IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 19-101
	)	
JOHN BASSETT,	)	
	)	
Respondent.	)	

Counsel for the Bar:	Rebecca Salwin
Counsel for the Respondent:	Peter R. Jarvis and Trisha Thompson
Disciplinary Board:	Mark A. Turner, Adjudicator Kathleen Tastetter Eugene Bentley, Public Member
Disposition:	Violation of RPC 1.8(a). Trial Panel Opinion. Public reprimand.
Effective Date of Opinion:	November 25, 2021

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged respondent John Bassett with violation of RPC 1.8(a). The rule requires that when a lawyer enters into a business transaction with a client: (1) the terms must be fair and reasonable to the client and fully disclosed in writing; (2) the client must be advised, and given the opportunity, to seek the advice of independent legal counsel; and (3) the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and whether the lawyer is representing the client in the transaction.

Respondent was approached by an individual, Rick Barrett, whom he had known for years, had represented in the past, and had loaned money to on prior occasions. Barrett had defaulted on the mortgage payments for his house and sought legal advice on how to deal with the notice of default. Respondent himself paid the funds to cure the default. Respondent and Barrett discussed and eventually entered into an agreement whereby Respondent would fund renovation of Barrett's house, which would then be sold and the profits would be split between the two. The Bar argued that Respondent was Barrett's attorney when the deal was entered into and Respondent failed to comply with RPC 1.8(a). Respondent argued that he was not Barrett's attorney when the deal was entered into and so the rule did not apply. He further

argued that, if the rule applied, the disclosures he did make to Barrett satisfied the rule's requirements.

The case was tried over video conference on July 22, 23 and 25, 2021 before a trial panel consisting of the Adjudicator, Mark A. Turner, attorney member Kathleen Rastetter, and public member Eugene Bentley. The Bar appeared through counsel, Rebecca Salwin. Respondent appeared and was represented by attorneys Peter Jarvis and Trisha Thompson.

As discussed below, we find that the Bar proved the charge by clear and convincing evidence and that the appropriate sanction here is the one requested by the Bar, a public reprimand.

FACTS

The trial of this case involved a lengthy presentation of the facts over a two-day period. Respondent attacked Barrett's version of events as well as his credibility. Barrett, in turn, was difficult and uncooperative. Much of the testimony was neither responsive nor relevant. At times it seemed as if Respondent was trying a breach of contract or fraud case against Barrett. The issues before this trial panel, however, were much narrower and, in the end, much simpler than the transcript of the trial might suggest.

Respondent had known Barrett for over 40 years when the events at issue here occurred. Barrett was a drywall installer. Respondent had represented him in some legal matters in the past, never charging Barrett for the work he performed. Respondent had also loaned Barrett money in the past, interest-free, some of which Barrett had repaid, some of which was still outstanding debt in May of 2018. Respondent loaned Barrett $8,000 in December of 2009, which was repaid. Ex. 126. He also loaned him $1,000 in December of 2016, $7,000 in May of 2017, $3,000 in February of 2018, and $5,000 in March of 2018, all of which amounts remained outstanding. *Id*.

Barrett received a notice of default on his home mortgage dated May 2, 2018. He met with Respondent on May 15, 2018, and Respondent and Barrett discussed potential legal and equitable defenses to a foreclosure action. None of them seemed like viable options. Respondent offered to pay what was due on behalf of Barrett to cure the default, again interest-free. Barrett accepted the offer. Respondent agrees he was acting as Barrett's lawyer when they met on May 15 and during his subsequent interactions with the mortgage servicing company. On May 23, 2018, Respondent wrote the mortgage company, stating "I represent Rick Barrett with respect to the issues presented in the letter sent to him by Selene Financial." Ex. 2. On June 6, 2018, Respondent paid the amount due on Barrett's mortgage, $11,106.96.

In conversations beginning in late May the arrangement grew from merely curing the default. Tr. at 58. Respondent had successfully renovated and sold two houses at a profit in the recent past, and Barrett had done some work on those projects. The two discussed and eventually agreed that Respondent would pay to renovate Barrett's home with the intent to

then sell it. The net proceeds, after paying off the mortgage (approximately $365,000), deducting the cost of renovation, and paying off Respondent's loans to Barrett, would be split evenly between Barrett and Respondent. Tr. at 100-101 and at 355. Respondent estimated the sale price would be "more than a million dollars." Tr. at 99-100. Although the parties agreed on the concept, the details remained to be negotiated and reduced to writing.

