IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 19-125
	)	
D. RAHN HOSTETTER,	)	
	)	
Respondent.	)	

Counsel for the Bar:	Eric J. Collins
Counsel for the Respondent:	Peter R. Jarvis and Trisha Thompson
Disciplinary Board:	Mark A. Turner, Adjudicator Elizabeth A. Dickson Burl A. Baker, Public Member
Disposition:	No violation of RPC 1.1, RPC 1.7(a)(2), and RPC 8.4(a)(4). Trial Panel Opinion. Dismissal.
Effective Date of Opinion:	March 12, 2022

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged respondent D. Rahn Hostetter with violation of three Oregon Rules of Professional Conduct: RPC 1.1 (failure to provide competent representation), RPC 1.7(a)(2) (current client conflict of interest), and RPC 8.4(a)(4) (engaging in conduct prejudicial to the administration of justice).

The charges arise from Respondent's representation of an individual, Gari Price (Price), (or "Gari" in Bar documents), now deceased. Price was elderly and estranged from his children. His wife had divorced him after 62 years of marriage and was deceased at the time of relevant events. Price wanted to ensure that his 46-acre ranch property near La Grande would not be further developed and would be preserved for wildlife after his death. Price wanted to give the property and improvements to Clint Troyer (Troyer), a man who had recently befriended Price and was caring for him. Price's children lived elsewhere, and were not providing consistent support for their father. Troyer refused to accept the land as a gift, but was willing to buy it and preserve it the way Price wanted. He also was willing to provide care to the 88-year-old so he could live out the remainder of his life on the ranch.

Price hired Respondent to handle the land sale. Respondent worked on the transaction, but anticipated resistance from Price's children. He ultimately advised his client to follow a strategy that required the appointment of a guardian (Troyer) and a conservator, with the conservator's approval a necessary precondition of any land sale. Price's children objected to the guardian and the conservator nominated by Respondent and proposed that Price's oldest daughter, Suzi Kelley (Kelley) be appointed to both positions. A court battle ensued and Kelly was ultimately appointed both guardian and conservator, over her father's objection. Price died not long thereafter. Subsequently, the property was not sold to Troyer. Instead the evidence at trial was that the children sold the property, and the purchaser was subdividing and selling the property for development, directly contrary to Price's wishes.

The Bar alleged that Respondent's work on behalf of Price was incompetent, that Respondent had a conflict of interest when he personally petitioned the court to appoint a guardian and conservator for Price, and that his handling of the ensuing proceedings involved conduct prejudicial to the administration of justice. The Bar asked for a nine-month suspension as the appropriate sanction.

The case was tried by videoconference over a five-day period, October 25-29, 2021, before a trial panel consisting of the Adjudicator, Mark A. Turner, attorney member Elizabeth A. Dickson, and public member Burl A. Baker. The Bar appeared through counsel, Eric Collins and Rebecca Salwin. Respondent appeared personally and was represented by counsel, Peter Jarvis and Trisha Thompson.

After consideration of the evidence and the arguments of the parties, and as explained in detail below, the panel finds that the Bar failed to prove any of the charges by clear and convincing evidence. The charges are dismissed.

FACTS

Price and his wife raised five children on a 137-acre property near La Grande that Price dubbed "Monticola Ranch." The couple dissolved their 62-year marriage in 2012, apparently initiated by their children. Mrs. Price was suffering health problems, including dementia, and had been moved to an adult foster home. Ex. 2. The adult children of Price claim he was resistant to paying for his wife's medical expenses and care. One of the daughters, Barbara Johnson (Johnson), acting on behalf of their mother, filed the dissolution action to divide the property, allegedly to provide a means of support for Mrs. Price. Ex. 1.

Judge Russell West presided over the divorce proceedings and divided the property between husband and wife in a Dissolution Opinion dated November 13, 2012. Ex. 2. At the time of the dissolution, the real property awarded to Price was valued by the judge at $800,000, less a mortgage of about $125,000. Ex. 2 at 10. Price received a roughly 33-acre tax lot upon which the family house was located and another 13-acre tax lot for a total of about 46 acres. Price's wife received the remainder. Price had asked the court to sell a conservation easement to raise money for his wife's care and then order sale of the entire ranch. *Id.* at 1. Price wanted to avoid

developing the ranch and preserve habitat for elk and deer. The judge rejected that approach as "misguided and unrealistic" due to the time that would be required to sell a conservation easement and the fact that no conservation group had made an offer to purchase such an easement. *Id.* at 9. The judge also noted that the property value would be cut in half if a conservation easement were applied to the property. *Id*.[1]

Price lived alone in the family house after the dissolution and increasingly neglected his personal care. He also exhibited cognitive decline. His ex-wife soon died, and the children began selling parts of the ranch she had been awarded in the dissolution. Troyer entered into an agreement with Johnson to buy a 14-acre portion of that land for $195,000. Price and Troyer did not know one another at that time.

In October 2016, Troyer stopped at Price's house. This was their first meeting. At the time he testified in this proceeding, Troyer was 50 years old. He operates two companies that employ approximately 15 people, one of which is a lawn care business.

When they first met they spoke on Price's deck and Price asked Troyer for help cleaning up some of his property. Tr. at 824. Approximately two weeks later Troyer sent a crew to help Price by stacking firewood that he used for home heat. About this time Troyer first went into the house with Price and saw that it was a mess, with animal feces and trash scattered in the main room. Tr. at 826-28. The refrigerator/freezer was broken and Price had made himself sick eating spoiled food. Price had moved his bed from the bedroom to the main room next to the fireplace for warmth. Troyer brought Price a meal later that day. After this, Troyer began to visit Price regularly. He brought him meals twice a day, arranged for a housekeeper to clean and otherwise provided transportation and personal care to Price.

Price spoke with Troyer about his hope for the property and his concern that it might be subdivided and developed by his children, as they were doing with the portion of the property given to his wife in the dissolution proceeding. Troyer was aware that Price did not have a good relationship with his children. Tr. at 828.

Price told Troyer that he wanted to give Troyer his property because Troyer would preserve it as Price wanted. Troyer rejected the idea of a gift, and told Price that he would be interested in purchasing the property from Price. Tr. at 834-35. Troyer advised Price that he needed to have a lawyer represent him in the transaction, and later in October made arrangements for Price to meet with a local attorney, Jesse Hardval (Hardval), on October 24, 2016. Tr. at 836. Troyer emailed Hardval after a phone call describing the basic facts as: 1) Price wishes to gift the property to Troyer; 2) Troyer would assume the mortgage (estimated at $118,000); 3) Price wanted to stay on the property until his death; and 4) "under no circumstances is the property to be subdivided." Ex. 6. Troyer concluded: "If this case was to be

[1] In a prescient statement relevant to this proceeding, the judge stated in late 2012: "It appears husband is having problems with cognitive functioning and decision making. I find that it is only a matter of time before husband needs assistance with his own care. **I find that he needs assistance at this time with his financial affairs**." Ex. 2 at 6 (emphasis added).

agreed to be handled by your firm I would insist that a meeting with [Price] would ensue promptly so that he could express his wishes in person." *Id*. Hardval had been in practice for seven months by this time.

