing following full written disclosure of the conflict of interest and the material risks of having Coran purport to represent each of their interests in the drafting of the Contract and, from Nielsen's standpoint, the advisability of entering into the transaction the Contract represented.

16.

On October 16, 2013, Nielsen put up \$15,000 for Rosenstiel's bail. Upon release, Rosenstiel signed the Contract. Soon thereafter, Rosenstiel disappeared, and did not repay Nielsen as promised.

### **Violations**

17.

Coran admits that, by representing two current clients on both sides of a loan transaction, without proper disclosures and informed consent, he engaged in a current-client conflict of interest in violation of RPC 1.7(a)(2). Coran further admits that, when he put money in his client's jail account without limiting its use to litigation-related expenses, he provided improper financial assistance to a client in violation of RPC 1.8(e).

### **Sanction**

18.

Coran 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 Coran'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.

a. **Duty Violated.**

Coran violated his duty to his clients to avoid engaging in conflicts of interest. *Standards* § 4.3. The *Standards* provide that the most important ethical duties are those that lawyers owe to their clients. *Standards* at 5.

b. **Mental State.**

Initially, Coran negligently failed to recognize that his own interests might affect his representation of Nielsen and Rosenstiel. By the time of the drafting of the Contract in which Nielsen's and Rosenstiel's interests were objectively adverse, however, Coran's actions were knowing (i.e., with the conscious

awareness of the nature and attendant circumstances of his conduct but without the conscious objective or purpose to accomplish a particular result). *Standards* at 9. Coran acted negligently when he put his own money in Rosenstiel's jail account without limiting its use to expenses related to his legal matter.

c. **Injury.**

Injury can be actual or potential. *Standards* § 3.0. Coran's actions caused or contributed to actual injury to Nielsen's grandmother, the source of the \$15,000 Nielsen used to pay Rosenstiel's bail. Coran ultimately repaid Nielsen's grandmother the full amount of the loan; however, this does not negate the injury entirely. In addition, there was potential injury to both Nielsen and Rosenstiel insofar as Coran was obligated to objectively represent their competing interests as lender and borrower.

d. **Aggravating Circumstances.** Aggravating circumstances include:

1. Prior disciplinary offenses. *Standards* § 9.22(a).

Coran has stipulated to formal discipline on four prior occasions, two of which involved conduct violative of the same or a predecessor of the current-client conflict rule at issue in this case.

- (a) In 2000, Coran stipulated to a reprimand for a case in which he was appointed to represent a man and his common-law wife as co-defendants in a felony robbery case. He consulted with each, and advised he would decide after their arraignment whether he would continue to represent both. He appeared at the arraignment for both, and there informed the court he intended to withdraw from representing one of the defendants after he conferred again with each. After representing both for approximately three weeks, up until their arraignment, he withdrew from representing the man, and continued on representing the woman for a period of time. He stipulated to an actual or likely conflict of interest between current clients, and an actual or likely conflict of interest between a current and former client. Coran acted negligently in that matter, and caused potential, but not actual, injury. *In re Coran*, 14 DB Rptr 136 (2000) (reprimand for violations of DR 5-105(C) (*current* RPC 1.9) and DR 5-105(E) (*current* RPC 1.7(a)—multiple-client conflict)). This discipline involved the same rule—RPC 1.7(a), or its former equivalent, as that involved with Nielsen and Rosenstiel.

- (b) In 2002, Coran stipulated to a reprimand for neglecting three matters when he failed to timely file time-sensitive documents on his clients' behalf. In two of those matters, Coran continued to represent the client, despite the client's potential malpractice claim against him for his neglect, and failed to first obtain consent after full disclosure. In all three instances, Coran acted negligently, and his neglect caused some injury. *In re Coran*, 16 DB Rptr 234 (2002) (reprimand for violations of DR 5-101(A) (*current* RPC 1.7(a)—personal-interest conflict) and DR 6-101(B) (*current* RPC 1.3)). As with his prior discipline, this discipline involved the same rule—RPC 1.7(a), or its former equivalent, as that involved with Nielsen and Rosenstiel.
  - (c) In 2010, Coran stipulated to a reprimand for charging an improper contingent fee in a criminal case and failing to deposit and maintain client funds in a lawyer trust account. *In re Coran*, 24 DB Rptr 269 (2010) (reprimand for violations of RPC 1.5(c)(2), RPC 1.15-1(a), and RPC 1.15-1(c)).
  - (d) In 2011, Coran stipulated to accept a 30-day suspension, all stayed, pending completion of a two-year probation based upon three matters. In one, he failed to promptly deliver a file to a former client upon request. In two other matters, he entered into an improper flat-fee agreement. In one of the matters, he completed the representation, and no refund was required. In the other, he took the flat fee up front, and did not deposit the funds into his lawyer trust account. Thereafter, he did not complete the representation and voluntarily refunded a majority of the fee. As a result of this conduct, Coran was sanctioned in 2013 with a 30-day suspension, all stayed, pending completion of a two-year probation. He successfully completed probation. *In re Coran*, 27 DB Rptr 170 (2013) (30-day suspension, all stayed, pending completion of a two-year probation, for violations of RPC 1.5(c), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d)).
2. Multiple offenses. *Standards* § 9.22(d). Coran 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).

3. Substantial experience in the practice of law. Coran had been a lawyer in Oregon for over 30 years at the time of the misconduct. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. Coran acted with a belief he was helping his clients, rather than with an intent to benefit himself. *Standards* § 9.32(b).
  2. Timely good-faith effort to make restitution or to rectify consequences of misconduct. Although he did not benefit from the loan, and had no obligation to repay it, Coran paid the full \$15,000 to Nielsen’s grandmother. *Standards* § 9.32(d).
  3. Coran cooperated in the Bar’s investigation of his conduct. *Standards* § 9.32(e).
  4. Character or reputation. Coran provided references from legal professionals supporting his good character and reputation in the local legal community. *Standards* § 9.32(g).
  5. Imposition of other penalties or sanctions. In addition to the \$15,000 that Coran paid, as a result of these events and the ongoing disciplinary investigation, he lost his position in two county criminal defense consortiums, from which he had obtained 95 percent of his caseload. *Standards* § 9.32(k).
  6. Remorse. Coran has expressed remorse for the harm caused by his actions, which is supported by his repayment to Nielsen’s grandmother. *Standards* § 9.32(l).

19.

Under the *Standards*, a “[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” *Standards* § 4.32. A “[r]eprimand 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. “Suspension is also generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.” *Standards* § 8.2.

