

**DISCIPLINARY  
BOARD  
REPORTER**

Report of Lawyer Discipline Cases  
Decided by the Disciplinary Board  
and by the  
Oregon Supreme Court  
for 2011

**VOLUME 25**

*January 1, 2011, to December 31, 2011*

## **PREFACE**

This Disciplinary Board Reporter (DB Reporter) contains final decisions of the Oregon Disciplinary Board, stipulations for discipline between accused lawyers and the OSB, summaries of 2011 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 25 DB Rptr \_\_\_\_ (2011).

In 2011, a decision of the Disciplinary Board was final if neither the Bar nor the Accused sought review of the decision by the Oregon Supreme Court. See Title 10 of the Bar Rules of Procedure (page 63 of the OSB 2011 Resource Directory or [www.osbar.org](http://www.osbar.org), click on Rules, Regs & Policies) and ORS 9.536.

The decisions printed in this DB Reporter have been reformatted and corrected for typographical errors, but no substantive changes have been made to them. Because of space restrictions, most exhibits are not included but may be obtained by calling the Oregon State Bar. Those interested in a verbatim copy of an opinion should contact the Public Records Coordinator at extension 394, 503-620-0222 or 800-452-8260 (toll-free in Oregon). Final decisions of the Disciplinary Board issued on or after January 1, 2012, are also available at the Oregon State Bar Web site, [www.osbar.org](http://www.osbar.org). Please note that the statutes, disciplinary rules, and rules of procedure cited in the opinions are those in existence when the opinions were issued. Care should be taken to locate the current language of a statute or rule sought to be relied on concerning a new matter.

General questions concerning the Bar's disciplinary process may be directed to me at extension 319.

**JEFFREY D. SAPIRO**  
*Disciplinary Counsel*  
*Oregon State Bar*

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IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-145
	)	
J. STEFAN GONZALEZ,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	None.
Disciplinary Counsel:	Deanna L. Franco, Chair; James C. Edmonds; Joan J. LeBarron, Public Member
Disposition:	Violation of RPC 3.4(c) and RPC 8.4(a)(4). Trial Panel Opinion. 60-day suspension.
Effective Date of Opinion:	January 28, 2011

**TRIAL PANEL OPINION**

This matter is before a Region 6 Trial Panel of the Oregon State Bar Disciplinary Board to consider the sanctions sought by the Bar against the Accused resulting from the entry of an Order of Default to a Formal Complaint.

**Procedural History**

The Accused was served with the Bar’s Formal Complaint and Notice to File Answer, by personal service, on March 3, 2010.

On March 29, 2010, the Bar filed and served a Notice of Intent to Take Default if the Accused did not file an answer or otherwise appear by April 9, 2010. The Accused failed to answer or otherwise appear within the time allowed.

On May 10, 2010, the Bar filed a Motion for Order of Default against the Accused. On May 11, 2010, pursuant to BR 5.8(a), the Region 6 Chair granted the Bar’s Motion for Order of Default. As a result of the Accused’s default, the allegations of the Bar’s Complaint are deemed to be true. BR 5.8(a).

On May 24, 2010, the current Trial Panel was appointed. On June 29, 2010, the Trial Panel Chair sent a letter to the Bar and the Accused proposing that both parties be granted an opportunity to provide a Sanctions Memorandum to the Trial Panel to assist the Panel in its

determination of appropriate sanctions. The deadline given for filing the Sanctions Memorandum was Friday, July 30, 2010. At the request of the Bar for additional time to submit said Memorandum, the deadline was extended to both the Bar and the Accused to allow the submission of a Sanctions Memorandum on or before Tuesday, August 3, 2010.

On August 3, 2010, the Bar filed its Sanctions Memorandum, together with copies of documents of record and supporting exhibits.

On September 2, 2010, the Trial Panel Chair received an e-mail communication from Mr. Elkanich advising that he had recently been retained by the Accused to represent the Accused in the pending disciplinary matter. Mr. Elkanich requested an additional three (3) weeks in which to submit a Sanctions Memorandum and advised that the Bar did not consent to such request.

On September 2, 2010, the Trial Panel requested an additional forty-five (45) days in which to render an opinion in the matter. At the time of the request, the Trial Panel had reviewed the file and the Bar's Sanctions Memorandum, but had not had the opportunity to come to an opinion in the matter.

On September 7, 2010, the Trial Panel Chair sent a letter to both the Bar and Mr. Elkanich, via e-mail and regular mail, that given the Bar's objection the verbal request for an extension was being denied and that a formal Motion would need to be filed.

On September 9, 2010, the Accused's counsel acknowledged receipt of the Chair's September 7, 2010, letter and advised that a Motion would be filed in fourteen (14) days.

On September 29, 2010, the Accused file a Motion to Consolidate Matters, and in the alternative, Motion to File Formal Sanctions Memorandum which contained supporting declarations and copies of documents of record.

On October 4, 2010, the Bar filed its Response to the Accused's Motion to Consolidate, and in the alternative, Motion to Extend the Time to File a Sanctions Memorandum.

On October 5, 2010, the Trial Panel Chair sent a letter to both the Bar and Mr. Elkanich advising that the Motion to Consolidate the Matter was denied, but that the Accused's Motion to File a Formal Sanctions Memorandum was being granted. Said Memorandum was to be received on or before October 29, 2010. As a result of granting the Accused the opportunity to submit a Sanctions Memorandum, the Trial Panel Chair submitted a request to the Disciplinary Board State Chair for additional time to render an opinion, such that an opinion was to be filed on or before November 26, 2010.

On October 29, 2010, the Accused filed his Memorandum on Sanctions together with supporting documentation.

On November 1, 2010, the Trial Panel Chair received an e-mail communication from the Bar whereby the Bar requested the opportunity to file a Reply to the Accused's Memorandum on Sanctions, with the Reply to be filed on or before November 8, 2010. The Chair responded to the Bar and granted said request.

On November 8, 2010, the Bar filed its Reply Sanction Memorandum, together with supporting documentation.

On November 22, 2010, the Trial Panel conferred on the matter. The only issues considered by the Trial Panel were whether the facts, deemed true by virtue of the default, constituted the disciplinary rule violations alleged and, if so, whether the sanction sought by the Bar was appropriate.

### **BURDEN OF PROOF / EVIDENTIARY STANDARD**

In the usual disciplinary proceeding, the Bar has the burden of establishing the Accused's misconduct by clear and convincing evidence. BR 5.2. "Clear and convincing" means that the truth of the facts asserted are highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994). In the instant action, however, the failure of the Accused to respond to the Formal Complaint and the issuance of the default relieves the Bar of this burden as all of the facts alleged in the Formal Complaint are deemed to have been conclusively established. BR 5.8(a); *In re Magar*, 337 Or 548, 551–553, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). The only remaining burden to be met by the Bar is to establish that the sanction sought is appropriate for the misconduct deemed proven.

### **FINDINGS AND CONCLUSIONS AS TO VIOLATIONS**

At all relevant times, the Accused, J. Stefan Gonzalez, was an attorney at law, duly admitted by the Supreme Court of the State of Oregon on November 4, 1986, to practice law in this state and was a member of the Bar, having his office and place of business in the County of Marion, State of Oregon.

As explained below, the Trial Panel finds that the appropriate sanction in this case is suspension for a period of 60 days. In making its determination, the Trial Panel considered the allegations of the Bar's Formal Complaint, the Order of Default, the Bar's August 3, 2010, Sanctions Memorandum and the exhibits provided to the Trial Panel by the Bar, the Accused's October 29, 2010, Memorandum of Sanctions and the exhibits provided to the Trial Panel by the Accused, and the Bar's November 8, 2010, Reply Sanction Memorandum and the exhibits provided to the Trial Panel by the Bar.

The Trial Panel has reviewed the facts as establish by default. We summarize the facts in the Formal Complaint as follows:

The Bar has charged the Accused with violating RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion

that no valid obligation exists) and RPC 8.4(a)(4) (engaging in conduct that is prejudicial to the administration of justice).

Based on its consideration of the allegations and evidence received, the Trial Panel agrees with the Bar regarding the professional duties violated by the Accused.

1. The Accused Violated RPC 3.4(c) of the Rules of Professional Conduct.

RPC 3.4(c) states that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.”

The Trial Panel finds that the Accused violated RPC 3.4(c) by his failure to comply with court orders dated July 25, 2002, September 21, 2007, and June 18, 2009.

The Accused attempts to argue that a violation of a court order is not the same as “knowingly disobeying an obligation under the rules of a tribunal,” suggesting that the word “rules” does not include orders and judgments of a court. The Trial Panel does not agree with the Accused’s interpretation of the RPC, believing that the Accused is interpreting the word “rule” too narrowly. Furthermore, the Accused, in his own statement to the Trial Panel, admitted to his violation of the rule by stating “I told [Stacy Hankin] I had no objection to the Bar taking a default because the allegations were true.” (Accused’s Memorandum on Sanctions, Exhibit C, page 4.)

2. The Accused Violated RPC 8.4(a)(4) of the Rules of Professional Conduct.

RPC 8.4(a)(4) states that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”

The Trial Panel finds that the Accused’s failure to comply with court orders dated July 25, 2002, September 21, 2007, and June 18, 2009, was conduct that was (1) improper, (2) occurred during the course of a judicial proceeding, and (3) had prejudicial effect on the administration of justice and is therefore a violation of RPC 8.4(a)(4).

### SANCTION

In fashioning an appropriate sanction, the Trial Panel must consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) and Oregon case law. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993). The *Standards* require that the Accused’s conduct be analyzed by the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances. *Standards*, § 3.0. Once the Accused’s conduct is analyzed according to the factors, the Trial Panel should make a preliminary determination of the appropriate sanction, and thereafter adjust the sanction based on the existence of aggravating or mitigating circumstances. *Standards*, § 3.0;

*In re Knappenberger*, 337 Or 15, 30, 90 P3d 614 (2004); *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998).

1. General Duties Violated.

The Trial Panel has determined that the Accused has violated the duties set forth in RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists) and RPC 8.4(a)(4) (engaging in conduct that is prejudicial to the administration of justice), and therefore has violated his ethical duties to legal system. *Standards*, § 6.2.

2. Mental State.

“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. *Standards*, p. 7.

It is uncontested that the Accused acted knowingly when he failed to comply with the obligations imposed on him by the June 26, 2002, September 21, 2007, and June 5, 2009, court orders.

3. Extent of Actual or Potential Injury.

For purposes of determining an appropriate disciplinary sanction, the Trial Panel takes into account both the actual and potential injury. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The *Standards* define “injury” as “harm to the client, the public, the legal system or profession which results from lawyer’s conduct.” “Potential injury” is harm to the client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer’s conduct. *Standards*, p. 7. An injury does not need to be actual, but only potential to support the imposition of a sanction. *In re Williams*, 314 Or at 547.

The Accused’s failure to comply with the obligations imposed on him by the June 26, 2002, September 21, 2007, and June 5, 2009, court orders not only caused actual injury to his ex-spouse and children, but to the legal system as well by consuming time that the court could have devoted to other legal matters.

4. Presumptive Sanction.

In the absence of aggravating and mitigating circumstances, the following *Standards* appear to apply:

“Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.” *Standards*, § 6.22.

5. Aggravating and Mitigating Circumstances.

A. Aggravating Circumstances. The following factors, which are recognized as aggravating under the *Standards*, exist in this case:

- (1) Pattern of misconduct. *Standards*, § 9.22(c). The Accused's failure to comply with multiple court orders establishes a pattern of misconduct.
- (2) Multiple offenses. *Standards*, § 9.22(d). The Accused committed multiple ethical violations.
- (3) Vulnerability of victim. *Standards*, § 9.22(h). The Accused concedes the vulnerability of his victims.
- (4) Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to the Bar in 1986 and has substantial experience in the practice of law.

B. **Mitigating Circumstances.** The following factors which are recognized as mitigating under the *Standards* exist in this case:

- (1) Absence of a prior disciplinary record. *Standards*, § 9.32(a). The Accused has no prior disciplinary history.
- (2) Absence of a dishonest or selfish motive. *Standards*, § 9.33(b). While the Trial Panel does not condone the failure of the Accused to take care of his personal obligations, the Trial Panel believes that the Accused was not acting with a dishonest or selfish motive for not doing so, but that the Accused genuinely believed that he did not have the ability to do so.
- (3) Cooperative attitude toward proceeding. *Standards*, § 9.33(d). The Accused has displayed a cooperative attitude toward these proceedings.
- (4) Imposition of other penalties or sanctions. *Standards*, § 9.33(k). The Accused was found in contempt for which the court imposed monetary and other sanctions on the Accused.
- (5) Remorse. *Standards*, § 9.33(l). The Trial Panel finds that the Accused is remorseful for his conduct which is the subject of this proceeding.

6. Oregon Case Law.

Sanctions in disciplinary matters are not intended to penalize the accused lawyer, but instead are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998); *In re Kimmel*, 332 Or 480, 488, 31 P3d 414 (2001). In order to protect the public and the integrity of the profession, the court has found it necessary to suspend lawyers who have engaged in similar conduct.

Consistent with the *Standards* and Oregon case law, when a lawyer fails to comply with court-imposed orders and is found in contempt, the lawyer is suspended. *In re Chase*,

339 Or 452, 121 P3d 1160 (2005) (lawyer suspended for 30 days for a single violation where the mitigating circumstances substantially outweighed the aggravating circumstances); *In re Rhodes*, 331 Or 231, 13 P3d 512 (2000) (court imposed a two-year suspension for violations of DR 7-106(A) and DR 1-102(A)(4) for failing to pay child support). The Trial Panel finds that the Accused's misconduct, while similar to the facts of the *Chase* case, are more egregious and that there were mitigating factors in the *Chase* case which were not present nor evidenced by the Accused that would support the same result.

### **Conclusion**

The Bar has asked the Trial Panel to suspend the Accused for 120 days. We consider this sanction to be excessive. When the violations committed by the Accused are taken as a whole, factoring in the appropriate aggravating and mitigating circumstances, and in light of prior case law, the Accused should be suspended from the practice of law for 60 days.

### **Order**

IT IS HEREBY ORDERED that the Accused, J. Stefan Gonzalez, be, and upon the effective date of this Order shall be, suspended from the practice of law for a period of 60 days.

DATED this 28th day of November 2010.

/s/ Deanna L. Franco

Deanna L. Franco  
OSB No. 01047  
Trial Panel Chair

/s/ James C. Edmonds

James C. Edmonds  
OSB No. 86184

/s/ Joan J. LeBarron

Joan J. LeBarron, Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-127  
)  
ARTHUR P. SLININGER, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.3 and RPC 1.4(a). Stipulation for Discipline. Public Reprimand.  
Effective Date of Order: January 27, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.3 and RPC 1.4(a).

DATED this 27th day of January 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ Anthony A. Buccino  
Anthony A. Buccino, Region 7  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Arthur P. Slininger, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Oregon State Bar continuously since that time, having at all relevant times herein his office and place of business in Clackamas County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 15, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 and RPC 1.4(a) of the Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

On or about March 20, 2009, the Accused was appointed to defend Kenneth Burnham (hereinafter “Burnham”) in a criminal case, Clackamas County Case No. CR0900307. With Burnham’s approval, the Accused negotiated a plea agreement pursuant to which Burnham would admit his guilt and receive a 13-month term of imprisonment. Burnham would also agree that he would be ineligible for any alternative sanctions.

6.

On or about May 1, 2009, pursuant to the plea agreement, Burnham entered his guilty plea and was sentenced. Following entry of the judgment on May 1, 2009, the Accused closed Burnham’s file. The Accused did not notice that the judgment erroneously stated that Burnham was ineligible for any form of reduction in sentence. In fact, Burnham had not relinquished, and was eligible for, consideration for good time credit for appropriate institutional behavior under ORS 421.121 (hereinafter “good time credit”).

7.

Soon after his imprisonment, Burnham discovered that the written judgment in his matter erroneously stated he was ineligible for any form of reduction in sentence. Because of

this error, the Department of Corrections intended to deny Burnham good time credit. Burnham and Burnham's parents assert that in May and June 2009, they called the office of the Accused to report the error in the written judgment and seek the assistance of the Accused in getting it corrected. Burnham and Burnham's parents did not reach the Accused and the Accused asserts that he did not receive any telephone messages left by Burnham or Burnham's parents.

8.

On or about July 9, 2009, Burnham wrote a letter to the Accused describing the error in the judgment and the lack of success he and his parents had experienced reaching the Accused by telephone. Burnham demanded that the Accused either assist in getting the error corrected or notify Burnham that he would not do so and forward Burnham's file so that Burnham could pursue other means of getting the judgment corrected. Although the Accused received Burnham's letter, and retrieved Burnham's file, the file was mistakenly returned to the Accused's closed files and the Accused took no action in response to the letter.

9.

Burnham asserts that he made additional calls to the Accused's office for assistance getting the judgment corrected. The Accused asserts that he did not learn of any such calls.

10.

In February 2010, Burnham contacted the Oregon State Bar for assistance in getting a response from the Accused. After the Accused was contacted by Client Assistance Office staff at the Oregon State Bar with respect to Burnham's difficulties with the Accused, the Accused contacted the Clackamas County District Attorney regarding the erroneous written judgment and the court issued a corrected written judgment soon thereafter.

### **Violations**

11.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 10, he neglected a legal matter, in violation of RPC 1.3, and failed to promptly respond to reasonable inquiries from his client, in violation of RPC 1.4(a).

### **Sanction**

12.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental

state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to act with reasonable diligence and promptness in representing a client. *Standards*, § 4.4.
- b. **Mental State.** “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 9. The Accused’s failure to respond or take action in response to communications from Burnham was the result of negligence.
- c. **Injury.** There was substantial potential injury as good time credit could have reduced Burnham’s term of imprisonment by as much as 20 percent and the judgment was not corrected to permit good time credit until Burnham had nearly served the entire term of his sentence. There was actual injury as a result of the anxiety and frustration Burnham suffered.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused, having been admitted to practice in 1979, had substantial experience in the practice of law at the time of his misconduct. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a selfish or dishonest motive. *Standards*, § 9.32(b).
  3. Cooperative attitude toward proceedings. *Standards*, § 9.32(e). The Accused was forthcoming about the events and showed a cooperative attitude toward the disciplinary proceeding.
  4. Remorse. *Standards*, § 9.32(l). The Accused has expressed remorse for his failure to act more diligently.

13.

Under the *Standards*, 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. *Standards*, § 4.43.

14.

Oregon case law is in accord. See, e.g., *In re Cohen*, 330 Or 489, 8 P3d 953 (2000) (reprimand for neglect of a legal matter where lawyer had prior admonitions for neglect, but significant mitigating factors outweighed aggravating factors); see also *In re Burns*, 22 DB Rptr 325 (2008) (reprimand for neglect of a legal matter and failure to communicate with a client where mitigating factors outweighed aggravating factors); *In re Lebenbaum*, 19 DB

Cite as *In re Slininger*, 25 DB Rptr 8 (2011)

Rptr 154 (2005) (where mitigating factors outweighed aggravating factors, lawyer reprimanded for neglect of a legal matter that included a failure to communicate with his client).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded, the sanction to be effective upon approval of this stipulation.

16.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 13th day of January 2011.

/s/ Arthur P. Slininger

Arthur P. Slininger

OSB No. 79397

EXECUTED this 18th day of January 2011.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 03222

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 10-148
	)	
SCOTT J. RUBIN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Susan Roedl Cournoyer
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 3.4(c) and RPC 8.4(a)(4). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	February 16, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 3.4(c) and RPC 8.4(a)(4).

DATED this 16th day of February 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Scott J. Rubin, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused, a member of the Bar of the Commonwealth of Pennsylvania (“Pennsylvania Bar”), was admitted to appear pro hac vice in a matter pending before the Public Utility Commission of Oregon (“PUC”). The Accused is subject to the Bar’s disciplinary authority with respect to his acts and omissions occurring during his pro hac vice admission. RPC 8.5(a); UTCR 3.170(1)(d). Discipline imposed in this proceeding may subject the Accused to reciprocal or other discipline in Pennsylvania.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On December 11, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 3.4(c) and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

The Accused represented the International Brotherhood of Electrical Workers, Local 89 (“IBEW”), which the PUC had permitted to intervene in The Matter of Verizon Communications, Inc., and Frontier Communications Corporation, PUC UM 1431 (“the Verizon matter”).

On July 17, 2009, the PUC entered a Superseding Highly Confidential Protective Order (“Protective Order”) governing the acquisition and use of confidential information in the Verizon matter. Pursuant to the Protective Order, parties responding to discovery requests were permitted to designate and label documents or information they considered to be confidential when they produced the material to other parties in the Verizon matter. The Protective Order allowed a party to challenge by motion the designation of any document or information as confidential. All persons who were given access to information designated confidential by reason of the Protective Order were prohibited from using or disclosing that information for any purpose other than to prepare for and conduct the Verizon matter before the PUC and were obligated to keep the confidential information secure. The Protective

Order also required each person for whom access to confidential information was sought to sign and file with the PUC an agreement certifying that he or she had read, understood, and agreed to be bound by the terms of the Protective Order (“confidential information agreement”).

On July 17, 2009, the Accused signed a confidential information agreement stating that he had read and understood, and agreed to be bound by, the Protective Order.

On July 18, 2009, Randy Barber (“Barber”), an outside expert hired by IBEW, also signed a confidential information agreement stating that he had read and understood, and agreed to be bound by, the Protective Order.

Pursuant to the Protective Order, Verizon provided discovery to IBEW on September 9, 2009. The discovery materials included a document showing Verizon’s largest shareholders and the number of shares each held; the document was marked “Highly Confidential—Use Restricted per [Protective Order]” (“Verizon document”). A footnote in the Verizon document identified public filings with the Securities and Exchange Commission as the source of the shareholder information.

Upon reviewing the Verizon document, the Accused concluded that the shareholder information it contained was not confidential under the terms of the Protective Order. However, the Accused did not file a motion or otherwise challenge Verizon’s designation of this information as confidential.

On September 11, 2009, the Accused filed a motion in a proceeding pending before the Pennsylvania Public Utilities Commission (“PA Commission”), in which he described the shareholder information contained in the Verizon document. The Accused also filed an affidavit signed by Barber, which affidavit further described the shareholder information contained in the Verizon document.

On September 17, 2009, Verizon filed a motion to terminate IBEW’s participation in the Verizon matter based, inter alia, on the Accused’s use of Verizon’s discovery document in the motion he filed before the PA Commission. By order dated October 14, 2009, the PUC revoked IBEW’s status as an intervening party in the Verizon matter.

### **Violations**

#### **6.**

The Accused admits that he knowingly disobeyed an obligation under the rules of a tribunal in violation of RPC 3.4(c) and that he engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

## Sanction

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the Accused’s mental state, (3) the extent of actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to the legal system to comply with applicable orders or rules. *Standards*, §§ 6.0, 6.2.
- b. **Mental State.** The Accused acted on a belief that the Protective Order did not apply to public information contained within a confidential document. However, he knowingly failed to challenge Verizon’s designation of the shareholder information as confidential and knowingly used that information without first obtaining relief under the Protective Order. Therefore, his mental state was, in part, knowing (defined as acting with the conscious awareness of the nature or attendant circumstances of his conduct but without a conscious objective or purpose to accomplish a particular result). The Accused also acted with negligence (defined as a failure to heed a substantial risk that circumstances exist or that a result will follow when such failure deviates from the standard of care that a reasonable lawyer would exercise in the situation) when he concluded that describing (while not disclosing) the shareholder information did not constitute “using” information designated as confidential under the Protective Order. *Standards*, at 7.
- c. **Injury.** The legal system was injured by the Accused’s misconduct in that the PUC was required to expend time and attention addressing the Accused’s violation of the Protective Order. Verizon was potentially injured by the Accused’s misconduct because it may have incurred the expense of preparing additional pleadings in response to the Accused’s violation of the Protective Order.
- d. **Aggravating Circumstances.** There are no aggravating circumstances present in this matter.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a); and
  2. Full and free disclosure and a cooperative attitude toward the bar investigation and proceedings. *Standards*, § 9.32(e).

8.

*Standards*, §6.22, provides that suspension is generally appropriate when a lawyer knowingly violates a court order or rule and there is interference with a legal proceeding or injury or potential injury to a client or a party.

*Standards*, § 6.23, provides that reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

9.

Oregon case law supports the imposition of a public reprimand in this case. *See In re Dodge*, 22 DB Rptr 271 (2008) (attorney disclosed to a Bureau of Labor and Industries investigator the existence and terms of a confidential mediation settlement offer his client's employer had extended in a workers' compensation mediation); *In re Carusone*, 20 DB Rptr 231 (2006) (attorney filed two motions and obtained two orders ex parte without complying with ORCP 80 (requiring notice to opposing party before appointment of a receiver) and local court rules); *In re Foley*, 19 DB Rptr 205 (2005) (attorney served three records subpoenas on opposing party's credit union without providing notice to opposing counsel, in violation of ORCP 39 and 55 and despite a warning from opposing counsel after the first subpoena was improperly served); *In re Egan*, 13 DB Rptr 96 (1999) (attorney filed two improper motions in violation of court's specific instruction).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 3.4(c) and RPC 8.4(a)(4).

