

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-54
)
WALTER J. LEDESMA,)
)
Respondent.)

Counsel for the Bar: Veronica R. Rodriguez

Counsel for the Respondent: None

Disciplinary Board: Mark A. Turner, Adjudicator
Susan T. Alterman
James E. Parker, Public Member

Disposition: Violation of RPC 1.15-1(d) and RPC 1.16(d). Trial Panel
Opinion. 30-day suspension.

Effective Date of Opinion: December 25, 2021

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged Respondent Walter J. Ledesma with violation of RPC 1.15-1(d) and RPC 1.16(d) based on his failure to promptly return client property and to return unearned fees upon termination of representation. Respondent failed to file an answer to the formal complaint in this proceeding and is in default. The Bar asks us to find that the allegations in the formal complaint support the charges and issue a public reprimand. As discussed below, we find that the charges are supported by the allegations in the formal complaint. We further find that the appropriate sanction in this case is a 30-day suspension.

PROCEDURAL POSTURE

The Bar filed a formal complaint and notice to answer on March 18, 2021. Respondent signed an acceptance of service on April 8, 2021. After service, Respondent did not file an answer. On May 4, 2021 the Bar served Respondent with a Notice of Intent to Take Default. On May 24, 2021, the Bar filed a Motion for Order of Default. The Adjudicator entered an Order of Default on May 27, 2021.

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

STATEMENT OF FACTS

In July 2017, Clyde J. Green retained Respondent to represent him in a tort claim against an unknown actor who assaulted him. ¶13¹ On February 5, 2018, Respondent collected \$400 from Green and deposited it into his trust account. Respondent told Green the \$400 payment was for anticipated costs for conducting a pre-filing perpetuation deposition to ascertain the identity of Green's assailant. Respondent, however, never deposed anyone. ¶14. In June of 2019, Respondent withdrew from representing Green, 15 days before the statute of limitations expired on Green's claim. ¶15. Respondent told Green he was withdrawing due to health issues and because he was no longer practicing law. *Id.* At the time of his withdrawal, Respondent continued to hold Green's \$400 in his trust account. *Id.* More than a year later, on September 2, 2020, after learning that Green had made a complaint to the Bar, Respondent returned Green's \$400. ¶16.

ANALYSIS

We find that Respondent's conduct violated both RPC 1.15-1(d) and RPC 1.16(d).

RPC 1.15-1(d) provides:

"Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

At the time his representation ended, Respondent held Green's \$400 in his trust account. Green was entitled to receive the funds as soon as Respondent withdrew as his attorney in 2019. Respondent's delay in refunding Green's \$400 from June 2019 until September 2020 violated RPC 1.15-1(d).

RPC 1.16(d) provides as well:

¹ All paragraph citations are to the formal complaint.

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.”

Respondent had a duty upon withdrawal to refund Green’s advance \$400 payment for the cost of a perpetuation deposition. Respondent had not incurred any expense. Respondent’s inaction constituted a failure to take reasonably practicable steps to protect Green’s interest upon termination of representation, in violation of RPC 1.16(d).

SANCTION

We refer to the *ABA Standards for Imposing Lawyer Sanctions* (ABA Standards) and Oregon case law for guidance in determining the appropriate sanctions for lawyer misconduct.

ABA Standards.

The ABA Standards establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer’s mental state; and the actual or potential injury caused by the conduct. Once these factors are analyzed, we make a preliminary determination of sanction, after which we may adjust the sanction based on the existence of recognized aggravating or mitigating circumstances. *See In re Nisley*, 365 Or 793, 815, 453 P3d 529 (2019).

Duty Violated.

The most important ethical duties a lawyer owes are to his clients. ABA Standards at 5. Respondent violated his duty to his client to promptly return money belonging to his client. ABA Standard 4.1; *see also In re Bertoni*, 363 Or 614, 641-42, 426 P3d 64 (2018). Respondent also violated his duty as a professional by failing to return a client’s funds upon termination. ABA Standard 7.0.

Mental State.

The ABA Standards recognize three mental states: intent, knowledge, and negligence. “Intent” is when a lawyer acts with the conscious objective or purpose to accomplish a particular result. ABA Standards at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Negligence” is the failure to be aware of a substantial risk

that circumstances exist or that a result will follow, which failure deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent's mental state here is a critical factor in determining the appropriate sanction. The Bar argues that Respondent acted negligently when he failed to take the steps necessary to return his client's funds without considering how his conduct might have injured his client. The Bar further reported to us that Respondent had to go through the formal reinstatement process under BR 8.1 beginning in 2019 due to an earlier suspension. As part of that process he apparently provided supporting documentation regarding his health. We have reviewed some of these materials, which indicate that Respondent was suffering from serious illnesses at the time he withdrew from Green's matter. The Bar contends this is further evidence that Respondent acted negligently.

