

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 21-43
)
ADAM KIMMELL,)
)
Respondent.)

Counsel for the Bar: Veronica R. Rodriguez

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.9(a). Stipulation for Discipline. Public reprimand.

Effective Date of Order: October 18, 2021

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is publicly reprimanded for violation of RPC 1.9(a).

DATED this 18th day of October, 2021.

/s/ Mark A. Turner

Mark A. Turner
Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

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

1.

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

2.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on November 5, 1991, and has been a member of the Bar continuously since that time, currently having his office and place of business in Clackamas County, Oregon.

3.

Respondent enters into this Stipulation for Discipline (Stipulation) freely, voluntarily, and with the opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On June 11, 2021, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of RPC 1.9(a) of the Oregon Rules of Professional Conduct. The parties intend that this Stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In 2011 and 2012, Respondent represented Nels Johnson (Johnson) to obtain a modification of child support payable to his first wife, Julie Ann Johnson, pursuant to a 1996 dissolution judgment.

6.

As part of Respondent's representation of Johnson in the 2011-2012 modification matter, Johnson disclosed his financial information to Respondent. Some of this information may have been unknown to his then-wife, Ginette Johnson (Ginette).

7.

In May 2019, Johnson filed *pro se* for dissolution of his marriage from Ginette. Respondent undertook to represent Ginette, and Laura Schantz (Schantz) represented Johnson. In representing Ginette adversely to Johnson, Respondent did not obtain the informed consent

of either Johnson or Ginette regarding the representation. The court ultimately ordered Respondent removed from representing Ginette.

Violations

8.

Respondent admits that, by representing Ginette in the dissolution matter, after he had represented Johnson in the 2011-2012 child support modification matter, he represented another person in a substantially related matter in which that person's interests were materially adverse to the interests of his former client in violation of RPC 1.9(a).

Sanction

9.

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 lawyer's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The most important duties a lawyer owes are those owed to clients. ABA Standards at 5. Respondent violated his duty to his clients to avoid a conflict of interest. ABA Standard 4.3.
- b. **Mental State.** The ABA Standards recognize three types of 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 of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards at 9.

Respondent was negligent in failing to identify a substantial risk that he could use the confidential information he obtained in his representation of Johnson against Johnson in his representation of Ginette.

- c. **Injury.** Injury can be either actual or potential under the ABA Standards. ABA Standard at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but

for some intervening factor or event, would probably have resulted from the lawyer's misconduct. ABA Standards at 9.

Respondent's failure to avoid a client conflict caused actual injury to his client in that Ginette was required to obtain new counsel when the court ordered his removal. Respondent also caused injury to Johnson in that Johnson experienced anxiety that his confidential information could be used against him in the dissolution matter. Johnson also incurred additional legal fees to compel Respondent's removal from representing Ginette.

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

1. Prior disciplinary offenses. ABA Standard 9.22(a). The following factors are considered in applying an attorney's prior discipline as an aggravating factor: (1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) the timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar. *In re Cohen*, 330 Or 489, 499, 8 P3d 953 (2000).

In 1996, Respondent was reprimanded for engaging in the unlawful practice of law.¹ In 2001, Respondent was suspended for 6 months for engaging in criminal conduct that reflected adversely on a lawyer's honesty, trustworthiness, or fitness to practice law.²

Respondent's prior discipline should not be given substantial weight because the prior conduct is not similar to the conduct at issue in this matter and did not occur close in time to the conduct here. Remoteness in time diminishes the significance of a prior offense as an aggravating factor, but does not function as a mitigating factor. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

2. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent was licensed to practice law in Oregon in 1991.

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

1. Absence of a dishonest or selfish motive. ABA Standard 9.32(b).

¹ *In re Adam Kimmell*, 10 DB Rptr 175 (1996).

² *In re Adam Kimmell*, 332 Or 480 (2001).

2. Full and free disclosure to disciplinary board and cooperative attitude toward proceedings. ABA Standard 9.32(e).

10.

Under the ABA Standards, a public reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. ABA Standard 4.33.

11.

Oregon case law is in accord. *See In re Steven D. Gerttula*, 26 DB Rptr 31 (2012) (stipulated public reprimand when a lawyer represented two individual clients who owned real property as joint tenants in common, prepared deeds on behalf of both conveying the property to themselves as tenants in common and later, after one client died, represented the deceased client's children in attempts to force the surviving client to partition the property, without informed consent from his present and former clients); *In re Gregory Mark Abel*, 33 DB Rptr 175 (2019) (stipulated reprimand where a lawyer represented a husband in a criminal matter involving one of the husband's daughters and then later simultaneously represented both the husband and wife in a dependency hearing where the husband's interests in defending against the daughter's allegations in the criminal matter were fundamentally different from the wife's interest in keeping another daughter, who was the subject of the dependency hearing, safe).

12.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be publicly reprimanded for violating RPC 1.9(a).

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. 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: California, New York.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on September 11, 2021. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 13th day of October, 2021.

/s/ Adam Kimmell
Adam Kimmell, OSB No. 915176

EXECUTED this 14th day of October, 2021.

OREGON STATE BAR

By: /s/ Veronica R. Rodriguez
Veronica R. Rodriguez, OSB No. 181818
Assistant Disciplinary Counsel