11.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re Rubin*, 25 DB Rptr 13 (2011)

EXECUTED this 3rd day of February 2011.

/s/ Scott J. Rubin

Scott J. Rubin

EXECUTED this 10th day of February 2011.

OREGON STATE BAR

By: /s/ Susan Roedl Cournoyer

Susan R. Cournoyer

OSB No. 863381

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 09-35 and 10-78
	)	
A. E. BUD BAILEY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Sonia A. Montalbano, Amber Bevacqua-Lynott
Counsel for the Accused:	Bradley F. Tellam
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.2(a) and RPC 1.4. Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	February 16, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.2(a) and RPC 1.4.

DATED this 16th day of February 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

A. E. Bud Bailey, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 1987, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Clark County, Washington.

3.

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

4.

On September 14, 2010, a Fourth Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), relating to two separate matters. The first matter ("the AutoZone matter") alleged violations of California RPC 3-310(C)(3) (current client conflict of interest) and California RPC 2-100(A) (communication with a represented party). The second matter ("the US Bank matter") alleged violations of Oregon RPC 1.2(a) (failure to abide by a client's decision whether to settle a matter) and Oregon RPC 1.7(a)(2) (personal interest conflict of interest).

On December 7, 2010, the SPRB authorized an additional charge against the Accused in the US Bank matter, alleging violation of Oregon RPC 1.4 (failure to keep a client reasonably informed and to communicate sufficient to allow the client to make informed decisions regarding the representation). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

## **Facts**

### **The AutoZone Matter**

5.

Upon further factual and legal inquiry, the charges alleged in the AutoZone Matter are, upon approval of this stipulation, dismissed.

### **The US Bank Matter**

6.

Prior to October 2007, the Accused, and the firm of Bailey, Pinney & Associates, LLC, undertook to represent current and former employees of US Bank in a class action employment wage case against US Bank (“US Bank claims”). Among the individuals with potential US Bank claims was Kevin Nunn (“Nunn”). After that class action complaint was certified, and during the class claims process, Nunn made a claim for damages against US Bank by filing a claim form with the court. Subsequently, the class action was decertified.

7.

After decertification of the class action, the Accused processed more than 200 individual claims against US Bank. On or around July 18, 2009, the Accused spoke with Nunn by telephone. Thereafter, on or around July 23, 2009, the Accused sent Nunn a fee agreement and engagement letter for services of Bailey, Pinney & Associates, LLC, with respect to his individual claim against US Bank. The letter stated: “Thank you for selecting our law firm to represent you in your wage claim against U.S. Bank. Please feel free to call us any time to discuss this fee agreement or the progress on your case.” Although Nunn never returned this agreement, the Accused understood from his July 18 conversation that Nunn authorized him to proceed with his claim for damages.

8.

Without confirming that a signed fee agreement was returned, and without further confirming with Nunn that he wanted the Accused or Bailey, Pinney & Associates to represent him in connection with his potential US Bank claim, the Accused drafted a complaint against US Bank. Included with the complaint served on US Bank was an offer of judgment that sought the full recovery of Nunn’s claim. The Accused asserts that he caused copies of the complaint and offer of judgment to be sent to Nunn (and has copies of an August 17, 2009, letter and postmarked envelope sending the complaint and other documents), but Nunn did not respond and asserts that he did not receive them.

9.

On or about August 13, 2009, US Bank tendered to the Accused a lump sum counteroffer of judgment for Nunn’s claim for less than a full settlement of all of Nunn’s claims. The Accused attempted to contact Nunn by telephone in response to this counteroffer, and left him at least one message that the Accused needed to talk to him. Nunn did not return the Accused’s call(s). The Accused does not have documentation that the counteroffer was sent to Nunn by mail. On August 17, 2009, shortly before the counteroffer’s expiration, after Nunn had not responded to the Accused’s attempt to contact him and without further consultation with or authorization from Nunn, the Accused rejected US Bank’s counteroffer because the Accused had no authority from Nunn to accept the offer.

10.

The Accused wrote to US Bank suggesting that US Bank segregate Nunn's claim from attorney fees and costs. At that time, the Accused did not copy Nunn with this correspondence. On or around August 19, 2009, US Bank tendered a second counteroffer which included a 100% recovery for Nunn on his claim and which segregated attorney fees and costs to be paid by US Bank. The Accused did not copy Nunn with this counteroffer.

11.

The Accused did not speak with Nunn or send the offer to him by mail. Despite the fact that he did not consult with Nunn or obtain his permission to do so, the Accused accepted this second offer on behalf of Nunn on August 20, 2009.

### **Violations**

12.

The Accused admits that by settling Nunn's US Bank claim without speaking with him or obtaining his permission to do so, the Accused failed to abide by his client's decisions concerning the objectives of representation and consult with him as to the means by which they were to be pursued, in violation of RPC 1.2(a). The Accused further admits that he failed to keep Nunn reasonably informed about the status of a matter or explain a matter to the extent reasonably necessary to permit Nunn to make informed decisions regarding the representation, in violation of RPC 1.4.

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.7(a)(2) is dismissed.

### **Sanction**

13.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty of diligence to his client, including his duty to adequately communicate with him. *Standards*, § 4.4.
- b. **Mental State.** The Accused acted negligently and knowingly. "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. *Standards*, at 9. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow,

which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

The Accused was negligent in failing to follow up with Nunn to obtain a signed fee agreement before he initiated a legal proceeding on his behalf. The Accused acted knowingly when he responded to settlement offers from US Bank without speaking with Nunn or obtaining his authority to settle Nunn's US Bank claims.

- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Although Nunn did not initiate the complaint against the Accused, he was actually injured to the extent that the Accused filed a complaint that Nunn asserts he decided not to pursue. Nunn was also actually injured by not participating in the decision to settle the claim. However, the Accused did obtain the full amount of Nunn's prayer, which the Accused calculated to be the statutory penalty to which Nunn was entitled and which Nunn had claimed in the class action. The Accused collected his attorney fees from US Bank, did not take any portion of the settlement paid to Nunn, and Nunn accepted the settlement monies tendered to him by the Accused.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. A prior record of discipline. *Standards*, § 9.22(a). The Accused was reprimanded in 2007 for violations of DR 5-101(A) (personal interest conflict) and DR 5-104(A) (business with a client). *In re Bailey*, 21 DB Rptr 64 (2007).
  - 2. Multiple offenses. *Standards*, § 9.22(d).
  - 3. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to practice law in Oregon in 1987 and in Washington in 2003, and practices primarily in employment law.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a dishonest motive. *Standards*, § 9.32(b).
  - 2. Remorse. *Standards*, § 9.32(l). The Accused has expressed remorse for acting without Nunn's authority.

14.

Under the *Standards*, a 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. A suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standards*, §§ 4.42, 4.43.

15.

Oregon cases support the imposition of a reprimand or short suspension under similar circumstances. *See, e.g., In re Dames*, 23 DB Rptr 105 (2009) (attorney reprimanded for conceding a defense motion for summary judgment without notice to his client, knowing that the client desired to proceed with the claim); *In re Bottoms*, 23 DB Rptr 13 (2009) (attorney reprimanded when he failed to appear for court hearings related to his client's criminal case, did not notify the court or his client in advance about his intent or inability to appear, did not fully explain the district attorney's settlement offer to his client, and failed to otherwise keep the client reasonably informed about the status of the case); *In re Clarke*, 22 DB Rptr 320 (2008) (attorney suspended for 60 days after she decided that client's appeal had no merit, so elected not to file a brief; however, she did not withdraw, but allowed the appeal to be dismissed, and then failed to disclose the dismissal to the client); *In re Gorham*, 17 DB Rptr 159 (2003) (attorney reprimanded when he filed a motion to change the venue of a client's postconviction relief proceeding contrary to the client's instruction not to do so).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 1.2(a) and RPC 1.4, the sanction to be effective upon approval by the Disciplinary Board.

17.

This Stipulation for Discipline has been reviewed by Disciplinary Counsel of the Oregon State Bar and approved by the SPRB. The parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 8th day of February 2011.

/s/ A. E. Bud Bailey

A. E. Bud Bailey  
OSB No. 871577

EXECUTED this 11th day of February 2011.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott  
OSB No. 990280  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-40
	)	
MARSHA M. MORASCH,	)	SC S059134
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	Wayne Mackeson
Disciplinary Board:	None.
Disposition:	Violations of RPC 8.1(a)(2) and RPC 8.1(c). Stipulation for Discipline. One-year suspension, six months stayed with conditions, two-year probation.
Effective Date of Order:	February 17, 2011

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. The Accused is suspended from the practice of law in the State of Oregon for a period of one year, effective the date of this order. Six months of the suspension is stayed pending satisfactory completion of the probation terms set forth in the Stipulation. If the Accused satisfactorily completes the probation terms, she shall be permitted to reinstate to action membership in the Oregon State Bar pursuant to BR 8.3. If the Accused does not satisfactorily complete the probation terms, then she shall remain suspended for the remaining six-month period and she will be subject to the requirements of BR 8.1 upon application for reinstatement.

February 17, 2011

/s/ Paul J. De Muniz

DATE

CHIEF JUSTICE

**STIPULATION FOR DISCIPLINE**

Marsha M. Morasch, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 27, 1990, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

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

4.

On February 4, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 8.1(a)(2) and RPC 8.1(c) of the Oregon Rules of Professional Conduct. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Facts**

5.

Pursuant to ORS 9.568, the State Lawyers’ Assistance Committee of the Oregon State Bar (hereinafter “SLAC”) is authorized to investigate and resolve complaints or referrals regarding lawyers whose performance or conduct may impair their ability to practice law or their professional competence. At all relevant times herein, RPC 8.1(c) requires a lawyer who is the subject of a complaint or referral to SLAC to respond to the initial inquiry of SLAC, to furnish any documents in the lawyer’s possession relating to the matter under investigation by SLAC, to participate in interviews with SLAC, and to participate in and comply with a remedial program established by SLAC or its designees.

6.

In or around January 2008, the Accused was referred to SLAC by a circuit court judge. SLAC determined the Accused to be appropriately within its jurisdiction, required her to submit to an independent alcohol evaluation, and required that she provide to SLAC a copy of this evaluation.

7.

On or about May 29, 2008, SLAC requested the Accused to sign a release that would allow the independent alcohol evaluator to communicate to SLAC that the Accused had made and kept an appointment for an evaluation and to provide SLAC with a copy of the evaluation and treatment recommendations. The Accused did not sign such a release, but instead granted permission to only one member of SLAC—and not the whole committee—to communicate with the independent alcohol evaluator and to see the alcohol evaluation and treatment recommendations.

8.

By letter dated September 22, 2008, SLAC required the Accused to, on or before October 6, 2008, enter an outpatient treatment program and attend various meetings as recommended by the independent alcohol evaluator. SLAC also required the Accused, on or before October 6, 2008, to sign and return to SLAC the following documents: SLAC Monitoring Agreement, Authorization to Use/Disclose Protected Health Information, Consent for the Release of Information to SLAC, and Recovery Program Meeting Attendance Log. The Accused did not enter an outpatient treatment program, attend the recommended meetings, sign and return the documents SLAC had requested by October 6, 2008, or otherwise respond to SLAC's September 22, 2008, letter.

9.

By letter dated October 24, 2008, SLAC again required the Accused to perform the actions and submit the documents described in paragraph 8 above on or before November 3, 2008. The Accused did not enter an outpatient treatment, attend the recommended meetings, sign and return the documents SLAC requested, or otherwise respond to SLAC's October 24, 2008, letter.

10.

On or about February 27, 2009, the Oregon State Bar received a complaint from SLAC concerning the Accused's conduct. On March 2, 2009, the Disciplinary Counsel's Office ("DCO") forwarded a copy of SLAC's complaint to the Accused and requested her response by March 23, 2009. The Accused made no response. On April 9, 2009, DCO again requested the Accused's response to SLAC's complaint by April 16, 2009. The Accused made no response.

### **Violations**

11.

The Accused admits that by engaging in the conduct described in this stipulation, she violated RPC 8.1(a)(2) and RPC 8.1(c).

## Sanction

12.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated her duties as a professional. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted knowingly.
- c. **Injury.** The Accused caused actual injury to the Bar and to the public by causing the unnecessary expenditure of time and resources and delay in these proceedings. The Accused’s conduct also had the potential for injury to her clients to the extent that it delayed treatment for a period during which the Accused continued to practice law.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused has displayed a pattern of misconduct. *Standards*, § 9.22(c).
  2. The Accused has committed multiple offenses. *Standards*, § 9.22(d).
  3. The Accused has substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  3. Personal or emotional problems. *Standards*, § 9.32(c).

13.

*Standards*, § 7.2, suggests that a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to the public. Oregon case law is in accord. *See In re Wyllie*, 326 Or 447, 952 P2d 550, *reh’g denied*, 326 Or 622 (1998), where the court suspended a lawyer for one year for making several court appearances while intoxicated (*former* DR 1-102(A)(4)) and for a failing to cooperate with SLAC (*former* DR 1-103(F)).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of one year for violations of RPC 8.1(a)(2) and RPC 8.1(c), effective on the day this stipulation is approved by the Supreme Court. However, six months of the suspension shall be imposed and the remaining six months' suspension shall be stayed pending completion of probation as described herein. The Accused shall be permitted to reinstate to active membership in the Bar pursuant to BR 8.3 following the term of imposed suspension, if she can demonstrate to the satisfaction of DCO that she has (a) completed in-patient residential treatment at Astoria Pointe treatment facility, (b) maintained her sobriety since her release from that facility, and (c) followed the ongoing aftercare treatment plan developed for her by Astoria Pointe. If the Accused cannot so demonstrate, she shall remain suspended for the remaining six-month period (total suspension of one year) and be subject to the requirements of BR 8.1 upon application for reinstatement.

Upon reinstatement to active membership in the Bar pursuant to BR 8.3 following the term of imposed suspension, the Accused will be subject to a two-year probation supervised by the State Lawyers Assistance Committee (SLAC) which shall include the following terms and conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9;
- (b) A member of SLAC or such other person approved by Disciplinary Counsel in writing shall supervise the Accused's probation (hereinafter "Supervising Attorney");
- (c) The Accused shall continue substance abuse treatment as determined by SLAC to be appropriate and shall meet at least monthly with SLAC for the purpose of reviewing the Accused's compliance with the terms of the probation. The Accused shall cooperate and comply with all reasonable requests of SLAC, including submitting to random urinalysis, and DCO that will allow the SLAC and DCO to evaluate the Accused's compliance with the terms of this stipulation for discipline;
- (d) In the event the Accused fails to comply with any condition of this stipulation, the Accused shall immediately notify SLAC and Disciplinary Counsel in writing;
- (e) At least quarterly, and by such dates as established by DCO, the Accused shall submit a written report to Disciplinary Counsel, approved in substance by SLAC advising whether she is in compliance or noncompliance with the terms of this stipulation and the recommendations of her treatment providers, and each of them. The Accused's report shall also identify: the dates and purpose of the Accused's meetings with SLAC and the dates of meetings and other

consultations between the Accused and all mental health professionals during the reporting period. In the event the Accused has not complied with any term of probation in this disciplinary case, the report shall also describe the noncompliance and the reason for it, and when and what steps have been taken to correct the noncompliance;

- (f) The Accused hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by SLAC or any other mental health or substance abuse treatment providers of the Accused's compliance or noncompliance with this stipulation and their treatment recommendations to SLAC and DCO. The Accused agrees to execute any additional waivers or authorizations necessary to permit such disclosures;
- (g) The Accused is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation; and
- (h) In the event the Accused fails to comply with any condition of her probation, Disciplinary Counsel may initiate proceedings to revoke the Accused's probation pursuant to BR 6.2(d), and impose the stayed period of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

15.

On or before the date she is reinstated to the practice of law, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$439.65 incurred for her deposition. Should the Accused fail to pay \$439.65 in full by July 31, 2011, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

16.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 19th day of January 2011.

/s/ Marsha M. Morasch

Marsha M. Morasch

OSB No. 900920

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks

OSB No. 751674

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 10-137
	)	
JACK LEVY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Susan Roedl Cournoyer
Counsel for the Accused:	Wayne Mackeson
Disciplinary Board:	None.
Disposition:	Violation of ORS 9.527(2). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	February 24, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of ORS 9.527(2).

DATED this 24th day of February 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Jack Levy, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1993, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On November 12, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of ORS 9.527(2) and RPC 8.4(a)(2) of the Oregon Rules of Professional Conduct. On reconsideration and for purposes of this stipulation only, the SPRB dismissed the RPC 8.4(a)(2) charge. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

ORS 166.065(1)(a)(A) provides that a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting such other person to offensive physical contact. ORS 166.065(4) provides that harassment is a Class A misdemeanor if a person violates ORS 166.065(1)(a)(A) by subjecting the other person to offensive physical contact and the offensive physical contact consists of touching the sexual or other intimate parts of the other person.

On March 4, 2010, the Accused violated the statutes described above when, as a guest at a law office party, he subjected another guest (who was at that time his opposing counsel in a civil dispute) to offensive physical contact.

On July 7, 2010, the Accused pled guilty to and was convicted of one count of Class A misdemeanor harassment.

### Violations

6.

The Accused admits that he was convicted of a misdemeanor involving moral turpitude and thereby violated ORS 9.527(2).

### Sanction

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duties to the public and the profession. *Standards*, §§5.0, 7.0.
- b. **Mental State.** The Accused acted intentionally.
- c. **Injury.** The Accused’s misconduct caused actual injury to the victim, who was harassed and distressed by his violations of her dignity and personal security.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law (the Accused was admitted to practice law in Oregon in 1993). *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Full and free disclosure to Disciplinary Board or cooperative attitude toward the proceedings. *Standards*, § 9.32(e).
  3. Imposition of other penalties or sanctions. As a result of his criminal conviction, the Accused was placed on a 24-month bench probation and was assessed a conviction fee, a bench probation fee, and an ORS chapter 163 assessment. *Standards*, § 9.32(l).
  4. Remorse. *Standards*, § 9.32(m).

8.

Under the *Standards*, suspension is generally appropriate when an attorney knowingly engages in criminal conduct that does not contain the elements listed in *Standards*, § 5.11 (stating that disbarment is appropriate for serious criminal conduct) and that seriously adversely reflects on the lawyer’s fitness to practice. *Standards*, § 5.12.

However, because the mitigating circumstances outweigh the aggravating circumstances in this matter, the parties conclude that a public reprimand is the more appropriate sanction.

9.

Oregon case law does not offer any similar fact patterns for guidance in this matter. However, some cases involving misdemeanor convictions have resulted in public reprimands when there is no prior discipline. *See, e.g., In re Flannery*, 334 Or 224, 47 P3d 891 (2002) (attorney convicted of submitting false application for a driver license (ORS 807.530)); *In re Bernabei*, 23 DB Rptr 1 (2009) (attorney convicted of public indecency (ORS 163.465)); and *In re Arnold*, 22 DB Rptr 13 (2008) (attorney convicted of providing alcohol to a person under the age of 21 years (ORS 471.410(2))).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of ORS 9.527(2), the sanction to be effective as of the date the Disciplinary Board approves this Stipulation for Discipline.

11.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of February 2011.

/s/ Jack Levy

Jack Levy  
OSB No. 933420

EXECUTED this 15th day of February 2011.

OREGON STATE BAR

By: /s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer  
OSB No. 863381  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-80  
)  
LYNN E. ASHCROFT, )  
)  
Accused. )

Counsel for the Bar: Jeffrey D. Sapiro  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 8.4(a)(4). Stipulation for Discipline.  
60-day suspension.  
Effective Date of Order: March 17, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 60 days, effective 14 days after the date of the this order, for violation of RPC 8.4(a)(4).

DATED this 3rd day of March 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Lynn E. Ashcroft, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Oregon State Bar continuously since that time, currently having his office and place of business in Multnomah County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 10, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 8.4(a)(4). The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

At all times relevant to this complaint, the Accused was a circuit court judge in Marion County, Oregon.

6.

In or about March 2008, Heather L. Parks (hereinafter “Parks”) was arrested for possession of controlled substances in Marion County, Oregon. A two-count information was filed against Parks on or about May 5, 2008, later replaced by a two-count indictment in or about June 2008, alleging that she possessed two different controlled substances. *State v. Parks*, Marion County Circuit Court No. 08C-43959. The Accused presided over Parks’ initial appearances in court on or about May 15, 2008, and June 5, 2008.

7.

Subsequent to Parks' initial appearances in court but before trial in her matter, the Accused was in a public eating establishment in Marion County, Oregon, at the same time that Parks and acquaintances of hers were there. The Accused purchased food and drink for a group of patrons that included Parks and her acquaintances. The Accused asserts that when he paid the restaurant tab for Parks and her acquaintances, he did not recall that Parks was a defendant in a criminal case then pending in Marion County Circuit Court. However, Parks immediately reminded the Accused of this such that he knew it before he left the restaurant.

8.

On or about August 12, 2008, at the direction of the Accused, the Accused's judicial assistant requested of court administration staff that *State v. Parks* be specially assigned to the Accused and immediately be scheduled for a status conference before the Accused, which occurred. This special assignment deviated from the established and typical procedure for assigning circuit court judges to criminal cases pending in Marion County.

9.

Thereafter, Parks waived her right to a jury trial and the case of *State v. Parks* came before the Accused for trial on or about October 15, 2008. The Accused failed to make any disclosures to the parties or their counsel that he knew Parks or that he had purchased food and drink for her while her criminal case was pending.

10.

On or about October 15, 2008, the Accused found Parks not guilty of all charges. The Accused asserts that his decision was based solely on his consideration of factors related to the criminal prosecution and not on any personal interest he had in Parks. However, the State of Oregon presented evidence and authority at trial that supported a guilty finding on at least one of the charges.

11.

Subsequent to November 15, 2008, Parks initiated contact with the Accused, who then engaged in a personal relationship with Parks, purchasing meals for her, giving her gifts, loaning her money, and exchanging numerous electronic messages with her, some of a sexual nature. There is no evidence that the Accused and Parks engaged in a physical sexual relationship at any time.

12.

In or about January 2010, the Oregon Department of Justice began investigating the Accused and his relationship with Parks. Without admitting guilt or fault in any respect, the Accused resigned his position as a circuit court judge on February 3, 2010.

13.

While the Accused was a circuit court judge, he was subject to the Oregon Code of Judicial Conduct, including: JR 1-101(A) (observe high standards of conduct to preserve integrity and impartiality of judiciary), JR 1-101(C) (conduct adversely reflecting on character or fitness), JR 1-101(E) (allowing social relationship to influence judicial conduct or judgment), JR 1-101(F) (use of position to advance private interests), JR 2-102(B) (ex parte communications), JR 2-102(D) (disclosure of communication that may influence the outcome of an adversary proceeding), JR 2-106(A) (disqualification when impartiality may be questioned), JR 2-106(D) (disclosure of basis for disqualification), JR 2-107 (deciding matters on the facts and applicable law), and JR 2-110(B) (acting with bias or prejudice toward litigants).

The parties acknowledge that allegations of judicial misconduct are typically investigated and, if appropriate, adjudicated by the Oregon Commission on Judicial Fitness and Disability (hereinafter “the Commission”). In this case, the Accused’s resignation as a circuit court judge rendered any consideration by the Commission moot.

In this proceeding, the Bar asserts that in addition to any violations of the Code of Judicial Conduct that the Accused may have committed, the Accused’s conduct violated RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct, and that the Bar has jurisdiction to take action on that violation. The Accused does not dispute the Bar’s assertion of jurisdiction in this matter.

14.

By purchasing food and drink for a group of patrons that included Parks while her criminal case was pending, arranging for the case of *State v. Parks* to be specially assigned to him, failing to disclose his prior contact with Parks at the time *State v. Parks* came to trial, rendering a verdict in the case, and thereafter engaging in a personal relationship with Parks, the Accused engaged in conduct prejudicial to the administration of justice.

### **Violations**

15.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 14, he violated RPC 8.4(a)(4) of the Rules of Professional Conduct.

