

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 21-17
)
MARK AUSTIN CROSS,)
)
Respondent.)

Counsel for the Bar: Eric J. Collins

Counsel for the Respondent: None

Disciplinary Board: Mark A. Turner, Adjudicator
Thomas Kranovich
Eugene Bentley, Public Member

Disposition: Violation of RPC 1.15-1(d), RPC 1.16(d), and 8.1(a)(2). Trial Panel Opinion. 150-day suspension with restitution and formal reinstatement.

Effective Date of Opinion: March 12, 2022

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged Respondent Mark Austin Cross with violations of RPC 1.15-1(d) (failure to promptly deliver funds a client is entitled to receive and render a full accounting at the client's request); RPC 1.16(d) (failure to take reasonable steps to protect a client upon termination of representation), and RPC 8.1(a)(2) (failure to respond to inquiries from a regulatory authority). The charges arise from Respondent's representation of a client in a court case in which the client paid Respondent a \$25,000 retainer pursuant to an oral agreement. The agreement required Respondent to refund any unearned portion of the money at the conclusion of the matter.

When the matter concluded the client asked for an accounting of the fees earned and the tasks performed. Respondent never provided one despite repeated demands. Instead, Respondent refunded \$10,000 to the client with no explanation for the amount. The client subsequently sued Respondent for an additional \$10,000 for unjust enrichment and breach of contract. Respondent failed to appear for trial and a money judgment for \$10,000 was entered against him.

Thereafter, the client's attorney submitted a claim to the Client Security Fund (CSF) for the amount due from Respondent. This prompted an investigation by Disciplinary Counsel's Office (DCO), which Respondent ignored, leading to his suspension under BR 7.1. This action was commenced. Respondent failed to answer and was found in default.

The Bar asks us to suspend Respondent for 150 days, order that he be required to seek formal reinstatement under BR 8.1 if he intends to practice law in the future, and order that he pay restitution to the CSF in the amount of \$10,000. As explained below, we find that the Bar has adequately pleaded the elements of the charges and we find that Respondent committed the alleged violations. We order a sanction consistent with the Bar's request—a suspension for 150 days, formal reinstatement under BR 8.1, and an order requiring Respondent to pay restitution in the amount of \$10,000 to the CSF.

PROCEDURAL POSTURE

Respondent was personally served with the formal complaint and notice to answer on August 6, 2021. The Bar served a ten-day notice of intent to take default on August 24, 2021 and filed a motion for order of default on September 16, 2021. Respondent filed no opposition. The Adjudicator entered an order of default on September 22, 2021.

When a respondent is in default, the Bar's factual allegations are deemed to be true. BR 5.8(a); *In re Magar*, 337 Or 548, 551-53, 100 P3d 727 (2004). We first determine whether the facts pleaded establish the rule violations alleged and, if so, what sanction is appropriate. *See In re Koch*, 345 Or 444, 455, 198 P3d 910 (2008). In assessing whether the charges are established we are limited to considering only the facts alleged in the formal complaint. When determining the appropriate sanction, we may consider additional evidence.

STATEMENT OF FACTS

Respondent agreed to represent Keith Charles Casper (Casper) in September of 2008. Casper was named as a defendant in a lawsuit filed in Clackamas County Circuit Court, Case No. CV07110571. ¶ 3.¹ Respondent also agreed to review Casper's rights in an unrelated criminal matter. *Id.* Casper paid Respondent a \$25,000 retainer pursuant to an oral agreement. *Id.* The parties agreed that when the representation was concluded, Respondent would deduct a reasonable amount for his services from the retainer, as well as any fees and costs advanced, and would return the remaining funds to Casper. ¶ 4.

When the representation concluded, Casper asked Respondent on April 12, 2013, to provide a bill describing the services performed, the time spent performing those services, and the amount Respondent charged for the work. ¶ 5. Respondent did not provide the requested

¹ All paragraph citations are to the formal complaint.

information at the time, nor did he do so when his client made additional demands for it. ¶ 6. Respondent did refund \$10,000 to Casper, however. ¶ 5.