Price met privately with Hardval. Hardval's law firm declined the representation. Hardval's letter to Price declining the engagement stated that he was concerned that the transaction "raises [too] many red flags for undue influence and lack of capacity." Ex. 8.

Troyer eventually contacted Respondent about representing Price. Respondent and Troyer had no prior relationship. Troyer drove Price to Respondent's office in Enterprise for a meeting in January 2017. Respondent agreed to represent Price. Price signed a fee agreement. Ex. 15. Troyer paid a $5,000 retainer on Price's behalf. Respondent prepared, and Troyer and Price signed, waiver letters acknowledging Respondent represented only Price, not Troyer. Ex. 94, p 3.

Soon thereafter both parties signed a four-page purchase and sale agreement drafted by Respondent that sold all of Price's land to Troyer for $400,000. Ex. 16. Respondent included certain conditions that were critical to Price. The parties had to reach agreement on the terms of a life estate in favor of Price that would allow Price to live on the property until his death, and the sale was contingent on a "conservation easement to be drafted and recorded before the closing date," which, under the contract, was to occur on or before April 1, 2017. At Price's direction, Respondent also notified Price's son Peter Price (Peter) that Price was revoking a power of attorney he had previously granted to Peter.

Troyer was unable to secure financing to purchase the 14-acre property from the estate of Price's ex-wife for $195,000, and that deal fell by the wayside. We heard no further evidence about it.

In early March 2017, Price's oldest daughter, Kelley, first learned details of the sale from her father and Troyer, which Kelley summarized in an email to her brothers dated March 5, 2017, Exhibit 24, and an email to Respondent dated March 10, 2017, Exhibit 30. She understood that Troyer and his family would buy Price's land and move into the home. Price would move into the property's pool house after renovations that would make it habitable as an apartment. Kelley was told that the deal restricted Troyer's ability to divide and sell the property, so that it would be preserved pursuant to Price's wishes. Ex. 24. This was the first time Kelley and Troyer met. Troyer told her that Price had not wanted his children to know of the plan, but Kelley noted that Troyer "had no trouble telling me the plan right in front of dad." Ex. 30.

During this time, Peter, who lived in Las Vegas, made a violent threat against Troyer in a phone call and Troyer responded in-kind. After Respondent learned of this incident, and believed Peter had threated Price as well, he told Kelley that he reported his concerns about elder abuse to the authorities, and she told him that Troyer's threats to Peter were also reported. Respondent emailed Kelley on March 9, 2017, stating: "In light of recent threats of violence, I intend to recommend to [Price] that we file a conservatorship and have any proposed transactions

reviewed by a conservator or the court. That is the only way that my representation of [Price] can continue." Ex. 26.

Respondent met with Price in person on March 14, 2017. After this, Respondent identified Tim Donivan (Donivan), to serve as Price's conservator, if appointed. Donivan was Price's neighbor. He was a long-time acquaintance. He was also a financial adviser and had managed Price and his wife's finances in the past.

Respondent drafted a second purchase and sale agreement that included similar conditions to the first one—approval of a life estate and a "conservation easement to be drafted before closing." Ex. 32. It added a new condition, that the terms of the agreement must be approved by a "court-appointed conservator."[2]

Following through on the course of action he outlined to Kelley, Respondent, as petitioner, filed a petition seeking the appointment of Troyer as guardian and Donivan as conservator for Price on March 28, 2017. Ex. 36. Respondent did not mention Troyer's or Donivan's relationship to Price or the pending land sale in the petition. Respondent estimated the value of Price's estate at $500,000. Respondent described his client as "semi-incapacitated" and "suffering from diminished mental acuity" with "money and real property that requires management and protection by a capable financial manager and counselor." *Id.* at 2.

The same day Respondent's office emailed Troyer an unsigned copy of the second purchase and sale agreement for his review. Unknown to Respondent, the purchase and sale agreement was signed by Price and Troyer by March 31, 2017, and submitted to escrow with Eastern Oregon Title Co. Ex. 38.

In early April 2017, Price was hospitalized for an infection secondary to pneumonia. The court-appointed visitor designated to report on Price advised Judge West that Price was experiencing delirium stemming from the infection and possible side-effects of medication. Ex. 39. Around this time, several of Price's children filed objections to Respondent's petition, and Kelley filed a cross-petition seeking appointment of herself as guardian and conservator. Exs. 40, 41, 44, and 47.

On April 19, 2017, Respondent filed an amended petition seeking appointment of Troyer and Donivan as guardian and conservator, respectively. His amended petition described Troyer's relationship to Price as "a friend of [Price] for over seven months. Mr. Troyer helps [Price] with his home and personal care." Ex. 45. Respondent again did not mention the land sale. Respondent now identified Price as "incapacitated" rather than "semi-incapacitated."

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[2] The Bar noted this agreement incorrectly referenced only part of Price's property, the tax lot containing his home, as subject to sale, and thus, it claims, would have subdivided Price's property against his wishes. Respondent acknowledged that this was merely a drafting error that would have been caught when Troyer had to approve the preliminary title report pursuant to ¶4 of the agreement and that any ultimate sale would have included the entire property.

Respondent filed an objection on Price's behalf to Kelley's cross-petition on May 3, 2017. Ex. 48. Respondent also took Price's perpetuation deposition on May 15, 2017. Ex. 49.

On May 23, 2017, Kelley filed a Petition to Appoint Temporary Guardian and Temporary Conservator. Ex. 51. Such a petition can be filed when the petitioner alleges an "immediate" threat to the protected person's finances. ORS 125.600(1). A petition to appoint a temporary guardian and temporary conservator proceeds on an expedited schedule. ORS 125.605. Kelley's attorney, Timothy Marble (Marble), sent a letter to the court stating that he had set the deadline for objection as May 25, 2017, and pursuant to ORS 125.605(5) asked the court to hold a hearing on those objections within two judicial days of when they were filed. Ex. 50. On Wednesday May 24, 2017, Respondent's associate, Benjamin Boyd, filed a motion to strike and dismiss the Temporary Petition. Ex. 56. Respondent was out of town at the time.

On the afternoon of May 24, 2017, Respondent's office received a notice that a "Hearing – Case Management" had been set for May 31, 2017 in the protective proceeding. Ex. 57. The notice stated in capital letters:

> "JUDGE POWERS PRESIDING; 30 MIN ALLOWED; RE: SCHEDULING ALL PENDING MATTERS; ATTYS TO HAVE SCHEDULES READY."

Id. Respondent's office moved to disqualify Judge Powers the next day. Ex. 268. Later that day, Respondent received a notice that the hearing had been moved to May 30, 2017. Ex. 270. It stated, again in capital letters:

> "JUDGE WEST PRESIDING; 45 MIN ALLOWED; RE: SCHEDULING ALL PENDING MATTERS; ATTY'S TO HAVE SCHEDULES READY. **NOTE THIS HEARING IS REPLACING THE 5/31/17 HEARING**"

Ex. 270.

Respondent testified at trial that he understood the notice to advise all parties that the May 30, 2017 hearing was a scheduling conference. Respondent's office manager, Tami Phinney, emailed Respondent that afternoon asking if he wanted to file a motion to appear by telephone "since it is only relating to scheduling all pending matters." Ex. 272. Respondent, who lives approximately 60 miles from the Union County Courthouse, told Ms. Phinney he wanted to appear by phone and that they would file a motion the next day. *Id.*

Uniform Trial Court Rule 5.050 allows a party to request that "a nonevidentiary hearing or a motion not requiring testimony be heard by telecommunication." Respondent filed a motion to appear by telephone. Ex. 274. Judge West granted the motion and allowed Respondent to appear by telephone. Ex. 275. Judge West also permitted the attorney for one of Price's daughters to appear by phone.