Beginning in June, Respondent drafted various versions of a letter to memorialize the parties' evolving agreement. Prior to drafting the letters, Respondent called the ethics help line at the Oregon State Bar to consult about his obligations. He spoke with Assistant General Counsel Mark Johnson-Roberts, who advised him regarding the requirements of RPC 1.8(a). Respondent included references to the Rules of Professional Conduct in each of the drafts.

The first draft was dated June 7, 2018. Ex. 3. There Respondent described the situation as involving "the issues presented in the May 2, 2018 letter you received from Selene Financial…" The letter included the following language regarding the Rules of Professional Conduct:

> "The Oregon State Bar Rules of Professional Conduct require that an attorney who represents you in a legal matter which attorney might enter into a business relationship with you must write a letter to you and present full disclosure. That full disclosure provides that your attorney cannot enter into a business relationship with you unless the business relationship is fair and reasonable to the client and the terms are fully disclosed and transmitted in writing in a manner that can reasonably be understood by the client.
>
> "The client must also be advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction.
>
> "Then, if you give informed consent to me in writing to the essential terms of the transaction and the attorney's role in the transaction including whether I am representing you with respect to the issues presented in the May 2, 2018 letter you received from Selene Finance, then we can proceed." *Id*.

The next day he prepared another draft that for the first time recited terms of an agreement for renovating and selling the house, stating: "The thought is to renovate the house forthwith with the goal of completing the renovation by the end of the first week of August, 2018." Ex. 4. The letter included 15 numbered deal points. It also included a signature block for Barrett to acknowledge his agreement.

The language in the second draft letter regarding the conflict issue changed slightly. Respondent now wrote:

> "The Oregon State Bar Rules of Professional Conduct require that an attorney who represents **an individual** in a legal matter which attorney might enter into a

> business relationship with **the client** must write a letter to **the client** and present full disclosure. That full disclosure provides that your attorney cannot enter into a business relationship with **the client** unless the business relationship is fair and reasonable to the client and the terms are fully disclosed and transmitted in writing in a manner that can reasonably be understood by the client.
>
> The client must also be advised in writing of the desirability of seeking **other counsel and the client was** given a reasonable opportunity to seek the advice of independent legal counsel on the transaction." Ex. 4 (emphasis added.)

Respondent replaced the word "you" in the first paragraph, first with "an individual," and then three times with "the client." In the second paragraph Respondent added the words "other counsel and the client was" in place of the word "is" preceding the language "given a reasonable opportunity to seek the advice of independent legal counsel on the transaction." The third paragraph of the disclosures in Exhibit 3, discussing informed consent in writing, is omitted from Exhibit 4.

The parties had agreed that Barrett would continue to occupy the home during the work. However, a tenant occupied the lower level of the house at the time and the project required that the tenant move out. The tenant did occasional work for Barrett in lieu of rent, although Barrett did not have records that actually documented how much rent the tenant had paid through his labor. The Respondent and Barrett agreed that the tenant needed to vacate the premises, and deal point number 13 in the June 8 letter stated that, "The tenant shall vacate the residence no later than June 11, 2018. Should the tenant fail to do so eviction proceedings shall be filed after proper notice." Ex. 4.

Respondent prepared another draft dated June 11, 2018, that reduced the numbered deal points to six. Ex. 5. The draft made no mention of the tenant, although the tenant had not vacated the premises at the time. The disclosure language reverted back to the version in the first draft, Exhibit 3, as far as the use of "you" and "the client." It returned the paragraph discussing informed consent, adding to the sentence in exhibit 3 after "then we can proceed," the phrase "with respect to the issues presented in the May 2, 2018 letter you received from Selene Finance." *Id*. By the time this draft was prepared Respondent had already paid the amount due on Barrett's behalf.

On June 14, 2018, Respondent emailed Barrett with an attached draft dated the same day asking Barrett, "Why the delay." Ex. 6. The email advises Barrett that, "if you have questions about the letter let me know or take it up with your attorney." *Id*. The disclosure and consent discussion remained the same.

The June 14 draft contained 12 numbered deal points, and additional discussion not present in the earlier versions. Ex. 7. This draft acknowledges in point one that completion of the renovation by the first week of August is not realistic. It states in point nine that the tenant shall vacate the premises no later than June 13, with a parenthetical note: "Rick: a while ago the guy was going to be out the next weekend, then it was Wednesday, now it is tomorrow?"

