

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-94
)
TIMOTHY RICHARD GASSNER,)
)
Respondent.)

Counsel for the Bar: Samuel Leineweber

Counsel for the Respondent: David J. Elkanich

Disciplinary Board: None

Disposition: Violation of RPC 1.15-1(a), RPC 1,15-1(c), and RPC 5.3(a).
Stipulation for Discipline. 180-day suspension, all stayed,
2-year probation.

Effective Date of Order: March 2, 2021

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Timothy Richard Gassner (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 suspended for 180-days, all stayed pending two years probation, effective March 2, 2021 for violation of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 5.3(a).

DATED this 24th day of February, 2021.

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

STIPULATION FOR DISCIPLINE

Timothy Richard Gassner, attorney at law (Respondent), and the Oregon State Bar (Bar) hereby stipulate to the following matters pursuant to Bar Rule of Procedure (BR) 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 30, 2002, and has been a member of the Bar continuously since that time, having his office and place of business in Jefferson County, Oregon.

3.

Respondent enters into this Stipulation for Discipline freely, voluntarily, and with the advice of counsel. This Stipulation for Discipline is made under the restrictions of BR 3.6(h).

4.

On January 21, 2020, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c), and RPC 5.3(a). 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.

Beginning in 2010, Respondent was the managing partner of his law firm and oversaw his firm's bookkeeping and lawyer trust account transactions. Respondent also had direct supervisory authority over the firm's bookkeeper ("bookkeeper").

On February 6, 2019, staff from Respondent's law firm called and transmitted a letter to the Bar to report two overdrafts in the firm's lawyer trust account.

On February 11, 2019, the Bar received an IOLTA overdraft notification from Columbia Bank stating that two items were presented against insufficient trust account funds. The checks for \$22,187.98 and \$180 were paid from an available balance of \$17,436.88.

While investigating the overdraft, Respondent discovered that over the course of several years, the bookkeeper transferred client funds from the trust account to the firm's business account before they were earned, and failed to keep accurate records of those transfers of client funds.

Respondent and the bookkeeper ascertained the amount of money that was prematurely withdrawn and in June 2019, took out a line of credit to repay the firm's client trust account in and amount of \$53,373.32.

During the time period relevant herein, Respondent failed to supervise the activity of the bookkeeper sufficiently to discover that she had failed to keep accurate records of client funds in the firm's trust account, that she had failed to keep the clients' funds separate from those of the firm, or that she had withdrawn client funds from the firm's trust account before they were earned.

Violations

6.

Respondent admits that, by engaging in the conduct described above, he failed to safeguard client property, in violation of RPC 1.15-1(a), and removed client funds from trust before they were earned, in violation of RPC 1.15-1(c). Respondent also admits that he failed to make reasonable efforts to ensure that his bookkeeper's and staff's conduct was compatible with his professional obligations, in violation of RPC 5.3(a).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.15-1(b) should be and, upon the approval of this stipulation, is dismissed.

Sanction

7.

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.** The ABA Standards presume that the most important duties a lawyer owes are those owed to clients. ABA Standards at 5. Respondent violated his duty to his clients to preserve client property. ABA Standard § 4.1. Respondent also violated the duty he owed as a professional to adequately supervise his staff. ABA Standard § 7.0.
- b. **Mental State.** The ABA Standards recognize three mental states. "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure 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. ABA Standards at 9.

Respondent's conduct reflects a negligent mental state. Respondent negligently supervised his staff and failed to confirm that disbursements from the law firm trust account were appropriate, which led to premature withdrawals of client funds before they were earned, and the overdraft of his trust account.

c. **Injury.** There was both actual and potential injury to Respondent's clients when funds were prematurely disbursed before fees were earned. In addition, by failing to comply with the trust account rules, Respondent caused actual harm to the legal profession.

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

1. Multiple Offenses. ABA Standard 9.22(e).
2. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been admitted to practice law in Oregon since 2002.