We disagree with this analysis and find that Respondent here knew or should have known that his conduct was in violation of his duties as a lawyer. Unfortunately, due to Respondent's default, there is no testimony from Respondent as to his actual mental state at the time. We believe, however, that any lawyer who accepts funds from a client for a particular expense, never incurs that expense, and then withdraws from the engagement knows, or should know, that he or she owes the client a refund. Consequently, we conclude that Respondent's mental state was knowing.

Extent of Actual or Potential Injury.

For purposes of determining an appropriate disciplinary sanction, we may take into account both actual and potential injury. ABA Standards at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). "Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. "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.

Respondent's conduct caused actual injury to Green by depriving him of the use of his money. Respondent's conduct could also have caused significant potential injury, particularly in light of his withdrawal a mere 15 days before the statute of limitations ran on his client's claim.

Preliminary Sanction.

Absent aggravating or mitigating circumstances, the following ABA Standards apply here, depending on the mental state of a respondent:

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. ABA Standard 4.12.

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 4.13.

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. ABA Standard 7.2.

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.

Since we find that Respondent acted knowingly here, we find that suspension is the presumptive sanction.

Aggravating and Mitigating Circumstances.

We find the following aggravating factors recognized under the ABA Standards present here:

1. A pattern of misconduct. ABA Standard 9.22(c). Respondent was previously disciplined for trust account violations, which the Bar argues is similar to the misconduct in this matter. See *In re Bertoni*, 363 Or 614, 644, 426 P3d 64 (2018) (“...[A] pattern of misconduct... bears on whether the violation is a one-time mistake which may call for a lesser sanction, or part of a larger pattern, which may reflect a more serious ethical problem.”).²
2. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent was admitted to practice law in 1992.

In mitigation, we find the following:

1. Absence of a dishonest or selfish motive. ABA Standard 9.32(b);
2. Personal or emotional problems. ABA Standard 9.32(c). Respondent was diagnosed and treated for depression during the period of his conduct at issue. Respondent has disclosed that he was hospitalized twice in 2020 for serious illnesses.³

² *In re Ledesma*, 33 DB Rptr 47 (2019). The Bar advises us, however, that because the sanction in the 2019 matter did not precede the acts that led to this matter, this discipline does not qualify as a “prior disciplinary offense” under ABA Standard 9.22(a). *In re Bertoni*, 363 Or 614, 644, 426 P3d 64 (2018).

³ This information was submitted in Respondent’s formal reinstatement process, not in response to this proceeding.

3. Character or reputation. Standard 9.32(g). As part of his reinstatement materials, Respondent's character references spoke very highly of him.

The Bar also asked us to find remorse as a mitigating factor under Standard 9.32(1), telling us that Respondent has stated that he sincerely regrets his actions and admitted that his client deserved better from him. We decline to find this mitigating factor applies to this case. Respondent has expressed no remorse to this panel. Other than accepting service of the complaint, Respondent has consciously chosen not to engage in this case. We find that Respondent's refusal to answer the complaint or appear and explain himself in this proceeding is the antithesis of real remorse.

We find that the aggravating and mitigating factors balance out and that no modification of the presumptive sanction is warranted.

Oregon Case Law.

Our objective in assessing a sanction is not to penalize a respondent. Instead we are charged with protecting the public and the integrity of the profession. *See In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

The Bar provided us with a number of cases supporting its argument that a public reprimand is appropriate here. The Bar's argument, however, was premised on a finding that Respondent was merely negligent. There are many cases imposing more severe discipline when the respondent's conduct was knowing. These cases often involve multiple rule violations, making them difficult to match with the facts before us. We cannot find a case that looks exactly like this one.

Under the circumstances, however, we believe a 30-day suspension is the appropriate sanction. Given that the Bar is seeking a public reprimand here, we are confident that Respondent could have entered into a stipulation for discipline with that as the agreed-upon sanction. Instead, for reasons unknown, Respondent declined to participate in this process. In our view, a lawyer who neglects his duties to his client, as Respondent did here, and then neglects to engage with the disciplinary process, should not escape with a mere public reprimand. Such a result has no deterrent value whatsoever. Since deterring unethical conduct and protecting the public are our stated goals, we feel they will not be served without imposing at least the minimum suspension here. Accordingly, we order that Respondent is suspended for 30 days, beginning 30 days after this decision becomes final.

CONCLUSION

The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge

their professional duties. ABA Standard 1.1. To fulfill this goal, we order that Respondent is suspended for 30 days effective 30 days after this decision becomes final.

Respectfully submitted this 25th day of October 2021.

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

/s/ Susan T. Alterman
Susan T. Alterman, Trial Panel Member

/s/ James E. Parker
James E. Parker, Trial Panel Public Member