20.

Oregon case law also provides that a period of suspension is appropriate for conflicts of interest. *See, e.g., In re Germundson*, 301 Or 656, 724 P2d 793 (1986) (63-day suspension and three-year probation for personal-interest conflict of interest when there was no prior disciplinary history); *In re Baer*, 298 Or 29, 688 P2d 1324 (1984) (60-day suspension when attorney with no prior discipline represented both the sellers of real property and his wife as buyer without sufficient disclosure to the sellers of the nature of the conflict of interest). Additionally, the court has increased the length of a suspension for a conflict of interest when there was a prior disciplinary history for the same violation. *See e.g., In re Brandt*, 331 Or 113, 10 P3d 906 (2000) (finding that attorney's conflict of interest warranted a one-month longer suspension because attorney had previously received a letter of admonition for a conflict of interest, even when attorney had no other prior discipline). Finally, a short suspension has been imposed in some cases in which attorneys have improperly provided financial assistance to clients. *In re Hendrick*, 19 DB Rptr 170 (2005) (attorney stipulated to a 30-day suspension for loaning money to his client to resolve a nonjudicial foreclosure and satisfy other debts owed by the client to the creditor); *In re Carstens*, 17 DB Rptr 46 (2003) (stipulated 30-day suspension when attorney loaned money to his divorce client to insure that the client did not lose her house, and subsequently assisted the client by paying her household expenses).

21.

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 that may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices may best serve the purpose of protecting clients, the public, and the legal system.

22.

Consistent with the *Standards* and Oregon case law, the parties agree that Coran shall be suspended for 120 days for violations of RPC 1.7(a)(2) and RPC 1.8(e); the sanction to be effective December 1, 2016, or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later. However, all but 30 days of the suspension shall be stayed, pending Coran's successful completion of a three-year term of probation on the conditions described below.

23.

Coran's license to practice law shall be suspended for a period of 30 days beginning December 1, 2016, or 10 days after the stipulation is approved by the Disciplinary Board, whichever is later ("actual suspension"), assuming all conditions have been met. Coran 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 Coran re-attains his active membership status with the Bar, Coran 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.

24.

Probation shall commence upon the date Coran is reinstated to active membership status (the “commencement date”) and shall continue for a period of three years, ending on the day prior to the third-year anniversary of the commencement date (the “period of probation”). During the period of probation, Coran shall abide by the following conditions:

- (a) Coran shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (b) Within seven days of his reinstatement date, Coran 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. Coran shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (c) Coran shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding practice management and case management, including processes and procedures to identify and avoid conflicts of interest. No later than 30 days after recommendations are made by the PLF, Coran shall adopt and implement those recommendations.
- (d) No later than 60 days after recommendations are made by the PLF, Coran 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, if any, and explaining why he has not adopted and implemented those recommendations.
- (e) Jason E. Thompson (OSB #014301) shall serve as Coran’s probation supervisor (“Supervisor”). Coran shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Coran’s clients, the profession, the legal system, and the public.



- (f) Beginning with the first month of the period of probation, Coran shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Coran'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 percent or 10 of Coran's active case files (whichever is greater) to determine:
  - 1. Whether Coran is timely, competently, diligently, and ethically attending to matters, including communication with clients, opposing parties/counsel, and the court.
  - 2. Whether Coran is engaged in any current-client or former-client conflicts of interest.
  - 3. Whether Coran is taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
- (g) During the period of probation, Coran shall attend not less than 12 MCLE accredited programs, for a total of 36 hours, which shall emphasize law practice management, recognizing and avoiding conflicts of interest, and client management. These credit hours shall be in addition to those MCLE credit hours required of Coran for his normal MCLE reporting period. The Ethics School requirement does not count towards the 36 hours needed.
- (h) Each month during the period of probation, Coran 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, and that he has proper, written informed consents in place for conflicts purposes, when necessary.
- (i) On a monthly basis, on dates to be established by Disciplinary Counsel beginning no later than 30 days after his reinstatement to active membership status, Coran shall submit to Disciplinary Counsel's Office ("DCO") a written "Compliance Report," approved as to substance by Supervisor, advising whether Coran is in compliance with the terms of this agreement. In the event that Coran has not complied with any term of the agreement, the Compliance Report shall describe the noncompliance and the reason for it.
- (j) Throughout the term of probation, Coran shall diligently attend to client matters and adequately communicate with clients regarding their cases. Coran shall also avoid transactions that may present conflicts of interest.
- (k) Coran authorizes Supervisor to communicate with Disciplinary Counsel regarding his compliance or noncompliance with the terms of this stipulation,

and to release to Disciplinary Counsel any information necessary to permit Disciplinary Counsel to assess Coran's compliance.

- (l) Coran is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (m) Coran's failure to comply with any term of this stipulation, 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.
- (n) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (o) The SPRB's decision to bring a formal complaint against Coran for unethical conduct that occurred or continued during the period of his suspension or probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

25.

Coran 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, Coran has arranged for Jason E. Thompson, an active member of the Bar, to either take possession of or have ongoing access to Coran's client files and serve as the contact person for clients in need of the files during the term of his suspension. Coran represents that Jason E. Thompson has agreed to accept this responsibility.

26.

Coran 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. Coran 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.

27.

Coran 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. This requirement is in addition to any other provision of this agreement that requires Coran to attend or obtain continuing legal education ("CLE") credit hours.

28.

Coran represents that, apart from Oregon, he is not admitted to practice law in any other jurisdictions (whether his current status is active, inactive, or suspended).

29.

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 November, 2016.

/s/ Theodore C. Coran

Theodore C. Coran

OSB No. 822260

EXECUTED this 10th day of November, 2016.

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. 15-101  
)  
SARA LYNN ALLEN, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: Deanna L. Franco, Chairperson  
Willard H. Chi  
Joan J. LeBarron, Public Member  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC  
1.5(a), and RPC 1.16(d). Trial Panel Opinion. 60-day  
suspension, formal reinstatement, and restitution.  
Effective Date of Opinion: November 29, 2016

**TRIAL PANEL OPINION**

This matter came regularly before a Trial Panel of the Region 7 Disciplinary Board consisting of Deanna L. Franco, Chair; Willard H. Chi, Attorney Member; and Joan J. LeBarron, Public Member, on a Formal Complaint to consider the sanctions sought by the Bar against the Accused in connection with a specific domestic relations matter alleging a total of five violations of the Oregon Rules of Professional Conduct.