### **Sanction**

16.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “Standards”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental

state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** As a judicial officer, the Accused had a duty to maintain the public trust. *Standards*, § 5.2.
- b. **Mental State.** The Accused asserts that he did not intentionally or knowingly violate the Rules of Professional Conduct, but did so negligently, which is defined in the *Standards* as a failure of the lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at p. 7. Under RPC 8.4(a)(4), no particular mental state is required to establish a violation because the focus of the rule is on the effect a lawyer's conduct has on the administration of justice, rather than the lawyer's mental state when engaging in the conduct. *In re Claussen*, 322 Or 466, 482, 909 P2d 862 (1996).
- c. **Injury.** In determining the appropriate sanction, consideration is given to both actual and potential injury. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, the State of Oregon was denied the opportunity to learn about the Accused's prior interaction with the defendant in *State v. Parks* and to seek trial before a different judge. There was also potential injury in this case, to the extent that members of the public, upon learning of the facts, could have formed an adverse opinion about the integrity of the Oregon judicial system, concluding that justice in that system depends on who a party knows within the system and whether they have a personal relationship with the judge.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused has substantial experience in the law, both as a practicing lawyer and as a judge. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused has no prior disciplinary record. *Standards*, § 9.32(a)
  2. The Accused fully cooperated in the bar proceedings, including initiating his own report of the matter to the Bar. *Standards*, § 9.32(e);
  3. The Accused resigned his judicial position. *Standards*, § 9.32(k);
  4. The Accused is remorseful for his conduct. *Standards*, § 9.32(l).

17.

Under the *Standards*, suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process. *Standards*, § 5.22. Reprimand is generally appropriate when a lawyer in an official or governmental position

negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process. *Standards*, § 5.23.

18.

This case presents unique facts such that there is no Oregon case on point to guide a determination of sanction. In a judicial misconduct case, a judge was censured (the judicial disciplinary equivalent of a reprimand) for not disqualifying herself from a criminal case after she had interaction with the defendant in a restaurant. *In re Baker*, 335 Or 591, 74 P3d 1077 (2003). A reprimand is often imposed in lawyer discipline cases involving conflicts of interest when the accused lawyer fails to make an appropriate conflicts disclosure. *In re Carey*, 307 Or 315, 767 P2d 438 (1989); *In re Petshow*, 23 DB Rptr 55 (2009); *In re Kloos*, 22 DB Rptr 42 (2008). Where there is evidence, however, that a judge has used court resources to further his own private interests, there is authority for a suspension. *In re Gallagher*, 326 Or 267, 951 P2d 705 (1998).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for a period of 60 days for violation of RPC 8.4(a)(4), the sanction to be effective 14 days after this stipulation for discipline is approved by the Disciplinary Board.

20.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 22nd day of February 2011.

/s/ Lynn E. Ashcroft

Lynn E. Ashcroft  
OSB No. 791504

EXECUTED this 23rd day of February 2011.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro

Jeffrey D. Sapiro  
OSB No. 783627  
Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-06  
)  
ANTONIO PORRAS JR., )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None.  
Disciplinary Board: William G. Blair, Chair  
Colin D. Lamb  
Allen M. Gabel, Public Member  
Disposition: Violations of RPC 8.4(a)(2) and RPC 8.4(a)(3).  
Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: March 8, 2011

**TRIAL PANEL OPINION**

**Procedural History**

This matter is before this Trial Panel of the Oregon State Bar Disciplinary Board on a Formal Complaint charging violations of the Oregon State Bar Rules of Professional Conduct arising out of theft and misappropriation of client funds by the Accused.

On February 9, 2010, the Oregon State Bar filed its Formal Complaint. On April 13, 2010, the Accused was personally served with a copy of the Formal Complaint and Notice to Answer. The Accused did not respond to the Bar's Formal Complaint.

On May 12, 2010, an Order of Default was entered in this proceeding. By virtue of this Order, the Bar's factual allegations against the Accused are deemed to be true. BR 5.8(a).

On December 7, 2010, an Order for Written Submissions as to Sanctions was entered requiring that the parties submit, by December 28, 2010, written memoranda, affidavits, and exhibits in support of their respective positions and recommendations as to appropriate sanctions.

On December 27, 2010, the Bar filed its Sanction Memorandum and supporting documents. The Accused has, as of the date of this Opinion and Order, filed nothing.

### **Findings and Conclusions as to Violations**

Because of the entry of default, the facts alleged in the Second Amended Formal Complaint are deemed to have been conclusively established. Additional facts relating to sanctions and restitution are established through the Bar's submission of evidence regarding sanctions. The Trial Panel has reviewed the facts as established by default, considering de novo the conclusions to be drawn therefrom. We summarize the facts in the Formal Complaint, drawing our own conclusions as follows:

The Accused was, at all times material herein, an attorney at law, admitted to practice by the Supreme Court of the State of Oregon since 1992. As of the date of the Formal Complaint and the facts alleged therein, he maintained his office and place of business in Columbia County, Oregon. The Accused has no prior disciplinary history with the Oregon State Bar.

From January 2006 to December 2008, the Accused was employed as Executive Director of the Columbia County Indigent Defense Corporation, an Oregon nonprofit corporation doing business as The Columbia County Consortium ("CCC"). CCC provided indigent defense services to persons charged with crimes in Columbia County as ordered by the Columbia County Circuit Court, through a group of lawyers under contract to CCC. The CCC received monthly payments from the State of Oregon to fund, among other things, employee salaries and compensation for the services of its contract lawyers. As Executive Director of CCC, the Accused was solely responsible for distributing the money received by CCC to its contracted lawyers, and for paying CCC's other obligations, including payroll. For his responsibilities as Executive Director, the Accused was paid a regular monthly compensation, and received a set monthly fee for office expenses.

Between January 2006 and the end of December 2008, the Accused paid himself additional compensation totaling \$39,169.48<sup>1</sup> without the knowledge or authority of the CCC's Board of Directors (by whom he was appointed and to whom he was answerable), and intentionally converted those funds to his own use and benefit.

At the end of the 2006–2007 fiscal year, contract attorney Timothy Pizzo noticed that his total compensation for that fiscal year was significantly less than for the preceding year. Pizzo contacted the Accused and asked why he had been under-compensated for that fiscal year. The Accused responded that the numbers were down for the CCC contract, and that

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<sup>1</sup> This amount is pleaded by the Bar in its Formal Complaint, and we accept this as conclusively established by the Accused's default. We note that in its Sanctions Memorandum the Bar uses a higher figure. Because the difference is immaterial in our analysis, and both are several times the threshold for Aggravated Theft, we rely on the amount pleaded in the Formal Complaint.

Pizzo had received his proper share of the money from the contract. This representation was false and material, and the Accused knew that it was false and material when he made it.

In fact, the Accused knew and failed to disclose to Pizzo that he had advanced himself several thousand dollars from the CCC bank account, which substantially contributed to the shortage of funds available for distribution to CCC contract attorneys, including Pizzo. This was a material fact of which the Accused was aware when he responded to Pizzo without disclosing it.

On November 5, 2008, the Board of CCC directed its treasurer to do a review of the accounting since the beginning of the 2007–2008 fiscal year. On December 8, 2008, the Accused wrote a letter to the CCC treasurer outlining reasons for the “drain” on CCC funds. In that letter he disclosed that he had “drawn future monthly payments as an attorney under the state contract against the [CCC] reserve funds.” He acknowledged that he had “overpaid [him]self year to date.”

Between January 2006 and December 2008, the Accused engaged in acts and conduct amounting to the commission of the crime of Theft in the First Degree (ORS 164.055), a Class C felony, and Aggravated Theft in the First Degree (ORS 164.057), a Class B felony.

Section 8.4(a) of the Oregon State Bar Rules of Professional Conduct (RPC) provided, in material part:

- (a) It is professional misconduct for a lawyer to:
  - (2) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
  - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law;

When the Accused took and converted the funds of CCC to his own use without knowledge or approval of CCC, the Accused violated RPC 8.4(a)(2). This conduct amounted to conduct punishable as a felony under Oregon law.

When the Accused made false representations and failed to make material representations to Timothy Pizzo, knowing that these representations were false and intending that his misrepresentations and failure to disclose material facts would deflect and satisfy Pizzo’s inquiries into why he was under-compensated, the Accused violated RPC 8.4(a)(3).

### **Sanction**

The Oregon Supreme Court refers us to the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct. *In re Eakin*, 334 Or 238, 257, 48 3d 147 (2002).

### **ABA Standards**

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the general duty violated in the specific rule, the lawyer's mental state, and the actual or potential injury caused by the conduct. Once these factors are analyzed, the panel or court makes a preliminary determination of baseline sanctions, after which it adjusts the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances.

#### ***General duties violated.***

The Accused's violation of duties set forth in RPC 8.4(a)(2) (engaging in criminal conduct reflecting on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) violated both his general duty to preserve client property (*Standards*, § 4.1) and his general duties as a professional (*Standards*, § 4.6). The Accused's knowing misrepresentations to Timothy Pizzo likewise violated his general duties as a professional (*Standards*, § 4.6). His theft of funds from the nonprofit corporation of which he was executive director was an especially grave breach of his duty as a lawyer.

#### ***Mental state.***

"Intent" is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 7.

We have found that the Accused knowingly misappropriated funds of CCC as alleged in the Formal Complaint. We also find that this conduct was intentional.

Knowledge and intent are further established by the Accused's knowing and intentional misrepresentations to Pizzo, made for the purpose of setting to rest inquiries into facts that would have revealed the Accused's misappropriation of CCC funds. In short, the Accused not only stole CCC money, he actively attempted to cover up his theft.

#### ***Extent of actual or potential injury.***

For the purposes of determining an appropriate disciplinary sanction, the Trial Panel takes into account both actual and potential injury. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The *Standards* define "injury" as "harm to the client, the public, the legal system or the profession which results from a lawyer's conduct." "Potential injury" is harm to the client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer's conduct. *Standards*, p. 7. An injury does not need to be actual, but only potential to support the imposition of sanction. *In re Williams*, 314 Or at 547.

The Accused caused actual and potential injury to CCC, to the lawyers working under contract to CCC in the defense of indigent persons accused of crimes, the legal system, and the profession. In this regard the facts already recited speak for themselves as to the actual and potential injury caused by the Accused's conduct.

***Baseline sanction.***

Before consideration of aggravating or mitigating circumstances, the Panel has reviewed this case in light of the following standards to determine a baseline or presumptive sanction:

“Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.” *Standards*, § 4.11.

“Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.” *Standards*, § 7.1.

While there may be a nice distinction as to whether CCC was a “client” of the Accused, the simple fact is that under these facts, the CCC effectively stood in the position of a client within the spirit of *Standards*, § 4.1. The Accused was not only the executive director of CCC and in exclusive administrative control of its funds, but was one of the attorneys who contracted with CCC to provide indigent defense services. While apparently under-paying other contract attorneys, he overpaid himself.

The Panel finds that disbarment is the clearly appropriate baseline sanction under the *Standards*.

***Aggravating and mitigating circumstances.***

The following factors which are recognized as aggravating under the *Standards* exist in this case:

1. A dishonest or selfish motive. *Standards*, § 9.22(b). The Accused acted with dishonest or selfish motives in misappropriating funds lying in hope of avoiding the consequences of his misconduct.
2. A pattern of misconduct. *Standards*, § 9.22(c). The Accused engaged in a pattern of misconduct, making unauthorized distributions of CCC reserve funds to himself on multiple occasions.
3. Multiple offenses. *Standards*, § 9.22(d). The Accused has violated two rules, one to cover up the other.
4. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused has practiced law since 1992 and had substantial experience at the time he committed these violations.

The only facts disclosed by this record that might be considered as mitigating are that the Accused has no prior record of discipline, and that he did disclose his defalcations in his letter of December 4, 2008, to the CCC treasurer, and thereafter agree to make restitution by entering into an unsecured promissory note in favor of CCC. We cannot, however, find these facts as significantly mitigating on the record before us.

Absence of a prior record of discipline has not been regarded by the Oregon Supreme Court as significant in light of theft of funds by a lawyer in the course of his practice. *See* discussion of Oregon case law, *infra*.

The Accused's December 4 disclosure to the CCC treasurer was made at a time when discovery was certain upon an audit of CCC financial records. In that light, it was not a truly voluntary disclosure with no threat of being otherwise discovered, but rather an attempt to blunt the repercussions of impending discovery.

The Accused's promissory note was made on July 3, 2009, after he had been removed as Executive Director, and was to be paid by deductions from fees he might earn as a contract attorney providing indigent defense through CCC. As of December 23, 2010, there remains an unpaid balance of \$4,667.61 on the note, and the Accused is no longer providing indigent defense services under contract to CCC.

The Trial Panel finds that aggravating factors overwhelm any arguable mitigating factors, and the baseline sanction of disbarment is the proper sanction determined under the *Standards*.

### **Oregon Case Law**

#### ***Disbarment for conversion.***

Virtually without exception, and consistent with the *Standards* and Oregon case law, when a lawyer intentionally or knowingly misappropriates or converts clients' funds, the lawyer is disbarred. *In re Pierson*, 280 Or 513, 518, 571 P2d 907 (1977) (“[w]e hold that a single conversion by a lawyer to his own use of his client's funds will result in permanent disbarment”). Disbarment has been the result even where the lawyer claimed not to know he was not entitled to the funds, or the conduct was only negligent because of poor record-keeping practices. Severe financial straits, poor accounting practices, failure to explain adequately what happened to the funds, and other evidence may prove knowing or intentional misappropriation/conversion. *In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1988). A lawyer may suffer from disability and may have the greatest of attributes, but if he or she converts or misappropriates client funds, the sanction is (and should be) disbarment. *In re Phelps*, 306 Or at 520.

It does not matter to the court whether the lawyer makes full restitution. *In re Thomas*, 294 Or 505, 525, 659 P2d 960 (1983). It does not matter that the lawyer takes client funds in anticipation of imminent receipt of an earned fee or other funds from which the

lawyer can replenish the account. *In re Jordan*, 300 Or 430, 712 P2d 97 (1985); *In re McCormick*, 281 Or 693, 576 P2d 371 (1978). Nor does it matter if the amount of the conversion is relatively small. *In re Martin*, 328 Or 177, 970 P2d 638 (1998) (\$500); *In re Whipple*, 320 Or 476, 886 P2d 7 (1994) (approximately \$300 on one occasion and \$370 on another); *In re Laury*, 300 Or 65, 76, 706 P2d 935 (1985) (\$500 in one instance, \$600 in another).

As noted above, there may be a fine distinction between CCC and a “client” of the Accused. And, as so noted, it is a distinction without a difference under the facts of this case.

We note as significantly instructive the case of *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998), in which the accused was disbarred for stealing funds from his own law firm. The Court held that, like lawyers who commit a single conversion of client funds, generally a lawyer who embezzles money from his firm should be disbarred. *See also In re Pennington*, 220 Or 343, 348 P2d 774 (1960) (lawyer disbarred for diverting fees collected by him and neither reporting nor depositing them in the firm account); *In re Gregg*, 252 Or 174, 448 P2d 547 (1968) (lawyer disbarred for embezzling from an organization where he served as treasurer).

Because the Panel finds that the Accused dishonestly converted the funds of CCC, the sanction must be disbarment.

Because we find that disbarment is the appropriate sanction for violation of RPC 8.4(a)(3) and (4) as a result of conversion of CCC funds, we do not separately address a sanction for violation of RPC 8.4(a)(4) in connection with the Accused’s misrepresentation to Pizzo. Instead, we regard that violation as substantial aggravation warranting disbarment for the conversion of CCC funds.

### **Conclusion**

For the reasons given and upon the facts found herein, the Trial Panel unanimously concludes that the Accused should be permanently disbarred.

The Bar has not sought the remedy of restitution in this case, and we therefore do not address restitution as a component of our disposition.

**Order**

IT IS HEREBY ORDERED that the Accused, Antonio Porras Jr., be, and upon the effective date of this Order shall be, permanently DISBARRED.

DATED January 5th, 2011.

/s/ William G. Blair

William G. Blair  
OSB No. 69021  
Trial Panel Chair

/s/ Colin D. Lamb

Colin D. Lamb  
OSB No. 69100  
Attorney Member

/s/ Allen M. Gabel

Allen M. Gabel  
Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-13
	)	
CONRAD E. YUNKER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Susan Roedl Cournoyer
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.3 and RPC 1.4(a). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	March 16, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violations of RPC 1.3 and RPC 1.4(a).

DATED this 16th day of March 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Conrad E. Yunker, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 25, 1987, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On January 15, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 and RPC 1.4(a) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

In February 2008, the Accused undertook to represent Calvin Vance on a collection matter against Jason Phillips. The Accused obtained a \$1,255 arbitration award for Vance and, on May 12, 2008, filed a petition in Marion County Circuit Court to confirm the arbitration award as a judgment. Phillips was served with the petition and the Accused filed a return of service on December 9, 2008. On March 27, 2009, the Accused filed an amended petition (seeking an award of attorney fees) and achieved service on Phillips the next day. However, the Accused was not aware that the court had already signed an order administratively dismissing the case for want of prosecution on March 25, 2009.

6.

On April 8, 2009, the Accused initiated a second action to confirm the award by filing a new petition in Marion County Circuit Court; Phillips was served on April 16, 2009. However, the Accused did not file the return of service with the court. On or about September 9, 2009, the court administratively dismissed this matter without prejudice and the Accused received notice of the dismissal shortly thereafter.

7.

The Accused did not inform Vance that the petition to confirm the arbitration award had been dismissed until January 5, 2010, when Vance specifically asked him about the status of the matter. Although the Accused recalls informing Vance in or about the fall of 2009 that the petition to confirm the arbitration award had been dismissed, Vance denies that this occurred and the Accused has no corroborating evidence of his account.

### Violations

8.

The Accused admits that by engaging in the conduct described above, he violated RPC 1.3 (neglect of a legal matter entrusted to him) and RPC 1.4(a) (failure to keep his client reasonably informed about the status of a matter).

### Sanction

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated duties of diligence and candor owed to his client. *Standards*, §§ 4.4, 4.6.
- b. **Mental State.** The Accused acted with negligence (defined as the failure to heed a substantial risk that circumstances exist or that a result will follow, which failure deviates from the standard of care a reasonable lawyer would exercise in the situation) when he failed to file the return of service in April 2009, failed to file a new petition or a motion to set aside the September 2009 dismissal when he received notice of it, and when he failed to notify his client of the dismissal.
- c. **Injury.** Injury can be either actual or potential. *Standards*, at 7. Vance suffered actual injury in that the confirmation of his arbitration award as an enforceable judgment has been substantially delayed by the Accused’s failure to act diligently or to promptly inform him of the dismissal. However, because the dismissal was without prejudice and the Oregon Uniform Arbitration Act contains no limitation period for confirming an award, the Accused’s misconduct has not precluded Vance from filing a new petition in circuit court to confirm the award.

- d. **Aggravating Circumstances.** There is one aggravating circumstance present in this matter:
1. The Accused has substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. No prior history of discipline. *Standards*, § 9.32(a).
  2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  3. Remorse. *Standards*, § 9.32(l).

10.

Under the *Standards*, 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. *Standards*, § 4.43. Reprimand is also generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information and causes injury or potential injury to the client. *Standards*, § 4.63.

11.

Oregon case law also supports a public reprimand. *In re Witte*, 24 DB Rptr 10 (2010) (public reprimand for violations of RPC 1.3, RPC 1.4(a), RPC 1.16(a) (failure to withdraw when required) and RPC 1.16(d) (failure to take steps to protect a client's interests upon withdrawal)); *In re Petshow*, 23 DB Rptr 55 (2009) (violations of RPC 1.3, RPC 1.4(a), and RPC 1.7(a) (current client conflict of interest)); *In re Nielson*, 22 DB Rptr 286 (2008) (violations of RPC 1.3 and RPC 1.4(a)); *In re Freudenberg*, 22 DB Rptr 195 (2008) (violations of RPC 1.3 and RPC 1.4(a)).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.3 and RPC 1.4(a).

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re Yunker*, 25 DB Rptr 50 (2011)

EXECUTED this 2nd day of March 2011.

/s/ Conrad E. Yunker

Conrad E. Yunker

OSB No. 873740

EXECUTED this 10th day of March 2011.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro

Jeffrey D. Sapiro

OSB No. 783627

Disciplinary Counsel

**Cite as 350 Or 113 (2011)**  
**IN THE SUPREME COURT**  
**OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

DAVID E. GROOM,

Accused.

(OSB No. 08-105; SC S057898)

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted November 5, 2010. Filed March 25, 2011.

Wayne Mackeson, Portland, argued the cause and filed the briefs for Accused. With him on the briefs was Kelly Jaske, Portland.

Mary A. Cooper, Assistant Disciplinary Counsel, Oregon State Bar, argued the cause and filed the brief for the Oregon State Bar.

Before De Muniz, Chief Justice, and Durham, Balmer, Kistler, Walters, and Linder, Justices. Gillette, J., retired December 31, 2010, and did not participate in the decision of this case. Landau, J., did not participate in the consideration or decision of this case.

PER CURIAM

The complaint against the Accused is dismissed.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer discipline case, the Bar charged the Accused with violating RPC 1.4, which requires that a lawyer keep a client reasonably informed and explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions. We conclude that the Bar did not prove that charge by clear and convincing evidence, and we hold that the Accused is not guilty of that charge and related charges brought by the Bar and decided by the trial panel. The complaint against the Accused is dismissed.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-38  
)  
JAMES R. DOLE, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: Dan W. Clark  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.4(a), RPC 1.7(a), RPC 1.9(a), and  
RPC 1.9(c). Stipulation for Discipline. Public  
Reprimand.  
Effective Date of Order: March 25, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violations of RPC 1.4(a), RPC 1.7(a), RPC 1.9(a), and RPC 1.9(c).

DATED this 25th day of March 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ Megan B. Annand  
Megan B. Annand, Region 3  
Disciplinary Board Chairperson

## STIPULATION FOR DISCIPLINE

James R. Dole, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 15, 1989, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Josephine County, Oregon.

3.

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

4.

On April 20, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.4(a), RPC 1.7(a), RPC 1.9(a), and RPC 1.9(c) of the Rules of Professional Conduct. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

Prior to 2004, Louis Schultz (hereinafter “Schultz”) was an attorney at the Accused’s law firm. During that time, Schultz represented Thomas Hart Sr. (hereinafter “Tom Sr.”) and his wife Mary Ann Hart (hereinafter “Mary Ann”), personally. Schultz also represented entities wholly owned by Tom Sr. and Mary Ann: Hartsons, LLC, and Hart Manufacturing, Inc. (hereinafter “the entities”).

6.

Pursuant to an estate plan Schultz drafted in or about November 2000, and assisted Tom Sr. and Mary Ann to implement, Tom Sr. and Mary Ann transferred assets, including their respective one-half interests in Hartsons, LLC, into revocable living trusts (hereinafter “the trusts”), with the other spouse as successor trustee. In the following years, Tom Sr. and

Mary Ann gifted small portions of their membership interests in Hartsons, LLC, to their children, Thomas R. Hart Jr. (hereinafter “Tom Jr.”), Michael Hart, Carol Hix, and Rex Hart, and to the children’s spouses (collectively “the children”).

7.

In pertinent part, the trust instrument governing Mary Ann’s trust provided that upon her death, if Tom Sr. survived her, the assets of her trust would be distributed as follows: Certain specified assets would be distributed. Thereafter, a marital share (equal to the minimum amount necessary as a marital deduction to reduce to the maximum extent possible any federal estate tax) would be distributed to Tom Sr. outright. All other assets would become a “Family Trust.” The net income of the Family Trust would be distributed to or for the benefit of Tom Sr. in quarterly or more frequent installments. The trustee would distribute to or for the benefit of Tom Sr. such portions of the principal as the trustee deemed necessary for the health, education, support, and maintenance of Tom Sr. to enable Tom Sr. to maintain the standard of living he maintained in Mary Ann’s lifetime. After the death of Tom Sr., the principal would be distributed to surviving children and lineal descendants of any child who predeceased Mary Ann.

8.

Schultz retired from the Accused’s firm and, in or about January 2004, the Accused began to represent Tom Sr., Mary Ann, and the entities. From in or about January 2004 through on or about August 12, 2005, the Accused represented and advised Tom Sr. and Mary Ann in matters pertaining to the entities and the trusts.

9.

On or about August 12, 2005, Mary Ann died, and Tom Sr. became successor trustee of Mary Ann’s trust. Thereafter, the Accused’s continuing representation of Tom Sr. included, in addition to the matters described in paragraph 6 above, advising Tom Sr. regarding his rights and responsibilities as trustee and beneficiary of Mary Ann’s trust and the Family Trust.

10.

In or about May 2006, the Accused also undertook to represent and advise the children in matters pertaining to the entities and the Tom Sr. and Mary Ann trusts. The Accused continued to do so until November 2008.

11.

Sometime after commencement of the Accused’s joint representation of Tom Sr., Tom Jr., the children, and the entities, and continuing until Tom Sr.’s death in June 2009, a dispute arose between Tom Sr. and the children concerning the valuation and distribution of Tom Sr.’s marital share of the Mary Ann trust. The interests of Tom Sr. and the interests of

the children were materially adverse in the dispute. The Accused was aware of the dispute from around the time it arose.