Up to this point, the letters had stated that the costs of renovation would be deducted from the sale proceeds and "the balance of the net proceeds would be divided on a 50-50 basis after all costs and advances are reimbursed to John Bassett." The June 14 letter changes that language to state that "the balance of the net proceeds would be divided on a 50-50 basis after all costs, **loans** and advances are reimbursed to John Bassett." Ex. 7, point six (emphasis added). This is the first mention of loans in the draft letter agreements. The June 14 letter also for the first time includes a requirement that Barrett execute a warranty deed to Respondent, stating: "The deed shall be recorded upon the completion of the renovation and upon the sale of the residence." *Id* at point 12. Respondent also includes statements to Barrett that the renovation is going to be far in excess of what Respondent had originally thought.

Even though a written agreement had not been executed, Respondent hired two men to begin demolition of the house on June 15, 2018. Barrett objected to the men who appeared and had discussions with Respondent about replacing them.

The parties still had not finalized their arrangement on June 19, 2018, when Respondent sent Barrett an email expressing his concern about Barrett keeping his end of the bargain. Ex. 10. The email also expresses larger concerns about how Barrett is living his life, and asks him if he gambled away prior monies loaned by Respondent.

Respondent sent Barrett another email on June 21, 2018, primarily addressing the situation with the tenant, who had not moved out. Ex. 10A. Respondent reminded Barrett that he had advised him that a landlord has to give a 30-day notice to evict a tenant who was renting on a month-to-month basis. Respondent described a phone call with Barrett in which he told Barrett he needed to have documentation to show the work the tenant had performed in lieu of rent, and advised Barrett not to write up "phony documentation" to support his position. He recited additional issues that would be relevant to an eviction proceeding, and concludes the first paragraph by stating: "But I need all the facts in order to address what needs to be done." *Id*.

This email also raises larger concerns about Barrett's lifestyle choices, urging Barrett to "start to exercise discipline in your life. Bookkeeping, no drinking, no gambling. Otherwise life is going to continue to be troubling." *Id*.

During this time, Barrett raised the possibility of moving away from the metro area and starting over. He discussed moving to the coast or to central Oregon and starting a new drywall business. In connection with these discussions, Respondent loaned additional sums to Barrett, $2,000 on July 5, 2018 and $17,000 on July 9, 2018. Ex. 126.

The final draft of the letter agreement is dated July 9, 2018, and was signed by Barrett that day as well. Ex. 12. This version of the letter agreement has returned the description of the split of the proceeds to "a 50-50 basis after all costs and advances are reimbursed to John Bassett," removing the terms "loans." Respondent testified that he did not know how or why

that change was made. Tr. --.[1] The letter still states that the tenant shall vacate the premises no later than June 13, 2018, even though the agreement was dated July 9, 2018. It includes the warranty deed requirement as well. The disclosure and consent language remained the same as it had been since the June 11 draft, Exhibit 5. The letters never refer to Barrett as a "former client," or indicate that the attorney-client relationship had terminated.

The agreement provided that Respondent would record the warranty deed only upon completion of the renovation and sale of the property. The Bar presented expert testimony that the use of a warranty deed here was "highly abnormal." Tr. at 153. The stated purpose of the deed requirement was to provide Respondent with security for his investment and his loans. Tr. at 102. According to the Bar's expert, Shannon Calt, an attorney who specialized in representing lenders in judicial and non-judicial foreclosures, standard practice would have been to have Barrett execute a trust deed. With a trust deed the borrower has a third-party fiduciary holding the power to foreclose, and has certain statutory protections regarding notice, timing, and the requirement of a public sale of the property. Tr. at 136-141. By signing a warranty deed instead, Barrett actually transferred title of the property to Respondent. He essentially forfeited any equity he had in the property. Tr. at 158-159.

Barrett apparently changed his mind about starting over in a new location and remained in the house. Respondent learned in September that Barrett had not made the July and August mortgage payments despite the fact that Respondent had loaned him $19,000 in the month of July. Respondent was troubled by this development.

As to the mortgage payments, the agreement stated that Respondent could make the payments if Barrett did not. The agreement did not provide that Respondent could record the warranty deed if Barrett failed to make a mortgage payment. The agreement only allowed the deed to be recorded upon completion of the renovations and sale of the property. Despite this, Respondent recorded the deed on September 4, 2018. Respondent testified that Barrett had orally agreed that the deed could be recorded if a mortgage payment was missed. Tr. at 104. That term was never reduced to writing. Moreover, Barrett testified that he did not understand what a warranty deed was (Tr. at 221-22) and would not have signed it if he had known he was "signing my house away." Tr. at 216.

