IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 19-49, 19-50, and 19-51
	)	SC S068386
DONALD R. SLAYTON,	)	
	)	
Respondent.	)	

Counsel for the Bar:	Eric Collins
Counsel for the Respondent:	Jason E. Thompson
Disciplinary Board:	Mark A. Turner, Adjudicator Honorable Frank R. Alley Dr. George A. McCully, Public Member
Disposition:	Violation of RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.6(a), RPC 1.9(c)(1), RPC 3.3(a)(1), and RPC 8.4(a)(4). Order granting dismissal of appeal and imposing Trial Panel Opinion. 18-month suspension.
Effective Date of Order:	January 3, 2022

ORDER GRANTING STIPULATED MOTION TO DISMISS APPEAL
(IMPOSING TRIAL PANEL OPINION)

The stipulated motion to dismiss appeal is granted.

Appeal dismissed.

/s/ Lynn R. Nakamoto
Lynn R. Nakamoto, Presiding Justice
Supreme Court 11/4/2021 3:43 PM

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged respondent Donald R. Slayton with violating eight Rules of Professional Conduct (RPC) relating to three separate matters. While representing a client in litigation, he is accused of violating RPC 1.2(a) (failure to abide by client's decision to settle), RPC 1.6(a) (disclosure of client confidential information), RPC 1.9(a) (representing

another person in conflict with a former client), and RPC 1.9(c)(1) (use of former client's information to former client's detriment). The Bar alleges he refused to dismiss his client's lawsuit when she directed him to do so and, instead, inserted himself into the litigation adverse to her interests, opposing her decision to dismiss her lawsuits and using and disclosing her confidential information to her disadvantage.

In representing another client, Respondent is accused of violating RPC 3.3(a)(1) (failure to correct false statements to a tribunal) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). The Bar alleges he violated procedural rules to obtain a default order and later failed to correct material misstatements in affidavits and a default judgment within a reasonable time after they were brought to his attention.

Finally, in the third matter, Respondent is accused of violating RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (failure to keep client reasonably informed) during representation of clients in a dispute involving the purchase of a home with significant defects. The Bar alleges that he neglected work on the case for more than a year and failed to respond to the clients' requests for status updates and a return of retainer funds until after the client filed a Bar complaint.

The Bar argues that the appropriate sanction for these multiple offenses is an 18-month suspension.

Trial took place by videoconference on December 8 through 11, 2020. The trial panel consisted of the Adjudicator, Mark A. Turner, attorney member the Honorable Frank R. Alley, and public member Dr. George A. McCully. The Bar appeared through counsel, Eric J. Collins. Respondent appeared and was represented by counsel, Jason E. Thompson.

As discussed below, after considering the evidence and argument offered at trial, we conclude that the Bar proved the alleged violations of RPCs 1.2(a), 1.6(a), 1.9(c)(1), 3.3(a)(1), 8.4(a)(4), 1.3, and 1.4(a) by clear and convincing evidence. We find that the Bar failed to prove a violation of RPC 1.9(a). We order that Respondent be suspended for a period of 18 months.

ANALYSIS OF THE FACTS AND CHARGES

We take the matters up in the order pleaded by the Bar, and use the designations applied by the Bar to each. The first, denominated the Batchelor Matter, involves client Carol Batchelor. The second, denominated the Chanti Matter, involves a complaint against Respondent made by Lane County Circuit Court Judge Suzanne Chanti. The third, denominated the Kimball Matter, involves a client, Kenneth Kimball.

BATCHELOR MATTER[1]

In April of 2016, Carol and Jack Batchelor stipulated to a judgment in Lane County Circuit Court dissolving their marriage. The couple owned real property in Samoa, and the judgment awarded Carol a 50% interest. In late 2017, Carol suspected that Jack had sold the property without sharing the proceeds.

After being turned down by other lawyers, Carol met with Respondent and another lawyer who worked with him, Todd Moore, on November 30, 2017. She did not have funds to pay Respondent's proposed retainer of $7,500 and could not pursue the case on an hourly basis. After further discussion, Respondent agreed to take the case on a contingency basis, documented in a written agreement signed by Carol on December 1, 2017. Ex. 12. The agreement had no provision governing Respondent's fee in the event the representation was terminated prior to completion of the engagement.

The lawyers immediately undertook significant work on Carol's behalf. They ultimately filed a complaint against Jack with a motion for a temporary restraining order and a preliminary injunction to protect Carol's share of any sale proceeds. They also filed additional contempt pleadings in the existing dissolution case.

At a hearing on December 22, 2017, Jack told Carol and Respondent that the property sale had not closed and Jack had not yet received any money from a buyer. The parties then negotiated a stipulated injunction whereby Jack would have Carol's share of any proceeds from a sale transferred to the trust account of an Oregon lawyer, Ruby Drake, who was representing Jack's mother, Opal. The lawyer would hold the funds as an escrow. Discovery was to continue, with dates set for document production and depositions in the near future.

The sale was supposed to close in January 2018, but Carol apparently learned that there would be a three to four month delay. Carol decided she no longer wanted to pursue the litigation. She spoke with Respondent by phone on January 19, 2018. Respondent stated in a court filing that she told him that: "[S]he was 'mentally exhausted, and just wanted this all to be over,' or words to that effect. She further advised [Respondent] that she was inclined to dismiss the pending litigation, and just 'deal with Jack [defendant] directly….'" Ex. 41, p. 5.

Respondent testified that he was concerned about Carol's change in attitude. He told her in their January 19 conversation that her decision made no sense, given the protection afforded by the stipulated injunction. He further told her that if she dismissed the pending litigation the protection of her interests provided by the injunction would disappear and she would be back to "square one." *Id*.

---

[1] Client Carol Batchelor did not testify at the disciplinary trial. A Bar investigator testified that she wanted no further involvement with the matter because of the distress it caused her. Tr. at 113-14. Carol's actions and motivations were documented by the written record and testimony of other witnesses.

Despite Respondent's arguments, Carol terminated Respondent by email on January 21, 2018. She stated, in part, "I have no choice but to work with Jack, Ruby, the Chinese and the Samoan government to resolve these ongoing financial delays and obstacles, or try to recoup our property. Please accept this as my formal notice to discharge your services and all legal proceedings and stop any further actions against Jack." Ex. 20.

Carol emailed Respondent on January 23, 2018, explaining that the litigation was having an adverse effect on her mental health and that she believed the property sale was falling apart. Ex. 22. She also discussed her desire to end the litigation in a phone call with Respondent later that day.

Carol emailed Respondent for the last time, on January 24, 2018, at 9:09 a.m. She invoked the termination provision from the contingent fee agreement. She then stated, "I do not want to waste any more time, money or tears over this. I'm sorry if you can't understand that, but I'm done." Ex. 25. She advised Respondent that she had "obtained paperwork for a motion for dismissal with the courts." *Id*. She concluded by instructing Respondent to file his "order to withdraw." *Id*.

Respondent was concerned that his client was trying to deprive him of his contingent fee. She had discussed modifying the terms with him once before, stating that she had handed him the case "on a silver platter." Tr. at 472-73. That day Respondent telephoned the Bar's Deputy General Counsel Mark Johnson Roberts for guidance. He testified that he spoke with Johnson Roberts twice in total, and stated that his understanding after the conversations was that the rules allow him to reveal information reasonably necessary to "perfect" or "protect" his claim. Tr. at 509.

On the afternoon of January 24 Respondent filed a "Notice of Claim of Lien" seeking $88,550 for fees and costs in both the property and dissolution proceedings. Exs. 8, 26. He filed motions to withdraw in both cases as well.

On January 25, 2018, Carol and Jack, without counsel, appeared in court *ex parte* and filed a pro se stipulated motion to dismiss both the property and dissolution proceedings. Exs. 9, 29. The court signed stipulated judgments of dismissal without prejudice. These were entered on January 29, 2018. Exs. 10, 30.

On January 31, 2018, Respondent filed on his own behalf a motion to vacate the judgment of dismissal in the property case in order keep the stipulated injunction in place to protect the money that could satisfy his attorney lien claim. Ex. 31. Respondent filed a declaration in support of the motion that disclosed information gained from Carol during the representation. He also included copies of correspondence between Carol and himself regarding her decision to stop the litigation. Ex. 32.