**Procedural History**

On March 16, 2016, the Bar filed a Formal Complaint alleging the Accused’s violation of the Oregon Rules of Professional Conduct.

On April 13, 2016 the Accused signed an Acceptance of Service. Thereafter, the Accused did not file an Answer or make any other appearance.

On May 2, 2016, the Accused was served with the Bar’s Notice of Intent to Take Default by mail, addressed to her last known address. The Notice was not returned to the Bar and the Accused failed to answer or otherwise appear within the time allowed.

On May 17, 2016, the Bar filed and served a Motion for Order of Default against the Accused. On June 3, 2016, pursuant to BR 5.8(a), the Trial Panel Chair signed an Order granting the Bar's motion for default and holding the facts alleged in the Formal Complaint to be true.

On June 30, 2016, the Trial Panel Chairperson mailed a letter to the Bar and the Accused informing both parties of the entry of the Order of Default and requesting that both parties submit Sanctions Memorandums to assist the Panel in rendering an opinion limited to the issue of appropriate sanctions.

On July 22, 2016, the Bar filed a memorandum in supporting sanctions, recommending sanctions.

The deadline for submitting the Sanctions Memorandums was Monday, August 1, 2016. The Trial Panel received no response from the Accused.

Neither the Bar nor the Accused requested the Trial Panel to convene to hear testimony in order to evaluate whether a sanction was appropriate for the Accused's conduct.

The Trial Panel convened on September 7, 2016 (following entry of an Order Extending Time to File Opinion), to evaluate the appropriate sanction for the Accused's conduct. No testimony was taken. This Opinion represents the unanimous decision of the Trial Panel.

#### **BURDEN OF PROOF / EVIDENTIARY STANDARD**

In the usual disciplinary proceeding, the Bar has the burden of establishing the Accused's misconduct by clear and convincing evidence. BR 5.2. Clear and convincing means that the truth of the facts asserted is highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994). In the instant action, however, the failure of the Accused to respond to the Formal Complaint and the entry of the Order of Default relieves the Bar of this burden as all of the facts alleged in the Formal Complaint are deemed to have been conclusively established. BR 5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). The only remaining burden to be met by the Bar is to establish that the sanction sought is appropriate for the misconduct deemed proven.

#### **FINDINGS AND CONCLUSIONS AS TO VIOLATIONS**

At all relevant times, the Accused, Sara Lynn Allen, was an attorney at law, duly admitted by the Supreme Court of the State of Oregon on September 20, 1999, to practice law in this state and was a member of the Bar, having her office and place of business in the County of Clackamas, State of Oregon.

As explained below, the Trial Panel finds that the appropriate sanction in this case is suspension for a period of 60 days; requirement that the Accused seek formal reinstatement under BR 8.1 if she wishes to return to the practice of law; and payment of restitution to her client in the amount of \$2,500. In making its determination, the Trial Panel considered the

allegations of the Bar’s Formal Complaint; the Order of Default; and the Bar’s July 22, 2016 Sanctions Memo Following Default Judgment. Because of the entry of the Order of Default, the facts alleged in the Formal Complaint are deemed to have been conclusively established. BR 5.8(a). The Accused has not submitted any materials for consideration.

The Trial Panel has reviewed the facts as established by default, considering *de novo* the conclusions to be drawn therefrom. We summarize the facts in the Formal Complaint drawing our own conclusions as follows:

The Accused is charged with five (5) causes of complaint in connection with a single client matter (the “Scott” matter), including: (a) neglect of legal matters entrusted to her (RPC 1.3); (b) failure to adequately communicate with her client to keep her client informed or respond to requests for information (RPC 1.4(a)); (c) failure to explain a matter to the extent necessary to allow the client to make decisions (RPC 1.4(b)); (d) charging or collecting a clearly excessive fee (RPC 1.5(a)); and (e) failing, upon termination, to take steps to the extent reasonably practicable to protect a client’s interests—refunding any advance payment of fee or expense that has not been earned or incurred (RPC 1.16(d)). These charges all represent violations of the Oregon Rules of Professional Conduct.

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

RPC 1.3 states:

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

Accepting the allegations in the Formal Complaint as true, the Trial Panel finds that the Accused violated RPC 1.3 by neglecting the legal matter entrusted to her by her client by failing to complete the legal matters for which she had been retained. Specifically, the Accused took no substantial action in her client’s matter and did nothing to protect or further his interests. The Accused abandoned her practice without notice to her client, while the client’s matter was still pending.

**B. The Accused violated RPC 1.4(a) of the Rules of Professional Conduct.**

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

Accepting the allegations in the Formal Complaint as true, the Trial Panel finds that the Accused violated RPC 1.4(a) in that she repeatedly and consistently failed to communicate with her client, failed to respond to her client’s efforts to communicate with her, and refused to provide information when requested.

**C. The Accused violated RPC 1.4(b) of the Rules of Professional Conduct.**

RPC 1.4(b) provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Accepting the allegations in the Formal Complaint as true, the Trial Panel finds that the Accused violated RPC 1.4(b) in that she failed to keep her client informed as to status conferences, agreements between her and opposing counsel, and hearing dates, as well as abandoned her office location without providing information to her client as to a new office location of her whereabouts generally.

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

RPC 1.5(a) provides in relevant part: “(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.”

Accepting the allegations in the Formal Complaint as true, the Trial Panel finds that the Accused violated RPC 1.5(a) when she collected a flat fee, failed to complete the professional services for which the fee was paid, and failed to promptly remit the unearned portion of the fee to the client.

**E. The Accused violated RPC 1.16(d) of the Rules of Professional Conduct.**

RPC 1.16(d) provides in relevant part:

(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.

Accepting the allegations in the Formal Complaint as true, the Trial Panel finds that the Accused violated RPC 1.16(d) by: (i) failing to take steps to withdraw from the client's legal matter, including providing notice to the court and opposing counsel; (ii) failing to deliver a copy of or make available the client's file so that it could be provided to new counsel; and (iii) failing to refund the unearned portion of all unearned fees and expenses upon the termination of her employment.

**Sanction**

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* (“Standards”), in addition to its own case law for guidance determining the appropriate sanction for lawyer misconduct. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993); *In re Eakin*, 334 Or 238, 257, 48 3Pd 147 (2002).