The parties continued to exchange emails, documenting the continuing deterioration of their relationship. Exs. 18, 19. 21, 22, and 23. Respondent made it clear that he had recorded the deed to protect his position, and he told Barrett that if Barrett did not cooperate Respondent would "proceed accordingly." Ex.18. On September 15, 2018, Respondent told Barrett that he would have to vacate the property if he did not comply with the terms of their contract within ten days. Ex. 21.

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[1] Respondent used a home office, but had a legal secretary who kept a business office. Respondent instructed Barrett to go to the secretary's office on July 9, 2018, where he signed the letter agreement and the warranty deed. Respondent did not attend the signing session. There was no suggestion that any changes to the letter agreement could have been made by Barrett.

Barrett sought the advice of other counsel on how to proceed while he and Respondent were exchanging emails. Ex. 20 (September 14, 2018 email from Barrett to Stephen English). Barrett sent Respondent an email on September 17 that stated, "John, Your [sic] my lawyer, what advice do you have for me? Rick." Ex. 22. Respondent described the email as "Machiavellian" at trial, contending that it was sent at the suggestion of the lawyer Barrett conferred with to entrap Respondent into an admission that he was Barrett's lawyer. Respondent answered, with only a part of his reply available as an exhibit. In relevant part, Respondent told Barrett, "If you need legal advice then you should consult another attorney. I have not represented you since the Oregon State Bar letter was received by you and you signed it." *Id*. The "Oregon State Bar letter" was what Respondent called the letter agreement between the parties that was signed by Barrett on July 9.

Barrett complained to Respondent by email on October 7, 2018 about a number of matters, including his claim that Respondent had breached their agreement by recording the deed. Ex. 24. Barrett made a complaint to the Client Assistance Office (CAO) of the Bar in November of 2018. Exs. 27, 28.

Respondent initially replied to Barrett's allegations on his own behalf. Exs. 29, 30. Respondent stated that he and Barrett had orally agreed on all material terms of their agreement and that Respondent drafted the letter agreement to comply with the applicable rule. He admitted to CAO that he was required to comply with RPC 1.8(a) and argued that the July 9, 2018 letter satisfied the rule. Ex. 30. The case was transferred to Disciplinary Counsel's Office (DCO). Respondent engaged attorney Ward Greene to represent him. Greene wrote to DCO in January of 2019, again operating on the premise that RPC 1.8(a) applied and arguing that Respondent had complied with it. Ex. 31. Greene, though, did arrange for his client to deed the property back to Barrett via a Bargain and Sale Deed. *Id*.

By the time of trial, represented by different counsel, Respondent contended that the only attorney-client relationship between himself and Barrett involved the limited task of curing the May 2018 default. Respondent argued that when he paid Selene Financial the past-due amount in early June the attorney-client relationship ended and the agreement with Barrett regarding renovation and sale of the house did not fall under RPC 1.8(a) because Barrett was no longer a current client.

ANALYSIS OF THE CHARGE

RPC 1.8(a) states:

> "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

1. We Find Barrett Was Respondent's Client at the Time of the Transaction.

The threshold question we must answer is whether Barrett was Respondent's client when they entered into a business transaction. A lawyer-client relationship exists when the client subjectively believes that that the lawyer was representing him, and that belief was objectively reasonable under the circumstances. *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). A client's reasonable belief can be shown by "objective facts on which a reasonable person would rely as supporting existence of that intent" or "by evidence that the lawyer acted in a way that would induce a reasonable person in the client's position to rely on the lawyer's professional advice." *Id; see also In re Wittermyer*, 328 Or 448, 456, 980 P2d 148, 153-54 (1999).

Respondent does not dispute that Barrett was his client when he was engaged to deal with the mortgage default. He contends, however, that he ceased to be Barrett's lawyer once the payment to the mortgagor was made. This contention, however, is belied by clear and convincing evidence in the record.

There is little doubt that Barrett subjectively believed he was Respondent's client during the negotiation of the business transaction involving the house. Barrett believed Respondent was his attorney when he first received a draft of the letter agreement. Tr. at 199. He thought Respondent was his lawyer when he received Exhibit 10A, discussed below. Tr. at 209. He thought Respondent was his lawyer when he signed the letter agreement on July 9, 2018. Tr. at 215.