As these events were unfolding, Carol complained to the Bar about Respondent on January 30, 2018. Ex. 33. She made another complaint on February 1, 2018. *Id*. The Bar sent Respondent copies of the complaints on February 9, 2018. Ex. 34.

Respondent filed a hearing memorandum on February 23 in support of his motion to vacate that disclosed additional confidential communications between himself and his client. Ex. 41.

Two days later, on February 25, 2018, Respondent filed a supplemental declaration in support of his motion to vacate, which disclosed even more client information. Ex. 42.

The court held a hearing on the motion to vacate on February 26, 2018. Over objection from Jack's lawyer, Respondent called Carol as a witness and engaged in lengthy questioning of her regarding his representation and her decision to end the litigation. Ex. 43, pp 43-79. Carol was not represented by counsel at the hearing. The examination also involved further disclosure of client information.

Carol ultimately hired a lawyer who filed a suit against Respondent for breach of fiduciary duty and intentional infliction of emotional distress. Ex. 49. Respondent finally withdrew his motion to vacate in August 2018 as part of a global settlement agreement that included the claims asserted against Respondent. The parties walked away from one another. Respondent received no fees. No evidence was presented that Carol or Jack Batchelor ever received any money for the Samoa property either. The condition precedent to Respondent's entitlement to fees never occurred.

CHARGES

1. Allocation of Authority Between Client and Lawyer: Respondent failed to abide by his client's decision to settle the matter and dismiss the litigation in violation of RPC 1.2(a).

RPC 1.2(a) provides:

> *Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.* ***A lawyer shall abide by a client's decision whether to settle a matter.*** *In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. (Emphasis added.)*

This rule is explicit. It states that a lawyer shall abide by a client's decision whether to settle a matter. Carol decided to stop the litigation against her ex-husband. She directed Respondent to stop working on her cases and to dismiss both of them. Respondent did not follow her instructions.

When Respondent resisted, Carol filed stipulated dismissals in the property and the dissolution cases. Respondent then filed a motion to vacate the stipulated dismissals. In doing so, not only did Respondent ignore his client's instructions regarding dismissal, he actively opposed his client's wishes in court.

Respondent claims he did so because he was concerned that Carol was being misled into dropping the cases, which would have the effect of erasing the protections put in place with the stipulated injunction. He says he was acting in Carol's best interest. There is no such exception in the rule.

If an attorney disagrees strongly with a client's decision to settle and terminate litigation, the attorney may seek to withdraw from the representation. If all Respondent had done here was tell Carol he could not follow her directive to dismiss the lawsuits and that he must withdraw, we believe that course of conduct would not, in itself, violate the rule. However, when Respondent not only failed to follow her instructions, but also took affirmative steps to oppose his client's decisions regarding settlement, he violated the rule.

Respondent argued that the Oregon attorney lien statutes allowed him to do what he did and, thus, he cannot be found guilty of misconduct when his conduct was procedurally allowed by law. Respondent cited no case law to support this position, and the argument is in direct conflict with the language of RPC 1.2(a). The fact that the law makes certain procedures available to a litigant does not mean the Rules of Professional Conduct no longer apply if the litigant is a lawyer.

As a general proposition, we note that the course of action Respondent chose was not the only one available to him to pursue his lien claim. The Bar presented expert testimony regarding the functioning of the attorney lien statutes and legal practice involving such liens. An attorney may assert a lien in an existing case involving a client, as Respondent did here. An attorney may commence a separate action against a client to enforce an attorney's lien. An attorney representing a plaintiff may also bring a separate action against the defendant in an action to collect on the lien. *See Potter v. Schlesser Co., Inc.*, 335 Or 209, 63 P3d 1172 (2003). Respondent argued that *Potter* justified him opposing his client's dismissal of her litigation in pursuing his lien claim. We disagree.

In *Potter*, a client reached a $12,000 settlement with the opposing party without involving his lawyer. The client disappeared. The lawyer then filed a separate suit against the defendant to seek his fees based on his lien on the underlying case. The court permitted the attorney to pursue his claim against the defendant. The court noted that ORS 87.445 "serves as notice to all the world that an attorney's lien for fees arises when an action is commenced." *Id*. at 213.[2] The court then explained that ORS 87.475 provided that the lien was not affected by a

[2] **87.445 Attorney's lien upon actions and judgments.** An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, orders and awards entered therein in the client's favor and the proceeds thereof to the extent of fees and compensation specially agreed

settlement between the parties to the action. *Id*. at 214.[3] Finally the court held that "in the absence of statutory direction the attorney's lien could be enforced by various methods depending on the 'peculiar circumstances attending the character of the lien.'" *Id*. at 215.

Potter does not address the issue here. The fact that a statute may authorize a particular course of action does not mean that an attorney may follow that course if it violates the Rules of Professional Conduct. For example, ORS 87.430 grants lawyers a possessory lien on "client papers and property for services rendered to the client." RPC 1.16(d) also states that lawyers "may retain papers, personal property and money of the client to the extent permitted by other law." The language just cited seems to make the lawyer's right to retain papers absolute. But the issue is subject to debate because retaining client papers may violate a lawyer's fiduciary obligations to the client.

OSB Formal Opinion No. 2005-90 explains that if a lien is otherwise valid and if the client has sufficient resources to pay the lawyer but chooses not to do so (or to file a bond as security for the amount due), the lawyer may lawfully withhold the materials. If the client does not have the resources to pay the lawyer, and if withholding the materials would cause foreseeable prejudice to the client, the attorney must surrender the materials. The fiduciary obligation supersedes the right explicitly granted in the statute.

Other states have treated the issue in various ways.[4] We believe, however, that the approach taken by the Formal Opinion should hold here. Respondent had the right to assert his lien claim in his client's ongoing case. Once the client decided to dismiss the lawsuit, however, Respondent's statutory right to pursue his lien must yield to the client's decision on settlement, which the Rules of Professional Conduct make absolute. Respondent had other avenues to use to pursue his lien claim. He could have filed a separate suit against his client for the fees. He could also have filed a separate suit against Jack Batchelor, the defendant, as the lawyer did in *Potter*. He chose neither. Moreover, Respondent could have sought provisional process in such separate actions seeking the same protections as were in the stipulated injunction. Respondent's opposition to his client's decision was a tactical choice squarely at odds with his obligations under RPC 1.2(a).

Respondent wanted to keep the existing stipulated injunction in place because it provided him with protection that any money generated by an offshore sale of the Samoa property would be reachable in the trust account of an Oregon attorney. Respondent's motion had no effect on the validity of his lien claim. Its only effect regarding the lien claim may have

---

upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney.

[3] **87.475 Effect of settlement on attorney's lien; satisfaction of judgment.** (1) Except as provided in subsections (3) and (4) of this section, the lien created by ORS 87.445 is not affected by a settlement between the parties to the action, suit or proceeding before or after judgment, order or award.

[4] *See* Hierschbiel, "Difficult Paradigm: Are lien rights absolute?" *Oregon State Bar Bulletin*, May 2006.

been to make collection of any judgment easier. Respondent disregarded and then actively obstructed his client's decision to settle a matter. That is a violation of RPC 1.2(a).

2. Confidentiality of Information: Respondent breached his duty to maintain confidentiality and violated RPC 1.6(a) by disclosing information relating to his representation of Carol without authorization.

RPC 1.6(a) provides:

> *A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).*[5]

In steps he took regarding his lien claim, Respondent repeatedly and intentionally disclosed embarrassing client information in public court filings that was detrimental to his former client.

Respondent alleged in his motion to vacate that Carol engaged in fraud, misrepresentation, or other misconduct in concert with Jack for the sole purpose of avoiding the payment of legal fees owed to Respondent. Ex. 31. Respondent included in his pleadings descriptions of conversations he had had with Carol as well as specific emails received from her, all relating to the representation. That information included that she felt "mentally exhausted and just wanted this all to be over," or words to that effect, and was inclined to dismiss the litigation and deal with her husband directly. Ex. 32, Ex. 31.

