

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 21-81
)
RICHARD F. ALWAY,)
)
Respondent.)

Counsel for the Bar: Rebecca Salwin

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.5(a), RPC 4.2(a), RPC 7.1, and RPC 7.5(a).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: November 12, 2021

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Richard F. Always (Respondent) and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is publicly reprimanded for violation of RPC 1.5(a), RPC 4.2(a), RPC 7.1, and RPC 7.5(a).

DATED this 12th day of November, 2021.

/s/ Mark A. Turner
Mark A. Turner
Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Richard F. Alway, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 1977, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Respondent 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 11, 2021, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 1.5(a), RPC 4.2(a), RPC 7.1, and RPC 7.5(a) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

5.

Facts

Since approximately 2005, Respondent used the firm name "Law Offices of Alway and Associates," which name appears on Respondent's letterhead. Respondent's firm name contains a misleading communication because Respondent has not been associated with other attorneys, except for a period of about two years from 2016 to 2018.

6.

Oregon Revised Statute, section 125.095(2) provides that, "prior court approval is required before the payment of fees from the funds of a person subject to a protective proceeding when the payment is to . . . any attorney who has provided services relating to a protective proceeding."

7.

In January 2017, Janice Hoglan (Hoglan) was the subject of a protected party proceeding, pursuant to a petition for a guardianship and conservatorship filed by her daughter, in Polk County Circuit Court case number 17PR00032 (protected party proceeding). On February 15 2017, Hoglan retained Respondent to represent her in the protected party proceeding. Respondent charged and collected an \$850 retainer fee directly from Hoglan. Respondent applied the \$850 fee to pay himself on October 26, 2017. Respondent did not obtain court approval for his fee until November 16, 2017, when he obtained court approval of a fee statement that listed his outstanding fees and disclosed his prior fee.

8.

On December 10, 2018, the court approved Limited Judgment for the appointment of successor professional conservator and professional guardian (collectively, the professional fiduciaries) for Hoglan, replacing two family members in these roles. Both professional fiduciaries were represented by the same attorney. On March 6, 2019, the day of a motions-hearing, Respondent directly approached the conservator outside of the courtroom, asking to meet with her. The attorney for the professional fiduciaries was present, stated she represented both professional fiduciaries, and stated she should be included in any communications that Respondent would have with her clients. The attorney for the professional fiduciaries followed up that conversation with a letter dated March 18, 2019, informing Respondent to direct all further communication to her. Thereafter, on three occasions, on April 5, 2019, May 21, 2019, and June 5, 2019, Respondent contacted the professional fiduciaries by email, copying their attorney. Each time, Respondent's communication was on the subject of their representation.

9.

Violations

Respondent admits that by charging and collecting a fee from Hoglan, a protected party, prior to court approval, he charged and collected an illegal fee, in violation RPC 1.5(a). Respondent further admits that by emailing the professional fiduciaries directly, he communicated with persons he knew to be represented on the subject of the representation and without prior consent from their lawyer, in violation of RPC 4.2(a). He further admits that by using the name "Law Offices of Alway and Associates" when he is a sole practitioner, he used a false or misleading firm name and letterhead, in violation of RPC 7.1 and RPC 7.5(a).

10.

Sanction

Respondent 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* (ABA

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

- a. **Duty Violated.** Respondent violated a duty owed to the legal system by communicating with a represented party. ABA Standard 6.3. Respondent violated a duty owed as a professional by using a misleading firm name and by charging an improper fee. ABA Standard 7.0.
- b. **Mental State.** "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result, while "negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards at 9. Respondent was negligent in assessing whether the term "associates" in his firm name was misleading. Respondent negligently failed to realize that did not have permission to concurrently email the professional fiduciaries and their attorney. Respondent was also negligent in determining whether he needed court approval before charging Hoglan a retainer fee.
- c. **Injury.** Respondent's actions in contacting the professional fiduciaries directly caused potential injury by causing them to act without the advice of legal counsel, but this is mitigated by the fact that as professional fiduciaries, they were experienced with the legal system. Respondent potentially could have injured his client, a protected party, by charging her a fee without court oversight. Respondent's firm name potentially could have injured a client who may have been influenced to retain him based on a misleading firm name.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior record of discipline. ABA Standard 9.22(a). In 2020, Respondent was reprimand by a trial panel in DB No. 19-96 for violations for RPC 1.4(a) (inadequate client communication) and 5.3(a) (inadequate supervision). The weight of this factor is limited by the fact that Respondent's current conduct is unrelated to and largely pre-dates his prior reprimand. *See In re Jones* 326 Or 195, 200, 951 P2d 149 (1997) (finding the following considerations important in analyzing prior misconduct: the relative seriousness, similarity, amount, recency, of the prior offense or offenses, as well as whether the attorney was sanctioned prior to engaging in the current misconduct).
 2. Pattern of misconduct. ABA Standard 9.22(c). Respondent repeatedly emailed the professional fiduciaries. Respondent also used his misleading

firm name for approximately 15 years, both before and after briefly employing associate attorneys.

3. Multiple offenses. ABA Standard 9.22(d).
4. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been licensed to practice since September 26, 1977.

Under the ABA Standards, reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. ABA Standard 6.33.

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. ABA Standard 7.3.

11.

A public reprimand is in accord with prior cases. *See, e.g., In re Reed*, 21 DB Rptr 222 (2007) (stipulated public reprimand for attorney who, in addition to one instance of misconduct under RPC 8.4(a)(3), also used term “Reed and Associates” in his firm name despite being a sole practitioner); *In re Joshua Trigsted*, 32 DB Rptr 208 (2018) (stipulated reprimand for attorney who used “reply all” to send an emails to opposing counsel and that counsel’s clients, after being instructed otherwise); *In re Hammond*, 34 DB Rptr 15 (2020) (stipulated fully-stayed suspension of 60 days for attorney who collected an illegal fee that was not in compliance with applicable regulations, when attorney had been previously reprimand twice for an illegal or excessive fee).

12.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be publicly reprimanded for violations of RPC 1.5(a), RPC 4.2(a), RPC 7.1, and RPC 7.5(a), the sanction to be effective upon the Disciplinary Board’s approval of this stipulation.

13.

Respondent 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.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on September 11, 2021. Approval as to form by Disciplinary Counsel is evidenced below. The

parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 10th day of November, 2021.

/s/ Richard F. Alway

Richard F. Alway, OSB No. 770966

EXECUTED this 10th day of November, 2021.

OREGON STATE BAR

By: /s/ Rebecca Salwin

Rebecca Salwin, OSB No. 201650

Assistant Disciplinary Counsel