When Barrett emailed Respondent on August 31, 2018, he stated, "I asked you for help as well as [to] represent me around the 1st of June, and you did, in return you have put me through absolute hell on earth." Ex. 15. He stated to counsel he consulted in September of 2018, explaining why he signed the letter agreement, "I did not fully understand, but I trusted [Respondent]….[he] indicates in the letter/contract that he represents me." Ex. 20. Respondent argued that Barrett's acknowledged lack of trust in Respondent as the relationship deteriorated undercut his claim that he thought Respondent was his lawyer, but Barrett never wavered in his belief that Respondent was his lawyer even when the two were at odds.

This subjective belief is supported by ample objective facts that make the belief reasonable. First, in the letter agreements beginning June 7, 2018, Respondent addressed his comments in the disclosures to Barrett as if he was a client, i.e., "you," or "the client." He refers to himself always as the attorney to "you" or "the client." This continued through the final, July 9, version of the agreement that was signed by Barrett. Barrett testified that he understood Respondent's references to "attorney" and "client" in the letter agreement referred to the two of them. Tr. at 200; Ex. 45 (Barrett Depo. Tr.) at 184-186.

Respondent claimed at trial that the references in the letter agreement were "not referring to me or Mr. Barrett." Tr. at 95-96. Respondent's reasoning on the issue was tortured and unpersuasive. In our view, this language is only included because Respondent knew he was acting as Barrett's lawyer while they were negotiating the terms of their business transaction.

Respondent testified that he only included the disclosures in his letters "out of an abundance of caution," after speaking with the assistant general counsel of the Bar on the ethics help line. Tr. at 75. This justification rings hollow in light of the facts surrounding the parties' relationship.

Respondent's June 21, 2018 email to Barrett, Exhibit 10A, is perhaps dispositive evidence that the parties continued an attorney-client relationship even after Respondent cured the mortgage default. Respondent addressed the situation involving the tenant in the house, advising Barrett that he needed proper documentation, that he should not create documents after the fact to account for the labor-for-rent arrangement, and specifically told Barrett, "But I need all the facts in order to address what needs to be done." Ex. 10A. Barrett understood Respondent to be acting as his lawyer at the time. Tr. at 209-210. He said of the email, "he's telling me what needs to happen in order for the guy to be removed legally." Tr. at 210. That is legal advice.

The Bar correctly points out that Respondent never advised Barrett, either orally or in writing, that he was no longer acting as an attorney in their relationship. Moreover, Respondent emailed a reply to Barrett on September 17, 2018 that stated that he was acting as Barrett's attorney until "the Oregon State Bar letter was received by you and you signed it." This is objective evidence that the parties had an attorney-client relationship at least through July 9, 2018, the day the transaction was documented by Barrett's signing. Ex. 22. Whether the attorney-client relationship continued after that date is not relevant here. Respondent's admission brings RPC 1.8(a) into play.

Respondent also admitted in his communications with the Bar during its investigation that the rule applied. He wrote to the CAO on December 13, 2018, describing the letter agreement with Barrett as "required by the Oregon State Bar with respect to an attorney getting involved with a client with respect to a business matter and the need for Mr. Barrett to contact separate counsel." Ex. 30. Respondent acknowledged the same through his former counsel, Greene, who wrote on January 29, 2019 that, "…we recognize that Mr. Bassett had an obligation to document the agreement. His letter to Mr. Barrett of July 9, 2018 attempted to do that, but was deficient in one respect." Ex. 31.

Respondent's argument that he completed the legal portion of his relationship with Barrett when he wrote the check to the mortgage company narrows the attorney-client relationship in a way inconsistent with the Oregon Supreme Court's view of the subject. The court has found that the attorney-client relationship does not abruptly end the moment legal services are performed. The court has stated, "[T]he relationship between lawyer and client is one of trust and confidence, and does not abruptly start and stop -- at least not necessarily -- with the opening and closing of case matters." *In re Schenck*, 345 Or 350, 362, 194 P3d 804, 812 (2008) (citing *In re Drake,* 292 Or 704, 713, 642 P2d 296 (1982)).

In *Drake,* the attorney argued that he had concluded his legal engagement with his client in May 1976 when a litigation matter was resolved. Drake then obtained a loan from his client in June. He then undertook to represent the client in a divorce proceeding in August. *Drake,* 292 Or at 709-11. The attorney claimed that he was not representing his client when the loan was made because the most recent legal issues had been resolved and there were no open legal matters. The court, however, found there was a current attorney-client relationship.