**A. ABA Standards**

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using four (4) factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury caused by the conduct, 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 441–42. The Trial Panel addresses each of the factors in order:

**1. Ethical Duties Violated.**

The Accused’s violation of duties set forth in RPC 1.3 (diligence/neglect of a legal matter), and RPC 1.4(a) and (b) (duty to communicate with the client and explain matter to allow client to make decisions) breached her general duty to act with reasonable promptness and diligence, including reasonable communication, in representing a client. *Standards* § 4.4.

The Accused’s violation of duties set forth in RPC 1.5(a) (charging or collecting a clearly excessive fee), and RPC 1.16(d) (failure upon termination to take steps reasonably practicable to protect her client) violated her duty to the profession to refrain from charging excessive fees (*Standards* § 7.0) and to the client to preserve and return client property (*Standards* § 4.1).

**2. Mental State.**

The *Standards* recognize three mental states: “intentional”, “knowing”, and “negligent”. The relevant mental states are defined as follows:

“‘Intent’ is the conscious objective or purpose to accomplish a particular result.” *Standards* at 9.

“‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9.

“‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9.

Concerning the Accused’s violation of duties set forth in RPC 1.3 (diligence/neglect of a legal matter), RPC 1.4(a) and 1.4(b) (duty to communicate with the client and explain matter to allow client to make decisions), the Trial Panel finds that the Accused’s initial inaction was at first, negligent, but such continued inaction changed to knowing conduct following her receipt of her client’s messages and communication, for which she did not respond. 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 444, 198 P3d 910 (2008).



Concerning the Accused's violation of duties set forth in RPC 1.5(a) (charging or collecting a clearly excessive fee) and RPC 1.16(d) (failure upon termination to take steps reasonably practicable to protect her client), the Trial Panel finds that: (i) the Accused's abrupt office closure and abandonment of her practice without notice to her client; (ii) failing to take steps to withdraw from the client's legal matter, including providing notice to the court and opposing counsel; (iii) failing to deliver a copy of or make available the clients file so that it could be provided to new counsel; and (iv) failure to refund the unearned portion of all unearned fees and expenses upon the termination of her employment was knowing and intentional.

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

For the purposes of determining an appropriate disciplinary sanction, the Trial Panel takes into account both actual and potential injury. *Standards* § 3.0; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The *Standards* define *injury* as "harm to a client, the public, the legal system, or the profession which results from a lawyer's conduct." *Standards* at 9. "'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 . . . . *Standards* at 9. An injury does not need to be actual, but only potential to support the imposition of a sanction. *In re Williams*, 314 Or at 547.

The Accused caused actual and potential injury to her client and the profession. The Accused's misconduct caused the resolution of her client's matter to be stalled or delayed. Moreover, the Accused's failure to return fees or timely return documents and files frustrated her client's ability to pursue his matters through other counsel. To date, the client has never received the refund to which he is entitled from the Accused.

### **B. Preliminary Sanction.**

The *Standards* set out the appropriate level of sanction, absent aggravating or mitigating circumstances, and the following standards appear to apply:

"Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." *Standards* § 4.11.

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

Disbarment is generally appropriate when

- (a) a lawyer 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; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

*Standards* § 4.41.

“Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.” *Standards* § 4.42.

“Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.” *Standards* § 7.2.

“Disbarment is generally appropriate when a lawyer: . . . (b) 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).

### **C. Aggravating and Mitigating Circumstances.**

1. Aggravating Circumstances. In fashioning its sanction in this case, the Trial Panel took into account both aggravating and mitigating circumstances. The following factors, which are recognized as aggravating under the *Standards*, exist in this case:

- (a) A prior history of discipline. (*Standards* § 9.22(a)). In the previous case of *In re Allen*, 28 DB Rptr 275 (2014), the Accused was subject to Bar scrutiny for similar misconduct at the time she engaged in the misconduct in the present case<sup>1</sup>.
- (b) A pattern of misconduct. (*Standards* § 9.22(c)). The previous discipline and the present matter demonstrate a pattern by the Accused of disregarding duties to clients.
- (c) Multiple offenses. (*Standards* § 9.22(d)). The Accused has violated several rules involving many of the most basic general duties owed to her clients and the profession.
- (d) Substantial experience in the practice of law. (*Standards* § 9.22(i)). The Accused has practiced law in Oregon since 1999 and had substantial experience at the time she committed these violations.

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<sup>1</sup> Reference to the previous disciplinary proceeding was provided by the Bar in its Sanctions Memorandum, page 10, line 4.

2. Mitigating Circumstances. In mitigation, the Trial Panel took into account the following factor, which is recognized as mitigating under the *Standards*:
  - (a) Imposition of other penalties or sanctions. (*Standards* § 9.32(k)). The Accused, in the previous case of *In re Allen*, was suspended for six months (all stayed, pending a three-year probation). It is of note that the previous discipline of the Accused involved similar acts occurring during the same general time frame as those in the present case.

On balance, the aggravating factors outweigh those in mitigation both in number and in severity and justify an increase in the degree of presumptive discipline to be imposed. *Standards* § 9.21. The appropriate sanction in this case is that a period of suspension is warranted.

#### **D. 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 Accused had an ethical duty to pursue her client's matter and to timely and reasonably communicate with him about the matter. The Accused also has a duty not to charge or collect an excessive fee. When the Accused was unable to cope with the requirements of representing her client, the Accused had a duty to take the steps necessary to withdraw from representation. Knowingly and intentionally disregarding and failing to comply with these ethical obligations results in actual and/or potential injury to her client.

A lawyer, like the Accused, who: (i) engages in neglect of a legal matter, (ii) fails to adequately communicate with her client, (iii) fails to reasonably explain a matter so that the client can make a decision, (iv) charges an excessive fee by failing to return unearned fees, and (v) fails to take steps to protect her client's interests warrants a period of suspension. *In re Redden*, 342 Or 393, 153 P3d 113 (2003); *In re Koch*, 345 Or 444; *In re Obert*, 352 Or 231, 282 P3d 825 (2012).

#### **Conclusion**

"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 properly to discharge their professional duties . . . ." *Standards* § 1.1; *In re Huffman*, 328 Or 567, 587, 983 P2d 534 (1999).

The Bar has asked the Trial Panel to: (i) suspend the Accused for at least 120 days; (ii) be made to seek formal reinstatement per BR 8.1, at such time as she elects to return to the practice of law in Oregon; and (iii) order the refund of at least \$2,500 of the client's flat fee.