Respondent also included other emails he received from Carol in which she described mental health issues. In one email to Respondent Carol stated that her mental and physical health "could not take any more drama," that she was "overwhelmed," that she didn't have the "time, money or strength to fight this 'no win' battle in the States," and that it all was making her ill. Ex. 32.

In subsequent pleadings, Respondent revealed additional personal information, in particular statements she made about her ex-husband and his mother. Ex. 42. She would likely not want these statements made public if she was trying to maintain a cooperative working relationship with the two individuals.

Respondent also disclosed a draft motion to show cause prepared by Carol for the dissolution proceeding that was never filed or otherwise made public prior to Respondent's disclosure. It contained references to Carol's status on disability for certain conditions,

---

[5] RPC 1.0(f): "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

significant abuse at the hands of her ex-husband, and her allegation that her husband had engaged in outrageous conduct that we will not repeat here. Ex. 42.

The duty of confidentiality at issue here is fundamental. Comment 2 to ABA Model Rule 1.6 notes that the trust involved when a client shares embarrassing or legally damaging information with their lawyer is "the hallmark of the client-lawyer relationship." *Annotated Model Rules of Professional Conduct* (Eight Edition, 2015) at 102. Breach of that trust is serious misconduct.

An instructive case here is *In re Huffman*, 328 Or 567, 581, 983 P2d 534 (1999) (interpreting the predecessor to RPC 1.6). The attorney in *Huffman* sent a letter to his former client's new attorney accusing his former client of crimes and of committing bankruptcy fraud. *Id.* at 580-81. The court stated:

> "The nature of the disclosures, the overall tone of the letter, and the circumstances surrounding its preparation lead us to conclude that the accused's purpose in sending the letter at least in part, was to embarrass [the former client] and to portray him as a criminal or a cheat in order to induce [the former client's new lawyer] to question [client's] character and to refrain from pursuing [client's] claims." *Id.* at 581.

Such disclosures were found to be both embarrassing and detrimental to the client and violated the rule. *Id.*

Respondent here disclosed his client's confidential information trying to suggest, at least in part, that Carol engaged in fraud to avoid payment of Respondent's legal fees. He also disclosed the information to challenge his client's judgment in dismissing the pending litigation. Respondent's objective in disclosing the information was to cast his client in a bad light, just as the lawyer in *Huffman*. Ultimately, he was suggesting to the court that Carol was not acting in her own best interest, which would be embarrassing in itself.

The disclosures also revealed Carol's private thoughts and concerns regarding her ex-husband and his mother and highlighted her mental health issues. We find these disclosures similar to those in *Huffman.* We find that revealing them was likely detrimental and embarrassing to Carol, and would be to anyone. Carol did not provide informed consent to the disclosures. Respondent was not impliedly authorized to make such disclosures either.

Respondent might avoid a finding of misconduct here if his disclosures fall within the exception to the rule set forth at RPC 1.6(b)(4). It provides in relevant part that, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer **reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client**. . . .." RPC 1.6(b)(4) (Emphasis added.).

Respondent's disclosures occurred in connection with a controversy between himself and his client over fees. Allowable disclosures, however, are limited to those a lawyer

"reasonably believes necessary to establish a claim or defense" in such a controversy. *See, e.g.*, *Huffman*, 328 Or at 581 ("That exception is limited by its terms, to disclosures that are *necessary* to establish a claim or defense on behalf of the lawyer in the controversy between the lawyer and the client." (Emphasis in original)).[6]

In interpreting the term "controversy" in the rule our analysis must begin with the "text and context" as instructed by the Oregon Supreme Court in *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009), and *PGE v. Bureau of Labor & Industries*, 317 Or. 606, 859 P.2d 1143 (1993). *See In re Newell*, 348 Or. 396, 234 P.3d 967 (2010) (applying statutory construction principles to RPC 4.2). Under the court's approach, the words of the statute are paramount. "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Gaines*, 346 Or. at 171 (internal quotation marks omitted); *In re Nuss,* 335 Or. 368, 372, 67 P.3d 386 (2003) ("In interpreting a statute, we begin with the text and context of the statute, giving words of common usage their plain, natural, and ordinary meaning." (citing *PGE*, 317 Or. at 610–11)).

The word "controversy" is not defined in the RPCs. The plain, natural, and ordinary meaning of "controversy" is defined in *Webster's New International Dictionary* (3d Edition), 1993, as: "**1 a :** the act of disputing or contending **b (1)** a cause, occasion, or instance of disagreement or contention **:** a difference marked esp. by the expression of opposing views. . ."[7]

The Bar argues that Respondent's disclosures did not occur in connection with a controversy with his client because there was no evidence that Carol disputed Respondent's entitlement to fees. The testimony offered that she expressed dissatisfaction with the fee arrangement and may have proposed a possible reduction of the fee, does not necessarily create a "controversy." If there was no "controversy," Respondent was not entitled to disclose any of the client information under the exception.

For purposes of our analysis, however, we need not answer that question. We will assume that the filing of the lien satisfies the "controversy" requirement of the exception because, as discussed below, the disclosures Respondent made were not "reasonably necessary to establish" his lien claim, and thus do not fall within the exception.

---

[6] Respondent argued at trial that the standard is subjective, and that since Respondent testified that he reasonably believed the disclosures were necessary the exception applies. Respondent is incorrect. RPC 1.0(l) states: "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question **and that circumstances are such that the belief is reasonable**." (Emphasis added.) That is an objective standard.

[7] The word "controversy" has other legal definitions arising from interpretation of the Case or Controversy Clause of the U.S. Constitution, Article III, Section 2, Clause 1, but there is no indication that the drafters of the rule intended the word to be understood in anything other than its plain, natural, and ordinary sense.

Respondent's notice of lien, by itself, was sufficient to establish his interest in the recovery of any settlement proceeds or judgment. The only action Respondent needed to take was the filing of his lien as notice to the world. The only information necessary for Respondent to establish his lien was that he had incurred fees specifically agreed upon with his client while representing her in the action, or that he was entitled to collect the reasonable value of his services. ORS 87.445 and 87.450.

Respondent admitted as much when he testified regarding his hearing memorandum on the motion to vacate (which contained information relating to the representation of his client): "It wasn't in support of the claim of lien. My claim of lien was a one-page document." Tr. at 499. In fact, this specific admission was one of many in a lengthy exchange between Respondent and his counsel at trial in which Respondent testified to specific reasons for many of his disclosures in the pleadings that had nothing to do with establishing his lien claim. Tr. at 483-502.

The motion to vacate itself was not necessary to **establish** Respondent's claim. It was potentially beneficial to Respondent to continue the stipulated injunction in order to make collection of fees easier in the future, but it was not necessary in any way to establish the lien claim itself. If the motion to vacate was not "reasonably necessary to establish" Respondent's lien, the disclosures made to support it were not reasonably necessary to establish his claim either, and they cannot fall within the exception in RPC 1.6(b)(4).[8] Any disclosure of client information in connection with the motion to vacate ran afoul of the rule.

Accordingly, we find that Respondent violated RPC 1.6(a).

3. Duties to Former Clients: Respondent did not violate RPC 1.9(a)(1), but he did violate RPC 1.9(c)(1).

The Bar charged violations of RPC 1.9(a) and RPC 1.9(c)(1). The first charged section, RPC 1.9(a), states:

> *A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.*[9]

---

[8]Respondent called the Bar's ethics hotline before filing his motion to vacate, but there was no testimony that he discussed the course of action he intended to take. Further, it is no defense to a charge of misconduct that a lawyer sought advice from the Bar before engaging in particular conduct. *In re Gatti*, 356 Or 32, 50, 333 P3d 994, 1004 (2014) (citing *In re Ainsworth*, 289 Or 479, 490, 614 P2d 1127 (1980)).

[9] For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk

RPC 1.9(c)(1) then provides:

> *A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.*

The Bar argues that Respondent violated RPC 1.9(a) when he filed his motion to vacate. That rule prohibits a lawyer from representing "another person" in the same or a substantially related matter if the person's interests are adverse to the former client. The Bar says that Respondent violated the rule because, by appearing *pro se*, Respondent "represented" himself—"another person." We reject this reading of the rule.

Harkening back to our mandate to interpret the Rules of Professional Conduct based on the plain meaning of the text, we believe the rule means what it says, namely, that the prohibition applies to a lawyer representing another person against a former client, not to a lawyer appearing on his or her own behalf adverse to a former client.