The court analyzed the former disciplinary rule governing business relations with clients. The purpose of the rule is to prevent attorneys from abusing the trust and confidence they have gained from their client relationships. *Id* at 713. It is no different under the current Rules of Professional Conduct. On the subject, the *Drake* court quoted approvingly from the Disciplinary Review Board's decision:

> "'If Accused's contention is to be accepted, then the simple termination of a case creates an opportunity or period in which an attorney is freed from the rules governing attorney-client relationships. During this period the attorney would be free to use the rapport and confidence he had developed with his former client to persuade the former client to do things that would otherwise be prohibited by the disciplinary rules governing client relationships. After these actions were completed, the attorney could then freely enter into a new relationship with the former client. The only important thing would be that the paperwork showing opening and closing dates of cases be kept in order. The attorney would point to these as proof the aggrieved party was not a client during the period in question.' (citation omitted)." *Id*.

The court took the same view in *Schenck, supra.* In *Schenck*, a client contacted her attorney for help drafting a will. He delivered it on April 8, 2003. The client had no open legal matters with him again until she consulted with him on May 16, 2003. *Schenck*, 345 Or at 363. In the interim, the attorney renegotiated a debt he owed his client. The court reaffirmed *Drake,* finding "under this court's reasoning in *Drake*, however, that break in his legal activities on Stephanie's behalf did not create a period in which the accused was free from the rules governing attorney-client relationships. We therefore conclude that Stephanie was a client of the accused when the May 16, 2003, note was executed." *Id* (again analyzing former disciplinary rules).

We conclude, as Respondent's letter agreement itself states, that Barrett was a current client.[2] We now address whether Respondent complied with RPC 1.8(a)'s requirements in his written disclosures.

2. We Find Respondent's Letter Did Not Meet RPC 1.8(a)'s Requirements.

As noted above, RPC 1.8(a) requires that when a lawyer enters into a business transaction with a client: (1) the terms must be fair and reasonable to the client and fully disclosed in writing; (2) the client must be advised, and given the opportunity, to seek the advice of independent legal counsel; and (3) the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and whether the lawyer is representing the client in the transaction.

Respondent's letter agreement does not adequately comply with the first and third requirements. The terms of the transaction are not "fair and reasonable to the client" and are not "fully disclosed…in writing." In particular, the requirement of a warranty deed rather than a trust deed was not fair and reasonable to Barrett. By signing the warranty deed Barrett left himself at Respondent's mercy. Rather than giving Respondent security in the event of a breach of their agreement, Barrett conveyed title to the property to Respondent. He thus lost all protections available to him if the parties had followed standard practice and used a trust deed. The "highly abnormal" structure was unfair to the borrower/client, Barrett.

Respondent testified that the use of the warranty deed was a mistake and he did not use it to try to gain an unfair advantage. The rule, however, requires no intent on the part of Respondent. If this term of the transaction was objectively unfair it violates the rule.[3]

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[2] The Bar cited us to a number of cases in which other states have applied their equivalent of RPC 1.8(a) to former clients. *See, e.g., Iowa Disciplinary Bd. v. Pederson*, 887 N.W.2d 387 (Iowa 2016) (finding that "the rule of professional conduct governing business transactions with clients can extend to transactions with former clients," which the court found to be "consistent with the approach taken in other states, even in the absence of an express prohibition in the Rules"); *Matter of Ioannou*, 89 AD3d 245, 250, 932 NYS2d 52, 56-57 (App Div 2011) (holding that the business transaction rule may apply a former client if the former client reasonably relies on the lawyer to protect his interests in the transaction); *Hunniecutt v. California State Bar,* 748 P.2d 1161, 1161 (Cal. 1988) (finding "if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the business-transaction rule] even if the representation has otherwise ended"); *In re McGlothlan*, 99 Wn.2d 515, 522 (Wn. 1983) (finding that the rule governing business transactions with clients applies as long as the influence arising from an attorney-client relationship continues). We do not need to address that question since we find that Barrett was a current client of Respondent.

[3] Respondent's counsel argued at trial that this situation could have been cured by a court on the grounds of mutual mistake of the parties since they both would have agreed to the use of a trust deed. The argument does not change the fact that the agreement, on its face, is unfair. A post hoc rewriting of the unfair term does not put the transaction in compliance with the rule.