12.

Sometime after commencement of the Accused's joint representation of Tom Sr., Tom Jr., the children, and the entities, and continuing until Tom Sr.'s death, a dispute arose between Tom Sr. and the children concerning the distribution of income from Mary Ann's trust to Tom Sr. The interests of Tom Sr. and the interests of the children were materially adverse in the dispute. The Accused was aware of the dispute from around the time it arose.

13.

Sometime after commencement of the Accused's joint representation of Tom Sr., Tom Jr., the children, and the entities, and continuing until Tom Sr.'s death, a dispute arose between Tom Sr. and the children concerning whether to liquidate assets of Mary Ann's trust and the Family Trust to provide for the health, education, support, and maintenance of Tom Sr. The interests of Tom Sr. and the interests of the children were materially adverse in the dispute. The Accused was aware of the dispute from around the time it arose.

14.

Sometime after commencement of the Accused's joint representation of Tom Sr., Tom Jr., the children, and the entities, and continuing until Tom Sr.'s death, a dispute arose between Tom Sr. and the children concerning control over the entities and the assets of the entities. The interests of Tom Sr. and the interests of the children were materially adverse in the dispute. The Accused was aware of the dispute from around the time it arose.

15.

At the urging of his children in February 2007, Tom Sr. retained attorney Daniel Hughes to assist him in the disputes with Tom Jr. and the children concerning Mary Ann's trust, the Family Trust, and the entities. The Accused continued to represent Tom Sr. with respect to the Tom Sr. trust, the Mary Ann trust, the Family Trust, and the entities.

16.

On or about May 7, 2007, Tom Sr. resigned as trustee of the Tom Sr. and Mary Ann trusts and appointed Tom Jr. as trustee of both trusts. Mr. Hughes, without the Accused's knowledge or participation, represented and advised Tom Sr. in connection with his resignation. The Accused's representation of Tom Jr. from that time forward included advising and representing Tom Jr. regarding his duties as trustee of the trusts. On or about August 7, 2008, Tom Jr.'s appointment as trustee of the Tom Sr. trust was revoked by Tom Sr., and Tom Sr. was reappointed as trustee of the Tom Sr. trust.

17.

The Accused continued to represent and advise Tom Sr. with respect to the Tom Sr. and Mary Ann trusts and the entities until February 2008. The Accused continued to advise and represent Tom Sr. with respect to his own trust until on or about November 4, 2008. The Accused continued to advise and represent Tom Jr. and the children with respect to the trusts and the entities until on or about November 4, 2008.

18.

The Accused did not obtain informed consent confirmed in writing from Tom Sr. to represent Tom Jr. or the children in the trust and entity matters in which the Accused and his firm had formerly represented Tom Sr.

19.

The Accused did not obtain informed consent confirmed in writing from Tom Jr. or the children to represent them in the trust and entity matters in which the Accused and his firm had formerly represented Tom Sr.

20.

The Accused disclosed to Tom Jr. and the children information that Schultz and the Accused had obtained in the course of assisting Tom Sr. and Mary Ann to implement their estate plans, establish and administer the trusts, and manage the entities. The Accused used this information obtained in the course of representing Tom Sr. to the disadvantage of Tom Sr.

21.

From on or about July 2006 through on or about November 4, 2008, the Accused failed to keep Tom Sr. reasonably informed regarding the status of the legal matters upon which he represented and advised Tom Sr. including:

- (a) The Accused failed to keep Tom Sr. reasonably informed about the nature and seriousness of the concerns expressed by the children concerning Tom Sr.'s spending habits; and
- (b) The Accused failed to keep Tom Sr. reasonably informed about efforts the Accused was undertaking to address the concerns expressed by the children concerning Tom Sr.'s spending and Tom Sr.'s interests in the trusts and entities.

### **Violations**

22.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 21, he violated RPC 1.4(a), RPC 1.7(a), RPC 1.9(a), and RPC 1.9(c).

## Sanction

23.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to preserve a client’s confidences (*Standards*, § 4.2), to avoid conflicts of interest (*Standards*, § 4.3), and, in one respect, his duty of diligence (*Standards*, § 4.4).
- b. **Mental State.** The Accused acted knowingly in that he was aware of the nature or attendant circumstances that created a conflict between the interests of Tom Sr., Tom Sr.’s family, and the entities, but did not have the conscious objective or purpose of improperly continuing the representation. After Tom Sr. had freely discussed details of his and Mary Ann’s estate planning with the Accused in the presence of his children, the Accused negligently continued the representation under a mistaken belief that he could serve as the family lawyer at the request of Tom Sr. The Accused acted negligently in that he failed to heed a substantial risk that Tom Sr. was not promptly informed of the nature and degree of the concerns the children had raised regarding Tom Sr.’s spending and Tom Sr.’s interest in the trusts and entities.
- c. **Injury.** The potential for injury was significant as the Accused may not have advocated the interests of Tom Sr., the children, or the entities as vigorously as he might have in the absence of such a conflict. Furthermore, if Tom Sr. had earlier known of the nature and degree of the conflict he may have earlier obtained independent counsel in the matter. The potential for injury was reduced after Tom Sr. retained attorney Daniel Hughes in February 2007.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Multiple offenses. *Standards*, § 9.22(d); and
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a);
  2. Cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e);
  3. Good character and reputation of the Accused. *Standards*, § 9.32(g); and

4. The remorse the Accused has expressed in this matter. *Standards*, § 9.32(l).

24.

Under the *Standards*, suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards*, § 4.32. Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client or negligently reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and causes injury or potential injury to a client. *Standards*, §§ 4.23, 4.43.

25.

The court has imposed a public reprimand in conflict-of-interest cases where the mitigating circumstances predominated and actual injury was minimal. For instance, in *In re Harrington*, 301 Or 18, 718 P2d 725 (1986), the court reprimanded a lawyer who borrowed money from his elderly client and arranged for other clients and an employee to borrow money from the elderly client, in violation of former DR 5-104(A) (improperly entering into business transaction with client), DR 5-101(A) (self-interest conflict of interest), and DR 5-105(A) (multiple current client conflict of interest). The court relied heavily on the absence of injury and its determination that the lawyer acted without guile and in the utmost good faith. In *In re Trukositz*, 312 Or 621, 825 P2d 1369 (1992), the court reprimanded a lawyer who represented the husband in a dissolution proceeding in which paternity was at issue although the lawyer had previously represented the wife in obtaining an affidavit of paternity from the husband. In *In re Cohen*, 316 Or 657, 853 P2d 286 (1993), the court reprimanded a lawyer for a multiple-client conflict of interest where the lawyer had represented a husband in a criminal proceeding for physically abusing his stepdaughter and the lawyer also represented the husband's wife in a juvenile proceeding to keep custody of the daughter. There was no actual injury and the mitigating factors, including the lack of a selfish or dishonest motive, predominated. In *In re Howser*, 329 Or 404, 987 P2d 496 (1999), the accused lawyer defended his client from the claims of an alleged creditor. Unbeknownst to the accused lawyer, another lawyer in his firm had prepared wills for the creditor in preceding years. The creditor's lawyer informed the accused lawyer of his firm's former representation of the creditor and demanded he withdraw from further representing the debtor. The accused lawyer then retrieved the estate files at his firm and reviewed the wills, finding information relevant to dispute. The accused lawyer did not withdraw until over a year-and-a-half after the conflict was called to his attention. The court imposed a reprimand for the accused lawyer's violation of former DR 5-105(C) (former-client conflict of interest) and DR 2-110(B) (failure to withdraw from representation when required to do so). Although the court found the accused lawyer had acted knowingly, the court found little injury and a

predominance of mitigating circumstances, including the lack of any selfish or dishonest motive.

26.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 1.4(a), RPC 1.7(a), RPC 1.9(a), and RPC 1.9(c), the sanction to be effective upon the approval of this stipulation.

27.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 24th day of February 2011.

/s/ James R. Dole

James R. Dole  
OSB No. 89227

EXECUTED this 3rd day of March 2011.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis  
OSB No. 03222  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 09-132, 09-133, and  
) 09-134  
LANCE E. ERICKSON, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.16(d), and  
RPC 8.4(a)(4). Stipulation for Discipline. 90-day  
suspension.  
Effective Date of Order: May 4, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days, effective 30 days after the stipulation is approved for violation of RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4).

DATED this 4th day of April 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ Anthony A. Buccino  
Anthony A. Buccino, Region 7  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Lance E. Erickson, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on December 16, 2003, and has been a member of the Oregon State Bar continuously since that time. At all relevant times below, the Accused had his office and place of business in Marion County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On April 8, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.3, RPC 1.4(a), RPC 1.16(d), RPC 8.4(a)(3), and RPC 8.4(a)(4). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Newrones Matter—Case No. 09-132**

5.

On or about November 8, 2007, the Accused undertook to assist Brian Newrones (hereinafter “Newrones”) in setting aside and sealing a criminal conviction pursuant to ORS 137.225. At the time the Accused undertook to assist Newrones, the Accused understood from Newrones that unless the conviction was set aside and sealed by the end of January 2008, Newrones’ employer, 3PDelivery, was likely to terminate his employment. Newrones paid the Accused’s fees, advanced funds necessary for costs, and provided a fingerprint card to be submitted to the proper authorities.

6.

In or about mid-November 2007, the Accused’s office prepared a motion, supporting affidavit, and proposed order setting aside Newrones’ conviction. Newrones signed the affidavit and the Accused signed the motion. The Accused thereafter failed to ensure that his

office staff actually filed and served on any of the necessary parties the motion, affidavit, proposed order, and fingerprint card (hereinafter “the petition”).

7.

On or about November 26, 2007, the Accused mailed a letter to 3PDelivery on behalf of Newrones in which the Accused represented that he had filed a petition to set aside Newrones’ conviction and seal his record. The Accused mailed a copy of the letter to Newrones on or about the same date.

8.

On or about January 18, 2008, Newrones left a message with the Accused’s receptionist asking for information about the status of his legal matter and notifying the Accused that immediate action was needed or Newrones’ employment with 3PDelivery would be terminated on or about January 23, 2008. The Accused did not respond to Newrones or convey any information concerning his legal matter.

9.

On or about the morning of January 21, 2008, Newrones left a message with the Accused’s receptionist asking for information about the status of his legal matter and reminding the Accused that he had received no updates concerning his legal matter. On or about the afternoon of January 21, 2008, Newrones visited the offices of the Accused to request information about the status of his legal matter and to remind the Accused that 3PDelivery was on the verge of terminating Newrones’ employment. Newrones asked the Accused to contact 3PDelivery immediately regarding the matter. The Accused did not verify the status of the matter or contact 3PDelivery regarding the matter.

10.

The Accused did not respond to Newrones’ requests for information until on or about January 24, 2008. The Accused spoke with Newrones on or about that date but, as the Accused erroneously believed the petition had been filed, he did not inform Newrones that the petition was not filed. Newrones’ employment with 3PDelivery was terminated on or about January 31, 2008.

11.

Newrones and his spouse telephoned the Accused several times over the following months for updates about the status of the petition. The Accused did not return many of the calls. The Accused did not verify the status of the petition. The Accused did not inform Newrones that the petition had not been filed.

12.

In early April 2008, Newrones obtained employment with Oregon Housing and Associated Services. Newrones informed the Accused of his new employment, reminded the

Accused of the importance of setting aside and sealing his conviction, and requested information from the Accused regarding when he could expect his conviction would be set aside and sealed. The Accused did not respond to Newrones' requests for information.

13.

On or about May 7, 2008, the Accused mailed a letter to Oregon Housing and Associated Services on behalf of Newrones in which the Accused represented he had filed a petition to set aside Newrones' conviction and seal his record. The Accused mailed a copy of the letter to Newrones on or about the same date.

14.

Newrones' employment with Oregon Housing and Associated Services was terminated on or about May 15, 2008.

15.

Newrones and his spouse continued to repeatedly telephone the Accused seeking information concerning the status of the petition. The Accused did not substantively respond until on or about August 21, 2008, when he informed Newrones that he had discovered the petition was never properly filed.

**Nelson Matter—Case No. 09-133**

16.

On or about May 10, 2007, the Accused undertook to represent Michael Nelson (hereinafter "Nelson") in a dissolution of marriage proceeding, *Marnie Michelle Nelson and Michael John Nelson*, Marion County Case No. 06C33855. Nelson's wife was represented in the matter by attorney Lindsay Soto (hereinafter "Soto").

17.

In June 2007, the parties conducted a settlement conference and agreed upon the terms of a settlement. The parties informed the court on or about August 7, 2007, that they had agreed on the terms of a settlement. On or about September 5, 2007, after the court contacted the Accused and Soto regarding the need to file a judgment, the Accused delivered a proposed judgment to Soto. On or about September 11, 2007, Soto returned the proposed judgment to the Accused with minor changes. The Accused thereafter failed to submit the judgment to the court, provide a revised order to Soto, or take other appropriate action.

18.

On or about October 16, 2007, Soto contacted the court to request a status conference regarding the Accused's failure to submit a judgment. In a telephone conference that same date, attended by the Accused, the court scheduled a status conference for October 29, 2007.

On or about October 16, 2007, the court mailed the Accused notice of the October 29, 2007, status conference. The Accused did not appear at the October 29, 2007, status conference.

19.

On October 29, 2007, the court set another status conference for November 13, 2007. On or about October 29, 2007, the court mailed the Accused notice of the November 13, 2007, conference. The Accused did not appear at the November 13, 2007, status conference.

20.

On or about November 13, 2007, the court set another status conference for November 27, 2007. The court mailed the Accused notice of the November 27, 2007, conference. The Accused appeared at the November 27, 2007, status conference, reported that his client—who had recently accepted a job on the East coast—was contesting custody and parenting time issues, and requested a trial date. The court set a March 13, 2008, trial date and a February 19, 2008, pretrial status conference.

21.

On March 13, 2008, the parties convened and, after reaching a full settlement, reported the case settled. The Accused was responsible for preparing the general judgment. The Accused thereafter failed to submit a proposed judgment to Soto or the court.

22.

On May 14, 2008, after the court notified the Accused to appear for a May 27, 2008, status conference regarding his failure to file a judgment, the Accused retained an attorney to assist him in preparing and submitting the judgment. A judgment was thereafter submitted to the court.

#### **Alvarez Matter—Case No. 09-134**

23.

In or about June 2006, the Accused undertook to represent Sid Alvarez (hereinafter “Alvarez”) in an ongoing child custody matter in which Alvarez was not the biological or legal parent of the child. At the time the Accused undertook to represent Alvarez, a juvenile dependency matter involving the child and the child’s mother was pending.

24.

In September 2006, on behalf of Alvarez, the Accused filed a Motion to Intervene in the pending juvenile dependency proceeding and a Petition for Custody and Determination of Psychological Parentage (hereinafter “petition for custody”), to initiate a custody proceeding involving the child and the child’s mother. The Accused also represented Alvarez in efforts to increase visitation with the child and in dealing with the Oregon Department of Human

Services (hereinafter “DHS”) regarding Alvarez’s interest in the child and the concerns DHS raised about Alvarez.

25.

In November 2006, Alvarez was granted intervenor status in the juvenile dependency proceeding and Alvarez’s petition for custody was consolidated with that proceeding.

26.

On or about May 8, 2007, the court terminated the parental rights of the mother of the child in the dependency proceeding. DHS thereafter moved to terminate Alvarez’s intervenor status in the dependency proceeding. Although the Accused filed an objection, Alvarez’s intervenor status was terminated on or about September 25, 2007.

27.

On or about February 12, 2008, the Accused notified Alvarez that he was terminating his employment in Alvarez’s legal matters. At the time the Accused terminated the employment, a balance of funds belonging to Alvarez remained in his lawyer trust account. The Accused did not refund Alvarez’s funds until on or about April 11, 2008.

28.

From on or about September 25, 2007, through on or about October 14, 2008, Alvarez repeatedly requested from the Accused a copy of documents the Accused had filed in opposition to the DHS motion to terminate his intervenor status. The Accused did not provide a copy of the objection to Alvarez until on or about February 9, 2009.

### **Violations**

29.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 28, he violated RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4). Upon further factual inquiry, the parties agree that the charge of alleged violation(s) of RPC 8.4(a)(3) should be and, upon the approval of this stipulation, is dismissed.

### **Sanction**

30.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused's neglect of the Newrones and Nelson matters violated his duty to act with reasonable diligence and promptness. *Standards*, § 4.4. The Accused's failure to appear in court proceedings or timely prepare documents for the court in the Nelson matter also violated his duty to the legal system. *Standards*, § 6.2. The Accused's failure to take reasonable steps to protect his client upon withdrawing from representation in the Alvarez matter violated a duty he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 7. The Accused knew he was not completing the necessary documents in the Nelson matter. The Accused acted negligently in failing to ensure that Newrones' petition was filed and in failing to accurately inform Newrones for a long period about the status of his matter. The Accused's failure to promptly deliver property to Alvarez was also negligent.
- c. **Injury.** "Injury" is defined as "harm to a client, the public, the legal system or the profession which results from the lawyer's misconduct." *Standards*, at 7. Because the purpose of attorney discipline is to protect the public, the consideration of injury includes potential injury as well as actual injury. *Standards*, § 3.0. In addition to causing Newrones anxiety and frustration, the Accused's failure to verify the status of the petition and to communicate the correct information to Newrones contributed to Newrones' loss of employment. There was actual and potential injury to the client, the opposing party, and the court as a result of the Accused's inaction and delay in the Nelson matter. In the Alvarez matter, the actual or potential injury was minimal.
- d. **Aggravating Circumstances:**
  1. Prior disciplinary offenses. *Standards*, § 9.22(a). The Accused was admonished November 3, 2008, for violations of RPC 1.3 and RPC 1.4(a) in the Peetz matter. A letter of admonition is considered evidence of past misconduct if the misconduct that gave rise to the admonition was of the same or similar type as the misconduct at issue. *In re Cohen*, 330 Or 489, 500, 8 P3d 953 (2000). The Peetz matter involved misconduct similar to the present misconduct. Although the weight of the aggravation is increased by the recency and similarity of the Peetz matter, the offense and sanction were relatively less serious

and, significantly, the present misconduct occurred prior to the admonition in the Peetz matter.<sup>1</sup>

2. A pattern of misconduct. *Standards*, § 9.22(c). The failure to act or communicate in the three cases constituted a pattern of misconduct.
  3. Multiple offenses. *Standards*, § 9.22(d).
- e. **Mitigating Circumstances:**
1. Absence of a selfish or dishonest motive. *Standards*, § 9.32(b).
  2. Personal or emotional problems. *Standards*, § 9.32(c).
  3. Timely good-faith efforts to rectify consequences of misconduct. *Standards*, § 9.32(d). Prior to the complaints of Alvarez, Nelson, or Newrones, the Accused took some steps to rectify his misconduct, such as refunding funds, providing or submitting documents, and retaining another lawyer to assist him in meeting his obligations.
  4. Full and free disclosure to the disciplinary board or cooperative attitude toward the proceedings. *Standards*, § 9.32(e).
  5. Mental disability or impairment. *Standards*, § 9.32(h). At the time of the misconduct the Accused suffered from depression that had a substantial impact on his ability to take the action that needed to be taken in these matters.
  6. Remorse. *Standards*, § 9.32(l). The Accused has expressed his remorse in failing to take the necessary action, to the detriment of the court and his clients.

31.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client, and causes injury or potential injury. 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. *Standards*, §§ 4.42–4.43. Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. *Standards*, § 6.22. Reprimand is generally

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<sup>1</sup> When evaluating prior offenses, the court reviews all offenses prior to imposition of the sanction in the current case. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997). In determining the weight of each offense, the court considers: “(1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) the timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar.” *In re Jones*, 326 Or at 200.

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. *Standards*, § 7.3.

32.

The court has imposed 60-day suspensions on lawyers who have knowingly neglected a legal matter. *In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004) (so stating and citing examples). The failure to keep a client reasonably informed or to promptly refund unearned funds can also be seen as a species of neglect.<sup>2</sup> In the *Roberts* case, in the course of representing the conservator of an estate, a lawyer failed to comply with applicable procedural and substantive rules, failed to handle substantive issues, and failed to give the requisite attention to the case. *In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (facts discussed in *In re Bettis*, 342 Or 232, 242, 149 P3d 1194 (2006)). The court suspended the accused lawyer for 60 days for neglecting a legal matter and engaging in conduct prejudicial to the administration of justice. In *In re Gresham*, 318 Or 162, 864 P2d 360 (1993), the court imposed a 91-day suspension on a lawyer for his knowing neglect of a probate matter over a period of years and its accompanying harm to the administration of justice. That sanction also addressed the lawyer's neglect of a second legal matter.

33.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days for violations of RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(a)(4), the sanction to be effective 30 days after the stipulation is approved.

34.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

35.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

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<sup>2</sup> A failure to communicate was formerly considered a form of neglect of a legal matter under *former* DR 6-101(B). See *In re Bourcier*, 325 Or 429, 939 P2d 604 (1997).

EXECUTED this 30th day of March 2011.

/s/ Lance E. Erickson

Lance E. Erickson

OSB No. 03621

EXECUTED this 30th day of March 2011.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 03222

Assistant Disciplinary Counsel

**Cite as 350 Or 204 (2011)**  
IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:

Complaint as to the Conduct of

JOHN H. OH,

Accused.

(OSB Nos. 08118, 08119, 08120, 08156, 08157,  
0927, 0970, 0971, 0988, 0989; SC S058434)

En banc

On review from a decision of a trial panel of the Disciplinary Board.

Submitted on the record August 24, 2010; resubmitted March 25, 2011. Filed April 7, 2011.

Linn D. Davis, Assistant Disciplinary Counsel, Tigard, submitted the brief for the Oregon State Bar.

No appearance *contra*.

PER CURIAM

The Accused is disbarred, commencing 60 days from the date of filing of this decision. The trial panel order imposing restitution is affirmed.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged John Oh (the Accused) with numerous violations of the Rules of Professional Conduct (RPC) arising from his representation of several clients in immigration matters. When the Accused did not answer the Bar's formal complaint, the Bar notified the Accused that if he did not answer the complaint, an order of default would be entered against him. The Accused then requested and received an extension of time to file an answer. The Accused did not file an answer, however. Nor did he otherwise appear in the proceeding. Consequently, the trial panel entered an order of default against the Accused. *See* BR 5.8(a) (providing for default orders in such circumstances). In that order, the trial panel concluded that the Accused had committed a total of 52 violations of the RPCs in matters involving 12 different clients. As a sanction, the trial panel ordered that the Accused be disbarred and that he pay restitution to

specific former clients. *See* BR 6.1(a) (authorizing the Bar to order restitution in conjunction with another sanction).

The Accused is disbarred, commencing 60 days from the date of the filing of this decision. The trial panel order imposing restitution is affirmed.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-77  
)  
ARTHUR P. KLOSTERMAN, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None.  
Disciplinary Board: Mary Kim Wood, Chair; James C. Edmonds; Joan J. LeBarron, Public Member  
Disposition: Violation of RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(3), RPC 8.4(a)(4), and ORS 9.160. Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: April 13, 2011

**OPINION OF THE TRIAL PANEL**

This matter came on regularly before a Trial Panel of the Disciplinary Board consisting of Mary Kim Wood, Chair; James Edmonds, Member; and Joan J. LeBarron, Public Member, on December 6, 2010. The Oregon State Bar was represented in this matter by Amber Bevacqua-Lynott, Assistant Disciplinary Counsel. The Accused did not appear and had previously had a default taken against him. The Trial Panel has considered the pleadings, exhibits, and sanctions memorandum without argument from counsel.

Based on the findings and conclusions made below, we find that the Accused has violated RPC 5.5(a) (practicing law in violation of the rules governing the practice of law in a jurisdiction), RPC 8.1(a)(2) (failure to respond to demand from a disciplinary authority), RPC 8.4(a)(3) (prohibiting misrepresentation), RPC 8.4(a)(4) (conduct prejudicial to the administration of justice), and ORS 9.160 (practicing law when not licensed to do so). We further determine that the Accused should be disbarred.

**INTRODUCTION**

On July 27, 2010, the Bar filed its Formal Complaint against the Accused herein. He was personally served with the Formal Complaint and Notice to Answer on August 4, 2010, but thereafter failed to appear. The Bar sought and was granted an Order of Default on

August 26, 2010. Consequently, the allegations in the Bar's Formal Complaint are deemed true. It remains for the Panel to determine whether the facts deemed true by virtue of the default constitute the disciplinary rule violations alleged by the Bar and, if so, what sanction is appropriate. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008); *see also In re Kluge*, 332 Or 251, 253, 27 P3d 102 (2001) (describing the two-step process).

## FACTUAL FINDINGS

### 1. The Accused violated RPC 5.5(a) and ORS 9.160

RPC 5.5(a) prohibits a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. ORS 9.160 states that, except for the right reserved to litigants to prosecute or defend a cause in person, no person shall practice law or represent themselves as qualified to practice law unless that person is an active member of the Oregon State Bar.