On Tuesday May 30, the day after Memorial Day, Respondent appeared telephonically at the hearing. Judge West began the proceedings by expressing surprise that Respondent did not

appear in person. Ex. 65, at 5:21-22. Respondent explained: ". . . I saw this scheduling that says scheduling all pending matters. That's what it said; that's what I expected this call to be, to schedule a hearing. So, no, I didn't have time, nor did I understand the need to line up witnesses for this; I thought this was simply to schedule what was coming up. So you won't be hearing from Clint Troyer, and you need to." *Id.* at 16:18-24.

Respondent then argued that Price did not want Kelley to be his fiduciary in any capacity and that there was no emergency or imminent threat to Price or his finances that necessitated a temporary guardian or conservator. Respondent offered the video deposition of Price, which attorney Marble had brought to court. *Id.* at 25:29-24. Respondent's staff also successfully contacted Troyer who immediately traveled to La Grande from Baker City and appeared as a witness. *Id.* at 133:3-154:4.

Judge West ultimately ruled that Kelley would serve as Price's temporary guardian and conservator. No evidence was presented in this disciplinary proceeding to suggest that Respondent's physical presence at the hearing or any other evidence he might have presented at the hearing would have led to a different outcome.

On June 7, 2017, Kelley filed a motion seeking an order to remove Respondent as counsel for Price and replace him with attorney Michael Collins, who had represented Price's daughter Johnson as Mrs. Price's conservator during and after the dissolution proceeding. The motion stated:

> "Although Oregon Rule of Professional Conduct 1.14 allows that an attorney may seek the appointment of guardian and conservator for his or her own client, it does not specifically allow that the attorney may continue representing the impaired client in a subsequent hearing." Ex. 70.

It goes on to state that Price had submitted an objection to the petition. The motion stated that "The Objection does not specify a particular person that Mr. Price does not want to serve as a fiduciary, but appears to be a general objection to the proceeding." *Id*. It concluded, "As his attorney, [Respondent] is therefore obligated to contend for a position which, as petitioner, [Respondent] has directly opposed. This is a non-waivable conflict of interest." *Id*. This was not true.

The objection Price himself had earlier submitted was not a general objection to the proceeding. Instead, it was a form objection specific as to Kelley. Ex. 261. The form provided an option to choose as an objection: "I do not want anyone else making any of my decisions for me." Price did not check that option, but instead checked: "I do not want [proposed guardian] making any decisions for me." *Id.* In a later objection to appointment of a temporary guardian and temporary conservator filed by Boyd on behalf of Price on May 24, 2017, he reminded the court that, at Price's perpetuation deposition, "[Price] adamantly opposed appointment of [Kelley] to act for him in any capacity whatsoever." Ex. 55 at 4.

As the dispute between Price and his children continued, Respondent was concerned about protecting client confidences and privileged communications if he was subject to discovery requests from Kelley. Ex. 69. Respondent obtained a lawyer through the Professional Liability Fund (PLF), Thomas Peachey, to help him manage the issues. Peachey filed a Motion for Protective Order on June 19, 2017. Ex. 285. The same day, Marble sent Respondent a letter confirming that the parties had agreed that "the deadline for filing a response to my motion for substitute counsel will be June 26, 2017." Ex. 286.

On Friday June 23, 2017, the court issued a notice of a hearing at 9:00 AM on Monday June 26, 2017. The notice stated that it was a hearing on "MOTION FOR PROTECTIVE ORDER." Ex. 287. The notice does not mention the motion for substitute counsel.

At the hearing on June 26, 2017, Judge West announced that he would hear argument on both Respondent's motion for a protective order and on Kelley's motion for substitute counsel. Ex. 76 at 4:6-10. Respondent stated that the notice of hearing did not reference the motion for substitute counsel. He stated he was not prepared to address that motion and told the court that the deadline to file a response to Kelley's motion was midnight that same day. His office was preparing to file his response later that day. *Id.* at 5:21-25. Judge West stated that he had notified the parties on Friday, June 23, 2017, by letter that he would be hearing both motions on the 26th and that he was not willing to wait to hear it. *Id.* at 6:1-8. Respondent said he never received such a letter. He also told the court that he and Marble had agreed that Respondent could file his opposition that day. *Id.* at 6: 9-13. Neither party offered into evidence at this proceeding any letter or other communication from the court regarding consolidation of the motions at the hearing. The only written notice as to the hearing that is in the record is Exhibit 287, which references only the motion for protective order.

Price testified during the hearing that he chose Respondent to be his lawyer because he had seen three or four lawyers in La Grande who would not fulfill his wishes for the property. *Id.* at 96: 8-14. He knew what a guardian was and wanted Troyer to be his guardian. *Id.* at 96: 21—97: 5. He did not want Kelley to be his guardian because she did not value the property the same way he did—she was interested in "dollars" rather than the beauty of the area. *Id*. at 97: 15-23. He further testified that he trusted Donivan and wanted him to manage his finances. *Id.* at 99: 11-25.

Respondent's office submitted a written response during the hearing. At the end of the hearing, Judge West permitted Respondent to also file a supplemental response on June 27, 2017. Respondent did so. Counsel for Kelley and Peter each filed a reply to this supplemental response on June 28, 2017.

On July 3, 2017, Judge West issued an opinion granting the motion to remove Respondent as Price's counsel. Ex. 79. Judge West held that Troyer had a conflict of interest as the buyer of the property. The judge believed that Troyer exercised undue influence over Price to facilitate the land sale. He did not believe Price was capable of understanding and waiving any conflict involving Respondent, and that Price was not capable of choosing his own counsel. Judge West

later appointed Bruce Anderson as Price's new counsel, rather than Collins, the lawyer Kelley had urged the court to appoint.

Judge West based his opinion in part on his stated belief that the $400,000 sales price was too low given that the fair market value of the property was $800,000 based upon his prior findings during the dissolution proceedings. Although he expressly took judicial notice of the entire record in the Price dissolution case, he apparently did not recall, and did not take into account, his own finding in the dissolution case that applying a conservation easement to the property would reduce its value by half to $400,000.

Approximately one month after Respondent was removed as counsel, Kelley was appointed Price's guardian and conservator indefinitely. Anderson, Price's appointed lawyer, did not challenge her appointment. Judge West did, however, require court approval before leasing, selling, or encumbering the property. Ex. 87 at 240-41.

Price died sixteen days later, on August 18, 2017. Respondent contended that Price lost the will to live once Kelley was appointed indefinite guardian and conservator because he did not believe she would fulfill his wishes as to preserving the property.

Apparently, he was right. On October 8, 2017, Kelley, as personal representative for Price's estate, sold what remained of the ranch for $815,000. Ex. 307. She took no steps to attempt to preserve it and no conservation easement or other restrictive covenant was entered into. Nor did the court require her to do so. Each of Price's five children received a cash distribution from his estate of $77,385.21. Ex. 311. We were told the property has been subdivided and is being developed by the purchaser.