On February 23, 2015, attorney D. Craig Mikkelsen (Mikkelsen) filed a lawsuit on behalf of Casper against Respondent in Clackamas County Circuit Court, Case No. LV15020709. The complaint alleged claims of unjust enrichment and breach of contract and requested \$10,000 in damages as well as an order requiring Respondent to provide a full accounting of his work on Casper's behalf. ¶ 7.

A little over two years later, Respondent failed to appear for trial on March 29, 2017. On July 17, 2017, a general judgment and money award was entered against Respondent in the amount of \$10,000. The court found that Respondent had "wrongfully retained the sum of \$10,000 in excess of the amounts he actually earned and ... refused to refund any portion of said amount." ¶ 8.

Some years later, Mikkelsen submitted an application for reimbursement on behalf of Casper to the Bar's Client Security Fund (CSF). ¶ 11. This caused DCO to commence an investigation of Respondent's conduct on or about April 27, 2020. *Id.* The CSF reimbursed Casper \$10,000 for the loss. It provided notice of its action to DCO on January 14, 2021. *Id.*

On February 1, 2021, DCO sent a written request for Respondent's answers to questions regarding its investigation. ¶ 12. The request was sent by letter addressed to Respondent at his address then on record with the Bar (record address) and delivered by first class mail. DCO also sent the letter to Respondent at the email address then on record with the Bar (record email address). The email and letter were not returned undelivered, and Respondent did not respond by the due date. *Id.*

On or about February 24, 2021, DCO sent a second written request for a response to Respondent at the record address by both first class and certified mail, return receipt requested. The letter was also sent to the record email address. Respondent signed the certified mail receipt, but he did not respond to DCO's second written request for a response. ¶ 13.

On or about March 4, 2021, DCO filed a petition pursuant to BR 7.1 seeking Respondent's immediate suspension for failure to respond to DCO's inquiries. Respondent did not file any response to the petition. ¶ 14. On or about March 30, 2021, the Adjudicator issued an order suspending Respondent pursuant to BR 7.1. ¶ 15. As of June 21, 2021, when the Bar filed its formal complaint, Respondent had still not responded to DCO's requests for a response regarding his conduct in the Casper matter. ¶16.

ANALYSIS OF THE CHARGES

A. Respondent failed to promptly deliver funds his client was entitled to receive and to render a full accounting per his client's request in violation of RPC 1.15-1(d).

RPC 1.15-1(d) states:

"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."

A lawyer violates this rule by failing to provide an accounting of client funds held by the lawyer when a client requests and by failing to promptly return the unearned balance of advanced fees or retainers. *See In re Long*, 368 Or 452, 459-60, 491 P3d 783 (2021).

Here the client asked for an accounting when Respondent's representation ceased. Respondent never provided one, despite additional written requests for an accounting and a return of any unearned funds. Respondent returned \$10,000 of the retainer, without explanation or any accounting. The client then sued Respondent, alleging that he was owed an additional \$10,000. The trial court ruled that Respondent had "wrongfully retained the sum of \$10,000.00 in excess of the amounts he actually earned and has refused to refund any portion of said amount."

The alleged facts establish a clear a violation of RPC 1.15-1(d).

B. Respondent failed to take reasonably practicable steps to protect his client's interests upon termination of the representation in violation of RPC 1.16(d).

RPC 1.16(d) states:

"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."

A lawyer violates this rule by failing to refund an advance payment of a fee that the lawyer has not earned. *See Long*, 368 Or at 460 (finding the lawyer violated the rule by failing to refund \$1,000 in unearned fees). The facts stated above establish a clear violation of this rule as well.

C. Respondent knowingly failed to respond to lawful demands from a disciplinary authority in violation of RPC 8.1(a)(2).

RPC 8.1(a)(2) states: “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.”

This rule requires full cooperation from a lawyer subject to a disciplinary investigation. *In re Schaffner*, 325 Or 421, 425, 939 P2d 39 (1997). The Oregon Supreme Court has little tolerance for violations of this rule. *See In re Miles*, 324 Or 218, 222-25, 923 P2d 1219 (1996) (the court found violations of the rule and imposed a 120-day suspension while requiring formal reinstatement where the attorney failed to respond to inquiries from DCO, failed to respond to the Bar’s formal complaint, did not appear at trial, and was found in default).