Beginning on December 28, 2009, the Accused was suspended from practicing law in Oregon for a period of nine months. Despite notice of that suspension the Accused continued to meet and communicate with clients and other lawyers, as well as appear in court and file documents with the court on his clients' behalf. At no time did he notify the court, or any participants in a matter before the court, that he was suspended and not authorized to practice law. In a series of decisions stretching back to 1978, the Supreme Court has detailed the type of conduct which constitutes the parameters of practicing law. The actions of the Accused fall squarely within those boundaries.

The undisputed allegations of the Bar are that the Accused continued to represent Shobe, Jackson, Thurman, and Moneke after he was suspended from the practice of law in December 2009. In support of those allegations the Bar introduced copies of correspondence signed by the Accused and transcripts of hearings in which he participated, all of which were generated or occurred during the period of his suspension. The Panel has reviewed the evidence provided on this issue and finds that the Accused practiced law while suspended in violation of both RPC 5.5(a) and ORS 9.160.

### 2. The Accused violated RPC 8.1(a)(2)

RPC 8.1, in relevant part, provides:

- (a) [A] lawyer . . . in connection with a disciplinary matter, shall not:
  - (2) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

A lawyer violates RPC 8.1(a)(2) when he or she does not respond to the inquiries or requests of Disciplinary Counsel, which is empowered to investigate the conduct of lawyers. The Bar has alleged that the Accused violated RPC 8.1(a)(2) in that he failed to respond to

multiple letters, e-mails, and voice mails. The allegations of the Bar are deemed true. The failure of the Accused to respond to all communications from the Panel supports the validity of those allegations. The Panel finds that the Accused knowingly failed to respond to a disciplinary authority and violated RPC 8.1(a)(2).

**3. The Accused violated RPC 8.4(a)(3) and RPC 8.4(a)(4)**

RPC 8.4(a)(3) provides that it is professional misconduct for a lawyer to engage in conduct including misrepresentation. In order to prove a misrepresentation, the Bar must establish by clear and convincing evidence that an attorney's misrepresentations were knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process. It is also professional misconduct for an attorney to engage in conduct prejudicial to the administration of justice.

As discussed above, the Accused was aware of his suspension and knew he was not authorized to practice law during the period of that suspension. By continuing to practice law while suspended the Accused affirmatively represented to clients, counsel, and the court that he was entitled to practice law in Oregon. He knew those representations were untrue but intended that the recipients of those representations rely on them in making legal decisions. By failing to disclose his suspension, the Accused implicitly represented that he was a licensed attorney or otherwise authorized to practice law. The Accused kept silent with the intention that persons with whom he came in contact would assume he was authorized to practice law and rely on that status in making legal decisions. The Panel finds that his conduct and his silence constitute a knowing misrepresentation. His conduct, explicit and implicit, violated RPC 8.4(a)(3).

The Panel further finds that his representations which caused delays in at least one matter prejudiced the administration of justice in violation of RPC 8.4(a)(4).

**SANCTION**

In fashioning a sanction, the Panel first considers the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") and Oregon case law. The *Standards* require that the Accused's conduct be analyzed by the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances. *Standards*, § 3.0.

1. **Duty Violated:** The Accused violated his duty to the legal system to avoid both deceptive practices before the court and conduct prejudicial to the administration of justice. *Standards*, § 6.1. The Accused also violated his duty to the profession to refrain from the unauthorized practice of law and to cooperate with disciplinary investigations. *Standards*, § 7.0.
2. **Mental State:** "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or

attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards*, at 9.

The Accused's failure to Answer or otherwise appear, and subsequent default entered against him, means that the allegations of the Formal Complaint are deemed as true. In this case those allegations were supported by documentary evidence. The Panel finds that the Accused acted knowingly in misrepresenting his status as a lawyer, in failing to prepare judgments as directed by the court, in concealing his status from others, and in failing to respond to Bar inquiries. His prior disciplinary history clearly establishes that he acted as he did with full knowledge of the consequences. More significantly, that knowledge and his subsequent conduct demonstrates a total contempt for his profession and his ethical obligations.

3. **Injury:** For the purposes of determining an appropriate disciplinary sanction, the Panel considers both actual and potential injury. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, the court was actually injured by the Accused's failure to comply with its instructions, as were the parties (including the Accused's clients) whose cases were subsequently dismissed. Moreover, because the Accused did not have malpractice coverage while suspended, the public and all of the Accused's clients during this period were potentially injured by his ongoing practice. This is exemplified by the injury to the parties in the *Anderson and Shobe* and *Thurman and Ellis* matters, who, in addition to having their cases dismissed, have limited recourse for the Accused's failings in the absence of malpractice insurance coverage.

The Accused's failure to cooperate with the Bar's investigation of his conduct caused actual injury to both the legal profession and to the public. *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990).

4. **Aggravating and Mitigating Factors:** The final criteria to be considered before imposing sanctions are the existence of any aggravating or mitigating factors. *Standards*, §§ 9.22 and 9.32, respectively. In the instant action, several aggravating factors are present including:
  - a. *Standards*, § 9.32, Presence of a prior disciplinary record. The Accused has a prior disciplinary history involving some of the same or same types of disciplinary rules violated in the present case. He was reprimanded in 2002 for violations of *former* DR 5-101(A) (personal-interest conflict) and DR 6-101(B) (neglect, current RPC 1.3 and 1.4). *In re Klosterman*, 16 DB Rptr 384 (2002) ("*Klosterman I*") (Ex. 11). In *Klosterman I*, the Accused failed to file his client's appeal of the denial of his Social Security claim. Thereafter, he failed to respond to his client's inquiries for a prolonged period of time. In the matters

which gave rise to the instant proceeding, the Accused failed to file certain judgments as instructed by the court or to respond to the Bar inquiries.

In 2007, the Accused was disciplined for neglect and lack of communication. *In re Klosterman*, 21 DB Rptr 170 (2007) (“*Klosterman I*”) (Ex. 12). In *Klosterman II*, the Accused was suspended for 120 days for violations of RPC 1.3 (neglect), RPC 1.4(a) (failure to adequately communicate with a client or respond to reasonable requests for information), and RPC 8.1(a)(2) (failure to respond to a disciplinary authority). Although the Accused refused to respond to Disciplinary Counsel’s Office (“DCO”) in that matter, he ultimately responded to the Bar following the issuance of a subpoena by the Local Professional Responsibility Committee (“LPRC”) compelling him to do so.

In late 2009, the Accused was suspended for nine months for failing to comply with his trust account reporting requirements (RPC 1.15-2(m)) and failing to respond to the Bar and court. *In re Klosterman*, 23 DB Rptr 204 (2009) (“*Klosterman III*”) (Ex. 13). In *Klosterman III*, the Accused refused to respond to DCO or comply with an LPRC subpoena in violation of RPC 8.1(a)(2) (failure to respond to a disciplinary authority), despite a court order directing him to do so. The Accused was subsequently found in contempt by the court, in violation of RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

The Accused’s disciplinary history demonstrates that far from learning from his prior experiences, his contempt for his professional obligations, his clients, colleagues, the court, and the law has only increased over time. He was more than familiar with the disciplinary process when he engaged in the misconduct that gave rise to the instant action, and knew the consequences of such misconduct. He has clearly demonstrated that he simply did not care.

- b. *Standards*, § 9.22(d), Multiple offenses. The conduct at issue herein involves multiple clients, multiple counsel, and multiple offenses over a significant period of time.
- c. *Standards*, § 9.22(b), Dishonest or selfish motive. The failure to advise the client, to advise opposing counsel, or to advise the relevant court of his suspension was intentional and designed to allow the Accused to retain monies he was not legally entitled to receive.

- d. *Standards*, § 9.22(c), A pattern of misconduct. Despite three prior disciplinary sanctions, the Accused continued to fail to provide appropriate accountings to his clients, and continued to ignore lawful inquiries from the Bar. When an attorney demonstrates that less onerous sanctions are not effective, it is clear that more severe sanctions must be considered.
- e. *Standards*, § 9.22(h), Vulnerability of the victim. The Accused held himself out to the public in general and to his clients and the court in particular, as an attorney duly licensed to practice law in Oregon. There was nothing to put any of those individuals or entities on notice that he was suspended. His clients were at his mercy and he took advantage of them.
- f. *Standards*, § 9.22(e), Bad-faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency. The Accused has three prior disciplinary sanctions, two of which involved failing to respond to the Bar's requests for information regarding disciplinary complaints. His failure to respond to any requests from the Bar in the present case not only prolonged the proceedings, but can only be seen as intentional, given that prior experience has made him fully cognizant of the consequences of such failure
- g. *Standards*, § 9.22(g), Refusal to acknowledge wrongful nature of conduct.
- h. *Standards*, § 9.22(j), Substantial experience in the practice of law. The Accused was admitted to the Bar in April of 1986.

There are no mitigating circumstances.

**Preliminary Sanction Analysis.** Without considering aggravating and mitigating circumstances, the following *Standards* are applicable:

*Standards*, § 4.12. Suspension is generally appropriate when a lawyer knows or should know that he or she is dealing improperly with client property and causes injury or potential injury to a client.

*Standards*, § 4.42. Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

*Standards*, § 7.1. Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

*Standards*, § 7.2. 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.

*Standards*, § 8.1(a). Disbarment is generally appropriate when a lawyer intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession.

*Standards*, § 8.1(b). Disbarment is generally appropriate when a lawyer has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that causes injury or potential injury to a client, the public, the legal system, or the profession.

Applying the above standards to the instant action it is clear that:

1. The Accused violated duties to his clients, the public, and the profession. *Standards*, § 4.1 (Failure to Preserve the Client's Property), § 5.0 (Violations of Duties Owed to the Public), § 5.1 (Failure to Maintain Personal Integrity), and § 7.0 (Violations of Duties Owed as a Professional).
2. The Accused's conduct demonstrates both intent and knowledge. He knew he was suspended yet failed to disclose it to his clients, opposing counsel, or the court. He continued to represent clients by conducting settlement negotiations, exchanging correspondence, appearing for court hearings, and filing documents. The Panel finds his conduct in concealing his suspension was intentional, was done with knowledge of the harm it would do to his clients, and was for his own financial gain.
3. The Accused caused actual injury to his clients, the public, and the profession. He took client funds, caused delay in the pursuit of legal matters when his suspension was ultimately discovered, exposed his clients to additional costs to retain new counsel, and failed to respond to Disciplinary Counsel. Given that the Accused was without malpractice coverage during the period of his suspension he also exposed his clients to risk of harm from his own negligence—harm that did in fact occur, and with little recourse for them.
4. When one incorporates the aggravating factors, especially the prior disciplinary history, it becomes clear that no sanction short of disbarment will stop the Accused from continuing to flout his legal and ethical obligations to the resultant harm of the public and the profession.

## 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. *Standards*, § 1.1. This is the fourth time the Accused has faced formal sanctions for unethical conduct. In light of his history<sup>1</sup> and the reasons more fully set forth and detailed above, the Panel has concluded that the Accused will not or cannot conform his conduct to the rules of professional conduct. Based on the foregoing, the *Standards*, and Oregon case law, the Panel concludes that the Accused be disbarred.

DATED this 10th day of February 2011.

/s/ Mary Kim Wood

Mary Kim Wood  
Trial Panel Chair

/s/ James Edmonds

James Edmonds  
Trial Panel Member

/s/ Joan LeBarron

Joan LeBarron  
Trial Panel Public Member

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<sup>1</sup> In making its analysis the Panel has paid particular attention to the Accused's prior disciplinary history. The conduct which gave rise to the earlier discipline was similar to that at issue in the instant proceeding. Despite that history and the substantial sanctions previously imposed, the Accused has not amended his behavior.

**Cite as 350 Or 237 (2011)**  
**IN THE SUPREME COURT**  
**OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

RANDY R. RICHARDSON,

Accused.

(OSB No. 07154; SC S059049)

En banc

On review from a decision of a trial panel of the Disciplinary Board.

Submitted on the record March 9, 2011. Filed April 21, 2011.

No appearance for the Oregon State Bar.

No appearance *contra*.

PER CURIAM

The Accused is disbarred, effective 60 days from the date of this decision.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged Randy R. Richardson (the Accused) with six violations of the Oregon Rules of Professional Conduct (RPC), arising out of his representation of Margaret Patton and her nephew, Eric Penn, for his role in assisting Penn to obtain real property from Patton by means of fraud and deception. The Bar alleged violations of RPC 1.1 (failure to provide competent representation), RPC 1.2(c) (prohibiting assisting client in engaging in illegal conduct), RPC 1.7(a)(1) (prohibiting representation of parties directly adverse to one another), RPC 1.7(a)(2) (prohibiting representation of parties with conflicting interests), RPC 8.4(a)(3) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), and RPC 8.4(a)(2) (prohibiting criminal conduct). Following a hearing, the trial panel found, by clear and convincing evidence, that the Accused violated those rules and determined that the appropriate sanction was disbarment.

In this case, although the Accused sought review of the trial panel's order, he did not submit a brief challenging any aspect of that order. Consistent with *In re Hartfield*, 349 Or

108, 112, 239 P3d 992 (2010), and *In re Oh*, 350 Or 204, 307, 252 P3d 325 (2011), we conclude that the trial panel's order should be affirmed.

The Accused is disbarred, effective 60 days from the date of this decision.

**Cite as 350 Or 293 (2011)**  
**IN THE SUPREME COURT**  
**OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

JASON D. CASTANZA,

Accused.

(OSB No. 09-25; SC S059032)

En banc

On review of the decision of a trial panel of the Disciplinary Board.

Submitted on the record April 7, 2011. Filed May 5, 2011.

No appearance for the Accused or for the Oregon State Bar.

PER CURIAM

The Accused is suspended from the practice of law for a period of 60 days, commencing 60 days from the date of this decision.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged the Accused with violating Oregon Rule of Professional Conduct (RPC) 1.16(d) for failing to take reasonable steps to protect his clients' interests when he terminated his representation of them. After an evidentiary hearing, a trial panel of the Disciplinary Board found that when the Accused withdrew from representing his two clients in a civil action that he had filed on their behalf, he violated RPC 1.16(d) by failing to: (1) allow his clients sufficient time to employ another counsel, (2) make any attempts to postpone the trial date, (3) file a notice of change or withdrawal of counsel as the Uniform Trial Court Rules require, (4) respond to the defendant's motion to dismiss, thus permitting the trial court to dismiss the action, (5) respond to the opposing attorney's proposed general judgment and cost bill, and (6) communicate with his clients concerning the general judgment and cost bill. As a result of those violations, the trial panel suspended the Accused from the practice of law for 60 days.

We have no basis for disagreeing with the trial panel's decision. The Accused is suspended from the practice of law for a period of 60 days, commencing 60 days from the date of this decision.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 10-62, 10-65, 10-66,  
) and 10-111  
J. STEFAN GONZALEZ, )  
)  
Accused. )

Counsel for the Bar: Mary Crawford, Stacy J. Hankin  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.4(a), RPC 4.2, and RPC 8.1(a)(2).  
Stipulation for Discipline. Four-month suspension, with  
BR 8.1 reinstatement.  
Effective Date of Order: May 10, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for four months, effective the day the Stipulation for Discipline is approved, for violation of RPC 1.4(a), RPC 4.2, and RPC 8.1(a)(2). The Accused shall also apply under and comply with BR 8.1 (formal reinstatement) when he seeks reinstatement to active membership.

DATED this 10th day of May 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

## STIPULATION FOR DISCIPLINE

J. Stefan Gonzalez, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on November 4, 1986, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On September 16, 2010, a Second Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 4.2 and RPC 8.1(a)(2) in the Allen-Sleeman matter, RPC 1.4(a) and RPC 8.1(a)(2) in the Quezada matter, RPC 1.4(a) and RPC 8.1(a)(2) in the Serrano Flores matter, and RPC 8.1(a)(2) in the Ephrem matter. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Allen-Sleeman Matter (Case No. 10-62)**

#### **Facts**

5.

On January 5, 2009, the Accused undertook to represent Armando Barrera-Rubio (hereinafter “Barrera Rubio”) in two pending workers’ compensation claims. The first one (Claim No. 8112447G) was for injuries sustained on December 15, 2008. The second one (Claim No. 8113233K) was for injuries sustained on December 25, 2008. Both injuries occurred while Barrera Rubio was employed by Alternative Services (hereinafter “AS”). AS was insured by SAIF Corporation (hereinafter “SAIF”).

6.

SAIF accepted Claim No. 8112447G, but denied Claim No. 8113233K. On May 20, 2009, a workers' compensation administrative law judge approved a disputed claim settlement regarding Claim No. 8113233K. By law, the settlement was a final determination of all issues regarding that claim.

7.

On July 13, 2009, Barrera Rubio sustained another on-the-job injury (Claim No. 8135473A). On September 4, 2009, SAIF issued a notice deferring a decision on that claim.

8.

On August 17, 2009, AS offered Barrera Rubio a modified job as a residential trainer. The offer erroneously referenced the closed claim (Claim No. 8113233K). For a number of reasons, Barrera Rubio rejected the modified job and, as a result, SAIF reduced the benefits it was paying to him.

9.

On October 15, 2009, the Accused requested an expedited hearing disputing SAIF's decision to reduce benefits and challenging whether the modified job offer was appropriate. The Accused's request identified both Claim Nos. 8112447G and 8135473A as the subject matter of the dispute. The matters were set for a hearing on October 28, 2009.

10.

Shortly after the Accused filed his request for a hearing, he learned that Kevin Barrett (hereinafter "Barrett") was representing both SAIF and AS with regard to the disputed claims.

11.

On October 27, 2009, AS offered Barrera Rubio a modified job as a residential trainer. The offer was identical to the August 17, 2009, offer, but referenced Claim Nos. 8112447G and 8135473A. Pursuant to the notification, Barrera Rubio was to report to work on October 30, 2009.

12.

At the hearing on October 28, 2009, the parties offered evidence regarding SAIF's decision to reduce benefits and the modified job offer made by AS. In relevant part, AS's Operations Director testified about the process AS follows in creating and offering a job that is consistent with an injured workers' medical restrictions and limitations.

13.

Late in the day on October 29, 2009, at a time when the Accused knew that AS was represented by Barrett on Claim Nos. 8112447G and 8135473A, the Accused left telephone

messages for three key AS employees regarding the claims. The messages asked the employees to contact the Accused regarding whether, in light of the testimony of AS's Operations Director the day before, Barrera Rubio should report to work the next day pursuant to the modified job offer made in the two claims. None of the AS employees returned the Accused's calls.

14.

On March 1, 2010, Disciplinary Counsel's Office ("DCO") received a complaint from AS employees regarding the Accused's conduct. On March 9, 2010, DCO requested the Accused's response to the complaint on or before March 30, 2010. The Accused knowingly failed to respond to that letter and to a subsequent letter reminding him of his duty to respond.

#### **Violations**

15.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 14, he violated RPC 4.2 and RPC 8.1(a)(2).

#### **Quezada Matter (Case No. 10-65)**

#### **Facts**

16.

On April 11, 2008, the Accused undertook to represent Tim Quezada (hereinafter "Quezada") in a workers' compensation claim. On December 7, 2009, the Accused withdrew from representing Quezada.

17.

On or about March 1, 2010, DCO received a complaint from Quezada regarding the Accused's conduct. On March 9, 2010, DCO requested the Accused's response to the complaint on or before March 30, 2010. The Accused knowingly failed to respond to that letter and to a subsequent letter reminding him of his duty to respond.

#### **Violations**

18.

The Accused admits that by engaging in the conduct described in paragraphs 16 and 17, he violated RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.4(a) should be and, upon the approval of this stipulation, is dismissed.

**Serrano Flores Matter (Case No. 10-66)**

**Facts**

19.

On September 12, 2008, the Accused undertook to represent Javier Serrano Flores (hereinafter “Serrano Flores”) in a workers’ compensation claim.

20.

In September 2009, Serrano Flores received notice to attend a hearing on December 3, 2009. Shortly thereafter, the Accused informed Serrano Flores that he need not attend the hearing, that the Accused would take care of the hearing, and that the Accused would contact Serrano Flores.

21.

Thereafter, the Accused failed to communicate with Serrano Flores or respond to numerous inquiries from Serrano Flores until the end of April 2010.

22.

On or about April 16, 2010, DCO received a complaint from Serrano Flores regarding the Accused’s conduct. On April 20, 2010, DCO requested the Accused’s response to the complaint on or before May 11, 2010. The Accused knowingly failed to respond to that letter and to a subsequent letter reminding him of his duty to respond.

**Violations**

23.

The Accused admits that by engaging in the conduct described in paragraphs 19 through 22, he violated RPC 1.4(a) and RPC 8.1(a)(2).

**Ephrem Matter (Case No. 10-111)**

**Facts**

24.

In 2009, the Accused undertook to represent Ted Ephrem (hereinafter “Ephrem”) in a life insurance matter. On or about June 4, 2010, DCO received a complaint from Ephrem regarding the Accused’s conduct. On June 7, 2010, DCO requested the Accused’s response to the complaint on or before June 28, 2010. The Accused knowingly failed to respond to that letter and to a subsequent letter reminding him of his duty to respond.

### Violations

25.

The Accused admits that by engaging in the conduct described in paragraph 24, he violated RPC 8.1(a)(2).

### Sanction

26.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duties Violated.** The Accused violated duties he owed to Serrano Flores to act with reasonable diligence and promptness in representing him. *Standards*, § 4.4. In the Allen-Sleeman matter, the Accused violated a duty he owed to the legal system to avoid improper communications with represented persons. *Standards*, § 6.3. In all four matters, the Accused violated a duty he owed to the profession to cooperate in the Bar’s investigation into his conduct. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted negligently when he communicated with a represented person in the Allen-Sleeman matter, negligently and then knowingly when he failed to communicate with Serrano Flores, and knowingly in all four matters when he failed to repond to the Bar’s inquiries.
- c. **Injury.** Serrano Flores was frustrated when the Accused failed to respond to his numerous inquiries. The Accused’s improper communications with AS employees had the potential to injure AS. Had any of the employees been available when the Accused called, they might have unknowingly disclosed to him information that would undermine AS’s legal position in connection with the claims at issue. The Bar sustained actual injury because of the Accused’s failure to cooperate. Staff spent additional time and effort obtaining the information the Accused was required to and should have provided.
- d. **Aggravating Circumstances.** The following aggravating circumstances exist:
  1. Prior disciplinary offenses. In November 2010, a trial panel issued an opinion suspending the Accused from the practice of law for 60 days for violating RPC 3.4(c) and RPC 8.4(a)(4). Because of the timing, these prior disciplinary offenses are not given much weight in evaluating the appropriate sanction in this matter. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

2. Selfish motive. The Accused knowingly ignored the Bar's inquiries in order to avoid the consequences of his underlying misconduct. *Standards*, § 9.22(b).
3. A pattern of misconduct. In four separate matters over the course of four months, the Accused knowingly failed to respond to the Bar. *Standards*, § 9.22(c).
4. Multiple offenses. *Standards*, § 9.22(d).
5. Bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. The Accused failed to comply with two trial panel orders compelling him to produce documents in this proceeding. *Standards*, § 9.22(e).
6. Vulnerability of victim. Serrano Flores, a non-English-speaker, was vulnerable and relied on the Accused. *Standards*, § 9.22(h).
7. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1986. *Standards*, § 9.22(i).

**e. Mitigating Circumstances.** The following mitigating circumstances exist:

1. Personal problems. Some of the underlying events occurred at a time when the Accused was experiencing significant stressors in his personal life.
2. Remorse. The Accused expressed remorse for his conduct. *Standards*, § 9.32(l).

27.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standards*, § 4.42(a). Suspension is also 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. *Standards*, § 7.2. Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.33.

28.

Under similar circumstances, a suspension has been imposed. *See In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (30-day suspension imposed on lawyer who failed to inform his client about events in his legal matter and failed to respond to his client's reasonable requests for information); *In re Knappenberger*, 337 Or 15, 30, 90 P3d 614 (2004) (even though client did not sustain serious injury and the accused lawyer acted only negligently in failing to

pursue and communicate with his client over several months, a 60-day suspension was appropriate because the aggravating circumstances outweighed the mitigating circumstances, and the client experienced anxiety and frustration); *In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996) (120-day suspension imposed on lawyer who engaged in neglect and failed to respond in a Bar investigation).

29.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for four months for violation of RPC 1.4(a), RPC 4.2, and RPC 8.1(a)(2), the sanction to be effective on the day the Stipulation for Discipline is approved. The Accused shall also be required to apply under and comply with BR 8.1 (formal reinstatement) when he seeks reinstatement to active membership.

30.