After evaluating the ABA *Standards*, the factors in this case, and Oregon case law, in light of other requirements to be imposed on the Accused and when the violations committed by the Accused are taken as a whole, factoring the appropriate aggravating and mitigating circumstances, the Bar's request for suspension of at least 120 days is excessive. Therefore, the Trial Panel unanimously concludes that the Accused should be suspended from the practice of law for a period of no less than 60 days; pursuant to BR 8.1, the Accused shall be required to seek formal reinstatement at such time as she elects to return to the practice of law; and that the Accused shall pay restitution to her client, Scott, in the sum of \$2,500.00.

**Order**

**IT IS HEREBY ORDERED** that the Accused, Sara Lynn Allen, be, and upon the effective date of this Order shall be suspended from the practice of law for a period of no less than 60 days;

**IT IS FURTHER ORDERED** that pursuant to BR 8.1, the Accused shall be required to seek formal reinstatement at such time as she elects to return to the practice of law;

**IT IS FURTHER ORDERED** that Accused shall pay RESTITUTION to her client, Scott, in the sum of \$2,500.00; and

**IT IS FINALLY ORDERED** that the Oregon State Bar apply to the Oregon Supreme Court for entry of judgment of restitution as ordered herein.

Dated this 20th day of September, 2016

/s/ Deanna L. Franco

Deanna L. Franco

OSB No. 010470

Trial Panel Chairperson

/s/ Willard H. Chi

William H. Chi

OSB No. 97321, Trial Panel Member

/s/ Joan J. LeBarron

Joan J. LeBarron, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 16-124  
)  
TIMOTHY MPM PIZZO, )  
)  
Accused. )

Counsel for the Bar: Nik T. Chourey  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3 and RPC 1.4(a). Stipulation for  
Discipline. Public reprimand.  
Effective Date of Order: November 28, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Timothy MPM Pizzo is publicly reprimanded, for violation of RPC 1.3 and RPC 1.4(a).

DATED this 28th day of November, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Timothy MPM Pizzo, attorney at law (“Pizzo”), 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.

Pizzo was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 22, 1996, and has been a member of the Bar continuously since that time, having his office and place of business in Columbia County, Oregon.

3.

Pizzo 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 10, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Pizzo for alleged violations of RPC 1.3 (neglect of a legal matter), and RPC 1.4(a) (failure to respond to client’s reasonable requests for information) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

Katherine Warner (“Warner”) is divorced from Scott Crawford (“Father”) and the two have children together. In August 2015, Father’s attorney obtained an order requiring Warner to appear and show cause why their parenting plan should not be modified. The order gave Warner 30 days to appear in writing (by September 18, 2015).

6.

On August 28, 2015 (two days after she was served with the show-cause order), Warner met with Pizzo. Pizzo agreed to represent her and collected information necessary to draft a response for timely filing by the next week. He indicated that he would provide her with a draft response in the next day or two.

7.

There is a dispute as to whether Pizzo also called Father's attorney and left a message asking her not take a default against Warner without first giving Pizzo 10 days' notice, although he believes that he did so.

8.

On August 30, 2015, Warner left a voice message for Pizzo, indicating that she had not received the draft response that he had promised to provide her. Hearing nothing further, Warner began leaving voice messages daily for Pizzo beginning September 2, 2015, seeking information about her case. Pizzo did not respond.

9.

On September 10, 2015, Warner left another voice message for Pizzo indicating that she would stop by his office to pick up the documents she had left for him (including her copy of the show-cause order). When Warner called Pizzo again the next day, Pizzo answered the phone for the first time. He apologized for his lack of response, but assured her that he would draft a response and email it to her by Monday, September 14, 2015. Pizzo did not do so.

10.

When Warner did not receive anything responsive from Pizzo in her matter by September 14, 2015, she was compelled to contact another attorney for assistance. Pizzo did not respond to subsequent voice messages from Warner seeking information about her case between September 14 and 16, 2015.

11.

Warner was required to draft and file a *pro se* response to the show-cause order, in which she requested additional time to obtain new counsel and formally respond. The court granted her request, giving Warner an additional month to file her response.

### **Violations**

12.

Pizzo admits that his failure to timely attend to Warner's time-sensitive matter constituted neglect of a legal matter, in violation of RPC 1.3. Pizzo further admits that his failure to keep Warner reasonably informed, and to promptly comply with her reasonable requests for information, violated the requirements of RPC 1.4(a).

## Sanction

13.

Pizzo 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 Pizzo’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.

- a. **Duty Violated.** Pizzo violated his duty to his client to act with reasonable diligence and promptness in representing Warner, including the duty to adequately communicate with him. *Standards* § 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5.
- b. **Mental State.** There are three recognized mental states under the *Standards*. “‘Intent’ is the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9. “‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards* at 9.

Initially, Pizzo’s inattention to Warner’s legal claims may have been negligent. However, within a very short period of time, Warner’s inquiries on the status of her time-sensitive matter made Pizzo’s failure to timely respond knowing. Pizzo then also knowingly failed to respond to Warner’s requests for information.

- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Pizzo’s lack of communication caused actual injury in the form of client anxiety and frustration. *See In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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). The neglect itself also resulted in potential injury to Warner’s legal matter but not actual injury, as the court allowed Warner’s *pro se* request for an extension to respond to the show-cause order before Warner’s rights were adversely impacted.



- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior history of relevant discipline. *Standards* § 9.22(a). Pizzo was previously admonished for neglect (*current* RPC 1.3). *In re Pizzo*, OSB Case No. 00-86, Letter of Adm. (July 5, 2000). Pizzo’s conduct in this matter is similar to his prior admonition, making a reprimand the presumptive sanction. *Standards* § 8.3. *See also In re Cohen*, 330 Or at 500 (a letter of admonition is considered as evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue in the case at bar).
  2. A pattern of misconduct. *Standards* § 9.22(c). Pizzo’s prior misconduct, in conjunction with the violation in this case, demonstrates a pattern of failing to diligently attend to client matters. *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
  3. Substantial experience in the practice of law. *Standards* § 9.22(i). Pizzo was admitted to practice law in 1996.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
  2. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).
  3. Physical disability or impairment. *Standards* § 9.32(h). Pizzo reportedly contracted whopping cough shortly after being retained by Warner, and he was seriously ill and out of the office for a period of time relevant to Warner’s matter.
  4. Remoteness of prior offense. *Standards* § 9.32(m). *See In re Jones*, 326 Or 195, 200–01, 951 P2d 149 (1997); *In re Cohen*, 330 Or at 501–02.

14.