If we accepted the Bar's reading, lawyers could never proceed *pro se* against former clients to recover fees without the former client's consent. A claim for unpaid fees would appear to be "substantially related" to the matter on which the lawyer represented the client. The lawyer's and former client's interests are clearly adverse. Thus, the lawyer cannot seek fees on his or her own behalf without consent if the lawyer is "representing another person" when speaking on his or her own behalf. The lawyer could, however, avoid this outcome by pursuing the fee claim using another lawyer to represent them because the lawyer seeking the fees is not "representing" anyone against the former client. That outcome is nonsensical. The prohibition in RPC 1.9(a) applies, in our view, only when the charged lawyer is actually representing a client, not when the lawyer is appearing on his or her own behalf.

The prohibition in RPC 1.9(c)(1), however, does not have the same requirement that the charged lawyer be representing another person. Instead, it prohibits "use" of information "relating to the representation to the disadvantage of the former client." The prohibition applies except where "these Rules would permit or require" such use or the information has become generally known. The only applicable permission we can find in the Rules is the one discussed above, found in RPC 1.6(b). Accordingly, we believe the violation of this rule is co-extensive with the violation discussed immediately above. We find that Respondent did use the information relating to the representation of Carol Batchelor to her disadvantage in violation of RPC 1.9(c)(1).

---

that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter. RPC 1.9(d).

Chanti Matter

Respondent filed a complaint on July 19, 2016 on behalf of plaintiff Clear Channel Broadcasting against various individual and corporate defendants. Ex. 61. The complaint alleged three causes of action. The first was a breach of contract claim against two individual defendants, Marc Mancuso and Sanjana Pahalad-Mancuso. It sought $22,386.68 in contract damages, plus interest at the contract rate of 18 percent per annum and attorney fees as provided for in the contract. Of all the defendants, the two individuals were the only signatories to the written contract.

The complaint then alleged claims for *quantum meruit* and unjust enrichment against all of the defendants, naming three limited liability companies, Mancuso Nutrition, LLC, Vier Gesundheit, LLC, and DSL Fitness, LLC, along with the two individuals. These claims requested damages in the same amount as the contract claim, $22,368.68, but sought interest at the statutory rate of nine percent per annum, and did not allege any right to the recovery of attorney fees. This approach was legally correct insofar as the entitlement to the higher interest rate and attorney fees sought in the first claim arose from the written contract to which the LLC defendants were not signatories.

On September 1, 2016, an individual named Dominic Current filed an answer on behalf of two of the LLC defendants. Current was not a lawyer. ORS 9.320 requires that "a party that is not a natural person" must appear by attorney in all cases, "unless otherwise specifically provided by law." As a result, the answer filed by the two LLC defendants was legally defective.

Respondent testified that he handles a significant amount of collection work and that he has often encountered this scenario, where a non-lawyer files an answer on behalf of a business entity. He testified that his normal practice is to file a motion to strike such answers based on the provisions of ORS 9.320.

Respondent filed a document on September 6, 2016 captioned a Motion to Strike against the answer filed by Current. Ex. 63. The motion states that the answer should "be stricken immediately pursuant to ORCP 21A and E." ORCP 21A specifies certain defenses that may be asserted by a motion to dismiss. ORCP 21E allows for the filing of a motion to strike "(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading." Respondent did not confer with Current or anyone affiliated with the LLC defendants before filing the motion.

Uniform Trial Court Rule (UTCR) 5.010 requires the moving party to make a good faith effort to confer before filing a motion pursuant to ORCP 21, "except a motion to dismiss: (a) for failure to state a claim; or, (b) for lack of jurisdiction . . ." The moving party must file a certificate of compliance with the rule. Respondent's motion falls into neither of these exceptions to the conferral requirement.

Although the motion is clearly denominated a "motion to strike," Respondent testified that he considered the motion he filed to be a motion to dismiss for failure to state a claim so that he was not required to confer. Tr. at 443. He testified that it is his normal practice to proceed without conferring when moving against answers filed by non-lawyers on behalf of entity defendants. Respondent's cites no authority supporting his practice. His motion is clearly not a motion to dismiss for failure to state a claim or to dismiss for lack of jurisdiction. In fact, Respondent's argument is contradicted by the title he placed on his motion—motion to strike—which is undoubtedly covered by the conferral requirement.

Another UTCR, 5.100, requires that any proposed order involving "a self-represented party" must be served on the party "not less than 7 days **prior to submission to the court and be accompanied by a notice of the time period to object**." (Emphasis added.) Respondent ignored this requirement as he did the requirement to confer. He electronically filed with the court his proposed order striking the answer the same day he filed and served the motion and order, by mail, on Current, denying defendants the seven-day period specified in the rule. Respondent did not provide Current with any notice of the time period to object to the form of the order either. No opposition to the motion was filed, and the order was signed by Judge Jay A. McAlpin on October 12, 2016. Ex. 64.

Respondent testified that he complied with the rule by serving his proposed order when he filed the motion to strike. This approach is problematic.

ORCP 14B(2) governed what happened next. It provides that, "If the court grants a motion and an amended pleading is allowed or required [as would be the case here], that pleading must be filed within 10 days after service of the order, unless the order otherwise directs." The order striking the answer made no mention of the time allowed for filing an amended answer. There is no evidence that the order was served on the LLC defendants, other than when filed with the motion on September 6, 2016. This would mean that the LLC defendants' amended answer needed to be filed within ten days of September 6, 2016, which was almost a month before the court even granted the motion. Clearly the intent of the ORCP and UTCR is for proposed orders to be served on opposing parties **after** a motion has been granted, not before.

In any event, no amended answer was filed, and on November 15, 2016, Respondent filed a motion for an order of default against the two LLC defendants whose answer had been stricken. Respondent did not file or serve a notice of intent to apply for the order of default on Current or any other representative of the LLC defendants.

ORCP 69B(2) provides that if a party "has filed an appearance in the action, or has provided written notice of intent to file an appearance, then notice of the intent to apply for an order of default **must be filed and served at least 10 days, unless shortened by the court, prior to applying for the order of default**." (Emphasis added.)

Respondent testified that he did not consider the answer filed by Current to be an "appearance" since it was not filed by an attorney, and he was thus not obligated to provide

notice of intent to seek the order of default. Respondent provided no authority in support of his position. The rule does not say that it only applies to a party who has filed an appearance **by an attorney** in the action. Moreover, Respondent should have considered the LLC defendants' stricken answer at least to be a written notice of their intent to appear. Respondent's motion for an order of default was flawed from the outset. It also suffered from significant additional defects.

ORCP 69C requires a motion for an order of default to be accompanied by an affidavit or declaration setting forth certain facts necessary to establish entitlement to the default. An important statement an attorney must swear to is that "the party against whom the order is sought has failed to appear by filing a motion or answer. . ." ORCP 69C(1)(b). Respondent did not file the required affidavit or declaration in support of his motion making any of the required representations, including that one. He provided no explanation for this failure when he testified at trial. Defendants filed no opposition to the motion. Despite the lack of the required document from Respondent, the court granted the motion for default *ex parte* on November 25, 2016, against the two LLC defendants. Ex. 67.

More than six months later, on June 12, 2017, Respondent filed a motion for entry of a money judgment based on the default against the LLC defendants. Respondent this time did file the required affidavits, an Affidavit of Indebtedness, supporting the amount of damages claimed, an Affidavit of Attorney Fees, supporting his request for attorney fees, and an Affidavit of Costs and Disbursements, itemizing the recoverable items.

The Affidavit of Indebtedness and the Affidavit of Attorney Fees contained false statements. The Affidavit of Indebtedness stated in part, "The amounts that plaintiff seeks in the Judgment by Default are the amounts clearly stated in the pleading and prayer," which he swore was $22,386.68 plus contractual interest at the rate of 18 percent per annum together with reasonable attorney fees. Ex. 69. The problem with these statements is that the claims against the LLC defendants were not based on the written contract, they were for *quantum meruit* and unjust enrichment. Accordingly, stating that the LLC defendants were subject to an 18 percent interest rate and liability for attorney fees on the pleaded claims was false. Liability for those two items only arose by the terms of the written contract.