In addition, on or before April 26, 2012, or on the date he submits his application for reinstatement, whichever occurs first, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$862.05 incurred for depositions. Should the Accused fail to pay \$862.05 in full by April 26, 2012, or on the date he submits his application for reinstatement, whichever occurs first, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

31.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Randy Elmer, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Randy Elmer has agreed to accept this responsibility.

32.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with BR 8.1 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

33.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree

Cite as *In re Gonzalez*, 25 DB Rptr 88 (2011)

the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 28th day of April 2011.

/s/ J. Stefan Gonzalez

J. Stefan Gonzalez

OSB No. 863682

EXECUTED this 28th day of April 2011.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin

OSB No. 862028

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-22  
)  
BARRY E. GARLEY, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: Ronald L. Roome, Chair  
Carl W. Hopp  
William J. Olsen, Public Member  
Disposition: No violation of RPC 1.15-1(d), RPC 1.15-1(e), and  
RPC 8.4(a)(3). Trial Panel Opinion. Dismissed.  
Effective Date of Opinion: May 17, 2011

**TRIAL PANEL OPINION**

**INTRODUCTION:**

This matter was tried before the Trial Panel on January 12 and 13, 2011. Closing arguments were taken on January 20, 2011. The trial panel consisted of attorney Carl W. Hopp Jr., public member William J. Olsen, and attorney and trial panel chair Ronald L. Roome. Attorney Linn D. Davis, Assistant Disciplinary Counsel, represented the Oregon State Bar. The accused attorney, Barry E. Garley, appeared pro se.

Trial witnesses called by the Bar were Barry E. Garley, Holly L. Davis, Christopher A. Bagley, and Maureen Tkay (fka Maureen Benson). Barry Garley also testified on behalf of the defense.

The transcript of the trial proceedings was delivered to the Bar on February 7, 2011. The parties then had 14 days, or until February 21, 2011, to file a motion to correct the transcript. BR 5.3(e). No motion to correct was filed, effectively settling the transcript as of that date.

### **GENERAL NATURE AND SCOPE OF THE CHARGES:**

The accused attorney, Barry E. Garley, represented a wife in a dissolution proceeding. The Oregon State Bar alleged that Garley was entrusted with funds during his representation of the wife that were to be paid to the husband. The money in trust was not paid to the husband, however. The Bar alleges, instead, that the husband's funds were taken by Garley to pay his own attorney fees. As a result, the Bar charged Garley with improperly handling the funds entrusted for the husband, misrepresenting the status of the funds, and knowingly converting the funds. The Bar requested that the trial panel disbar Garley for the alleged dishonest conduct.

### **TRIAL PANEL OPINION:**

For the reasons set forth below, the trial panel is unanimous in concluding that the Bar did not meet its burden of proof. Because there was not clear and convincing evidence to support the Bar's allegations, Garley should be acquitted.

### **EVIDENTIARY STANDARDS AND BURDEN OF PROOF:**

The Bar has the burden of establishing an accused attorney's misconduct by clear and convincing evidence. BR 5.2. Clear and convincing evidence means that the truth of the facts asserted is highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

### **PLEADINGS—BAR'S COMPLAINT AND GARLEY'S ANSWER:**

#### **Complaint:**

The Formal Complaint filed by the Bar alleged, in summary, that Garley represented Maureen Benson in a marriage dissolution proceeding against her husband, Brian Benson. As the dissolution matter proceeded, the husband was given an equalizing judgment of \$50,000 (later reduced by agreement to \$14,000) and the family home was awarded to the wife. The Bar alleges that after a hearing on June 21, 2007, the parties' counsel agreed that the wife would refinance the home and \$14,000 from the refinance would go to pay the equalizing judgment to the husband. The payments from the wife were to be made in three monthly installments beginning on August 1, 2007. The wife refinanced the home in August 2007, and \$14,000 from the refinance was deposited into the trust account at the law firm where Garley worked. The Bar alleges that in contravention of the agreement that the \$14,000 was to be held in trust for payment to the husband, Garley applied the funds to pay the wife's legal fees and costs over a period from November 30, 2007, to about April 30, 2008. According to the Complaint, the husband's lawyer demanded an accounting of the \$14,000 on March 13, 2008, and further demanded that the funds be paid to the husband. Garley did not pay the husband any portion of the funds.

The Formal Complaint accuses Garley of violating the following Rules of Professional Conduct (the rules are paraphrased):

- A. RPC 1.15-1(d): a lawyer shall promptly notify receipt of and shall deliver funds to a third party that the third party is entitled to receive, and upon request shall promptly render a full accounting of those funds.
- B. RPC 1.15-1(e): a lawyer shall keep funds that are in dispute separate, but shall promptly deliver funds in which there is no dispute.
- C. RPC 8.4(a)(3): a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law.

**Answer:**

Garley's Answer denies that the husband was entitled to the \$14,000 from the refinance of the wife's home. The Answer asserts, in summary, that the husband held an equalizing award of \$14,000 from a limited judgment, that the husband's limited judgment entitlement had to be released before the wife could comply with the court order to refinance the home, that counsel orally agreed that \$14,000 from the refinance be placed in trust to provide security for the husband in the interim between the time of the wife's refinance and entry of a general judgment, that the general judgment of October 2, 2007, acted to restore the husband's right to the \$14,000 equalizing award, and that the \$14,000 placed in trust from the wife's refinance was not intended to be paid to the husband. The Answer contends that the October 2, 2007, general judgment created a lien that served to restore the husband's right to the equalizing award of \$14,000, but that the general judgment gave the wife 180 days to pay the equalizing award.

**DISCUSSION—FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

Garley represented Maureen Benson (nka Maureen Tkay) in the dissolution of her marriage to Brian Benson. He was Mrs. Benson's second attorney in this dissolution proceeding. Garley was employed by the Albertazzi law firm at the time. Brian Benson was represented by Christopher Bagley of the Bryant Lovlien & Jarvis firm.

A Limited Judgment of Dissolution of Marriage and Support/Money Award had been entered by the court in the case on October 24, 2006. This was before Garley became involved. His representation of the wife began in approximately November 2006. The Limited Judgment awarded Mrs. Benson the marital home; in exchange, Mr. Benson was given a \$50,000 equalizing award. Mrs. Benson was required by the Limited Judgment to refinance the mortgage on the marital home in order to remove Mr. Benson from any liability related to the property. If she failed to do so within 120 days, from date of the Limited Judgment of October 24, 2006, Mr. Benson could petition the court to order the sale of the home. The equalizing judgment created a lien on the marital home.

Further disputes between the parties led to a contempt hearing on June 21, 2007. Mrs. Benson claimed that Mr. Benson was in contempt for permitting her health insurance to

lapse, causing her to accumulate debt. Mr. Benson claimed that Mrs. Benson was in contempt for violating the Limited Judgment by not refinancing the home and not paying the equalizing judgment within 120 days. To resolve these disputes, the parties agreed at the June 21, 2007, hearing to reduce the equalizing judgment in favor of Mr. Benson to \$14,000. They also agreed that the \$14,000 equalizing judgment would be paid by Mrs. Benson in three equal monthly installments beginning on August 1, 2007. Attorney Bagley took responsibility for preparing a General Judgment based on the Limited Judgment and the parties' agreement at the June 21, 2007, hearing.

Because the parties could not agree on the form of the General Judgment, however, it was necessary to hold court hearings on October 1 and 2, 2007, to work out the terms of the final judgment. A General Judgment was not entered until October 3, 2007. In the interim, one or more attempts by Mrs. Benson to refinance the home were unsuccessful. This was caused, in part, because the Limited Judgment created a lien on the home and the Limited Judgment showed that Mrs. Benson owed her husband \$50,000. To facilitate a successful refinance of the property, Mr. Benson signed a Satisfaction of Judgment, a Deed, and Escrow Instructions on August 3, 2007. The Satisfaction of Judgment recited that the October 24, 2006, Limited Judgment was satisfied in full. The Deed conveyed Mr. Benson's interest in the home to his wife, and recited that the consideration for the transfer was \$14,000. The Escrow Instructions provided that payoff funds of \$14,000 were to be sent to Mrs. Benson's attorney to be held in the client trust account. After the refinance of the home was complete, the title company sent a \$14,000 check on August 29, 2007, payable to the Albertazzi Law Firm trust account. Holly Davis, the Albertazzi law firm's office administrator, deposited the funds into the trust account for Mrs. Benson on August 31, 2007.

At the suggestion of Judge Sullivan at the October 2, 2007, hearing, the parties agreed that Mr. Benson could petition to execute on the home if the \$14,000 equalizing judgment was not paid within 180 days and that Mr. Benson was entitled to interest from August 1, 2007. The General Judgment of Dissolution of Marriage and Money Award, reflecting this agreement, was entered into the court record on October 3, 2007. The General Judgment required Mrs. Benson to pay \$14,000 to her husband in three equal installments beginning on August 1, 2007, awarded interest if the payment was late (which it was), and provided that the court could order sale of the property if this sum plus interest was not paid within 180 days from the date of the General Judgment.

Beginning on November 30, 2007, the \$14,000 in the Albertazzi trust fund was applied to Mrs. Benson's attorney fees. That money was not paid to Brian Benson or his attorney. Bagley wrote a letter to Garley on March 13, 2008, about several outstanding issues between the parties, and for the first time since the General Judgment requested payment of the \$14,000 from the client trust account.

The Bar contends that Garley violated the Rules of Professional Conduct (RPCs) in several respects, because the Bar asserts that the money in the Albertazzi trust account

belonged to Mr. Benson. The Bar contends that Garley was required to notify Mr. Benson when he received the money, that he should have promptly distributed the money to the husband, that he did not properly account for the funds when asked, that he did not disclose to the husband that the money was no longer held in trust, and that he should have held the money separate if he believed that he had a competing claim to the funds. The relevant rules are:

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 an 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.”

RPC 1.15-1(e) provides: “When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.”

RPC 8.4(a)(3) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.”

The Bar did not charge Garley with misrepresentation to the court at the October 2, 2007, hearing. The Bar conceded that the court did not inquire into the status of the refinance at that hearing, and that the refinance was not material to the court’s considerations or determinations at that hearing.

Nor did the Bar charge that the \$14,000 in trust belonged to Mrs. Benson. As a result, the Bar did not contend in the formal complaint that Mrs. Benson’s money was improperly transferred from trust to pay her attorney fees. Rather, the Bar contended that it was Mr. Benson’s money that was wrongfully transferred from the Albertazzi trust account to pay Mrs. Benson’s attorney fees. Bar counsel confirmed this at the start of the trial, when he stated that “the Bar’s not making any contention that any funds were taken from Mrs. Benson . . . the accusation is that the money that Mr. Benson was entitled to was withdrawn to pay the wife’s legal fees and costs for the benefit of Mr. Garley and his firm.”

The Bar is required to prove that its case is “highly probable.” Witness Bagley’s testimony undermined that task. Many questions arose from his testimony, which weakened the Bar’s claim that both counsel agreed that the \$14,000 from the marital home refinance was Mr. Benson’s. For example, why did Bagley agree to transfer the refinance money to the trust account at the Albertazzi law firm, and not his own trust account, if he believed the \$14,000 from the refinance belonged to his client? Bagley claimed that the refinance money

was intended to pay off Mr. Benson's equalizing judgment; if so, why didn't Bagley instruct the title company to deliver the refinance money directly to him or to Mr. Benson? Bagley could easily have done so as a condition to his client signing the satisfaction of judgment, deed, and escrow instructions, all of which were necessary for Mrs. Benson to complete the refinance of the home. If the money was Mr. Benson's, Bagley would have instructed the title company at a minimum to notify him once the refinance was complete or to provide him with a copy of the payout from the refinance. Instead, Bagley allowed Mr. Benson to sign escrow instructions that sent the money to the Albertazzi trust account without any reference or indication in the escrow instructions that the money was intended for Mr. Benson. These are arguably not the actions of counsel who has agreed that this was Mr. Benson's money.

More questions developed from his testimony. Why didn't Bagley follow up promptly with Garley and/or the title company to determine when the refinance was complete? If payoff money was expected from the refinance, this would motivate counsel and client to monitor the progress of the refinance. The refinance was complete before the end of August 2007. But Bagley was silent and did not raise any concern about the refinance money until seven months later, when his March 2008 letter to Garley addressed the issue of payment to Mr. Benson almost as an afterthought. Presumably, Mr. Benson did not question his attorney about payment of the equalizing judgment until that time. This behavior belies an oral agreement that the August 2007 refinance money was intended to satisfy Mr. Benson's equalizing award.

Why, too, didn't Bagley insist that the parties comply with their June 21, 2007, agreement that the equalizing award be paid to Mr. Benson in installments on August 1, September 1, and October 1, 2007? If Bagley believed that the purpose of the refinance was to timely pay the equalizing judgment, then he would have demanded payment on each of those dates. There was no evidence of any such demands being made, however. Instead, Bagley was silent on payment until the March 2008 letter. That March 2008 letter, of course, came shortly before the 180 days allotted in the General Judgment for Mrs. Benson to satisfy the equalizing award. This delay supports Garley's contentions.

Further, Bagley did not require that at least a portion of the refinance money be paid directly to his client. The parties had already agreed at the June 21, 2007, hearing that Mrs. Benson would pay the equalizing award in installments beginning on August 1, 2007. The first payment was due before Bagley allowed his client to sign the satisfaction of judgment and escrow instructions. Why allow the money to go to the Albertazzi trust account when Bagley's client was already entitled to payment of at least a portion of the refinance proceeds? This suggests there was doubt in counsel's mind that the refinance money was Mr. Benson's.

Also, if Bagley believed there was an oral agreement as alleged by the Bar, why didn't he confirm that agreement in full in writing with Garley? It is not enough that Bagley and Garley disagree about the terms of their oral agreement. Bagley was the one with the

opportunity, responsibility, and necessity to reduce the alleged agreement to writing, if he truly believed one existed, and he did not do so.

It is significant that Bagley drafted the terms of the October 3, 2007, General Judgment. That document gave Mrs. Benson yet another 180 days to pay the equalizing judgment. But it failed to address the alleged agreement that the payout would come promptly from a refinance of the marital home. There is no dispute that Bagley knew about the refinance in early August 2007. There is also no dispute that by the time of the October 3, 2007, General Judgment all three of Mrs. Benson's installment payments were due and unpaid. Yet, even though payment was overdue and it had been two months since his client signed the satisfaction of judgment and escrow instructions to facilitate the refinance, Bagley did not raise the alleged refinance payout agreement either with Judge Sullivan at the October 2, 2007, hearing or in the General Judgment. Instead, he agreed to another 180 days for Mrs. Benson to make payment. This meant, as a result, it would be another 180 days before Mr. Benson could take steps to force sale of the home to satisfy his equalizing judgment. Arguably, these are not the actions of an attorney who has entered an oral agreement that \$14,000 from an August 2007 refinance would be paid promptly to his client.

One interpretation of Bagley's representation could be that he was not focused on the case. But it is also just as likely, if not more so, that his actions and inaction demonstrate that counsels' oral agreement was the one asserted by Garley.

It was undisputed that the Bensons did not trust each other, that there was considerable animosity between them, and that the dissolution was very contentious. As a result, Mrs. Benson did not intend or want the \$14,000 proceeds from the refinance to be paid to Mr. Benson. She had maintained all along that Mr. Benson secreted millions of dollars of her business assets and she was adamant that Garley locate that money. She testified that her plan was that once the hidden and missing assets were disclosed to the court the General Judgment would be set aside and she would never have to pay the \$14,000 equalizing judgment. Mrs. Benson was so adamant that the \$14,000 not be paid, in fact, that she was very upset when she learned that Albertazzi actually paid the money to Mr. Benson in the summer of 2008.

In all other material respects, the trial panel found Mrs. Benson's testimony unreliable and generally self-serving. Although she is a likeable and articulate woman, the trial panel discounted much of her testimony based on her demeanor and manner of testifying. As a result, the testimony from this witness did damage to the Bar's case.

By way of contrast, the trial panel felt that Garley was generally the most believable witness, especially during his testimony on direct during the defense portion of the case. His manner of testifying and his demeanor made him credible. His recitation of events logically supported his explanation of the documents and occurrences relative to his theory of the case. He was correct when he asserted that Mr. Benson's August 3, 2007, release of the Limited

Judgment left Mr. Benson unprotected. Once that document was filed, Mr. Benson no longer had a lien or an active judgment in his favor. Although it is not an ordinary practice, holding \$14,000 of Mrs. Benson's money in trust until the General Judgment reinstated the equalizing award arguably served, as Garley claimed, to bridge the gap, acting as "comfort" to Mr. Benson. The General Judgment did indeed place Mr. Benson in the same position he occupied, in terms of security, after the June 21, 2007, hearing.

With the exception of August 3, 2007, letter from Bagley to Deschutes County Title, copied to Garley, which calls for a payment of \$14,000 to Mr. Benson, the trial panel felt that the other exhibits in this case generally worked to support Garley's theory as much as the Bar's theory. That August 3 letter, which in itself could be seen as internally inconsistent, and which was not reflected in later actions or documents such as the General Judgment, is not enough to meet the burden of clear and convincing evidence that is placed upon the Bar.

Finally, while Holly Davis, the Albertazzi law firm's administrator and finance manager, made a reasonably good witness, it was apparent through her testimony that the law firm employed a weak accounting system. There were inadequate safeguards in place to confirm that Garley had an opportunity to thoroughly analyze or to knowingly authorize the November 30, 2007, transfer of \$11,631.05 in client trust funds to pay Mrs. Benson's attorney fees, or any subsequent transfer of money from trust for that matter. Garley was an attorney employee. He was in Chicago when the November 30, 2007, trust fund transfer was made by Davis. Davis answered to the attorney owner; the pressure in her job was to expedite processing of the fee bills, including prompt transfer of money from trust. Safeguards on client trust account transfers appear to have been occasionally sacrificed to meet office policy to send attorney fee bills to clients on the first of the month, with trust fund transfers already completed, and sometimes without sufficient verification that the originating attorney's understood and approved trust transfers.

The trial panel was persuaded, however, that Ms. Davis regularly sent Mrs. Benson monthly billing statements, including records of trust fund transfers, and that Mrs. Benson did not object to money transferred from trust to pay those statements until sometime after she learned of the Bar investigation. As a result, Mrs. Benson's objections appeared opportunistic to the trial panel. The trial panel also believed that Mrs. Benson received or had fair opportunity to receive the monthly statements and that she did not timely object to application of trust money to pay those bills.

#### **CONCLUSION:**

In conclusion, the trial panel focused this opinion on why the Bar did not meet its clear and convincing evidence burden at trial, because it is significant to understanding the panel's unanimous decision. The testimony from the witnesses presented and the evidence admitted, as addressed above, were not enough to make the Bar's case "highly probable."

**ORDER OF THE TRIAL PANEL**

For the forgoing reasons, IT IS HEREBY ORDERED that Barry E. Garley, the Accused, be ACQUITTED of the charges.

DATED: March 14, 2011

/s/ Ronald L. Roome

Ronald L. Roome

OSB No. 880976

Panel Chair

/s/ William J. Olsen

William J. Olsen

Public Member

/s/ Carl W. Hopp, Jr.

Carl W. Hopp Jr.

OSB No. 751760

Panel Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-140
	)	
ANGELA M. STEWART,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Arden J. Olson
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.4(a), RPC 1.4(b), and RPC 1.7. Stipulation for Discipline. Reprimand.
Effective Date of Order:	May 24, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violations of RPC 1.4(a), RPC 1.4(b), and RPC 1.7.

DATED this 24th day of May 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ William G. Blair  
William G. Blair, Region 4  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Angela M. Stewart, attorney at law (the “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 27, 1991, and has been a member of the Oregon State Bar continuously since that time, and at all times relevant herein, having her office and place of business in Washington County, Oregon.

3.

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

4.

On January 25, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter), RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 1.6(a) (disclosure of information relating to the representation of a client), RPC 1.7 (current-client conflict of interest), RPC 1.8(f) (accepting payment for services from someone other than a client without informed consent), and RPC 5.4(c) (permitting one who recommends, employs, or pays the lawyer to render legal services for another to direct the lawyer’s professional judgment in rendering such legal services). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Facts**

5.

In August 2006, William Lovell (“Lovell”), acting through a power of attorney, tendered a claim to Safeco Insurance Company (“Safeco”) on behalf of his parents, James and Velma Wheeler (collectively, “the Wheelers”). The Wheelers had been named as responsible parties by the Department of Environmental Quality (“DEQ”) for contamination from an underground storage tank at their former residence. Lovell and the Wheelers were personally represented in connection with the DEQ matter by attorney Thomas Benke (“Benke”).

6.

On August 29, 2006, Safeco accepted the tender of the defense of the Wheelers' claim with a reservation of rights. On October 24, 2006, Safeco notified Benke that it had assigned the defense of the claim to the Accused. The Accused was aware of Benke's representation of Lovell and the Wheelers. Although a November 2006 letter from Benke asking that he "be copied on all correspondence" was not received by the Accused, on December 1, 2006, the Accused was requested by Benke to "let me know when the initial investigation results are available."

7.

At the time she undertook to represent Lovell and the Wheelers on the DEQ claim, the Accused was an employee in Safeco's in-house counsel's office. The Accused did not notify or disclose to Benke, Lovell, or the Wheelers that she was in-house counsel, or an employee of Safeco, apart from a November 2006 fax the Accused sent to Benke with a cover sheet indicating in reduced font in the letterhead that attorneys in her office were employees of Safeco. Benke learned of the Accused's employer from the Safeco adjuster. Although the Accused's standard office practice was to send a letter confirming in writing the insured's informed consent to the Accused's representation of the insured and Safeco, a clerical error prevented the Accused from sending such a letter in this case.

8.

Prior to tendering the claim to Safeco, on behalf of Lovell, Benke retained the services of Evren NW, Inc. ("Evren"), an environmental engineering company, to assess the situation at the Wheelers' former residence. Evren assigned engineer Lynn Green ("Green") to the project. In part because of this preexisting relationship with Lovell and Benke, the Accused formed the mistaken belief that Green would continue to communicate with Lovell and Benke during the pendency of her representation.

9.

Between approximately November 2006 and November 2007, the Accused does not recall communicating with Benke, other than as noted in this stipulation. However, the Accused does remember one or more telephone conversations with Lovell during that period, of which she kept no notes. The events related to the DEQ claim during that period were: (a) a work plan in December 2006 with respect to which the Accused received notice from Benke of suggestions Benke had made to Green and that "[o]ther than that I have no comments"; (b) in April 2007, after Evren conducted its investigation, a draft Corrective Action Plan ("CAP") was sent from Green by e-mail to the Accused only; (c) re-receipt by the Accused in October 2007 of the draft CAP with Green's advice that Benke had asked to see it; (d) the Accused's advice to Green on October 29, 2007, that she had "no problems with the report"; and (e) approval of Green's sending the report to DEQ in November 2007. Because of her mistaken belief that Green was keeping Benke and Lovell informed, the

Accused did not notify them of events (b) through (e) or explain whether or not (or how) those events might affect the Wheelers' responsibilities to DEQ.

10.

The initial letter issued by Safeco to the Wheelers in October 2006 unqualifiedly agreed to defend the Wheelers' interest, reserving Safeco's rights only with respect to required cleanup, noting that injury solely to "property owned by any insured" was not covered by the policy. The April 2007 draft CAP described groundwater on the site as "perched," meaning pooled solely on the insured property. When Benke read the report, he became concerned that this finding might affect coverage related to the required cleanup on a theory that such groundwater was not publicly owned; the Accused did not and does not believe that it affected coverage related to the cleanup because all groundwater is publicly owned. A further letter from Safeco in December 2007 reiterated that there would be coverage for remediation required for property not owned by the property owners, but not for property solely owned by them. Because of her mistaken belief that Green was keeping Lovell or Benke informed, the Accused did not forward the April 2007 draft to Lovell or Benke, but she did forward it to Safeco.

11.

In early October 2007, Green re-sent the draft CAP by e-mail to the Accused only. Green instructed that the CAP would be sent to DEQ once he received the Accused's approval. Green further notified the Accused that Benke had not been provided with the CAP, but that Benke had asked to see it. Because of her mistaken beliefs that Green was generally keeping Lovell or Benke informed, and that Green's statement that Benke had asked to see it meant that Green was sending it to Benke, the Accused did not forward the CAP to Lovell or Benke but she did forward it to Safeco.

12.

In mid-November 2007, at the Accused's request, Safeco approved the transmission of the CAP to DEQ and notified the Accused that a letter would issue to the insured reminding of Safeco's reservation of rights, "as they need to be aware that this cleanup as outlined in the CAP may not be covered." The Accused did not forward this e-mail from Safeco to Lovell or Benke.

### **Violations**

13.