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

1. Absence of a prior record of discipline. ABA Standard 9.32(a).
2. Timely good faith effort to make restitution or to rectify consequences of misconduct. ABA Standard 9.32(d).
3. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. ABA Standard 9.32(e).
4. Character or reputation. ABA Standard 9.32(g).
5. Remorse. Respondent has expressed remorse for his conduct. ABA Standard 9.32(l).

f. **Preliminary Sanction.** The ABA Standards provide in pertinent part:

Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. ABA Standard 4.1

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.

8.

In comparable situations, the Disciplinary Board has approved stipulations imposing suspensions subject to probation. *See, e.g.,*

- *In re Boyd*, 33 DB Rptr 492 (2019) [6-month suspension, all stayed, 3-year probation] After Respondent overdrew his trust account in 2019, he realized that he had not reconciled his trust account and business account for quite some time. After investigating his accounts, Respondent found that nearly \$11,000 in client funds, belonging to multiple clients, had been prematurely withdrawn. Respondent then transferred his own money in to trust to repay the clients. Respondent had an audit done on his accounts and discovered discrepancies going back to 2011. Respondent also concluded that these improper transfers occurred in part because he had failed to properly supervise his bookkeeping staff. [RPC 1.15-1(a), RPC 1.15-1(c), and RPC 5.3(a)].
- *In re Landerholm*, 32 DB Rptr 372 (2018) [stipulated one-year suspension, all stayed/three-year probation] Respondent surrendered management of his trust account to an office manager who, based upon an audit, determined that errors had occurred and then made transfers to and from the trust account to try to reconcile the entries with information listed in other reporting documents and accounts, resulting in some client funds being removed before they were earned. Even following subsequent professional efforts, the accounting discrepancies could never be resolved. [RPC 1.15-1(a), (b), and (c), RPC 5.3(a)].
- *In re Allen R. Peters*, 32 DB Rptr 213 (2018) [stipulated eight-month suspension, all but 30 days stayed/two-year probation]. To address a substantial trust account deficit uncovered by a returned check, Respondent transferred personal funds into his trust account. Further investigation identified five transactions for four separate clients that were either mis-recorded in his ledgers and/or removed from the trust account in error. [RPC 1.15-1(a), (b), and (c)].
- *In re Mark O. Cottle*, 29 DB Rptr 79 (2015) [stipulated 60-day suspension, all stayed/two-year probation] Respondent was a managing attorney who oversaw law firm operations, including how the law firm handled firm and client money, and had direct supervisory authority over the non-lawyer staff. When Respondent's firm received a \$35,000 settlement check on behalf of a client, Respondent directed law firm staff to deposit the client's check, and checks from two other clients, into his trust account, for a total deposit of approximately \$40,000. Law firm staff did not complete the deposit, and Respondent did not verify that the deposit had been completed before writing a check a few weeks later for his fees. After the bank returned the check for insufficient funds, Respondent transferred approximately \$41,000 of his own funds into the firm's

lawyer trust account to correct the depositing error. [RPC 1.15-1(b) and (c), RPC 5.3(a)].

9.

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*, ABA Standard § 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.

10.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for six months for violations of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 5.3(a), with all of the suspension stayed, pending Respondent's successful completion of a two-year term of probation. The sanction shall be effective as directed by the Disciplinary Board (effective date).

If Respondent's term of suspension is imposed for any reason, Respondent 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 Respondent re-attains his active membership status with the Bar, Respondent 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.

11.

Probation shall commence upon 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, Respondent shall abide by the following conditions:

- (a) Respondent will communicate with Disciplinary Counsel's Office (DCO) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Respondent has been represented in this proceeding by David J. Elkanich (Counsel). Respondent and Counsel hereby authorize direct communication between Respondent and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Respondent's compliance with his probationary terms.