Under the ABA *Standards*, public “[r]eprimand 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 fails to perform services for a client and causes injury or potential injury to a client.” *Standards* § 4.42(a). On balance, Pizzo’s mitigating factors outweigh those in aggravation and support that a reprimand is a sufficient sanction for his misconduct in this matter.

15.

Oregon cases likewise provide that a public reprimand is appropriate for Pizzo's violations, when mitigation outweighs aggravation. *See, e.g., In re Bryant*, 25 DB Rptr 167 (2011) (attorney with more mitigation than aggravation was reprimanded when he failed to timely file a request for a hearing in a child support administrative proceeding, communicate a settlement proposal to his client, failed to appeal the order, and failed to respond to the client's requests for information); *In re Slininger*, 25 DB Rptr 8 (2011) (attorney who failed to respond to his incarcerated client's requests to correct an error in the criminal judgment was reprimanded when his inaction resulted in his client serving a longer sentence, having been wrongfully denied credit for good time, but when attorney had substantial mitigation); *In re Pieretti*, 24 DB Rptr 277 (2010) (respondent attorney with greater mitigation was reprimanded because, after his personal-injury client agreed to abate the case in order to submit the dispute to arbitration, respondent took no further action over several years, resulting in dismissal of the case).

16.

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

17.

Pizzo 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.

Pizzo represents that, apart from Oregon, he is not admitted to practice law in any other jurisdictions (whether his current status is active, inactive, or suspended).

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 14th day of November, 2016.

/s/ Timothy MPM Pizzo

Timothy MPM Pizzo

OSB No. 961709

EXECUTED this 18th day of November, 2016.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 16-118  
)  
ROSE L. HUBBARD, )  
)  
Accused. )

Counsel for the Bar: Stacy R. Owen  
Counsel for the Accused: Nellie Q. Barnard  
Disciplinary Board: None  
Disposition: Violation of RPC 1.15-1(d) and RPC 1.15-1(e).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: November 30, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Rose L. Hubbard is publicly reprimanded for violation of Oregon Rules of Professional Conduct (RPC) 1.15-1(d) and RPC 1.15-1(e).

DATED this 30th day of November, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Rose L. Hubbard, attorney at law (“Hubbard”), 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.

Hubbard 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. Hubbard’s office and place of business is in Washington County, Oregon.

3.

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

4.

On September 10, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Hubbard for alleged violations of RPC 1.15-1(d) (failure to promptly notify third person of receipt of property and failure to return third-person property on request) and RPC 1.15-1(e) (failure to keep disputed property separate until the dispute is resolved). 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.

Hubbard represented Andrea Titus (“Titus”) in a domestic relations matter. Titus has a child with Michael Dolan (“Dolan”). In September 2013, Titus and Dolan participated in a trial regarding child support, custody, and parenting time. The court ordered Dolan to pay \$8,000 for Hubbard’s attorney fees. Titus also obtained a judgment against Dolan for child support. In January 2014, Hubbard garnished Dolan’s wages for the attorney fee judgment. All payments for the attorney fee judgment were deposited into Hubbard’s lawyer trust account.

6.

The attorney fee judgment was paid off by mid-June 2015, but Hubbard did not notify Dolan’s employer of this fact because she erroneously thought the employer would monitor

the garnishment and terminate it when the value stated on the garnishment paperwork was reached. Dolan's employer kept making payments. At the end of July 2015, Hubbard received a large payment, which prompted Hubbard to notify Dolan's employer to cease paying. Hubbard did not notify Dolan directly of the receipt of the additional funds.

7.

As of the day that Hubbard contacted Dolan's employer, his employer had sent Hubbard \$3,769.76 more than the attorney fee judgment. On the same day that Hubbard notified Dolan's employer, and without notice to Dolan, Hubbard wrote a check to Titus in the amount of \$4,318.45, the amount then in Hubbard's lawyer trust account. Hubbard mistakenly reasoned that because Dolan had an outstanding child support obligation, Titus was entitled to any excess funds that came into Hubbard's possession, including the overpayment of the attorney fee judgment.

8.

When Dolan learned that his employer had overpaid Hubbard, he asked Hubbard to return his excess funds. However, by then, Hubbard had already given the funds to Titus. After giving Dolan's funds to Titus, Hubbard directed Titus to work with the Division of Child Support ("DCS"), the agency collecting Dolan's child support payments, to credit Dolan's DCS account for the overpayment sent to Titus. After time, with Dolan's agreement and direct participation by Hubbard, credit was applied to Dolan's DSC account.

### **Violations**

9.

Hubbard admits that, by failing to notify Dolan of her receipt of the excess funds, failing to deliver the excess funds to Dolan, and by choosing instead to deliver those funds to her client, she violated RPC 1.15-1(d). Hubbard further admits that, by failing to recognize the excess funds as being in dispute and by failing to retain those funds in her trust awaiting instructions for disbursement when the dispute was resolved, she violated RPC 1.15-1(e).

### **Sanction**

10.

Hubbard 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 Hubbard'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.

- a. **Duty Violated.** Hubbard violated her duties to the general public (*Standards* at 5) by failing to recognize that she was holding disputed funds belonging to

Dolan, failing to notify Dolan, and not retaining those funds in her trust account while awaiting Dolan's disbursement instructions instead of giving those funds to her client.

- b. **Mental State.** Hubbard knowingly or intentionally gave Dolan's money to Titus. She had the conscious objective or purpose to provide Titus the money. Hubbard also negligently failed to closely track the receipt of payments from Dolan's employer, allowing an excess of \$3,769.76 to accrue before informing Dolan's employer to cease payments.
- c. **Injury.** Dolan stated that Hubbard caused actual injury to him because he had to borrow money to make ends meet. Hubbard denied any injury by Dolan, pointing out that Dolan later agreed that the Child Support Division could credit him for those payments toward his child support obligation.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law. *Standards* § 9.22(i). Hubbard was admitted to practice in Oregon on April 14, 1989.
  2. Multiple offenses. *Standards* § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
  2. Absence of a dishonest or selfish motive. *Standards* § 9.32(b). Hubbard stated that her conduct was selflessly motivated, based upon a misinterpretation of RPC 1.15-1(d), and that she did not personally gain from her mistake.
  3. Full and free disclosure. *Standards* § 9.32(e). Hubbard admitted to the Bar that she provided the excess funds to her client, instead of Dolan.
  4. Timely and good-faith effort to rectify the consequence of misconduct. *Standards* § 9.32(d). Initially through her client, and later directly, Hubbard worked with DCS seeking to credit Dolan's child support account for the overpayment she had sent to Titus.