ANALYSIS OF THE CHARGES

1. Respondent did not violate RPC 1.1

Although it is the Second Cause of Complaint in the Amended Formal Complaint, the Bar led in its trial memorandum with its charge that Respondent failed to provide competent representation. We will address that charge first.

RPC 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

In the Amended Formal Complaint, the Bar alleged that Respondent failed to provide competent representation in the following ways:

"18.

In representing Price with respect to the sale of the ranch, Respondent failed to employ the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation, by doing one or more of the following:

A. Failed to adequately ascertain whether Price was competent to enter into the transactions described herein;

B. Failed to obtain independent valuation of the ranch or of the reduction in value of the ranch in light of the proposed life estate and conservation easement;

C. Failed to ascertain whether Price's sale of his primary asset for less than full value was in Price's best interests, given Price's age and the need to maximize resources for his care;

D. Knowing that preserving the ranch against partition and development after his death was Price's key objective in the representation, Respondent failed to prepare the conservation easement; and

E. Drafted a land sale contract that conveyed only one of the two tax lots comprising the ranch, which would have resulted in a partition of the ranch if enforced.

19.

In the probate proceeding described herein, Respondent failed to employ the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation, by doing one or more of the following:

A. Failed to adequately assess and pursue lesser restrictive alternatives to the filing of a petition for guardianship and conservatorship to accomplish the objectives of the representation;

B. Sought the appointment as guardian of an individual, Troyer, whose interests as the putative buyer of the ranch were in conflict with Price's interests as the seller of the ranch;

C. Failed to read the order setting the May 30, 2017, hearing on his objections to Kelley's petition for the appointment of temporary fiduciaries described in paragraph 15 herein;

D. Failed to appear in person at the May 30, 2017, hearing on Kelley's petition for the appointment of temporary fiduciaries, or to request that the hearing be reset for a time at which he could appear in person;

E. Failed to prepare for the May 30, 2017, hearing, produce evidence, or arrange for the appearances of witnesses; and

F. Failed to timely file his objections and supporting memorandum to Kelley's motion for substitution and appointment of counsel for Price."

In its trial memorandum, the Bar expanded the list of acts and omissions it argued violated the rule:

- Respondent failed to adequately ascertain whether Gari needed a conservator and guardian to manage his financial affairs, in light of his belief that Gari was competent to enter into the land sale contract.

- Respondent sought the appointment of Troyer as guardian, despite Troyer's obvious conflict of interest as potential buyer of Gari's property. If appointed as guardian by the court, Troyer would have the power to relocate Gari at any time to a care facility, ridding himself of the burden of Gari's care after taking over his property for approximately half its market value.

- Respondent failed to bind Troyer to any specific plan of future care for Gari in exchange for the sale of Gari's property to Troyer at about half of its fair market value. This oversight made it less likely the court would approve the land sale; further, Gari would have had little recourse if Troyer failed to follow through with his many promises for remodeling and upkeep of the property.

- Respondent failed to follow through with measures to secure a conservation easement for Gari's property.

- When Peter angrily voiced his displeasure about Troyer and the land sale in a phone call, Respondent almost immediately advised his client to seek court intervention as a means of consummating the land sale, when other measures could have better served his client.

- Respondent advised Gari to pursue a legal strategy that foreseeably would cost his client extensive legal fees. He did so at a time when his client had limited financial resources and when any sale proceeds were needed to both pay off substantial debts and fund Gari's future healthcare expenses.

- Respondent advised his client to pursue a legal strategy that would provide his children reason to intervene in court and effectively block the land sale.

- Respondent advised his client to pursue a legal strategy that would require the appointment of a conservator and then, eventually, under

ORS 125.430, would require notice to the children of the sale of Gari's home, and court approval of that sale.

- Respondent advised his client to pursue a legal strategy that subjected his client to a total loss of autonomy that would result from the appointment of an indefinite conservator and guardian, without considering less restrictive alternatives.

- Respondent drafted a second land sale contract that conveyed only part of Gari's property to Troyer, thereby effectively partitioning the property contrary to Gari's express wishes to have one person own all of his property and preserve it.

- Respondent failed to properly identify the property for sale in the second land sale contract or have the parties provide a date on which they signed the contract.

- Respondent failed to understand an order setting a May 30, 2017, evidentiary hearing set in response to the objection he filed on behalf of Gari to the appointment of Suzi as temporary fiduciary. He failed to have witnesses or evidence prepared for the hearing and failed to request a setover of the hearing after realizing he was unprepared—to Gari's detriment.

- Respondent failed to timely file his objections to Suzi's motion seeking his removal as Gari's lawyer and came to the hearing on that motion unprepared to argue it.

Respondent moved at trial to strike certain of these specifications on the grounds that they were not pleaded in the Amended Formal Complaint. In *In re Conduct of Ellis*, 356 Or. 691, 344 P.3d 425 (Or. 2015), the Supreme Court stated:

> "An accused lawyer must be put on notice "of the conduct constituting the violation," as well as the rule violation at issue. *In re Magar*, 296 Or. 799, 806 n. 3, 681 P.2d 93 (1984). In that regard, BR 4.1(c) provides, in part:
>
> 'A formal complaint shall * * * set forth succinctly the **acts or omissions** of the accused, including the specific statutes or disciplinary rules violated, so as to enable the accused to know the nature of the charge or charges against the accused.'
>
> "That rule 'does not obligate the Bar to plead any fact regarding a charge * * * beyond those that the * * * [former] disciplinary rules identify.' *In re Kluge*, 332 Or. 251, 262, 27 P.3d 102 (2001). The Bar must, however, sufficiently allege facts

in connection with the charged allegation. (citing multiple cases)." 356 Or at 738-39 (emphasis added).

Respondent is correct that many of the additional specifications in the trial memorandum allege acts and omissions beyond those identified in the Amended Formal Complaint, and thus we could ignore these in considering this charge. Rather than strike these matters, however, the Adjudicator has concluded that the trial panel will consider all of the Bar's specifications in the trial brief because we conclude that the Bar has failed to prove any of them by clear and convincing evidence.

"Whether a lawyer has provided competent representation is a fact-specific inquiry." *In re Conduct of Obert*, 352 Or. 231, 250, 282 P.3d 825 (2012) (internal quotes omitted). RPC 1.1 does not impose a standard of perfection, and a comment to the corresponding ABA Model Rule 1.1 notes, "In many instances, the required proficiency is that of a general practitioner." ABA Model Rule 1.1, Official Comment [1].

Oregon case law has noted that isolated instances of ordinary negligence may result in civil liability but they are not enough to warrant disciplinary action. *See, e.g.*, *In re Gygi*, 273 Or 443, 450-51, 541 P2d 1392 (1975). "The focus is not on whether a lawyer may have neglected a particular task, but rather whether his or her representation in the broader context of the representation reflects the knowledge, skill, thoroughness, and preparation that the rule requires." *Obert*, 352 Or at 250 (internal quotes omitted).

Simply put, the fact that alternatives existed to the course of action chosen by Respondent does not establish incompetence. Mere disagreement about choices among alternative courses of action does not establish incompetence. The fact that an expert may testify that she would have done things differently, as occurred here, does not establish incompetence. At the end of the day, that is all we have in this case.