- (c) Respondent shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (d) During the period of probation, Respondent shall attend not less than 8 MCLE accredited programs, for a total of 24 hours, which shall emphasize trust account management and supervising staff. These credit hours shall be in addition to those MCLE credit hours required of Respondent for his normal MCLE reporting period. (The Ethics School and Trust Accounting School requirements do not count towards the 24 hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Respondent shall submit an Affidavit of Compliance to DCO.
- (e) Prior to the end of the period of probation, Respondent shall attend Trust Accounting School, which is offered by the Oregon State Bar twice a year in the spring and fall.
- (f) Throughout the period of probation, Respondent shall diligently review and approve all accounting actions of his firm relating to the disbursement, transfer, or withdrawal of client funds.
- (g) Each month during the period of probation, Respondent 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; and
- (h) For the period of probation, Respondent will employ a bookkeeper approved by DCO, to assist in the monthly reconciliation of his lawyer trust account records and client ledger cards.
- (i) On or before March 1, 2022 and February 1, 2023, Respondent 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.
- (j) Paul F. Sumner OSB # 780913 shall serve as Respondent's probation supervisor (Supervisor). Respondent shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Respondent's clients, the profession, the legal system, and the public. Respondent agrees that, if Supervisor ceases to be his Supervisor for any reason, Respondent will immediately notify DCO and engage a new Supervisor, approved by DCO, within one month.

- (k) Respondent and Supervisor agree and understand that Supervisor is providing his/her services voluntarily and cannot accept payment for providing supervision pursuant to this Stipulation for Discipline.
- (l) Beginning with the first month of the period of probation, Respondent shall meet in person or via Zoom with Supervisor at least once a month for the purpose of:
 - (1) Permitting his Supervisor to inspect and review Respondent'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. Respondent agrees that his Supervisor may contact all employees and independent contractors who assist Respondent in the review and reconciliation of his lawyer trust account records.
- (m) Respondent authorizes his Supervisor to communicate with DCO regarding his compliance or non-compliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Respondent's compliance.
- (n) Within thirty (30) days of the effective date, Respondent shall file a report with DCO stating that he met with the PLF Practice Management Attorneys and received advice and assistance regarding procedures for handling client funds and reconciling his trust accounts, and for adequately training his staff regarding the handling of client funds. He shall include in his report the date of his consultation(s) with the PLF's Practice Management Attorneys; the recommendations that he has adopted and implemented; and the specific recommendations he has not implemented (if any) with an explanation why he has not adopted and implemented those recommendations. Respondent shall provide a copy of the Office Practice Assessment from his earlier meeting(s) with the PLF's Practice Management Attorneys. Respondent's report must be signed by the Practice Management Attorney who advised him.
- (o) Respondent shall implement all changes recommended by the PLF Practice Management Attorneys, to the extent reasonably possible, and participate in at least one follow-up review with PLF Practice Management Attorneys on or before September 1, 2021
- (p) On a quarterly basis, on dates to be established by DCO beginning no later than 90 days after the effective date, Respondent shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Respondent is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Respondent's meetings with his Supervisor.

- (2) A description of the accounting activities that Respondent reviewed, and the results thereof, including completion of three way reconciliation of Respondent's trust account.
- (3) Whether Respondent has completed the other provisions recommended by Supervisor, if applicable.
- (4) In the event that Respondent has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the non-compliance and the reason for it.
- (q) Respondent is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (r) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (s) Respondent's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (t) The SPRB's decision to bring a formal complaint against Respondent 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.
- (u) Upon the filing of a petition to revoke Respondent's probation pursuant to BR 6.2(d), Respondent's remaining probationary term shall be automatically tolled and shall remain tolled, until the BR 6.2(d) petition is adjudicated by the Adjudicator or, if appointed, the Disciplinary Board.

12.

On or before May 2, 2021, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$377.50, incurred for Respondent's deposition. Should Respondent fail to pay \$377.50 in full by May 2, 2021, the Bar may thereafter, without further notice to him, obtain a judgment against Respondent for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

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 or the denial of his reinstatement. The Bar offers Ethics School twice each year. This

requirement is in addition to any other provision of this agreement that requires Respondent to attend continuing legal education (CLE) courses.

14.

Respondent 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 Respondent is admitted: none.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 23, 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 21st day of February, 2021.

/s/ Timothy Richard Gassner
Timothy Richard Gassner, OSB No. 023090

APPROVED AS TO FORM AND CONTENT:

/s/ David J. Elkanich
David J. Elkanich, OSB No. 992558

EXECUTED this 22nd day of February, 2021.

OREGON STATE BAR

By: /s/ Samuel Leineweber
Samuel Leineweber, OSB No. 123704
Assistant Disciplinary Counsel