Respondent also falsely stated in the Affidavit of Attorney Fees that "Plaintiff is entitled to recover its reasonable attorney fees herein pursuant to the parties' contract as more fully described in plaintiff's complaint" and tallied the amount of those fees at $5,417.50. Ex. 70. The General Judgment that Respondent submitted duplicated the same false statements regarding the LLC defendants' liability. Defendants filed nothing in response to the motion for entry of the default judgment.

The court signed the judgment *ex parte* on June 13, 2017, thus subjecting the LLC defendants to inappropriate liability for prejudgment interest of $6,127.20 and for attorney fees of $5,417.50.

In late June 2017, the two LLC defendants finally retained an attorney, Lonn T.W. Johnston (Johnston). Between June 28, 2017 and July 19, 2017, Johnston contacted Respondent by phone and notified him that there were "errors" in the default judgment. Respondent claimed he did not understand that the errors included the interest rate and attorney fee award until September of 2017. Tr. at 451. He admitted, however, in an earlier written response to the Bar that he was aware by July 19, 2017 that the interest rate and award of attorney fees was challenged by Johnston. Ex. 88. Respondent's written admission is clear and convincing evidence to us that he knew of these specific defects by July 19, 2017.

Respondent confirmed those errors by reviewing the judgment pleadings but took no action to correct the affidavits or the judgment at that time.

On September 20, 2017 and September 22, 2017, Johnston contacted Respondent again regarding the errors in the judgment. Respondent still did nothing to correct the false statements.

Finally, on October 6, 2017, Respondent filed a "Corrected Default Judgment and Money Award." Ex. 79. However, Respondent corrected only the prejudgment interest rate, leaving the improper award of attorney fees in the corrected judgment. Respondent did not make any effort to correct the false statements contained in his sworn affidavits, which remained part of the court record. He did not advise the tribunal that he had made such misstatements.

Johnston had also asked Respondent to set aside the default based on the failure to provide the required notice to the LLC defendants, but Respondent would not agree. Johnston then had to file a motion to set aside the default judgment and order. Ex. 80. Respondent opposed the motion, and claimed that the approximately five months that had passed since entry of the default judgment was unreasonably long. In Respondent's opposition, he does not advise the tribunal of the false statements in his affidavits. Ex. 81.

A hearing took place on December 11, 2017 before Lane County Circuit Court Judge Suzanne Chanti. The judge granted the motion to set aside the default order and judgment. Ex. 82. The court held that the judgment was void, citing in her order Respondent's failure to give notice of intent to seek default to the LLC defendants and the inclusion of improper items in the money awards. Ex. 86. The judge was troubled by Respondent's handling of the case. She concluded that she was required to notify the Bar of Respondent's conduct. She did so by letter dated January 29, 2018. Ex. 87.

CHARGES

1. Candor Toward the Tribunal: Respondent failed to correct false statements of material fact in default judgment pleadings after being notified of the errors in violation of RPC 3.3(a)(1).

RPC 3.3(a)(1) states:

> *A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.* RPC 3.3(a)(1).

We accept Respondent's testimony that he made the false statements in his affidavits and the default judgment regarding his client's entitlement to prejudgment interest and attorney fees inadvertently. Respondent, however, admitted that he was aware of these errors by at least July 19, 2017. He took no action to correct these statements for two-and-a-half months, only acting to correct some, but not all, of the false statements on October 6, 2017. We find that this failure to act constituted a knowing failure to correct the false statements in violation of the rule.

Although knowingly making any false statement of fact or law to a tribunal is prohibited, knowing failure to correct a false statement of fact is only misconduct if the false statement was material. A misrepresentation is material if it is likely to affect the decision-making process of the recipient. Errors in a judgment have been found to be material when they sufficiently affect the rights or obligations of the parties. *See Mullinax v. Mullinax*, 292 Or 416, 425, 430-31, 639 P2d 628 (1982) (finding that a $50 per month reduction in a wife's child support "materially altered rights or obligations determined by the prior judgment" for purposes of determining the timely filing of an appeal). The errors here imposed significant additional monetary burdens on the defendants. We find that the false statements here were material.

Although the Bar need not prove actual reliance to show a violation of the rule (*In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000)), a judge actually relied on Respondent's false statements here when she signed a default judgment imposing the additional and unwarranted financial burdens on the defendants.

Neither party cited authority discussing how quickly a lawyer must act to correct a false statement made to a tribunal, nor have we found any. Courts must rely on lawyers to be accurate and tell the truth. Failure of a lawyer promptly to correct an error upon discovery may cause additional harm to a party or the legal proceeding. The longer a lawyer waits to correct a false statement of material fact or law, the more potential for harm. In our view, once a lawyer learns that a false statement has been made to a tribunal, correcting that error should move to the top of the lawyer's to-do list. Respondent did not do so here, and we find that an unexcused two-and-a-half-month delay constitutes a knowing failure to correct.

In addition, Respondent did nothing to correct the false statements contained in his sworn affidavits. The rule makes it a violation to "fail to correct a false statement . . . previously made to a tribunal." This obligation is not flexible under the terms of the rule. Lawyers should be jealous of their reputations for truthfulness before a tribunal, and should err on the side of strict compliance when viewing the obligation to correct false statements they make. Respondent's attitude toward his false statements appears cavalier at best.

The Oregon Supreme Court has treated lawyer misrepresentations in the context of an *ex parte* presentation to a judge, such as we have here, very seriously. *See In re Greene*, 290 Or

291, 297, 620 P2d 1379 (1980) (involving a lawyer's intentional failure to disclose relevant facts to the court). In *Greene*, the Supreme Court stated:

> "Our experience has been [that] all judges regularly rely upon the candor, honesty and integrity of the lawyer in handling *ex parte* matters which are presented to them. . . . Judges must be able to rely upon the integrity of the lawyer." *Id*.

Respondent's delay was not reasonable. He waited more than two months to take steps to correct some of his false statements. It further appears from the record that he only acted after continued pressure from Johnston. We are concerned that Respondent might never have corrected the errors had Johnston not pressed the issue.

Once Respondent did act, he failed to correct all material misstatements, leaving the improper attorney fee award in the judgment. Respondent blamed inadvertence for this failure, but his response to the situation and his testimony at trial exposed a casual approach to his ethical obligations that we find unacceptable. Respondent never made another attempt to correct the record. He failed to act even after Johnston filed a motion to set aside the default judgment. Respondent objected to the motion and appeared at oral argument before Judge Chanti with the false statements still in the record. It is no surprise the judge complained to the Bar after learning what transpired.

Respondent had a duty to the legal system to correct the material false statements in his affidavits and in the default judgment within a reasonable time—especially given the posture in which the errors occurred. Respondent's conduct caused harm to the integrity of the court system, which relies on lawyers to tell the truth and act promptly to correct material false statements in court filings. We find that Respondent violated RPC 3.3(a)(1).

2. Conduct Prejudicial to the Administration of Justice: Respondent violated RPC 8.4(a)(4) by disregarding multiple procedural rules and failing to correct false statements of material fact within a reasonable time.

RPC 8.4(a)(4) states:

> *It is professional misconduct for a lawyer to…engage in conduct that is prejudicial to the administration of justice.*

The Oregon Supreme Court has explained the elements that must be established to prove a violation of this rule:

> "To establish a violation of the rule prohibiting a lawyer from engaging in conduct prejudicial to the administration of justice, RPC 8.4(a)(4), the Bar must prove that (1) the lawyer engaged in 'conduct,' i.e., either did something the lawyer should not have done or failed to do something the lawyer should have done; (2) the conduct occurred during the 'administration of justice,' i.e., during

> the course of a judicial proceeding or an analogous proceeding; and (3) the lawyer's conduct resulted in 'prejudice' to either the functioning of the proceeding or to a party's substantive interests in the proceeding. To prove prejudice, it must be shown that the lawyer engaged 'either in repeated acts causing some harm to the administration of justice or a single act that caused substantial harm to the administration of justice.' The administration of justice includes both the procedural functioning of the trial or other proceeding and the substantive interests of the parties." *In re Sione*, 355 Or 600, 608, 330 P3d 588 (2014) (*citations omitted).*

The Bar does not need to prove any particular mental state.