We address the specifications serially:

- Respondent failed to adequately ascertain whether Gari needed a conservator and guardian to manage his financial affairs, in light of his belief that Gari was competent to enter into the land sale contract.

This specification was not proved. At most, the Bar's evidence at trial showed that reasonable minds could differ as to whether to seek appointment of a guardian and conservator. The Bar's expert testified that she would have chosen a different path. But that does not make Respondent's actions incompetent by any stretch. The evidence showed that Price was competent enough to know that he wanted to sell his property and the general conditions under which he was willing to do so, but still needed the guidance of a conservator to select the specifics of a transaction. Moreover, Respondent's decision to seek a guardian and conservator for Price was vindicated when the court in fact ordered that such be appointed. Although the court disagreed with the individuals nominated by Respondent, it concurred in his assessment that Price needed someone to manage his affairs.

- Respondent sought the appointment of Troyer as guardian, despite Troyer's obvious conflict of interest as potential buyer of Gari's property. If appointed as guardian by the court, Troyer would have the power to relocate Gari at any time to a care facility, ridding himself of the burden of Gari's care after taking over his property for approximately half its market value.

This specification was not proved either. Troyer's nomination to be guardian did not create a conflict of interest arising from his role as purchaser in the land sale because the conservator (and the court per ORS 125.430(1)), not the guardian, would have to approve any such sale. The Bar's argument also misses the point that the terms of Price's life estate and care arrangements with Troyer were left to be negotiated. They were not specified in the purchase and sale agreement, they were not intended to be specified in the purchase and sale agreement, and they did not need to be.

The Bar continually ignored the fact that the purchase and sale agreements for the property were prepared by Respondent as a starting point, not a final recitation of, the parties' understanding. There were terms expressly left to be negotiated, including what conservation restriction would be employed and how Price's life estate would be conditioned, that were plain on the face of the agreements, yet the Bar constantly argued that Respondent was incompetent when he failed to include these terms in the initial agreement. The Bar's position ignored both the testimony and the common practice used in land sale transactions.

This specification also recites the Bar's contention that the sale price of $400,000 was not fair market value. The Bar ignored Judge West's own conclusion that a conservation restriction on the property would reduce its value to approximately $400,000, as well as the opinion of Patty Glaze, a real estate agent to the same effect. Ex. 18. The constant repetition of the unproven claim that the property was being sold for an unfair price, when that was clearly Price's intent due to the conditions he required, weakened the Bar's case more than on just this specification.

Finally, the Bar ignored the provisions of ORS 125.320(3), which requires a guardian to file with the court and serve on the protected party a statement of intent to move that person to a care facility. The protected party may object and the court must hold a hearing. Troyer's appointment as guardian would not have given him carte blanche to run roughshod over Price's rights or wishes.

- Respondent failed to bind Troyer to any specific plan of future care for Gari in exchange for the sale of Gari's property to Troyer at about half of its fair market value. This oversight made it less likely the court would approve the land sale; further, Gari would have had little recourse if Troyer failed to follow through with his many promises for remodeling and upkeep of the property.

This is another specification of Respondent incompetence that ignored the reality that terms remained to be negotiated. It also ignored the reality of a guardianship. A guardian is under

the constant eye of the court. ORS 125.315. And because the court, along with the conservator, had to approve the sale of the residence, either could have insisted on more elaboration of Troyer's plans as guardian if they were deemed inadequate. In addition, if Troyer ever sought to "change the abode" of Price, he was subject to court oversight. ORS 125.320(3). In any event, the claim that this alleged "oversight" was incompetence that violated the rule is merely a bald assertion.

- Respondent failed to follow through with measures to secure a conservation easement for Gari's property.

Failure to secure a conservation easement on the property under the circumstances did not demonstrate Respondent's lack of competence for multiple reasons. First, before Respondent could complete this task, he became embroiled in the litigation with Price's children. The Bar produced no evidence that Respondent had a duty to secure a conservation easement, or that the level of appropriate competence applied to the matter would have resulted in securing a conservation easement, that early in the process.

Second, the Bar's position on the issue of a conservation easement was willfully obtuse. The Bar presented evidence at trial that the term "conservation easement" must mean a statutorily recognized restriction on a property's use that is sold to an entity recognized under the conservation easement law. The evidence showed that Price himself had at some time prior to the events here solicited the Rocky Mountain Elk Foundation to purchase an easement on his property. The foundation was apparently not interested.

This was consistent with the testimony of the Bar's expert, Steve Cook, general counsel for Columbia Land Trust, who testified that statutory conservation easements could be difficult to obtain, and oftentimes required the property owner to make a significant contribution to the entity to induce the purchase. Tr. at 578-79. He stated that the odds of obtaining a conservation easement are against the landowner unless the property is "fairly exceptional." *Id.* Cook also testified, however, that there were other mechanisms by which a property owner could restrict future development, such as private easements or restrictive covenants. This approach might not be the ideal, but it is a reasonable alternative if no third party is willing to purchase a statutory conservation easement. Tr. at 580. He stated that such a choice would be "rational" if a statutory conservation easement was unavailable. Tr. at 594, 599.

Respondent's testimony was undisputed that if a statutory conservation easement could not be arranged (as seemed likely given Price's own prior personal experience) he would have gone the restrictive covenant route. His testimony was undisputed that his client understood this. Given this set of facts, it is unreasonable to conclude that Respondent's failure to actually get a conservation easement during the period of time involved here was due to incompetence.

- When Peter angrily voiced his displeasure about Troyer and the land sale in a phone call, Respondent almost immediately advised his client to seek court intervention as a means of consummating the land sale, when other measures could have better served his client.

This, again, is another conclusion with no evidentiary showing of wrongdoing. Respondent's decision to initiate the protective proceeding for his client was not an irrational choice given the children's hostility. The Bar presented no evidence that there were any better options available by which Respondent could have achieved his client's wishes, much less that the path chosen was an act of incompetence. Again, the mere fact that there were alternative courses of action Respondent could have chosen is not enough. In our view, the Bar was required as a threshold matter to demonstrate that better alternatives existed which actually could have fulfilled Price's objectives. It did not do so. And it certainly did not prove by clear and convincing evidence that the option chosen was the result of incompetence.

Moreover, given the fact that the court ultimately found that Price should have a guardian and conservator appointed, it is hard to see how pursuing this alternative could be considered incompetent.

- Respondent advised Gari to pursue a legal strategy that foreseeably would cost his client extensive legal fees. He did so at a time when his client had limited financial resources and when any sale proceeds were needed to both pay off substantial debts and fund Gari's future healthcare expenses.

The Bar offered no evidence that a less costly alternative even existed to accomplish Respondent's client's objectives. We are convinced from the record before us that any attempt by Price to transfer his property, with the limits on development he desired, would inevitably reduce the sales price, and would have met with swift and determined resistance from his children. Respondent's attempt to fulfill his client's objectives in this way was not incompetent. Moreover, Respondent testified that he was always cognizant of the need to provide for Price's future support in any scenario.

- Respondent advised his client to pursue a legal strategy that would provide his children reason to intervene in court and effectively block the land sale.

This claim suffered from the same defects as the one immediately above. The Price children opposed Price's dreams for the property regardless of the legal strategy employed, as evidenced by their ultimate disposition of Price's property against his wishes.