Here Respondent did not respond to multiple written requests by DCO. He was subject to immediate suspension pursuant to BR 7.1. Despite the suspension, Respondent still refused to provide any response to the Bar’s inquiries. The evidence shows that Respondent did receive the requests. Respondent knowingly violated RPC 8.1(a)(2).

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 sanction, after which we may adjust the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances. ABA Standard 3.0.

Duty Violated.

The most important ethical duties are those that lawyers owe to their clients. ABA Standards at 5. Respondent violated his duty to properly handle his client’s property. ABA Standard 4.1. Respondent also violated his duty to the legal profession when he failed to cooperate with DCO’s investigation. ABA Standard 7.0; *see In re Gastineau*, 317 Or 545, 556, 857 P2d 136 (1993) (finding such conduct as a violation of the duty to the legal profession). Respondent also violated his duty to the public because the disciplinary process serves to protect the public. ABA Standard 5.0; *see In re Kluge*, 335 Or 326, 349, 66 P3d 492 (2003) (describing a lawyer’s failure to respond to a Bar investigation as a violation of such a duty).

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. . “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 here acted at least knowingly. He acted knowingly when he failed to provide the accounting his client requested after the conclusion of the representation. Respondent was aware of the request because, in response, he refunded \$10,000 of the \$25,000 retainer. The client continued to contact Respondent regarding the return of additional unearned fees and the accounting. Respondent ignored him. Respondent was aware of his obligation to provide an accounting and refund unearned funds but chose not to. Respondent also acted knowingly when he failed to respond to DCO’s inquiries. Respondent is presumed to have received the first requests from DCO, which were properly sent to his record addresses with the Bar. Respondent later signed the certified mail receipt for DCO’s second written request for a response regarding the matter but still failed to reply.

Extent of Actual or Potential Injury.

For purposes of determining an appropriate sanction, we 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’s conduct caused his client actual injury. His failure to return unearned portions of the retainer resulted caused the client’s loss of use of money and caused the client to hire new counsel to seek recovery of those funds. Even after a judgment was entered against Respondent in the amount of \$10,000, Respondent did not pay, and the client sought and obtained reimbursement through the CSF. It took the client nearly eight years to obtain the \$10,000, beginning with his initial demand in April 2013 to reimbursement from the CSF in January 2021. We also agree with the Bar that it is reasonable to infer that the client suffered anxiety and frustration as a result of Respondent’s failure to provide an accounting and refund the money for so long.² See *In re Schaffner*, 325 Or at 426-27 (client anxiety and frustration can constitute actual injury under ABA Standards).

² The Bar advised us that it was unable to obtain additional information from Casper’s lawyer, Mikkelsen, during DCO’s investigation. The Bar argues, however, that Oregon case law appears to presume client anxiety and frustration under certain circumstances such as exist here. The Bar cites us to *In re Koch*, 345 Or at 456, where the court held that a lawyer’s repeated failure to respond to clients’ reasonable requests caused injury in terms of time, anxiety, and aggravation, even though the court did

Respondent's failure to cooperate with DCO's investigation also caused harm to the legal profession and the public. *In re Miles*, 324 Or at 222. The Bar tells us that Respondent's failure to cooperate prevented the Bar from determining whether Respondent converted the client's funds. Such a charge, if proved, is among the most serious of ethical violations and presumptively warrants disbarment. To maintain public confidence in the integrity of the legal profession, the Bar must be able to identify lawyers engaging in theft of client funds, and Respondent's lack of cooperation thwarted that mission. The Bar's investigation was also delayed by Respondent's failure to cooperate. Although the Bar's investigation was not initiated by a client complaint, the Bar was unable to provide a timely and informed resolution of this matter for any member of the public seeking information about Respondent's disciplinary record.

Preliminary Sanction.

We find that the following ABA Standards apply here:

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. ABA Standard 4.12.

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. ABA Standard 7.2.

We find that a suspension is the presumptive sanction here for the multiple violations pleaded.

Aggravating and Mitigating Circumstances.