As to the first element, Respondent took actions he should not have taken and failed to take required steps under the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules handling the case against the LLC defendants. Respondent failed to confer with the LLC defendants before filing his motion to strike. A motion that fails to comply with the conference requirement must be denied. UTCR 5.010(1). Respondent improperly obtained the order striking the LLC defendants' answer.

Respondent failed to serve the LLC defendants properly with his proposed order and failed to notify them of their ability to object to the order. Whether compliance with this procedural requirement would have made a difference is not the issue—this is merely another of Respondent's "repeated acts" that caused harm to the administration of justice.

Respondent failed to file and serve a notice of intent to apply for default against those companies pursuant to ORCP 69 B(2). Respondent's claim that the LLC defendants had not actually appeared is specious—they did so defectively, but they did appear. Moreover, the filing of their defective answer constituted written notice of their intent to appear in the case.

Respondent then failed to file an affidavit of default as required by ORCP 69 C, perhaps because in doing so he would have had to swear that the LLC defendants had not appeared in the case. In any event, the requirements in the rules are not optional. The motion for the order of default should have been denied on this basis, but it was not because it was considered *ex parte*, under circumstances in which the court was trusting Respondent that he had fulfilled his obligations under the rules.

Respondent then filed the Motion for Entry of Judgment by Default against the LLC defendants supported by affidavits containing false statements of material fact, which were repeated in the form of judgment submitted. Again, in reliance on Respondent's trustworthiness, the court signed the judgment *ex parte*.

After Johnston advised Respondent of the misstatements, he took no action to correct them. The step he took months later was insufficient. Ultimately, Respondent never filed a fully corrected judgment or truthful affidavits. Johnston then had to file a motion to set aside the defaults, which Respondent opposed, despite the abundant defects in his handling of the

defaults. This forced the court to have to spend time considering the matter and hearing argument. The first element of the charge is established.

The second element is also satisfied. This conduct occurred during the course of a judicial proceeding.

The third element is satisfied as well. Respondent's repeated errors caused some harm to the administration of justice, including both the procedural functioning of the court and the substantive interests of the parties. Respondent's failure to abide by the ORCPs required the expenditure of attorney time and court time, which can constitute causing harm to the administration of justice. *See In re Kluge,* 335 Or 326, 346, 66 P3d 492 (2003) ("The accused's conduct prejudiced the procedural functioning of the judicial system by imposing a substantial burden upon both opposing counsel and [the judge] to undo the accused's actions." citing *In re Gresham,* 318 Or 162, 166, 864 P2d 360 (1993)). Respondent's conduct also harmed the substantive interests of the LLC defendants by subjecting them to a clearly excessive money judgment. He then left the judgment in place, failing to remedy the situation for months, and only then because the court had to become involved to clean up the mess. This course of conduct violated RPC 8.4(a)(4).

Kimball Matter

In November 2016, Kenneth Kimball and his girlfriend Amoreena Knittel hired Respondent to investigate and pursue potential claims related to Kimball's purchase of a home. After the purchase they discovered the home had significant defects. Kimball paid Respondent a retainer of $825.

During the first two months of the engagement, Respondent performed some work on the case. Knittel was the primary contact with Respondent's office. Tr. at 207. She provided him with reports and information that he asked for. Respondent did nothing on the case though after January 2017. In May of 2017, Respondent sent Kimball a bill for $206.20 showing he had applied that amount against the balance in trust. Ex. 105.

Respondent testified that there was a clear understanding that the clients were to gather documents and then they would make a decision about how to proceed. Tr. at 387. He claimed that the clients were to complete repair work to have a "liquidated" damage amount before he needed to do anything else on the case. Tr. at 393.

Knittel's recollection differed significantly. She testified that she called Respondent's office often in December 2016 and January 2017. Tr. 210. Respondent's records show that she left a voice mail on December 22. Respondent did not reply. Tr. at 209-10.

Respondent's records also show that she spoke with someone in his office on January 17, 2017. Knittel testified that she was "cranky" when she called because of Respondent's lack of response to her inquiries. Tr. at 211-12. She said that Respondent's employee told her to quit calling and to email instead. *Id*.

Knittel, using Kimball's email, sent Respondent a message on January 27, 2017, advising him that she and Kimball would "like to know how our case is progressing." Ex. 102. Again, they received no answer from Respondent. Tr. at 212-13. Knittel testified that she called Respondent's office at least once a week during this time up until she and Kimball broke up and she moved out in April of 2017. Tr. 213-14.

On May 15, 2018, after having heard nothing from Respondent for a year, Kimball emailed Respondent and requested a status update. Ex. 103. After receiving no reply, Kimball sent another email on May 30, 2018, asking that Respondent return the retainer if Respondent was not going to take further action on the case. Respondent still did not reply.

On June 24, 2018, Kimball filed a grievance with the Client Assistance Office (CAO). The CAO forwarded Kimball's grievance to Respondent on July 6, 2018. Ex. 106. On July 9, 2018, Respondent finally emailed Kimball and asked him to call to set up a meeting. Ex. 107.

On July 25, 2018, Respondent wrote to Kimball and Knittel, enclosing the $618.80 remaining on the retainer, and told them he was still willing to represent them, but that he could understand why they would want to terminate the representation. Ex. 108. He also asked them to contact him to discuss resolution of the Bar complaint Kimball filed. Kimball later emailed Respondent that he would prefer to resolve their issues without an in-person meeting. Ex. 109.

Respondent then wrote to Kimball on August 6, 2018, stating that he believed Kimball and Knittel needed to resolve their claims or file suit by October 21, 2018. Ex. 109. Respondent also asked whether they wanted him to represent them any longer. On August 7, 2018, Kimball responded that he would no longer need Respondent's services. *Id.*

Knittel presented as a credible witness. She was forthright in her answers. Her demeanor was calm. She answered directly and responsively. Moreover, she was a completely disinterested witness by the time she testified at trial. She and Kimball were no longer involved and she had nothing to gain from testifying falsely. We found her testimony to be clear and convincing on the issues she discussed.

CHARGES

1. Neglect of a Legal Matter: Respondent violated RPC 1.3 by failing to take any action on his client's case for approximately 18 months.

RPC 1.3 provides: *A lawyer shall not neglect a legal matter entrusted to the lawyer.* In order to prove a violation of the rule the Bar must show that a lawyer failed, over time, to act with reasonable diligence. A mere act of negligence is not sufficient to establish misconduct, but a course of neglectful conduct or an extended period of neglect will violate the rule. *In re Jackson*, 347 Or 426, 435, 223 P3d 387 (2009). "An extended period of neglect" in this analysis depends on the circumstances of the case. Failure to act for a short time may constitute neglect

if a matter is urgent. *See In re Meyer*, 328 Or 220, 970 P2d 647 (1999) (failing to act over two-month period when case required immediate action was violation).

Our Supreme Court has found neglect where a lawyer took a case but then failed to return calls, perform any work on the matter, return original documents, or return a cash advance over almost four months. *In re Recker*, 309 Or 633, 789 P2d 663 (1990). The court has also found neglect when, over the course of two years, a lawyer, after filing a construction lien for his client, determined that the case lacked merit but did not tell the client of that conclusion, did not take any other action in the case, and did not return the client's phone calls. *In re Dugger*, 299 Or 21, 697 P2d 973 (1985).

Here, Respondent did nothing on this case from January 2017 until July 2018. We find Knittel's testimony that Respondent ignored her inquiries more credible than Respondent's claim that his inaction was part of a plan understood by his clients. We find that the Bar proved by clear and convincing evidence that Respondent violated RPC 1.3.

2. Communication: Respondent violated RPC 1.4(a) when he did not respond to his client's status requests until after the client filed a Bar complaint.

RPC 1.4(a) states: A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. We consider multiple factors in evaluating a charge under this rule. Among these are the length of time a lawyer failed to communicate; whether the lawyer failed to respond promptly to reasonable requests for information from the client; and whether the lawyer knew or a reasonable lawyer would have foreseen that a delay in communication would prejudice the client. In re Groom, 350 Or 113, 124, 249 P3d 976 (2011).