11.

Under the ABA *Standards*, “[s]uspension 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.

The Oregon Supreme Court has stated that the usual sanction for a violation of RPC 1.15-1 is suspension of between 30 and 60 days. *In re Obert*, 352 Or 231, 262, 282 P3d 825

(2012); *see also In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (experienced attorney's single unintentional mishandling of client trust account warranted 60-day suspension). However, other Oregon cases have resolved with public reprimands. *See, e.g., In re Welty*, 24 DB Rptr 92 (2010) (attorney reprimanded for negligently failing to notice that, as part of a sales transaction, over time, more was collected than was disbursed, resulting in several thousand dollars accumulating in the trust account and not timely paid to the clients); *In re Arneson*, 22 DB Rptr 331 (2008) (attorney reprimanded for failing to notify a third party and negligently disbursing disputed funds to his client when the attorney was unaware of a party agreement whereby the attorney was expected to retain funds in trust until a dispute was resolved); *In re McIlhenny*, 18 DB Rptr 82 (2004) (attorney reprimanded when he negligently failed to deposit and maintain in his trust account judgment proceeds received from the opposing party equal to his outstanding fees, knowing that his client disputed his bill).

13.

In light of Hubbard's substantial mitigating factors, which outweigh those in aggravation in number and in gravity, particularly her lack of any prior discipline, a public reprimand is both sufficient and appropriate for Hubbard's violations of RPC 1.15-1(d) and RPC 1.15-1(e). The sanction will be effective upon approval of this stipulation by the Disciplinary Board.

14.

Hubbard 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.

15.

Hubbard 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 Hubbard is admitted: Washington.

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 26th day of October, 2016.

/s/Rose L. Hubbard

Rose L. Hubbard

OSB No. 890630

APPROVED AS TO FORM AND CONTENT:

/s/ Nellie Q. Barnard

Nellie Q. Barnard

OSB No. 122775

EXECUTED this 7th day of November, 2016.

OREGON STATE BAR

By: /s/ Stacy R. Owen

Stacy R. Owen

OSB No. 074826

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 16-102  
 )  
COLE CHASE, )  
 )  
Accused. )

Counsel for the Bar: Theodore W. Reuter  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(2) and ORS 9.527(2).  
Stipulation for Discipline. Six-month suspension, all  
stayed, 18-month probation.  
Effective Date of Order: December 5, 2016

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Cole Chase is suspended for six (6) months, all stayed, pending Chase's successful completion of an eighteen (18)-month term of probation, effective on the date approved by the Disciplinary Board for violation of RPC 8.4(a)(2) and ORS 9.527(2).

DATED this 5th day of December, 2016.

/s/ Robert A. Miller  
Robert A. Miller  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Cole Chase, attorney at law (“Chase”), 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.

Chase was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 3, 2005, and has been a member of the Bar continuously since that time, having his office and place of business in Klamath County, Oregon.

3.

Chase 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 7, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Chase for alleged violations of RPC 8.4(a)(2) (criminal conduct reflecting adversely on fitness) of the Oregon Rules of Professional Conduct (“RPC”), and ORS 9.527(2) (conviction of a felony or misdemeanor involving moral turpitude) of the Oregon Revised Statutes. 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.

At all times relevant herein, Chase was a Deputy District Attorney (“DDA”) in Klamath County. Several years ago, Chase was the prosecutor in a criminal case against David Prewitt (“Prewitt”) which arose out of a fight in which Brad Zimmer (“Zimmer”) was also present. Zimmer was prepared to act as a witness on Prewitt’s behalf in that matter.

6.

On October 24, 2014, Chase was at a bar in Klamath Falls for some time when he encountered Zimmer. Chase had been drinking and the two engaged in a verbal altercation. Because Chase had been confronted in public before in relation to his DDA work, he routinely carried a concealed weapon, for which he had a valid permit. On October 24, 2014, he was carrying a semi-automatic pistol.

7.

When Zimmer challenged Chase to go outside to fight, Chase responded, “I’m leaving. You do what you have to do.” When Chase went outside to leave, Zimmer followed him.

8.

Outside, the conflict escalated to the point that Chase drew his semi-automatic pistol and pointed it at Zimmer. Chase then advanced on Zimmer, grabbed Zimmer, and pressed him against the back wall of the building. Chase pressed the gun into Zimmer’s head, causing a minor cut behind his ear.

9.

About the time that Chase had Zimmer against the building, Prewitt exited the bar. Upon seeing Prewitt, Chase stepped back from Zimmer so he could cover both of them with his gun.

10.

Chase called 911 and requested police assistance. Zimmer also took his phone out of his pocket and called for police assistance. Once the police arrived, Chase surrendered his gun by placing it in the bed of a pickup and stepping away.

11.

As a result of these actions, a grand jury returned an eight-count indictment that included two counts of unlawful use of a weapon with a firearm (ORS 166.220), menacing (ORS 163.190), two counts of recklessly endangering another person (ORS 163.195), and two counts of pointing a firearm at another (ORS 166.190).

12.

Chase pled no contest to two counts of unlawful use of a weapon with a firearm and two counts of menacing. The first two counts were felonies. However, the felony counts are to be reduced to misdemeanors and merged with the second two counts in the event Chase successfully completes his criminal probation.

### **Violations**

13.

Chase admits that the actions resulting in his conviction, as well as his conviction, as outlined above, violated RPC 8.4(a)(2) and ORS 9.527(2).

## Sanction

14.

Chase 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 Chase’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.

- a. **Duty Violated.** Chase violated his duty to maintain his personal integrity by committing the crime of menacing. *Standards* § 5.1.
- b. **Mental State.** Chase acted knowingly. “Knowledge” is defined by the *Standards* as the “conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* at 9.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Chase caused actual physical injury to one of his victims and emotional injury to both of his victims. The potential injury stemming from Chase’s actions in drawing and wielding a firearm after consuming alcohol was quite serious.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law. The Oregon State Bar admitted Chase in 2005 and he has practiced law continuously since that time. *Standards* § 9.22(i)
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
  2. Full and free disclosure to the Bar and cooperative attitude towards proceedings. Chase was forthright with the Bar regarding his conduct, and promptly responded to requests for information from Disciplinary Counsel’s Office (“DCO”). *Standards* § 9.32(e).
  3. Imposition of other penalties or sanctions. Chase was convicted of crimes for which he paid fines and was placed on probation (the “Criminal Probation”). Chase has complied with his Criminal Probation, which included requirements that he participate in alcohol and anger management classes. *Standards* § 9.32(k).
  4. Remorse. *Standards* § 9.32(l).