The terms of the transaction were also not fully disclosed in writing. The letter only allowed Respondent to record the deed in limited circumstances when the renovations were completed and the house was sold, not if a mortgage payment was missed. Respondent's only written recourse if Barrett failed to make a mortgage payment was to make the payment himself. But Respondent intended to, and did, use the warranty deed to protect his interest while the work was in progress in response to a missed mortgage payment. If we accept Respondent's testimony that he and Barrett orally agreed that he could record the deed in the event of a missed payment, that is itself an admission that the terms of the transaction were not fully disclosed **in writing**. Alternatively, if there was no oral agreement to this term of the transaction, the letter did not fully disclose Respondent's intent as to the deed and again fails to meet the rule's full disclosure requirements.

We find this failure to convey the actual purpose of the deed in writing also runs afoul of RPC 1.8(a)(3)'s requirement that the client give consent in writing to the "essential terms" of the deal. The rule does not define what an "essential term" is, nor does the commentary to the ABA Model Rule give us guidance. From our standpoint, the deed requirement certainly appears to be an essential term of the agreement, in particular given Respondent's insistence that he be given security for his investments. The requirement was apparently not subject to any negotiation. Tr. at 220.

Respondent argued that the warranty deed was not an essential term of the agreement, and testified this was so because he would have entered into the deal even if Barrett had rejected the requirement. Respondent's testimony on the need for protection of his investment and the speed with which he resorted to recordation of the deed undercut the credibility of such a statement. Tr. at 102. Further, Respondent's deposition testimony regarding the deed was referenced at trial. His testimony on the matter was first that, "It's [the ability to record the deed if a mortgage payment was missed] not an essential – it is an essential term of the agreement. It's not an essential term of the letter." Tr. at 128. He then later admitted that "It is an essential term. It's just not in writing." Tr. at 129. We agree with this last statement—it is an essential term and it is not in writing. That establishes a violation of the rule.

The letter also completely misses the requirement in RPC 1.8(a)(3) that the client give informed consent in a writing signed by the client as to "the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction." Respondent's letters refer to "whether I am representing you with respect to the issues presented in the May 2, 2018 letter you received from Selene Finance…" Ex. 12. No one disputes that Respondent represented Barrett regarding the issues presented in the May 2, 2018 letter. What Respondent failed to do is to tell Barrett whether he was representing Barrett in "the transaction." The transaction is the business deal itself, and the letter is silent as to this required disclosure.

This omission is not a mere formality. The rule is designed to warn clients of the dangers they face entering into business transactions with their lawyers. A reminder that the lawyer is not representing the client in the transaction itself helps fulfill that purpose. The ABA commentary to the model rule points out, "The risk to a client is greatest when the client

expects the lawyer to represent the client in the transaction itself…"[4] Perhaps if this had been made clear Barrett would have heeded the disclosure to seek the advice of independent legal counsel on the transaction that Respondent properly included in the letter and this case would never have arisen. But that was not the case. Accordingly, we find that the Bar proved by clear and convincing evidence that Respondent violated RPC 1.8(a).

A Note on the Evidence and Due Process.

Respondent filed a motion in limine to exclude Barrett's testimony and exhibits containing Barrett's statements to the Bar on the grounds that he had failed to comply with subpoenas duces tecum to produce documents at his deposition and at trial, and that he had refused to answer questions from Respondent's counsel at his deposition. That motion was denied by the Adjudicator, first, on the grounds that Respondent had the opportunity to seek enforcement of the deposition subpoena as to documents and testimony in the appropriate circuit court prior to trial but did not do so. Second, the Adjudicator found that Respondent had an adequate opportunity to cross-examine and challenge Barrett's testimony at trial such that Respondent was not denied due process. Barrett's refusal to answer certain questions at trial involved matters that were of limited relevance (mainly pertaining to Barrett's financial disclosures to Selene Financial) and, even if answered, would have carried little weight with the trial panel as to the material issues in the case. Barrett was not a particularly credible witness in many instances, but his testimony before the panel on those material issues was corroborated by the written record or by Respondent's own testimony.

SANCTION

In assessing an appropriate sanction, we refer to the ABA *Standards for Imposing Lawyer Sanctions* (ABA Standards), and Oregon case law, for guidance.

ABA Standards

The ABA Standards establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer's mental state; and the actual or potential injury caused by the conduct. Once these factors are analyzed, we make a preliminary determination of the presumptive sanction, after which we may adjust the sanction based on recognized aggravating or mitigating circumstances. ABA Standard 3.0.

[4] The Oregon Supreme Court considers the commentary to the American Bar Association's Model Rule 1.8(a) persuasive authority since the Model Rule is identical to RPC 1.8(a). *In re Spencer*, 355 Or 679, 685, 330 P3d 538 (2014).