Respondent ignored Knittel's inquiries during the first months of the engagement. She ceased calling in April when she and Kimball ended their relationship. Silence ensued until May 2018, when Kimball emailed Respondent twice requesting an update.[10] Kimball also asked for the return of his retainer in his second email. Respondent failed to reply to either email. Kimball then filed a complaint with the Bar. Respondent finally contacted Kimball after he was advised that the Bar complaint had been made. Respondent might never have responded to Kimball had the client not contacted the Bar to complain. Moreover, a reasonable lawyer should have been concerned at this point about possible prejudice to the client's claims after so many months of silence and inaction. Respondent's approach to communication with Kimball was as cavalier as his approach to the procedural rules and Rules of Professional Conduct in the *Chanti* matter. We find that Respondent's failure to communicate with Kimball until the Bar complaint was filed is a violation of RPC 1.4(a).

[10] Respondent testified that his billing software should have produced occasional statements to Kimball showing his retainer balance during this time. Kimball denied receiving any. Respondent had no file copies to corroborate his testimony. Most importantly, a routine billing statement would not give the client any substantive information, and certainly would not substitute for responding to Knittel's specific inquiries.

SANCTION

In assessing an appropriate sanction, we refer to the ABA *Standards for Imposing Lawyer Sanctions* (ABA Standards), and Oregon case law, for guidance.

ABA Standards.

The ABA Standards establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer's mental state; and the actual or potential injury caused by the conduct. Once we analyze these factors, we make a preliminary determination of the presumptive sanction. We may then adjust the sanction based on recognized aggravating or mitigating circumstances.

Duty Violated.

The most important ethical duties a lawyer owes are those to clients. ABA Standards at 5. In the *Batchelor* matter, Respondent violated his duty of loyalty to his client. He violated his duty to keep information relating to his representation confidential, to abide by his client's decisions regarding the objectives of the representation, and to avoid using information gained during the representation to his client's disadvantage. ABA Standards 4.2 and 4.3.

In the *Chanti* matter, Respondent violated the duty he owed to the legal system by failing to correct, in a sufficient and timely fashion, false material statements previously made to the court and by engaging in conduct prejudicial to the administration of justice. ABA Standard 6.1.

In the *Kimball* matter, Respondent violated his duty to act with reasonable diligence and promptness, which includes the obligation to timely and effectively communicate. ABA Standard 4.4.

Mental State.

The ABA Standards recognize three mental states. The most culpable mental state is that of "intent," when the 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 and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Most of Respondent's conduct was knowing. Some of Respondent's conduct was intentional. Some of Respondent's conduct appears to have been merely negligent.

In the *Batchelor* matter, Respondent acted either intentionally or knowingly. Respondent pursued his own interest in being paid. In doing so, he concluded that expansive disclosure of information relating to the representation of Carol was justified, not to establish his attorney fee lien, but to enhance his prospects for collection. Respondent repeatedly and intentionally disclosed embarrassing and detrimental information from his client in multiple pleadings. Respondent also required Carol to take the witness stand and answer his questions relating to the representation, causing her further distress. After she retained counsel and filed her lawsuit against him, Respondent continued to pursue his motion to vacate, and continued to use the information adverse to his former client. He did not relent until August 10, 2018.

In the *Chanti* matter, Respondent, an experienced collections lawyer, consistently and, at least, negligently, failed to follow the rules regarding pleadings, service, and default judgments. Respondent also, at least negligently, filed affidavits and a judgment containing false statements. After being advised of the false and material information he had provided to the court, Respondent knowingly waited months before taking any action to correct the misstatements. Respondent negligently failed to correct all of the misstatements.

In the *Kimball* matter, Respondent at least negligently failed to take any action on the matter for an extended time and failed to communicate adequately with his clients.

Extent of Actual or Potential Injury.

For the 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). "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 clients and the legal system have all sustained actual injury here. Carol suffered from PTSD and depression, both of which were aggravated by Respondent's misconduct. "Client anguish, uncertainty, anxiety, and aggravation are actual injury under the disciplinary rules." *In re Snyder*, 348 Or 307, 321, 232 P3d 952 (2010). Carol was also forced to hire a second lawyer to counter Respondent's misconduct.

In the *Chanti* matter, Respondent's failure to follow the procedural rules and to correct false and material statements he made to the court *ex parte* caused injury to the legal system. *See In re Davenport*, 334 Or 298, 319, 49 P3d 91 (2002) (finding that "the public's confidence in the integrity of the law is undermined if lawyers reject its rules and application"). We have already found that Respondent's conduct actually harmed the administration of justice.

As to the *Kimball* matter, a client sustains actual injury when an attorney fails to actively pursue the client's case. *See, e.g., In re Parker*, 330 Or 541, 546-47, 9 P3d 107 (2000). Respondent's lack of communication and neglect caused Kimball and Knittel stress, frustration,

and anxiety. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997).

Preliminary Sanction.

The following ABA Standards discuss the applicable presumptive sanctions:

Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. ABA Standard 4.21.

Disbarment is generally appropriate when a lawyer, without the informed consent of client(s), represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client. ABA Standard 4.31(c).

Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. ABA Standard 4.22.

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. ABA Standard 6.12

Suspension is generally appropriate when a lawyer causes an adverse or potentially adverse effect on a legal proceeding. ABA Standard 6.12.

Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. ABA Standard 4.43.

We are not persuaded that the level of intent is present here that would make disbarment the presumptive sanction. Accordingly, we find that the presumptive sanction here for the multiple offenses involved is a substantial suspension.

Aggravating and Mitigating Circumstances.

Aggravating Factors

The following aggravating factors under the ABA Standards are present here:

A prior record of discipline. ABA Standard 9.22(a). Respondent has been admonished or sanctioned in four prior disciplinary proceedings. These proceedings each constitutes a prior disciplinary offense or past misconduct for purposes of assessing a sanction here. Each sanction preceded Respondent's acts that led to this proceeding. Some involved similar violations; namely, violating RPC 1.4(a), and RPC 8.4(a)(4) or its predecessor. *In re Bertoni*, 363 Or 614, 644, 426 P3d 64 (2018); *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997) (to qualify as a prior disciplinary offense, the prior offense must have been adjudicated before the imposition of the current sanction and the similarity and temporal relationship between the prior offense and current offense are relevant).

In 2004, Respondent was reprimanded for violating DR 1-102A(4) (engaging in conduct prejudicial to the administration of justice), the predecessor to RPC 8.4(a)(4), after he negligently signed a motion for issuance of a bench warrant that inaccurately claimed an opposing party had failed to appear at a show cause hearing. The court issued the warrant, and police later arrested the opposing party pursuant to the warrant and transported her to jail. *In re Slayton*, 18 DB Rptr 56 (2004).

In 2010, Respondent was suspended for 60 days for violating RPC 8.4(a)(3) (misrepresentation) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). *In re Slayton II*, 24 DB Rptr 106 (2010). Respondent represented to a court that he could not appear for trial due to a conflict with a vehicular homicide trial. Upon questioning from the court, Respondent admitted that the trial was not for vehicular homicide, but actually involved a citation issued against him personally for jaywalking.

In 2012, Respondent was admonished for violating RPC 1.4(a) (failing to communicate with client). *In re Slayton*, OSB Case No. 12-127. Letters of admonition are evidence of past misconduct if the underlying misconduct was of the same or similar type as the misconduct at issue in the case before us now. *In re Cohen II*, 330 Or, 489, 500-01, 8 P3d 953 (2000) (citing *In re Jones III*, 326 Or 195, 200, 951 P2d 149 (1997)).

In 2014, Respondent was suspended for 120 days, with the entire suspension stayed pending a two-year probation, for violating RPC 1.4(a) (failing to communicate with his client) and RPC 8.1(a)(2) (knowingly failing to respond to a request for information from a disciplinary authority). *In re Slayton III*, 28 DB Rptr 227 (2014). In representing a client in a dissolution proceeding, Respondent failed to notify his client that he intended to discontinue working for her or to withdraw, and failed to respond to multiple telephone calls from her. He failed to respond to Disciplinary Counsel's Office during its investigation until after DCO sought his administrative suspension under BR 7.1.