The Accused admits that her concurrent representation of both Lovell and the Wheelers on the one hand, and Safeco on the other, under circumstances where Safeco made a reservation of rights and where determinations made by Evren potentially would affect the existence of coverage of potential remediation by Safeco, created a significant risk that her representation of one client would be materially limited by her responsibilities to the other

client, and was prohibited in the absence of informed consent by RPC 1.7(a). Although the insured was informed of the Accused's employment by Safeco and consented to her representation, the Accused was required to confirm that informed consent in writing under RPC 1.7(b)(4), which did not occur.

14.

The Accused further admits that, although under an honest mistake of fact, her lack of communication with Benke or Lovell from November 2006 through November 2007 amounted to a failure to keep her client fully informed and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of RPC 1.4(a) and (b).

15.

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 1.6(a), RPC 1.8(f), and RPC 5.4(c) should be and, upon the approval of this stipulation, are dismissed.

### Sanction

16.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated her duties to her clients to confirm in writing their consent to a conflict of interest and to be diligent in their representation. *Standards*, §§ 4.3, 4.4. The *Standards* presume that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, at 5.
- b. **Mental State.** The Accused acted negligently in failing to recognize that she had not adequately confirmed consent to her dual representation and in her belief that Green was communicating with Lovell and Benke. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 9.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992); *Standards*, § 3.0.

The Accused's failure to communicate caused potential injury to the Wheelers insofar as information that was passed along to Safeco without their knowl-

edge or consent might have affected coverage under their insurance policy and information passed along to the DEQ without their knowledge or consent may have resulted in additional cleanup for which they would be responsible. However, Safeco ultimately agreed to fully cover the costs associated with the Wheelers' claim and the DEQ ultimately did not require further cleanup of the property.

Lovell and the Wheelers also suffered actual injury in the form of client anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of lack of diligence can constitute actual injury under the *Standards*); *In re Schaffner*, 325 Or 421, 426–427, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 1991.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a prior disciplinary record. *Standards*, § 9.32(a);
  - 2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b);
  - 3. Cooperation in the disciplinary investigation and these proceedings. *Standards*, § 9.32(e).

17.

Under the *Standards*, a reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. *Standards*, § 4.33. A reprimand is also generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client (including in communicating with a client), and causes injury or potential injury to a client. *Standards*, § 4.43.

18.

Oregon cases also support the imposition of a reprimand for these negligent violations. *See, e.g., In re Misfeldt*, 24 DB Rptr 25 (2010) (attorney reprimanded when she filed a petition for a proposed conservator and guardian without recognizing that she had already become the attorney of record for the protected person, and without having communicated with the protected person, relying instead on third-party accounts that the protected person was incompetent); *In re Petshow*, 23 DB Rptr 55 (2009) (attorney reprimanded when he represented another attorney in defense of an ethics complaint made by a client while also representing the client in the underlying legal matter out of which the ethics complaint arose,

a probate, without obtaining either client's informed consent confirmed in writing; attorney then failed to adequately communicate with the client regarding the probate).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.4(a) and (b) and RPC 1.7, the sanction to be effective upon approval by the Disciplinary Board.

20.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 12th day of May 2011.

/s/ Angela M. Stewart  
Angela M. Stewart  
OSB No. 914414

EXECUTED this 13th day of May 2011.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott  
Amber Bevacqua-Lynott  
OSB No. 990280  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 08-29 and 08-116
	)	
JAMES C. JAGGER,	)	SC S058201
	)	
Accused.	)	

Counsel for the Bar:	Kathryn M. Pratt, Amber L. Bevacqua-Lynott
Counsel for the Accused:	John Fisher
Disciplinary Board:	Robert A. Miller, Chair Mary Lois Wagner Audun (Dunny) I. Sorensen, Public Member
Disposition:	Violation of RPC 1.5(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(d), RPC 8.1(a)(2), and DR 9-101(A)(1). Stipulation to Trial Panel Opinion. Six-month suspension.
Effective Date of Order:	August 1, 2011

**ORDER GRANTING STIPULATED MOTION TO DISMISS**

The parties stipulated motion to dismiss is granted. The Accused is suspended for six months commencing August 1, 2011.

<u>May 26, 2011</u>	<u>/s/ Paul J. De Muniz</u>
DATE	CHIEF JUSTICE

**MOTION—DISMISS—STIPULATED**

COME NOW the Accused, James C. Jagger, and the Oregon State Bar, by and through their attorneys of record, and stipulate to entry of an Order dismissing this appeal.

The parties further stipulate to entry of an Order suspending the Accused from the practice of law for six (6) months, pursuant to the opinion of the Disciplinary Board Trial Panel, commencing the 1st day of August 2011. Costs shall be awarded in favor of the Oregon State Bar.

DATED this 16th day of May 2011.

/s/ John C. Fisher

John C. Fisher  
OSB No. 771750  
Attorney for Accused

/s/ Amber L. Bevacqua-Lynott

Amber L. Bevacqua-Lynott  
OSB No. 990280  
Assistant Disciplinary Counsel  
Oregon State Bar

## OPINION OF THE TRIAL PANEL

### NATURE OF THE CASE

The Accused is charged with disciplinary violations in two separate matters which were consolidated for hearing before the trial panel on September 9, 2009. The nature of each case will be discussed separately.

#### **The Joseph Matter: Case No. 08-29**

In 2004 the Accused represented Eugene Joseph (“Joseph”) in two criminal matters. Joseph’s father, Wayne Joseph, paid the Accused a \$4,500 flat fee as attorney fees in the two matters. (Ex. 7, 8.)

Joseph signed two written fee agreements with the Accused but neither agreement provided that the flat fee would be earned upon receipt or was nonrefundable. (Ex. 5, 6.) Upon receipt of the funds the Accused deposited them directly into his business account. (Ex. 24c; Tr. 113–114.)

On July 5, 2006, Joseph’s father complained to the Oregon State Bar (“the Bar”) regarding the Accused’s representation of Joseph and the Accused’s refusal to refund a portion of the fees previously paid. (Ex. 9.)

In response to Joseph’s father’s complaint, the Bar attempted to contact the Accused for his account of his representation of Joseph. The following is a summary of the Bar’s correspondence to the Accused and the Accused’s responses:

Date	Description of Contact	Exhibit No.
07/07/06	Bar’s initial letter to Accused requesting response by 7/21/06.	10
07/27/06	Bar’s certified letter to Accused requesting response by 8/3/06.	11

08/09/06	Bar’s letter to Accused referring matter to Disciplinary Counsel’s Office (“DCO”) based on Accused’s failure to respond.	12
08/14/06	Disciplinary Counsel’s letter to Accused requesting response by 9/5/06, including explanation as to why Accused had not previously responded to the Bar’s inquiries.	13
09/07/06	Accused’s response received at Bar, addressed to Bar’s Assistant General Counsel, not Disciplinary Counsel (Accused’s response failed to include any records requested by the Bar or explanation why Accused had previously not responded).	14
09/18/06	Disciplinary Counsel’s letter to Accused regarding absence of requested documents and requesting information as to why Accused did not respond to the Bar’s letters of 7/7/06 and 7/27/06.	15
09/21/06	Accused’s letter to Disciplinary Counsel explaining that Bar’s previous requests were not docketed on Accused’s calendar and assumption that a response had previously been provided. Requested documents enclosed except for time records.	16
10/13/06	Disciplinary Counsel’s letter to Accused enclosing Joseph’s reply to Accused’s response. Accused’s account due by 10/27/06.	17
10/31/06	Disciplinary Counsel’s letter to Accused requesting his further review of the matter.	18
11/02/06	Accused faxed letter to Disciplinary Counsel responding to Bar’s 10/13/06 letter.	19
11/19/07	Disciplinary Counsel’s letter opinion to Accused requesting additional bank and client ledger records and evidence of deposit of the \$4,500 fee plus explanation as to why Accused did not deposit the money into trust. Accused response due 12/3/07.	20
12/12/07	Disciplinary Counsel’s certified letter to Accused regarding no response to Bar’s 11/19/07 letter. Further response by Accused due 12/19/07.	21
12/27/07	Accused faxed response to Bar stating “not sure why I did not see your letter in my office of 11/19/07.” Accused requested two-week extension to acquire and produce requested information (due by 1/10/08).	22
02/21/08	Accused’s letter to Bar.	23

03/04/08      Bar's referral to Local Professional Responsibility Committee      24  
                  ("LPRC") for investigation.

**The Gonzalez Matter: Case No. 08-116**

In July 2006, Gonzalez paid Accused \$7,500 to represent Gonzalez in a federal criminal matter. (Ex. 1, 2.)

Gonzalez did not agree that this fee would be a nonrefundable flat fee, earned on receipt (Ex. 68) and the Accused failed to provide the Bar or the trial panel with any written fee agreement to the contrary. The Accused deposited Gonzalez's \$7,500 into his general business account and not his lawyer trust account. (Ex. 2.)

The Accused contends that Gonzalez entered into a written flat-fee retainer agreement similar to Exhibit 4, the agreement between Joseph and the Accused. (Tr. 79–81.) However, no such document was produced by or on behalf of the Accused.

In April 2007, Gonzalez became dissatisfied with the Accused's representation and terminated the Accused's services before Gonzalez's case was resolved. (Ex. 25, 59.) Gonzalez requested "some money back." (Ex. 59.) On May 23, 2007, the Accused paid \$100 to Gonzalez's books at the federal penitentiary. (Ex. 60.) On February 14, 2008, Gonzalez requested that Accused provide him with an accounting of the remaining \$7,400 and a return of "a large balance due." (Ex. 61.) On March 20, 2008, Gonzalez complained to the Bar regarding the Accused's refusal and failure to respond to his request and provided the Accused with a copy of that letter. (Ex. 62.)

On March 26, 2008, the Accused sent Gonzalez a letter responding to Gonzalez's March 20, 2008, letter, stating in substance that the \$7,500 was a flat fee and no refund was due. (Ex. 63.)

Thereafter the following communications transpired between the Bar and the Accused:

Date	Description of Contact	Exhibit No.
04/07/08	Bar's initial letter to Accused regarding Gonzalez's complaint and requesting response by 4/21/08.	64
04/28/08	Bar's certified letter to Accused requesting response by 5/5/08.	65
05/12/08	Accused's letter to Bar advising that response would be forthcoming by "end of this week" (5/16/08).	66
05/23/08	Accused's response to Bar denying obligation to refund money to Gonzalez.	67

06/20/08	Bar’s letter to Accused regarding Gonzalez’s response to the Accused’s reply. Additional information from Accused requested by 7/7/08.	68
07/09/08	Bar’s letter to Accused regarding Bar’s assumption that Accused had nothing further.	69
07/15/08	Bar’s letter to Accused regarding referral of matter to DCO.	70
07/17/08	Disciplinary Counsel’s letter to Accused requesting specific documents and explanations by 8/7/08.	71
08/12/08	Disciplinary Counsel’s certified letter to Accused again requesting specific documents and explanation by 8/18/08 or referral to LPRC.	72
09/23/08	Bar’s referral to LPRC.	73
10/13/08	LPRC’s letter to Accused requesting that Accused contact investigator for an opportunity to examine Gonzalez’s file and invoices and requesting contact from Accused as soon as possible.	77
11/06/08	Accused’s letter to Disciplinary Counsel which included a copy of Accused’s 5/23/08 letter to Bar and stating that no written fee agreement could be located.	74
11/07/08	LPRC Subpoena Duces Tecum to Accused for deposition and inspection of documents on 11/17/08.	76
11/12/08	Disciplinary Counsel’s letter to LPRC with Accused’s 11/6/08 response.	75
11/13/08	Accused’s response to LPRC’s subpoena stating that Accused can not comply and inquiring why no one from LPRC had previously contacted him to arrange a meeting.	78
11/14/08	LPRC’s e-mail reply to Accused’s 11/13/08 letter advising Accused to contact LPRC that day.	79
11/21/08	LPRC’s e-mail to Accused regarding 11/24/08 file review deadline and 11/26/08 meeting with LPRC investigator.	80

**DISCUSSIONS AND CONCLUSIONS OF LAW**

The Bar has the burden to prove the Accused’s alleged misconduct by clear and convincing evidence. (BR. 5.2.) Clear and convincing evidence means evidence establishing

that the truth of the facts asserted is highly probable. *In re Johnson*, 300 Or 52, 55, 707 P2d 573 (1985).

### **The Joseph Matter: Case No. 08-29**

**The Bar alleges two violations by the Accused.** The first charge is a violation of DR 9-101(A).

At the time of the Accused's alleged unethical conduct DR 9-101(A) provided:

All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, and escrow and other funds held by a lawyer or law firm for another in the course of work as lawyers, shall be deposited and maintained in one or more identifiable trust accounts in the state in which the law office is situated.

The trial panel concludes the Bar has proven by clear and convincing evidence that the Accused violated this rule.

The law requires that unless there is a written fee agreement that describes a prepaid fee as earned upon receipt, the fee must be deposited into the lawyer's trust account until it is earned. If the fee agreement does not so provide, the money remains the client's and must remain in the lawyer's trust account pursuant to the requirements of DR 9-101(A). *See In re Biggs*, 318 Or 281, 293, 864 P3d 1310 (1994); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007). The Accused admits that neither fee agreement executed on behalf of Joseph described the fee as nonrefundable or earned upon receipt.

The Accused contended that he explained to Joseph and his father that the fee would be earned immediately. However, such a discussion or other oral agreement does not provide a sufficient basis for an attorney to treat the client's funds as his own. *See In re Fadeley*, 342 Or 403, 409, 410, 153 P3d 682 (2007).

**The Bar's second cause of complaint** alleges the Accused's failure to timely and fully respond to lawful requests for information from the Bar and DCO regarding Joseph's complaint, a violation of RPC 8.1(a)(2), which reads as follows:

A lawyer in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 [client confidences].

The trial panel concludes that the Bar has proven by clear and convincing evidence a violation by the Accused of this rule.

The listing of the Bar's inquiries and the Accused's responses set forth in the Nature of the Case clearly demonstrates that the Accused knowingly, if not intentionally, refused to timely respond to Bar's requests for information. The Accused failed to respond to the Bar's

initial letter and again failed to respond to the Bar's certified letter requesting a reply. The matter was thereafter referred to Disciplinary Counsel whose letters to the Accused were equally ignored. When the Accused eventually responded he failed to produce the documents requested and explain why he had not previously responded to the Bar or Disciplinary Counsel.

As will be discussed later in this Opinion, the Accused has a long history of failing to timely respond to the Bar's requests for information in disciplinary proceedings. His conduct in the Joseph matter is consistent with his previous and subsequent unresponsiveness.

### **The Gonzalez Matter: Case No. 08-116**

**The Bar's first cause of complaint** in the Gonzalez matter is that the Accused failed to deposit the Gonzalez \$7,500 fee into his lawyer trust account in the absence of a written fee agreement indicating that the fee had been earned upon receipt, in violation of RPC 1.15-1(c) (*former* DR 9-101(A)) which provides:

A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

The trial panel concludes that the Bar has proven by clear and convincing evidence the Accused's violation of this rule.

For the same reasons articulated above in the Joseph matter, the Accused violated RPC 1.15-1(c) when he failed to deposit the Gonzalez flat fee into the Accused's trust account.

The Accused could not provide a written fee agreement relating to his representation of Gonzalez. The Accused and one of his secretaries testified that in their memory Gonzalez did in fact sign a written fee agreement, but in the absence of even a copy of the agreement, the trial panel could only conclude that one did not and does not exist. However, even if one had previously existed and been signed by Gonzalez, according to the Accused it would have been similar to the forms signed by Joseph. (Ex. 5, 6.) Those forms failed to specify that the fee was nonrefundable or that the funds were earned upon receipt. For the same reasons that the Accused's failure to deposit Joseph's funds into a trust account violated the disciplinary rule, the failure of the Accused to deposit Gonzalez's funds into trust violated RPC 1.15-1(c).

**The Bar's second cause of complaint** alleges that the Accused neglected a legal matter entrusted to him, in violation of RPC 1.3, when he failed to take substantive action on the Gonzalez matter for nearly a year.

RPC 1.3 provides that a lawyer shall not neglect a legal matter entrusted to the lawyer. Neglect in this context is a failure to act or the failure to act diligently. The lawyer's conduct must be viewed along a temporal continuum rather than as discreet, isolated events.

*In re Magar*, 335 Or 306, 66 P2d 1014 (2003); *In re Eadie*, 333 Or 42, 36 P3d 468 (2001); *In re Knappenberger*, 340 Or 573, 135 P3d 297 (2006).

The Bar contends that the Accused's actions on behalf of Gonzalez were not diligent or for Gonzalez's benefit. The essence of the Bar's claim is that although the Accused represented Gonzalez for nearly a year, made several visits to Gonzalez in jail, appeared in court on his behalf several times and filed motions and pre-sentence reports on his behalf, the actual time, effort, and effectiveness of the Accused's services to Gonzalez were ineffectual, cursory, and negligent. The specifics of the Bar's allegations presented at trial included the following:

1. The occasional meetings between Gonzalez and the Accused in jail were usually a few minutes long. (Ex. 81.)
2. The six court appearances made by the Accused on Gonzalez's behalf were mostly status conferences and for Gonzalez's change of plea. (Ex. 25, 67.)
3. The Accused failed to adequately explain to Gonzalez that he faced a mandatory minimum sentence of 10 to 15 years. (Tr. 289, 290.)
4. The Accused failed to discuss with Gonzalez all the options available to him to reduce his sentence. (Tr. 206, 207.)
5. The Accused filed a frivolous motion to suppress evidence. (Ex. 31, 32; Tr. 291.)
6. The Accused failed to adequately review the proposed pre-sentence report and determine whether Gonzalez would be eligible for any downward departures in his mandatory minimum sentence. (Tr. 286, 287, 300.)

In further support of the Bar's allegations of neglect of a legal matter, the Bar relies on the testimony of Gonzalez's subsequent attorney, Mr. Larry Roloff, who testified, in part, that the Accused's motion to suppress was not helpful (Tr. 290), that the pre-sentence report had not been objected to (Tr. 286), that it would have been malpractice for the Accused not to personally review the pre-sentence report with his client (Tr. 300), that the Accused's petition for leniency on behalf of Gonzalez did not conform to any federal procedural rules and was just "wishful thinking" (Tr. 302), and finally, that the petition for leniency would not in any way have changed Gonzalez's sentence (Tr. 303). Roloff further testified that the Accused's stated strategy of delaying the proceedings in hopes of wearing down the prosecutor to get a better resolution would not be effective and would only hurt the client. (Tr. 303, 304.)

The trial panel finds that the Accused's representation of Gonzalez was below the standard of care that Gonzalez had a right to expect. However, a violation of the standard of care or "negligent representation" does not necessarily amount to a violation of RPC 1.3. In reviewing all of the evidence presented, the trial panel believes that the Bar has not proven

by clear and convincing evidence that the Accused neglected the legal matter entrusted to him by Gonzalez.

The evidence presented shows that the Accused regularly communicated with his client, reviewed the pre-sentence report, appeared at required court appearances with Gonzalez, filed documents on Gonzalez's behalf and formulated some strategy, albeit an ineffective one, to prolong the proceedings which, in the Accused's mind, would eventually benefit the sentence that Gonzalez would ultimately receive.

The cases cited by the Bar in support of its contention that the Accused neglected a legal matter are not persuasive to the trial panel. *In re Meyer*, 328 Or 220, 970 P2d 647 (1999), involved the lawyer's complete failure to file necessary documentation on behalf of his client and to respond to lawful court orders. The accused in the *Meyer* case also failed to keep his client informed in any way regarding important temporary support issues, including the fact that his client was in default of court orders for temporary support. Regarding *In re Redden*, 342 Or 393, 153 P3d 113 (2007), the attorney failed to have his client sign a stipulated agreement reducing child support arrearages, failed to file it with the court, and conceded that he took no action on the client's behalf for over a year and a half.

Additional cases cited by the Bar are not directly on point to the Accused's conduct in the present case.

Therefore, the trial panel concludes that the Bar has not proven a violation of RPC 1.3 by clear and convincing evidence.

**The Bar's third cause of complaint** alleges that the Accused violated RPC 1.5(a) and RPC 1.16(d) when the Accused accepted a flat fee from Gonzalez but then failed to return a reasonable portion of the fee when his representation was terminated before completion.

A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses. [RPC 1.5(a).]

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. [RPC 1.16(d).]

The trial panel concludes that the Bar has proven by clear and convincing evidence that the Accused violated RPC 1.5(a) and RPC 1.16(d).

Any fee that is not earned is clearly excessive regardless of the amount. *In re Thomas*, 294 Or 505, 659 P2d 960 (1983). An attorney may not agree to perform specified legal services for a flat fee, fail to complete the work, and then claim that the fees were earned based on an hourly computation of time spent in the matter. *See In re Balocca*, 342 Or 279, 151 P3d 154 (2007).

The Accused performed legal services for Gonzalez and is entitled to some reasonable compensation for his representation. However, based on the evidence as discussed above regarding the quality and efficacy of the Accused's representation of Gonzalez, his efforts fell below the accepted standard of care that should have been provided. The Accused did little in attempting to reduce Gonzalez's mandatory minimum sentence nor did the Accused ever render an accounting to Gonzalez as requested or provide Gonzalez with any basis for which Gonzalez could reasonably determine what he owed the Accused and what refund, if any, was due him.

The Accused produced no written attorney fee agreement between him and Gonzalez and as discussed above even if one had been signed, it would not have clearly explained that the fee was nonrefundable and earned upon receipt. After the Accused was terminated as Gonzalez's attorney on April 17, 2007 (Ex. 59), and was thereafter requested by Gonzalez to refund the unearned portion of the \$7,500 and to provide an accounting (Ex. 61), the Accused did neither. A lawyer violates RPC 1.5(a) when he or she collects a nonrefundable fee, does not perform or complete the professional representation for which the fee was paid, and fails to promptly remit the unearned portion of the fee to the client. *See In re Gastineau*, 317 Or 545, 857 P2d 136 (1993); *In re Sousa*, 323 Or 137, 915 P2d 408 (1996). The court has drawn no distinction as to why the work was not completed—that is, whether the attorney resigned or the client terminated the attorney prior to the completion of the work. *See In re Thomas*, 294 Or 505, 659 P2d 960 (1983).

When Gonzalez became dissatisfied with the Accused's legal representation, the pre-sentence report had not been finalized nor had Gonzalez been sentenced. The case had been held in limbo for several months while Gonzalez remained incarcerated. After becoming dissatisfied with the Accused and terminating his services, Gonzalez and his parents paid \$6,000 to attorney Larry Roloff to complete the case. Roloff testified that he basically had to start from scratch, which included substantial legal research regarding the applicability of certain reduction of Gonzalez's presumed sentence and convincing Gonzalez that in order to receive a lighter sentence he must cooperate with the federal prosecutors, which Gonzalez eventually did and received a substantial reduction of his sentence because of Roloff's advice.<sup>1</sup>

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<sup>1</sup> The trial panel found Roloff's testimony extremely credible and persuasive regarding the quality of the Accused's representation of Gonzalez and the efforts Roloff undertook to secure a fair and reasonable sentence for his client.

Accordingly, a portion of the \$7,500 paid by Gonzalez to the Accused was unearned and the Accused had an obligation to refund that portion of the retainer that had not been earned. His failure to do so violated RPC 1.16(d).

**The Bar's fourth cause of complaint** is that the Accused violated RPC 1.15-1(d) when he failed to account for or return Gonzalez's property when requested by Gonzalez.

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. [RPC 1.15-1(d).]

The trial panel concludes that the Bar has proven by clear and convincing evidence that the Accused violated this rule.

Gonzalez made several requests for the Accused to account for and return the balance of the unearned portion of the \$7,500. (Ex. 59, 61, 62.) The Accused did neither and has yet to account for or return any portion of the \$7,500 paid on behalf of Gonzalez, except for the \$100 placed on Gonzales's prison books by the Accused. Such conduct by the Accused constitutes a violation of RPC 1.15-1(d). See *In re Fadeley*, 342 Or at 403; *In re Eakin*, 334 Or 238, 48 P3d 147 (2002); *In re Martin*, 328 Or 177, 970 P2d 638 (1998).

**The Bar's fifth cause of complaint** is that the Accused failed to respond to DCO and fully cooperate with the LPRC in their investigation of the Gonzalez complaint, in violation of RPC 8.1(a)(2).

A lawyer in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 [client confidences]. [RPC 8.1(a)(2).]

The trial panel concludes that the Bar has proven by clear and convincing evidence that the Accused violated this rule.

The specific factual and evidentiary basis for the trial panel's conclusion is set forth with particularity in the Gonzalez Nature of the Case section of this Opinion, pages 116 and 117.