Duty Violated

Respondent violated the duties he owed to his client to avoid conflicts of interest. ABA Standard 4.3.

Mental State

"Intent" is the conscious objective or purpose to accomplish a particular result. ABA 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. *Id.* "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id*.

Respondent acted negligently when he attempted to draft a business transaction letter that omitted material terms and disclosures.

Extent of Actual or Potential Injury

For purposes of determining an appropriate sanction, we may take into account both actual and potential injury. ABA Standards at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. ABA Standards at 9.

Respondent caused Barrett actual injury. Barrett was at a disadvantage when he executed the warranty deed and was injured when Respondent took his property by recording the deed. Respondent caused potential injury because the inadequate disclosures in the July 9 letter prevented Barrett from having a reasonable opportunity to understand the full nature of their agreement or have it reviewed and explained by independent counsel. *See Spencer*, 355 Or at 698 (failing to obtain written consent from client under Rule 1.8(a) potentially injured the client because "she was denied the opportunity to consider the extent to which the business transaction might place the accused in an advantageous position or permit him to engage in overreaching, or to consult independent counsel in that regard.").

Preliminary Sanction

We agree with the Bar that this case falls under ABA Standard 4.33, which provides that, "reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client."

Aggravating and Mitigating Circumstances

The following aggravating factors under the ABA Standards are present here:

1. Prior disciplinary offenses. ABA Standard 9.22(a). Respondent has a prior reprimand from 2002 for multiple offenses, including advancing financial assistance to a client and engaging in dishonest conduct by omitting material information. Ex. 41 (*In Re John Bassett*, 16 DB Rptr 129 (2002)).

2. A dishonest or selfish motive. ABA Standard 9.22(b). Respondent's motivation here was his own profit.

3. Vulnerability of victim. ABA Standard 9.22(h). Barrett was arguably a vulnerable victim given his financial insecurity and the threat of eviction posed by the use of the warranty deed.

4. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been a member of the Oregon State Bar since 1965.

The Bar also asked us to find that Respondent refused to acknowledge the wrongful nature of his conduct (Standard 9.22(g)) because he "continues to assert that the Rules of Professional Conduct do not apply to him in this matter." We disagree that Respondent here asserts the rules do not apply to him. Instead he argues that the rule does not apply to the transaction because it applies only to current clients. A respondent is entitled to vigorously defend against charges. We do not find that Respondent's defense constitutes an aggravating factor.

Although some aggravating factors are present here, we do not believe they justify an enhancement of the presumptive sanction of a public reprimand.

Oregon Case Law

Oregon case law justifies imposition of a public reprimand. The Bar cited numerous cases in which violations of RPC 1.8(a) resulted in a public reprimand. *See, e.g., In re Spencer,* 355 Or at 702 (court noted that a public reprimand might be appropriate for a single violation of RPC 1.8(a), although prior violations and injury to client led to imposition of a 30-day suspension); *In re Montgomery,* 292 Or 796, 643 P2d 338 (1982) (court imposed a public reprimand on an attorney who obtained an unenforceable loan from a client); *see also, e.g., In re Robert C. Williamson*, 31 DB Rptr 173 (2017) (stipulated reprimand when attorney and client agreed to barter construction work for legal services, but the attorney did not ensure the transaction and terms were fair and reasonable, and he did not obtain informed written consent); *In re Alan G. Seligson*, 27 DB Rptr 314 (2013) (attorney reprimanded by trial panel where attorney prepared a trust deed for his bankruptcy client's signature in favor of specified parties, including attorney, to secure his fees, but without obtaining his client's informed written consent); *In re Edward L. Daniels,* 22 DB Rptr 72 (2008) (stipulated reprimand under

former DR 5-104(A) where attorney purchased multiple pieces of real property jointly with a client, but failed to explain to the client the nature and extent of his adverse interests in those transactions).

The Bar Rules of Procedure require us to impose at least a public reprimand if we do not dismiss the charge. There is no lesser sanction available to a trial panel. Accordingly, we order that Respondent be publicly reprimanded for violation of RPC 1.8(a).

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 to properly discharge their professional duties. ABA Standard 1.1. Since we have found the charged rule violation, we conclude that this purpose is accomplished here by the imposition of a public reprimand.

Respectfully submitted this 25th day of October 2021.

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

/s/ Kathleen Rastetter
Kathleen Rastetter, Attorney Panel Member

/s/ Eugene Bentley
Eugene Bentley, Public Panel Member