We find the following aggravating factors recognized by the *Standards* present here:

1. A prior record of discipline. ABA Standard 9.22(a). Respondent received a public reprimand for his failure to communicate with a client in a post-dissolution modification matter in violation of RPC 1.4(a). *In re Cross I*, 29 DB Rptr 229 (2015).
2. Dishonest or selfish motive. ABA Standard 9.22(b). Respondent's failure to return his client's funds directly benefited him.

not refer to evidence or admissions supporting that holding. The Bar also cited us to *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989), where a lawyer's retention of military-discharge documents injured client "in terms of time, anxiety, and aggravation, in attempting to coax cooperation from the accused". We agree that an inference of actual frustration and anxiety is appropriate in this case.

3. Multiple offenses. ABA Standard 9.22(d).
4. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent was admitted to the Oregon State Bar in 1979.
5. Indifference to making restitution. ABA Standard 9.22(j). Respondent was aware that his client sought a return of funds from the retainer after the representation concluded. Respondent refunded some of those funds, but he failed to pay the \$10,000 judgment stemming from the litigation. That caused his client to expend additional time and resources seeking payment through the CSF.

Due to Respondent's default and lack of cooperation with DCO's investigation, we are unable to find any mitigating factors present in this matter.

We agree with the Bar that the aggravating factors here justify a lengthy suspension.

Oregon Case Law

Oregon cases also support a significant suspension. The Bar cites us to two analogous cases supporting this conclusion.

The first, *In re Koch*, 345 Or at 449, involved violations of three disciplinary rules, including RPC 1.15-1(d), regarding the lawyer's failure to provide an accounting for more than a year and a half despite the client's repeated requests. The court also determined the lawyer violated RPC 1.15-1(d) for holding the unearned balance of the client's retainer after the lawyer concluded the representation. *Id.* at 450. As well, the court found the lawyer violated RPC 8.1(a)(2) twice for knowingly failing to respond to requests for information about the matter. *Id.* In a separate matter, the court found the lawyer violated RPC 1.3 (neglect), RPC 1.4(a) (failure to communicate), and RPC 8.1(a)(2). *Id.* at 453-56. In its sanction analysis, the court found three aggravating factors, but also found three mitigating factors: absence of a dishonest or selfish motive, remorse, and personal or emotional problems. The court suspended the respondent for 120 days. *Id.* at 456-59.

The second case is *In re Houston*, 29 DB Rptr 238 (2015), where the trial panel found the lawyer violated RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(a)(1) and (d), and RPC 8.1(a)(2) and imposed a 150-day suspension. In that case, the lawyer failed to inform his client that he had been suspended for failing to pay his Professional Liability Fund assessment and failed to withdraw from the representation. *Id.* at 239-40. The client ultimately terminated the lawyer and demanded an accounting and a return of documents. The lawyer did not respond. *Id.* at 240. The lawyer also failed to respond to DCO's requests for information. *Id.* at 240-42. The trial panel found only one aggravating factor and two mitigating factors: lack of a prior disciplinary record and inexperience in the practice of law. *Id.* at 252-55. Although *Houston* involved more violations than this case, the trial panel in *Houston* found more mitigating factors than aggravating factors.

In both *Koch* and *Houston* there were more violations than are present here, but there were also significant mitigating factors, none of which are present here. We agree that this case merits a similar sanction. We order that Respondent be suspended for 150 days as the Bar requests.

BR 6.1(a) provides that we may require Respondent to make restitution of some or all of the money, property or fees received by him in the representation of the client. We order that Respondent reimburse the CSF for its \$10,000 payment to Respondent's client.

The Bar also asked us to require that Respondent be subject to formal reinstatement under BR 8.1 at such time as he elects to return to active status following any suspension. A suspension of more than six months automatically triggers the need for formal reinstatement. A suspension short of that is subject to informal reinstatement unless we order otherwise. This case merits requiring formal reinstatement. We find that it should be Respondent's burden to demonstrate that he is fit to again practice law. See *In re Loew*, 296 Or 328, 337, 676 P2d 294 (1984). We order that he be subject to the formal reinstatement requirement of BR 8.1.

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. A 150-day suspension is appropriate here, along with the requirement of restitution and formal reinstatement. Respondent's suspension will be effective 30 days after this decision becomes final.

Respectfully submitted this 10th day of January 2022.

/s/ Mark A. Turner

Mark A. Turner, Adjudicator

/s/ Thomas Kranovich

Thomas Kranovich, Trial Panel Member

/s/ Eugene Bentley

Eugene Bentley, Trial Panel Public Member