- Respondent advised his client to pursue a legal strategy that would require the appointment of a conservator and then, eventually, under ORS 125.430, would require notice to the children of the sale of Gari's home, and court approval of that sale.

Respondent's strategy was not incompetent. Appointment of a conservator and court approval of any sale were strategies utilized to enhance Price's ability to prevail over his children's preferences.

- Respondent advised his client to pursue a legal strategy that subjected his client to a total loss of autonomy that would result from the appointment

of an indefinite conservator and guardian, without considering less restrictive alternatives.

The Bar's evidence on this specification, again, was merely that less restrictive alternatives exist in a protected person proceeding and that its expert, Lisa Bertalan, a Bend estate-planning attorney, would have looked to them first. This does not constitute clear and convincing evidence that Respondent violated the rule. It also ignores the fact that Price, the client, desired appointment of a guardian and conservator; that as early as 2012 Judge West had opined that Price needed help managing his financial affairs; and that the court ultimately found that Price was indeed incapacitated sufficiently to merit appointment of both.

- Respondent drafted a second land sale contract that conveyed only part of Gari's property to Troyer, thereby effectively partitioning the property contrary to Gari's express wishes to have one person own all of his property and preserve it.

The drafting mistake in the second purchase and sale agreement was merely that, a mistake, one that both buyer and seller recognized and would have cured in the agreed-upon legal description. A drafting error that can be remedied is not incompetence under the rule. Furthermore, conveyance of part of a tract of land does not serve to partition it. It merely results in a divided legal lot.

- Respondent failed to properly identify the property for sale in the second land sale contract or have the parties provide a date on which they signed the contract.

The first part of this specification merely repeats the one above. The fact that Price and Troyer signed the agreement, without Respondent's knowledge, and failed to date the document is not evidence that Respondent violated the rule.

- Respondent failed to understand an order setting a May 30, 2017, evidentiary hearing set in response to the objection he filed on behalf of Gari to the appointment of Suzi as temporary fiduciary. He failed to have witnesses or evidence prepared for the hearing and failed to request a setover of the hearing after realizing he was unprepared—to Gari's detriment.

Even if this specification were true, we are not convinced it would establish incompetence of the type to violate the rule. In fact, though, this specification is completely controverted by the record evidence. Respondent was reasonable in his belief that the scheduling orders sent by the court showed this was just that, a scheduling hearing. Moreover, the fact that the court approved his appearance by telephone reinforced this view. Under the UTCRs, the court should have notified the parties of the proceeding's purpose, and should not have approved telephonic appearances if it expected evidence to be presented.

Under the circumstances, we believe Respondent presented the best case he could, even getting Troyer to the court to testify. Further, there was no evidence presented that asking for a setover would have improved the situation, much less that one would have been granted. Respondent made the best of a bad situation in front of a judge who was unwilling to recognize Respondent's legitimate surprise that an evidentiary hearing was on the docket.

- Respondent failed to timely file his objections to Suzi's motion seeking his removal as Gari's lawyer and came to the hearing on that motion unprepared to argue it.

Respondent, again, had no reason to believe that the motion to remove him as counsel was on the docket for the day he appeared to argue the motion for protective order. The court notice made no mention of it. Opposing counsel had also given Respondent until the end of that day to file his opposition. We find it remarkable that the Bar claims that Respondent failed to timely file his objections in light of the express written agreement with Attorney Marble that the filing was due by the end of the day. Finally, the letter from the court that supposedly advised Respondent on the Friday before the Monday hearing that the motions were consolidated was strikingly absent from the record.

As mentioned at the beginning of our analysis, a violation of this rule must be premised on something other than mistakes in hindsight. In light of this proposition, we question the bringing of this charge after reviewing Exhibit 313, a February 21, 2019 letter from Maureen A. DeFrank of the PLF to Timothy Marble, attorney for Kelley. Marble had submitted a demand letter regarding a malpractice claim against Respondent. In denying the claim, the PLF responded:

> "[Respondent] disagrees with a number of the factual assertions contained in your letter, and believes that Judge West's findings were not supported by the evidence presented at the hearing. However, I do not believe it is necessary to detail the areas of disagreement. We believe the entirety of the evidence shows [Respondent's] actions were taken pursuant to Gari Price's instructions and in the interests of furthering his express wishes. Thus, we do not believe Ms. Kelley would prevail in pursuing a malpractice claim against Hostetter.
>
> "Your primary focus seems to be that [Respondent] attempted to conduct the sale of Mr. Price's property at a price below fair market value. First, he was specifically following his client's wishes. Just because Mr. Price's stated goals differed from those of his children does not mean they were not legitimate and should not be pursued. Mr. Price had the right to do what he wanted with his property and [Respondent] endeavored to fulfill those goals. Sadly, Mr. Price's stated desires for his property were never achieved.
>
> "Second, your letter fails to take into account that the March 2017 property sale agreement prepared by [Respondent] specifically reserved a life estate in the property for Mr. Price, and provided for a conservation easement. As you are well aware, Mr. Price's wishes that a conservation easement be placed on the property

were long-standing and well-documented. Nor does anyone question that Mr. Price desired to live out his remaining days on his beloved property. Subjecting real property to a life estate and a conservation easement decreases the market value of the property. Factoring in the appropriate discounts for both a life estate and a conservation easement, the sales price set forth in the property sales agreement was not, in fact, well below market value.

"Because we believe [Respondent's] actions did not fall below the standard of care, we hereby respectfully deny your client's claim and demand." Ex. 313.

The PLF was correct and the Price children never brought any claim against Respondent. Despite this, the Bar decided to pursue charges of incompetence against Respondent based on the same set of facts. The Bar failed to prove by clear and convincing evidence the specifications of incompetence set forth in the Amended Formal Complaint, as well as the additional specifications presented a week before trial in its trial memorandum.

We find that the Bar failed to prove by clear and convincing evidence that Respondent violated RPC 1.1. That charge is dismissed.

2. Respondent did not violate RPC 1.7(a)(2)

RPC 1.7(a)(2) states:

"Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if … there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The Bar pursued two theories supporting its charge that Respondent violated RPC 1.7(a)(2). It contended first that Respondent had a personal conflict because as petitioner in the protected person proceeding he needed to establish that Price was incapacitated, while as Price's counsel in the land sale he needed to establish that Price was competent to enter into the agreement. The Bar then contends that a conflict arose when Respondent petitioned the court to find Price incapacitated without a written waiver. We find both theories inadequate.

The Bar premised its case on a black-or-white view of incapacity. Under that approach, if Price was competent to enter into the land sale agreement he was, therefore, in need of no protection whatsoever, but if Price was in need of any protection at all, he was incompetent for all purposes. We reject that view. The record established that Price was competent at the relevant times to make overall decisions about how he wanted to dispose of his property. The record also established, even going back to 2012 and Judge West's opinion in the dissolution proceeding, that Price had difficulty with the specifics of financial decision-making, and was a viable candidate for appointment of a conservator and guardian. Incapacity determination by a lawyer is not as clear as the Bar claims here, as evidenced by prior Ethics Opinions. "In

determining whether the client can adequately act in his or her own interests, the lawyer needs to examine whether the client can give direction on the decisions that the lawyer must ethically defer to the client. Short of a client being totally non-communicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation." Oregon Formal Ethics Opinion 2005—159 (discussing incapacity in requesting a guardian ad litem in a juvenile dependency case).