A dishonest or selfish motive. ABA Standard 9.22(b). Most, if not all, of Respondent's misconduct in the *Batchelor* matter was selfishly motivated. Respondent refused to abide by his client's decisions regarding the representation because he was concerned about protecting his attorney fee rights. He deliberately placed his own financial interests above his duty of loyalty to his client.

Respondent's conduct in the *Chanti* matter was dishonest insofar as he knew he had submitted false material statements to the court *ex parte*, and he allowed those misrepresentations to remain in the record for months.

A pattern of misconduct. ABA Standard 9.22(c). Respondent was previously admonished, reprimanded, and suspended for six separate violations, many of which are also present in this proceeding. "[A] pattern of misconduct does not necessarily require proof of a prior sanction. Rather, that aggravating factor 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." *In re Bertoni*, 363 Or at 644.

The rule violations at issue in this disciplinary proceeding are similar to Respondent's prior violations and establish a pattern of misconduct that warrants an enhanced sanction. The violations reflect a larger pattern of disregard for the interests of Respondent's clients and his obligations to the legal system and the legal profession. The Bar points out that Respondent's misconduct here began right after he completed his disciplinary probation.

Further, the *Chanti* case showed a disturbing pattern of flouting or ignoring the procedural rules. Given Respondent's high-volume collections practice we are left with serious concerns about whether other defendants may have been improperly defaulted in Respondent's practice over the years.

Multiple offenses. ABA Standard 9.22(d). This factor speaks for itself.

Refusal to acknowledge wrongful nature of conduct. ABA Standard 9.22(g). All respondents have a right to defend themselves vigorously against disciplinary charges. However, when a respondent has "acknowledged the factual accuracy of the Bar's complaint in nearly all material respects, but … claimed (and still claims) that that conduct was not blameworthy … [he] has failed to acknowledge the wrongful nature of his conduct." *In re Strickland,* 339 Or 595, 605 n 9, 124 P3d 1225 (2005). Respondent here has taken such a position with regard to the Carol Batchelor matter, where he claims his conduct was completely justified.

In the *Chanti* matter, Respondent has admitted to some negligence, but is unwilling to acknowledge the breadth and seriousness of the violations at issue.

Vulnerability of victim. ABA Standard 9.22(h). Carol Batchelor appears to have been a vulnerable individual, a fact that Respondent appeared to try to take advantage of in pursuing his motion to vacate.

Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has practiced law in Oregon since September 19, 1986.

Mitigating Factors.

Respondent demonstrated no mitigating factors. Respondent offered, without further elaboration, certain medical records showing that he was diagnosed with bladder cancer a number of years ago and has a substantial treatment history. Ex. 508. The Bar suggested that Respondent would raise this issue to claim personal or emotional problems as a mitigating factor. ABA Standard 9.32(c). Respondent provided us with no evidence showing how the condition, or the treatment for the condition, related in any way to the conduct at issue. For a condition to be a mitigating factor, a respondent must show a causal connection between the event, condition or impairment, and the conduct at issue. *See Commentary, Standards* § 9.3.

Oregon Case Law.

In assessing a proper sanction, we are guided by the proposition that sanctions in disciplinary matters are not intended to penalize the accused lawyer, but are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or at 66. Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992). Oregon case law confirms that a substantial suspension is appropriate here.

Respondent's conduct toward Carol Batchelor was knowingly aggressive. He sought to take advantage of her weaknesses by knowingly using embarrassing information he learned from the representation. His conduct also struck at the heart of the client-attorney relationship. It violated the trust that an attorney will keep a client's information inviolate. If such violations do not receive a substantial sanction the public's trust in the profession will be eroded.

The closest case in this instance is *Huffman*. That case also involved a fee dispute between a lawyer and his former client in which the lawyer disclosed confidential and embarrassing information in a threatening letter to his former client's new lawyer. The court in *Huffman* contemplated a sanction of disbarment but ultimately determined a two-year suspension was warranted due to the one-time nature of the disclosures and the accused attorney's lack of a prior disciplinary record. The attorney in *Huffman* also threatened criminal prosecution to gain an advantage in a civil matter, a charge not present here, but Respondent's misconduct regarding disclosure of information relating to his representation of a client is arguably more egregious than that in *Huffman* in volume and frequency.

In *In re Lackey*, 333 Or 215, 222-23, 37 P3d 172 (2002), the attorney was suspended for one year for a single disclosure of client confidences and secrets to the press. The court rejected the attorney's claim that the disclosure was authorized to expose government corruption. The court concluded that the lawyer made the disclosures in an attempt to seek revenge against his prior employer after his forced resignation. Here, Respondent made multiple improper disclosures, again more egregious than *Lackey*.

If our analysis were limited to the *Batchelor* matter alone, we might have limited the sanction to a one-year suspension. When we add in the other matters, the *Chanti* matter in particular, and the aggravating factors outlined above, a longer suspension is required.

In the *Chanti* matter, Respondent's cavalier attitude toward his misstatements to the tribunal leads us to agree with the Bar that we should treat the misconduct with the same gravity with which the court views a lawyer's misrepresentation to a court. The court has imposed substantial suspensions in such circumstances. The Bar provided us with two examples.

In *In re Greene*, 290 Or at 293, the accused attorney's wife was the conservator of her children's estate, and the lawyer prepared and submitted *ex parte* on her behalf a petition requesting permission to invest conservatorship funds in real estate. The accused attorney, however, intentionally failed to disclose to the probate court that the investment was the home owned by his wife, the conservator. *Id.* at 294. Had the attorney disclosed that fact in the petition, the judge might not have authorized it. *Id*. at 295. The court suspended the attorney for 60 days. *Id.* at 299.

In *In re Worth,* 337 Or 167, 92 P3d 721 (2004), the accused attorney made misrepresentations to the court regarding why he had not moved his client's civil case forward or complied with the court's order that an arbitration of the matter be set by a date certain. The lawyer received a 120-day suspension for violation of DR 1-102(A)(3).

With regard to the *Kimball* matter, and in contrast to the ABA Standards, the Oregon Supreme Court typically imposes a presumptive sanction of at least 60 days for freestanding knowing neglect. *In re Knappenberger*, 336 Or 15, 32-33, 90 P3d 614 (2004); *see also In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension imposed for single serious neglect despite that young, inexperienced lawyer had no prior discipline); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for neglect of tort claim and subsequent failure to notify client where aggravating and mitigating factors were equally balanced).

The court has also imposed suspensions for lapses in communication. *See, e.g., Snyder,* 348 Or at 232 (attorney's failure to respond to his client's status inquiries, failure to inform the client of communications with the other side, and failure to explain the strategy attorney decided upon regarding settlement negotiations, resulted in 30-day suspension); *In re Koch*, 345 Or 444, 198 P3d 910 (2008) (attorney suspended for 120 days when she failed to advise her client that another lawyer would prepare a qualified domestic relations order for the client, and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter); *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006) (three-month suspension, plus formal reinstatement, was appropriate for attorney appointed to handle a client's appeal, who took no action and failed to disclose the ultimate dismissal to the client); *Knappenberger*, 337 Or at 33 (2004) (90-day suspension for attorney who appealed a spousal support determination but failed to keep the client informed of the status of the appeal, did not respond to the client's inquiries and essentially abandoned the client after oral argument).

The Bar has previously reprimanded and suspended Respondent for similar conduct. He has been subject to probation. This prior discipline did not deter Respondent's current misconduct. Respondent has demonstrated a persistent disregard for the Rules of Professional

Conduct and the duties that he owed to his clients, the legal system, and the legal profession. Accordingly, we agree with the Bar that a suspension of 18 months is appropriate to deter future misconduct and to protect the public.

CONCLUSION

We conclude that the Bar proved the alleged violations of RPC 1.2(a), 1.6(a), 1.9(c)(1), 3.3(a)(1), 8.4(a)(4), 1.3, and 1.4(a) by clear and convincing evidence. We find that the Bar failed to prove a violation of RPC 1.9(a). We order that Respondent be suspended from the practice of law for a period of 18 months beginning 30 days after this decision becomes final.

Respectfully submitted this 18th day of February 2021.

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

/s/ Frank Alley
Hon. Frank Alley, Trial Panel Member

/s/ George McCully
Dr. George McCully, Trial Panel Public Member