15.

Under the ABA *Standards*, “[s]uspension 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 circumstances of Chase’s conduct show significant mitigating factors. One factor of particular relevance is the disposition of Chase’s criminal matters, which permit him to avoid a felony conviction if he complies with the terms of his criminal probation.

16.

Oregon case law supports a suspension for knowing criminal conduct, notwithstanding significant mitigation. *See In re Kimmell*, 332 Or 480, 31 P3d 414 (2001) (six-month suspension for attorney convicted of theft); *In re Allen*, 326 Or 107, 130, 949 P2d 710 (1997) (one-year suspension for attorney who assisted a client in purchasing drugs on which the client overdosed); *In re Benson*, 311 Or 473, 814 P2d 507 (1991) (one-year suspension for attorney who forged a signature on a deed when no actual harm was found). In addition to the foregoing, Oregon cases also support that a suspension of at least six months is necessary for knowing violations of the law. *See, e.g., In re Light*, 29 DB Rptr 263 (2015) (attorney suspended for seven months for knowing criminal conduct); *In re Bottoms*, 29 DB Rptr 210 (2015) (two-year suspension, partially stayed pending probation for criminal possession of cocaine and carrying a loaded concealed weapon in public, for which respondent was later convicted); *In re Steves*, 26 DB Rptr 283 (2012) (attorney received a one-year suspension for violations, including willfully failing to file federal income tax returns timely or pay the tax due for three years); *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); *In re Bowles*, 19 DB Rptr 140 (2005) (attorney suspended for one year when he failed to file income tax returns over a period of several years).

17.

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 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.

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Chase shall be suspended for six (6) months for violations of RPC 8.4(a)(2) and ORS 9.527(2). However, all of the suspension shall be stayed, pending Chase’s successful completion of an eighteen

(18)-month term of probation (“Disciplinary Probation”). The sanction shall be effective on the date approved by the Disciplinary Board State Chair.

19.

The Disciplinary Probation shall commence upon the date that this stipulation is approved by the Disciplinary Board State Chair, as required by BR 3.6(d) (“commencement date”), and shall continue for a period of eighteen (18) months, ending on the day prior to the eighteenth (18th)-month anniversary of the commencement date (the “period of probation”). During the period of the Disciplinary Probation, Chase shall abide by the following conditions:

- (a) Chase will communicate with DCO and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Chase shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (c) Chase shall comply with the terms of his Criminal Probation in Klamath County Circuit Court Case No. 14-02819 CR and report promptly any violation or termination of his Criminal Probation to the DCO.
- (d) A member of the State Lawyers Assistance Committee (“SLAC”) shall supervise Chase’s probation (“Monitor”), and Chase agrees to enter into and comply with the terms of a Monitoring Agreement with SLAC. Chase shall immediately notify SLAC upon approval of this Stipulation for Discipline of:
  - (1) The existence and contents of this Stipulation for Discipline;
  - (2) The history and status of any treatment or programs in which Chase has/is participating, either of his own accord or as a result of his criminal probation; and
  - (3) Discussions with SLAC on whether and how to modify his current treatment plan to best accomplish the objectives of Chase’s Disciplinary Probation.
- (e) Chase shall meet at least monthly with his Monitor for the purpose of reviewing Chase’s compliance with the terms of Chase’s Disciplinary Probation. Chase shall cooperate and shall comply with all reasonable requests of SLAC, including submitting to random urinalysis, which will allow SLAC and DCO to evaluate Chase’s compliance with the terms of this stipulation for discipline.

- (f) Chase shall enter into or continue substance abuse treatment if determined by SLAC to be appropriate, including any aftercare and relapse prevention education and therapy recommended by SLAC.
- (g) To the extent that the Monitor recommends that Chase attend OAAP, AA, NA, or equivalent meetings, Chase agrees to obtain, upon SLAC's request, verification of attendance at such meetings.
- (h) Chase shall report to his SLAC 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 Chase has possessed or consumed any controlled substances not prescribed by a physician in kind or amount, or which raises concerns about his mental fitness.
- (i) In the event Chase fails to comply with any condition of this stipulation, Chase shall immediately notify his Monitor and DCO in writing.
- (j) At least quarterly, and by such dates as established by DCO, Chase shall submit a written report ("Compliance Report") to DCO, approved in substance by his Monitor, advising whether he is in compliance or noncompliance with the terms of this stipulation and the recommendations of his treatment providers, and each of them. Chase's report shall also identify: the dates and purpose of Chase's meetings with his Monitor and the dates of meetings and other consultations between Chase and all substance abuse and mental health professionals during the reporting period. In the event Chase 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.
- (k) Chase hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by OAAP, his Monitor, or any other mental health or substance abuse treatment providers of Chase's compliance or noncompliance with this stipulation and their treatment recommendations to SLAC and DCO. Chase agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (l) Chase is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation.
- (m) In the event Chase fails to comply with any condition of his Disciplinary Probation, DCO may initiate proceedings to revoke Chase's Disciplinary Probation pursuant to BR 6.2(d), and impose the stayed six months of suspension.



In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

- (n) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to Disciplinary Counsel on or before its due date.
- (o) The SPRB's decision to bring a formal complaint against Chase for unethical conduct that occurred or continued during the period of his suspension or Disciplinary Probation shall also constitute a basis for revocation of the Disciplinary Probation and imposition of the stayed portion of the suspension.

20.

Chase acknowledges that, should he fail to successfully complete his Disciplinary Probation and have to serve his suspension, reinstatement is not automatic on expiration of the period of suspension. Chase is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Chase also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

21.

Chase 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. This requirement is in addition to any other provision of this agreement that requires Chase to attend or obtain continuing legal education (CLE) credit hours.

22.

Chase 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 Chase is admitted: None.

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 State and Regional Disciplinary Board Chairpersons for consideration pursuant to the terms of BR 3.6(d).

Cite as *In re Chase*, 30 DB Rptr 384 (2016)

EXECUTED this 16th day of November, 2016.

/s/ Cole Chase

Cole Chase

OSB No. 051140

EXECUTED this 21st day of November, 2016.

OREGON STATE BAR

By: /s/ Theodore W. Reuter

Theodore W. Reuter

OSB No. 084529

Assistant Disciplinary Counsel

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