Respondent took steps to confirm that Price was competent to move forward with the land sale. He met with Price in January 2017 and concluded that Price was competent. Respondent spoke to Randy Guyer, a CPA, who had a long-standing professional relationship with Price, who agreed. Tr. at 988. He also reviewed a recent medical report issued by Price's physician, Dr. Stephen Bump, who also concurred in the opinion that Price had the capacity to make his own decisions about the future of his property. Tr. at 984; Ex. 221.

Two months later, in light of the hostile reception from Price's children, Respondent suggested that they seek appointment of a court-appointed conservator who could approve the land sale and reduce the likelihood that the children could stop or unwind the transaction. The evidence was undisputed that Price believed his children were only after his money and would not follow his wishes regarding the property, a belief that was eventually borne out in fact. Respondent also suggested that they seek appointment of a guardian who could assist Price with his daily tasks and care, a role Troyer had been filling for months already.

Price agreed with both recommendations. Tr. at 1042-44. No evidence to the contrary was offered by the Bar. Further, Price specifically approved of the two individuals nominated to fill those roles, Donivan and Troyer. Tr. at 1050. The petition filed by Respondent in March 2017 alleged that Price was "semi-incapacitated." Respondent testified that he believed that Price was still independent and competent to make most decisions, but that he needed help with certain things, like financial details. Tr. at 1073-74. This testimony was also uncontroverted.

We find that Respondent's interests in completing the land sale on the terms and conditions his client wanted and his interests in having a guardian and conservator appointed at his client's direction were not in conflict. In actuality, these interests were in agreement with one another. By petitioning the court to appoint someone who could review, negotiate, and approve the detailed terms of the life estate, conservation restrictions, title report, sale price, and other terms, Respondent was pursuing his client's goal of preventing his children from blocking or unwinding the deal. Approval by a conservator was a reasonable means to accomplish what his client wanted to do. Further, the evidence was uncontroverted that Respondent explained this approach to Price and that Price approved and directed Respondent to proceed.

On these facts, the contention that a conflict of interest existed here is purely theoretical and insufficient to justify discipline. *E.g.*, *In re Stauffer*, 327 Or. 44, 48 n.2, 956 P.2d 967 (1998) (citing *In re Samuels and Weiner*, 296 Or. 224, 230, 674 P.2d 1166 (1983)). It follows that a conflicts waiver was not necessary. *See*, *e.g.*, The Ethical Oregon Lawyer § 10.2 (2015 Rev.) ("For an unlikely conflict, however, the disclosure and consent requirements did not have to be met.").

As in any disciplinary proceeding, the decision on whether a violation occurred is for the trial panel. Judge West's opinion to the contrary is not dispositive. *Gygi*, 217 Or at 448. Moreover, Judge West even agreed with the proposition that a lawyer could represent both the proposed protected person and the petitioner seeking appointment of a guardian and conservator if the client did not object to the guardianship or conservatorship, or to the persons nominated to fill those fiduciary roles. Ex. 317 at 54:2-62:1.

The Bar's second theory also fails. There is no Oregon statute, rule, or case law that prohibits a client's lawyer from also being the petitioner for the appointment of a guardian and conservator for his client. Further, Respondent cited authority that supports a client's lawyer acting as the petitioner. A May, 2004 article from the Oregon State Bar Bulletin discussing representation of impaired clients specifically commented: "While **the lawyer may act as the petitioner for appointment of a fiduciary** for the client, the lawyer may not represent a third party petitioning for guardianship over the lawyer's client. *In re Snell*, 15 DB Rptr 166 (2001) (attorney representation of third party to file Petition for Appointment of Conservator/Guardian for a former client in estate planning matters resulted in actual or likely conflict of interest in violation of DR 5-105(C))." Hierschbiel, "Impaired Clients," *Oregon State Bar Bulletin* (May 2004) (emphasis added). The article also cited ABA Formal Op. No. 96-404, 415 (1996), which concluded that a lawyer who reasonably determines that a client has become incompetent may take protective action on behalf of the client, including petitioning for appointment of a guardian.

Respondent also cited The American College of Trust and Estate Counsel Commentaries (5th ed. 2016) at p. 96:

> *"Client with Diminished Capacity*. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. **Doing so does not constitute an impermissible conflict of interest between the lawyer and the client**. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information)." (emphasis added.)

In the present situation, Respondent filed the petition as his client instructed him to do. Price's statements on the subject, both unsworn and under oath, consistently affirmed that he wanted Respondent to do what he did and he wanted Donivan and Troyer appointed as his fiduciaries. Again, the assertion that this posed a conflict of interest is merely theoretical and, in our view, cannot be the basis for discipline, with or without a waiver.

The record evidence is consistent that the conflict did not exist in fact. Respondent had an ethical duty to help Price achieve his legal objectives, including the appointment of his chosen fiduciaries. The fact that Price needed assistance with certain things did not permit Respondent to disregard his wishes. RPC 1.14(a) requires an attorney to "maintain a normal client-lawyer relationship" with a client with diminished capacity to the extent doing so is "reasonably

possible." "[A] lawyer shall abide by a client's decisions concerning the objectives of representation." RPC 1.2(a).

The Bar cites us to a trial panel opinion, *In re O'Neal*, 34 DB Rptr 176 (2020), that it argues supports the view that Respondent did have a conflict. There the respondent personally obtained a Family Abuse Prevention Act (FAPA) restraining order against her then-boyfriend while also representing him in a dissolution proceeding in which he sought parenting time. To obtain the FAPA order, the lawyer had declared that the client had become violent. After she was told by opposing counsel that she would be called as a witness adverse to her client, the lawyer did not withdraw and was ultimately disqualified by the court. The trial panel found that the lawyer's personal interest in confirming the truth of her sworn statements about her client's behavior was adverse to her client's interest in denying or minimizing her claim that he had acted violently. Even though the client wanted the respondent lawyer to continue representing him, the trial panel found the lawyer's judgment "might have been impaired" and her loyalty "might have been divided" under the circumstances, and she did not cure the conflict by obtaining the client's informed consent, in writing.

The case is distinguishable from the current proceeding. In *O'Neal*, the attorney's testimony would have been adverse to her client's position in the parental rights proceeding, thereby creating an adverse self-interest on the part of the attorney. Here, Respondent had no self-interest adverse to his client. His interest as petitioner was aligned with his client's interest in appointment of his chosen fiduciaries.

The Bar notes that the commentary to ABA Model Rule 1.14 cautions a lawyer in Respondent's position to seek the least intrusive intervention into a client's affairs, if possible.

> "If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary.
>
> Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

ABA Model Rule 1.14 comment [5] (emphasis added).

The ABA Formal Opinion previously cited concurs:

> "Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances. **The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available**."

ABA Formal Ethics Op No 96-404, p 6 (emphasis added).

The argument is not helpful here. The client's express desire was to pursue the guardian and conservator approach. Just as with the prior charge, all the Bar presented to us on the issue was that there were theoretically less-intrusive alternatives under the law. But the Bar never identified a particular course of action that could have accomplished the client's legitimate objectives. In particular, we note that the commentary to the Model Rule talks about "respecting the client's family and social connections." The family connections here were not helpful in any way. They were, in fact, the most obvious obstacle to accomplishing what Price wanted to do. As far as we can tell, pursuing the appointment of a guardian and conservator whom Price expressly approved of was the most reasonable alternative available that could, if successful, allow him to sell his property as he wished. No witness identified an alternative course of action that had a reasonable chance of success. Even if one had, though, that still does not establish that a conflict of interest existed.

Accordingly, we find that the Bar failed to prove by clear and convincing evidence that Respondent violated RPC 1.7(a)(2). That charge is dismissed.

3. Respondent did not violate RPC 8.4(a)(4).

RPC 8.4(a)(4) provides: "It is professional misconduct for a lawyer to … engage in conduct that is prejudicial to the administration of justice."

There are three elements to establish a violation of RPC 8.4(a)(4): (1) that the respondent's conduct was improper; (2) that the respondent's conduct occurred during the course of a judicial proceeding; and (3) that the respondent's conduct did or could have had a prejudicial effect upon the administration of justice. *In re Carini*, 354 Or 47, 54-55, 308 P3d 197 (2013) (citing *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003)). For the purposes of this rule, conduct means doing something that one should not do; or not doing something that one should do. *In re Haws*, 310 Or 741, 746, 801 P2d 818 (1990). The acts or omissions alleged by the Bar all occurred during the course of a judicial proceeding, satisfying the second element. Accordingly, we must examine whether the other two elements are present.

The Bar argues that Respondent improperly failed to disclose pertinent information to the court in his petition for appointment of a guardian and conservator. ORS 125.055(2)(c) required such a petition to include the "relationship" to the protected party of any person

nominated as fiduciary. In his initial petition filed March 28, 2017, Respondent omitted any information describing his client's relationships with Troyer and Donivan. Ex. 36. In his amended petition filed April 19, 2017, Respondent described the nominated fiduciaries' relationship to Price. Ex. 45. This omission was cured within weeks.

The Bar then faults Respondent for not including any information regarding Troyer's and Donivan's "connection to Price's land sale" in the amended petition. The Bar cites no authority that would require such information to be disclosed in the petition itself. ORS 125.055(2)(d) lists information that must be disclosed about a potential fiduciary. None of these categories would include information about the land sale agreement. In addition, it is not clear that the fiduciaries' involvement in the land sale agreement would be encompassed by the term "relationship" as used in the statute.

Even if the information arguably should have been included in the petition itself, we do not find this omission in the petition to rise to the level of "improper conduct." There was no attempt here to hide this information from the court or anyone else. It may not have appeared in the petition, but it was openly discussed throughout the proceeding.

ORS 125.055(2)(i) further required a petition to include a general description of the estate of the respondent and the respondent's sources and amounts of income. Respondent's petition estimated the value of Price's entire estate at $500,000. The Bar charges this as improper conduct, relying on the previously rejected argument that the value is less than fair market. We have already noted that the value of the land under the conditions that Price required in a sale was reasonably estimated at $400,000. The valuation was not improper.

The Bar then argues that Respondent failed to reference monthly payments of $750 that Price received from a renter on the property. The Bar claims this omission was improper because ORS 125.055(3)(a) required the petition to contain a statement whether the guardian would exercise control over the protected party's estate, and, if so, required the petitioner to include a statement of the protected party's monthly income, the sources of that income and the amount of any funds the guardian would be holding for the protected party at the time of the appointment. Again, there was no attempt to hide this information from the court. If the omission ran afoul of the statute, the end result was immaterial. The court was adequately informed about the rental income situation, and there was no evidence that anything against Price's interests happened with the rent money.

The Bar goes on, noting that ORS 125.320(2) provided that a guardian may not use funds from a protected person's estate for room and board that the guardian, guardian's spouse, parent or child have furnished the protected person unless the charge is approved by order of the court before the payment is made. The Bar faults Respondent for not including information in the petition "or later" regarding the land sale deal. First, the land sale deal had not been finalized. The parties never got to the point where the specifics of such an arrangement were set forth anywhere, other than in general terms, so in our view there was nothing yet to disclose in the petition. Moreover, this is another situation in which the facts that were available on the matter were all openly discussed with the court. Nothing improper occurred as it pertained to

this alleged omission. If the land sale had ever actually been consummated, both the conservator and the court would have had to approve the specifics.

Finally, ORS 125.055(7) provided: "The court shall review a petition seeking appointment of a guardian **and shall dismiss the proceeding without prejudice, or require that the petition be amended, if the court determines that the petition does not meet the requirements of this section**." (Emphasis added.) If the petition was defective, the statutory remedy was either dismissal without prejudice or leave to amend, both envisioning that errors and omissions could occur but could also be easily cured. The facts as proved by the Bar in this regard do not rise to the level of improper conduct.

The Bar also rehashes the issue of Respondent's belief that certain noticed hearings were for scheduling purposes, not for the presentation of evidence or consideration of motions that were not yet ripe for adjudication. Respondent's conduct under the circumstances we have outlined previously was not improper in this regard.

Even if the acts or omissions discussed above constituted "improper conduct" under the rule, the Bar must prove a prejudicial effect by clear and convincing evidence. A prejudicial effect exists "when the lawyer's conduct harms (or has the potential to harm) either the substantive rights of a party to the proceeding or the procedural functioning of a case or hearing." *In re Maurer*, 364 Or 190, 199, 431 P3d 410 (2018). Prejudice is shown by "several acts that cause some harm or a single act that causes substantial harm to the administration of justice." *In re McGraw*, 362 Or 667, 692, 414 P3d 841 (2018) (citing *Kluge*, 335 Or at 345). Attorneys cause harm by "disrupting or improperly influencing the court's decision-making process or by creating unnecessary work or imposing a substantial burden on the court or the opposing party." *Carini*, 354 Or at 55.

We do not agree that the acts or omissions identified resulted in any prejudice to either Price's substantive rights or to the functioning of the proceeding. Respondent was able to present his side of the case to the court. The mere fact that the court ruled against him is not indicative that his conduct caused any prejudice. Whatever prejudice was caused to the proceedings themselves appears to us to be the fault of the court in sending out notices that did not advise that a substantive evidentiary hearing was to take place or that the motion to substitute counsel was to be heard. The court itself further reinforced Respondent's view on the first hearing when it approved his motion to appear telephonically, which it should not have granted if it intended an evidentiary hearing to take place.

We find that the Bar failed to prove by clear and convincing evidence that Respondent violated RPC 8.4(a)(4). The charge is dismissed.

CONCLUSION

Proof by clear and convincing evidence is a heavy burden. At most what we were presented with here was a litany of second-guesses about the choices Respondent made in

representation of Price, within the context of a bad set of circumstances. The fact that lawyers may disagree about how to handle Price's case does not make Respondent's representation less than competent. Respondent did not have a conflict of interest when he pursued his client's clear and unchanging goals, and Respondent did not engage in any improper conduct that caused prejudice to the administration of justice. The charges herein are dismissed.

Respectfully submitted this 9th day of February, 2022.

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

/s/ Elizabeth A. Dickson
Elizabeth A. Dickson, Trial Panel Member

/s/ Burl A. Baker
Burl A. Baker, Trial Panel Public Member