The Accused virtually ignored the Bar's first inquiry of April 7, 2008. It was not until the Bar sent the Accused a certified letter requesting a response by May 5, 2008, that the Accused responded on May 12, 2008, stating that his response would be forthcoming by the "end of the week," which would have been by May 16, 2008. However, the Accused again failed to provide the materials as requested. Finally, on May 23, 2008, the Accused re-

sponded by denying his obligation to refund any of the \$7,500 to Gonzalez. Thereafter the matter was referred to DCO who wrote the Accused requesting specific documents and an explanation of Accused's conduct by August 7, 2008. After not receiving a response from the Accused the DCO sent a certified letter on August 11, 2008, again requesting information from the Accused by August 18, 2008. The Accused failed to respond. The matter was thereafter referred to the LPRC on September 23, 2008.

The difficulties that the LPRC had with obtaining any response or information from the Accused are set forth in Exhibits 75–80.

Although the Accused eventually cooperated with the LPRC, failure to respond to the inquiries from the Disciplinary Counsel violates this rule. *In re Rhodes*, 331 Or 231, 13 P3d 512 (2000).

### **SANCTIONS**

In determining appropriate sanctions for the Accused's misconduct, the trial panel has referenced the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), reviewed applicable Oregon Supreme Court case law, and considered the evidence presented at trial which provided clear and convincing evidence of the Accused's misconduct. Reference to the *Standards* is required by Oregon case law. See *In re Schaffner*, 323 Or 472, 478, 918 P2d 803 (1996).

### **STANDARDS**

The *Standards* establish a framework for determining appropriate sanctions in disciplinary cases using three factors: the duty violated, the lawyer's mental state, and the actual or potential injury caused by the conduct. *Standards*, § 3.0; *In re Devers*, 328 Or 230, 241, 974 P2d 191 (1999).

Following an analysis of these three factors, a preliminary sanction is determined and thereafter modified, if appropriate, based on any mitigating or aggravating circumstances.

### **DUTY VIOLATED**

The Accused clearly violated his ethical responsibility to protect and preserve client property, *Standards*, § 4.1, and his duty to cooperate with the disciplinary investigations. *Standards*, § 7.0.

### **MENTAL STATE**

The trial panel finds that the Accused negligently violated RPC 1.15-1(c) by depositing the Joseph and Gonzalez fees into his business account in the absence of a written fee agreement indicating that the fee had been earned upon receipt and was nonrefundable. The Accused testified that he believed the agreement with both clients was for a flat fee and therefore justified his depositing those retainers into his business account. He further testified

that he later learned from discussions with the Bar that his fee agreements did not comply with Bar Ethics Rules and had in fact been a violation of the Rules of Professional Conduct. (Tr. 86, 87; Ex. 14, 63, 67.) There was no substantial evidence to the contrary regarding the Accused's mental state.

The Accused's violation of RPC 1.15-1(c) occurred in 2004 as to the Joseph case and 2006 as to the Gonzalez case, both before *In re Balocca* was decided in 2007 but well after the 1994 decision in *In re Biggs*. Although the Accused should have been aware of the court's holding in *Biggs*, that is, requiring a clear written fee agreement specifying that a flat fee was nonrefundable and earned upon receipt, the Accused's failure to comply with the rule was a negligent violation. However, once both Joseph and Gonzalez demanded an accounting of the fees paid and a refund of any unearned portions of the fees, the Accused knowingly failed to provide either Gonzalez or Joseph any accounting or refund, even after the Bar's involvement in responding to the complaints by Gonzalez and Joseph. (Ex. 13, 67, 71, 77.) The Accused knowingly failed to comply with the Bar's repeated requests for information and knowingly failed to account for the attorney's fees paid and retained the unearned portions thereof.

Regarding the Accused's violations of RPC 8.1(a)(2), in both the Joseph and Gonzalez matters, the trial panel finds that the Accused knowingly failed to reasonably and timely respond to Bar inquiries. The Accused has provided no reasonable reason or excuse for his failure to do so.<sup>2</sup>

The trial panel further finds that the Accused received all correspondence from the Bar and knowingly failed to respond in a timely fashion. *In re Miles*, 324 Or 218, 923 P2d 1219 (1996).

### **EXTENT OF ACTUAL OR POTENTIAL INJURY**

For the purposes of determining an appropriate disciplinary sanction, the trial panel may take into account both actual and potential injury. *Standards*, at 6; *In re Williams*, 315 Or 530, 840 P2d 1280 (1992). The Accused's failure to promptly account for the fees paid by Joseph and Gonzalez and refund unearned portions of the fees upon request injured not only his clients by wrongfully retaining their money but also damaged the legal profession with yet another example of lawyer misconduct.

The Accused's failure to cooperate with the Bar's investigations of his conduct caused actual injury to both the legal profession and to the public because multiple requests were necessitated by his repeated failures to respond to the Bar and the LPRC, thereby

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<sup>2</sup> The trial panel found that the Accused's trial testimony regarding the reasons for his multiple failures to timely respond to Bar inquiries was not credible, was inconsistent, and was contradictory to his previous communications to the Bar.

delaying the Bar's investigation and consequently the resolution of the complaints against him. *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 801 P2d 818 (1990); *In re Gastineau*, 317 Or 545, 857 P2d 136 (1993).

### PRELIMINARY SANCTION

The *Standards* that apply to the present case are §§ 4.12 and 7.2.

4.12 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.

7.2 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.

The trial panel finds that the Accused knowingly dealt improperly with his clients' property by failing to provide them an accounting when requested and failing to refund the unearned portions of the fees paid. The panel also finds that the Accused knowingly and repeatedly disregarded Bar inquiries, requiring multiple follow-up requests for information and eventual referral to Disciplinary Counsel and the LPRC.

### AGGRAVATING CIRCUMSTANCES

The trial panel finds the following factors apply to the Accused:

1. Prior record of discipline. *Standards*, § 9.22(a). The Accused has a significant prior disciplinary history, some of which involves the same or similar conduct involved in the present two cases.

In 1983, the Accused was admonished for neglecting a probate proceeding and was warned that: "The Board also has expressed concern over your failure to respond to inquiries from the Bar regarding this matter. While such a rule was not in effect when this matter was first investigated by the Bar, you should be aware that DR 1-103(C) [current RPC 8.1(a)(2)] now requires a member of the Bar to cooperate with a disciplinary investigation." (Ex. 85.) *In re Jagger*, OSB Case No. 81-35, Letter of Admonition (April 11, 1983).

In 1985, the Accused was reprimanded by a trial panel for violating DR 9-102(B)(4) (failure to provide client property, current RPC 1.15-1(d)) when he destroyed materials obtained in the defense of his client rather than turning them over to the client. *In re Jagger*, 1 DB Rptr 63 (1985) (Ex. 86).

In 1995, the Accused was again reprimanded by a trial panel for violating DR 7-104(A)(1) (communication with a represented party). *In re Jagger*, 9 DB Rptr 11 (1995) (Ex. 87).

In 2002, the Accused was admonished for failing to deposit and maintain client funds in trust in violation of DR 9-101(A), current RPC 1.15-1(c). *In re Jagger*, Case No. 02-119, Letter of Admonition (August 5, 2002) (Ex. 88).

The Accused's prior discipline demonstrates his knowledge and previous warning of the disciplinary process. *In re Hereford*, 306 Or 69, 75, 756 P2d 30 (1988). The Accused's prior disciplinary offenses, taken together, carry significant weight in aggravation because the presence of prior disciplinary rule violations resulting in four relevant sanctions against the Accused demonstrates that he is careless with respect to his ethical obligations. *In re Jones*, 326 Or 195, 201, 951 P2d 149 (1997).

2. A pattern of misconduct. *Standards*, § 9.22(c). The Accused's prior conduct in failing to fully and timely respond to the Bar and the charges in this case demonstrate a collective pattern of failing to adequately respond to disciplinary inquires. Because of the Accused's long history in failing to respond timely to Bar inquires the trial panel believes it appropriate to set forth specifically the prior occasions that the Accused failed to respond in a timely manner to letters and inquires from the Bar.<sup>3</sup>

#### **Ackerman Complaint, 1998**

In addition to the 1983 matter referenced in Exhibit 85, a complaint to the Bar by attorney Ackerman resulted in a Bar inquiry on August 26, 1998, requesting information from the Accused by September 16, 1998. The Accused responded on September 24, 1998. On November 11, 1998, the Bar requested additional information by November 24, 1998. When no response was forthcoming the Bar again wrote the Accused on December 15, 1998, advising it would decide the issue on the record received. On December 16, 1998, the Bar received the Accused's written excuses as to why he had not previously responded: "Thanksgiving break" delayed his receiving the November 11, 1998, Bar letter until November 16, 1998, and his staff had been busy with client priorities but one secretary would work over the weekend to get his response mailed the following Monday. None was forthcoming. On January 4, 1999, the Bar received a second letter from the Accused advising that one of his secretaries had been on an extended vacation and the other suffered from depression and could not work, but that the Accused has personally typed a one-page response that was enclosed.

#### **Rennie Complaint, 2000**

On February 17, 2000, the Bar contacted the Accused by letter advising of a client complaint (Rennie) and requested information from the Accused by March 9, 2000. On April 27, 2000, the Bar received the Accused's response with an explanation that his typist had been sick all the preceding week. On May 16, 2001, the Bar re-contacted the Accused and requested a further response by June 1, 2001. When no response was timely received, the Bar

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<sup>3</sup> All references to dates and correspondence are supported by trial exhibits received without objection.

sent a certified letter to the Accused on June 11, 2001, again requesting a response by June 18, 2001. The Accused responded on the requested date with a letter explaining that a new billing and accounting secretary had been hired several weeks previously, along with the institution of a new billing system that prevented easy access to the requested financial information. The Accused also requested a copy of his previous correspondence with the Bar as he has misplaced his copies. The Accused eventually responded to the Bar on July 5, 2001, again explaining his personal problems and frustration with being unable to locate the requested data. On July 10, 2001, the Bar requested for a third time an accounting of Rennie's money by July 17, 2001. On July 20, 2001, the Accused submitted his response to the merits of the complaint.

### **McCall Complaint, 2000**

On May 16, 2000, the Accused was sent a Bar inquiry regarding a client complaint (McCall) and requested the Accused respond by June 6, 2000. The Accused did not respond. On June 13, 2000, the Bar sent the Accused a certified letter requesting a response by June 20, 2000, or the matter would be referred to the LPRC. Again, no response from the Accused. The Bar sent a certified letter to the Accused on July 27, 2000, advising that the investigation was being referred to the LPRC. In that letter, as in many of the Bar letters to the Accused both before and after this particular incident, the Accused was advised that DR 1-103(C) imposed an affirmative duty upon the Accused to cooperate with disciplinary investigations.

On August 1, 2000, the Accused faxed a response to DCO explaining that he was sorry for the delay in responding but one of his secretaries had been "out of the office for awhile." The faxed letter was dated June 28, 2000.

### **Overdraft Complaint, 2002**

On February 20, 2002, the Bar notified the Accused of an overdraft notice it received on the Accused's trust account and requested an explanation by March 13, 2002, together with copies of the Accused's trust account statements for the last 90 days. No response was forthcoming by the Accused. On March 18, 2002, the Bar sent a certified letter to the Accused requesting a response by March 25, 2002, to avoid a referral to the LPRC. The Accused was again reminded of possible discipline for a violation of DR 1-103(C). Again, no response from the Accused. However, on March 29, 2002, the Accused faxed a letter to the Bar explaining his response to the complaint but failed to include with his response any copies of the requested trust account statements. On April 8, 2002, Assistant Disciplinary Counsel requested detailed information regarding the overdraft and requested trust account bank statements be provided by April 22, 2002. When no response was forthcoming from the Accused, Disciplinary Counsel, on April 30, 2002, sent the Accused a letter reminding him of his duty to comply by May 10, 2002. No response was received from the Accused. On May 14, 2002, a letter to the Accused set forth a new deadline for his response by May 21,

2002, or the matter would be referred to the LPRC. Finally, on May 28, 2002, the Accused faxed a one-page letter which listed various check numbers and amounts but failed to include any of the requested documents or bank statements.

### **Lanning Complaint, 2008**<sup>4</sup>

On July 10, 2008, the Bar requested that the Accused respond to a client complaint (Lanning) by July 24, 2008. After receiving no response from the Accused, a certified letter was sent by the Bar to the Accused on September 3, 2008, requesting a response by September 10, 2008. After receiving no contact from the Accused, on September 16, 2008, the Bar wrote the Accused advising that the matter was being referred to Disciplinary Counsel who thereafter contacted the Accused on September 19, 2008, requesting the Accused's response by October 10, 2008. On October 22, 2008, the Accused had not responded to Disciplinary Counsel, resulting in another certified letter being sent to the Accused advising that the matter would be referred to the LPRC if no response was forthcoming by October 29, 2008. The Accused responded on November 6, 2008, advising that his account of what transpired between him and his client would be forthcoming the following Monday, November 10, 2008. When the Accused had not responded by November 25, 2008, the Bar advised that the matter would be referred to the LPRC if no response was forthcoming by December 2, 2008. On December 10, 2008, the Bar received the Accused's response, which coincidentally was dated November 6, 2008.

The Accused's consistent and repeated failures to timely respond to the Bar's lawful demands for information is viewed by the trial panel as a significant aggravating factor.

3. Multiple offenses. *Standards*, § 9.22(d).
4. Refusal to acknowledge nature of conduct. *Standards*, § 9.22(g).

The Accused testified during trial that following the Bar complaints by Joseph and Gonzalez he conferred with Bar counsel as to what language needed to be contained in his flat-fee retainer agreements. Based on their recommendation he changed the wording of his flat-fee contracts, "not because I believe that what I was doing was incorrect because what I have seen at least from my additional research and kind of re-education a little bit with the respect to ethical issues, I believe firmly that what was in the retainer agreement and how it was described with a client was correct." (Tr. 373–374.) Despite guidance from the Bar and despite clear Oregon case law as to the precise language required in a flat-fee retainer agreement to justify an attorney receiving and keeping a flat fee as "earned upon receipt," the Accused continued throughout the trial proceedings to believe that his conduct with regard to Joseph and Gonzalez was appropriate and not wrongful.

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<sup>4</sup> This investigation began during the Bar's Gonzalez inquiries and evidenced nearly identical conduct by the Accused in failing to timely respond to the Bar.

As to the Accused's apparent endless failures to cooperate in a timely fashion with Bar inquires, his excuses for not providing timely responses continued through the trial process. The Accused testified that he was "really embarrassed, . . . incredibly embarrassed . . . by my not responding in a different kind of way to the Bar." (Tr. 366.) He further stated that, "I was always trying to cooperate and get stuff to them." (Tr. 366.) Yet, when describing his perception of the importance of cooperating with the LPRC investigator, the Accused testified: "And I think with Liane Richardson saying I didn't see them as court deadlines, well, that's true, but that's not the extent of it. It wasn't meant or said in that kind of a situation. They are not court deadlines as in I'm going default and my client's going to lose money. I saw the Bar deadlines as something I can talk with them and those can be moved and they're flexible. They will work with me. And so I guess I felt like if I'm delaying getting a response back to them, I felt it was less onerous, that's right, than dealing with a client and missing something there." (Tr. 370.)

The Accused's repeated reference to secretarial difficulties as a reason for failing to timely respond to Bar inquiries is inconsistent with the Accused's trial testimony that "with respect to the responses to the Bar . . . I really tried to manage the response to the Bar myself because I didn't think that was fair for client's [*sic*] to be—clients to have secretaries pulled away from the work that they were doing for clients. And so I always tried to keep that burden on my own." (Tr. 376.) That testimony is unsupported by the evidence, and is another indication of the Accused's refusal to acknowledge the wrongful nature of his conduct.

5. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused has practiced law in the state of Oregon for 39 years.

6. Indifference to making restitution. *Standards*, § 9.22(j). The Accused clearly violated his duty to deposit client funds into his trust account and further violated his duty to not charge an excessive fee and to promptly account for client property upon their request. Yet the Accused has never offered to refund to either Joseph or Gonzalez any unearned portion of their fees.

### **MITIGATING CIRCUMSTANCES**

None.

### **OREGON CASE LAW**

Suspension has been the sanction upheld by the Oregon Supreme Court for improper dealing with client funds. See *In re Fadeley*, 342 Or at 403, and *In re Balocca*, 342 Or 279, 151 P3d 154 (2007), involving suspension for violating attorney duty to preserve client funds and not to charge, collect, or retain unreasonable or improper fees.

The Accused has been found guilty of violating multiple ethical duties owed to two separate clients and of failing to cooperate with two disciplinary investigations, a "serious

ethical violation.” *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000). The court has emphasized a no-tolerance approach for a violation of this rule. *In re Miles*, 324 Or 218, 222–223, 923 P2d 1219 (1996).

As Justice Gillette wrote in his concurring opinion in *In re Haws*, 310 Or at 741, “I hope that publication of this opinion will help to put the members of the Bar on notice that their obligations under DR 1-103(C) are no less serious, and the possible consequences to them for failure to abide by that rule no less dire, than those under other DRs.” *In re Haws*, 310 Or at 756. As the Supreme Court noted in *In re Miles*, 324 Or at 222–223, “the repeated failure on the part of the accused to respond to the inquires of the Bar and the LPRC ‘is a strong aggravating factor’” (citing *In re Schaffner I*, 323 Or at 480 n 7). In determining the appropriate sanction, the *Miles* court went on to state that “we take this opportunity to emphasize the seriousness with which this court views the failure of a lawyer to cooperate with a disciplinary investigation. The public protection provided by DR 1-103(C) is undermined when a lawyer accused of violating another provision of the Code of Professional Responsibility fails to participate in the investigatory process. Indeed, the disciplinary system likely would break down if the mandatory cooperation rule set forth in DR 1-103(C) were not in place, given the lack of incentive for a lawyer to cooperate with a Bar investigation if that lawyer had the option of not cooperating.” *In re Miles*, 324 Or at 222–223. *See also In re Skagen*, 342 Or 183, 149 P3d 1171 (2006).

The conduct of the Accused in these cases is similar to that found in *In re Schaffner I*, 323 Or at 472, and *In re Schaffner II*, 325 Or at 425. In discussing the requirements of DR 1-103(C), the court in *In re Schaffner II* stated, “That rule requires *full* cooperation from a lawyer who is the subject of a disciplinary investigation. Partial cooperation, such as responding only when and if the matter escalates to an LPRC investigation, reduces the extent of the violation but does not absolve a lawyer from his or her obligation under the rule. *See In re Haws*, 310 Or. 741, 749–51, 801 P.2d 818 (1990) (a lawyer who cooperated with an LPRC after inadequately responding to the Bar’s inquires nonetheless violated DR 1-103(C)).” In that case, the accused was suspended for two years from the practice of law for neglecting a legal matter, failing to deliver to client any property in lawyer’s possession that the client was entitled to receive, and failing to respond fully and truthfully to inquires and disciplinary investigations.

In the present case, the Accused is found to have violated DR 9-101(A), RPC 1.15-1, RPC 1.15-1(c), RPC 1.5(a), RPC 1.16(d), RPC 1.15-1(d), and RPC 8.1(a)(2) (*former* DR 1-103(C)). Based on the number of violations the Accused is found to have committed and the presence of several aggravating factors—including his disciplinary history, pattern of misconduct regarding the Accused’s failure to fully and timely respond to Bar inquiries, and the Accused’s failure to acknowledge the continuing wrongful nature of his conduct—the trial panel finds that the appropriate sanction is suspension.

### **RESTITUTION**

The Bar also requests that the trial panel order the Accused to make restitution to Gonzalez for the \$7,500 he paid and received no benefit, or alternatively, order the Accused to return any unearned portion of the \$7,500.

BR 6.1(a) provides that in conjunction with a disposition or sanction referred to in this rule, an accused may be required to make restitution of some or all of the money, property, or fees received by the accused in their representation of a client.

In the Gonzalez case the trial panel concluded that the Accused did not neglect a legal matter as that duty is defined in RPC 1.3. However, the trial panel did find that the Accused violated RPC 1.5 and RPC 1.16(d) by failing to properly account to Gonzalez for the unearned portion of the \$7,500 upon request and for his failure to return to Gonzalez the unearned portion of the fees since the Accused did not complete the legal representation for which he was hired. Gonzalez paid an additional \$6,000 to hire attorney Roloff who performed substantial and effective representation of Gonzalez through the sentencing process and conclusion of the case. The trial panel finds that there is clear and convincing evidence that the unearned portion of the \$7,500 is the \$6,000 Gonzalez paid Roloff.

### **ORDER**

Based on the foregoing, the trial panel orders that the Accused be acquitted on the charge of violating RPC 1.3. Having found by clear and convincing evidence that the Accused violated DR 9-101(A), RPC 8.1(a)(2), RPC 1.15-1(c), RPC 1.5(a), RPC 1.16(d), and RPC 1.15-1(d), and per BR 6.1(a), the trial panel further orders that the Accused is suspended from the practice of law for six months and is ordered to pay restitution to Guillermo Gonzalez, Case No. 08-116, in the amount of \$6,000.

DATED this 4th day of December 2009.

/s/ Robert A. Miller

Robert A. Miller  
OSB No. 73205  
Trial Panel Chair

/s/ Mary Lois Wagner

Mary Lois Wagner  
OSB No. 80428  
Panel Member

/s/ Dunny Sorensen

Dunny Sorensen  
Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 09-66 and 10-53  
)  
KEVIN T. LAFKY, )  
)  
Accused. )

Counsel for the Bar: Simon Whang, Stacy J. Hankin  
Counsel for the Accused: Bradley F. Tellam  
Disciplinary Board: None.  
Disposition: Violations of RPC 1.7(a)(2), RPC 1.8(a), RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).  
Stipulation for Discipline. Four-month suspension.  
Effective Date of Order: August 27, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for four months, effective August 27, 2011, for violation of RPC 1.7(a)(2), RPC 1.8(a), RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).

DATED this 27th day of May 2011.

/s/ R. Paul Frasier  
R. Paul Frasier  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Kevin T. Lafky, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 20, 1985, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On October 12, 2010, a Second Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.7(a)(2) and RPC 1.8(a) in the Atterberry matter, and violation of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c), and RPC 8.4(a)(3) in the Trust Account matter. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Atterberry Matter (Case No. 09-66)

#### Facts

5.

Between 1989 and 2006, the Accused represented Dennis Atterberry (hereinafter “Atterberry”) in various legal matters. During the same period, Atterberry and the Accused were also friends.

6.

In May 2005, the Accused and Atterberry purchased a boat together (hereinafter “boat purchase”). The Accused provided all of the funds for the boat purchase and only his name was on the title to the boat.

7.

In November 2005, Atterberry and the Accused signed a lease as members of Park Place Automotive LLC (hereinafter “Park Place”). Atterberry and the Accused intended to operate a car dealership on the leased property. The Accused was to provide all of the capital and credit to operate the dealership. At the time, Park Place LLC had not yet been registered with the State of Oregon. The Accused subsequently registered Park Place LLC with the State of Oregon, listing himself as the only member.

8.

Based on their current and prior attorney-client relationship and his perception of the situation, Atterberry had a reasonable expectation that the Accused was representing him in the boat purchase and Park Place matters. The Accused did not believe he was representing Atterberry in those matters, but failed to ensure that Atterberry understood that the Accused was not acting as his lawyer.

9.

There was a significant risk that the Accused’s representation of Atterberry in the boat purchase and Park Place matters would be materially limited by the Accused’s personal interest in those matters. To the extent Atterberry had a reasonable expectation that the Accused was representing him in both matters, the Accused failed to obtain Atterberry’s consent, confirmed in writing.

10.

The boat purchase and Park Place matters may not have been fair and reasonable to Atterberry, and the Accused failed to fully disclose the terms of the transactions in writing in a manner that could be reasonably understood by Atterberry. The Accused failed to advise Atterberry in writing of the desirability of seeking the advice of independent legal counsel and failed to give Atterberry a reasonable opportunity to seek the advice of independent legal counsel. The Accused failed to obtain written informed consent from Atterberry to the essential terms of the boat purchase and Park Place matters and the Accused’s role in the transaction, including whether the Accused was representing Atterberry in the transaction.

### **Violations**

11.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 10, he violated RPC 1.7(a)(2) and RPC 1.8(a).

**Trust Account Matter (Case No. 10-53)**

**Facts**

12.

On several occasions between January 2006 and November 2008, the Accused deposited a check or similar negotiable instrument into his lawyer trust account in settlement of claims on behalf of clients. On or about that same day as the funds were deposited, the Accused withdrew his portion of the settlement without ascertaining that the funds had cleared the banking process and were available. In doing so, the Accused drew on funds in his lawyer trust account that belonged to other clients.

13.

On several occasions between February 2007 and June 2008, the Accused withdrew funds from his lawyer trust account at a time when he had not yet earned some or all of those funds.

14.

On several occasions between January 2006 and November 2008, funds were remitted to the Accused either by or for the benefit of various clients. The Accused had not yet earned some of those funds and he failed to deposit the unearned portion into his lawyer trust account.

15.

Between 2006 and 2008, the Accused failed to maintain complete records of the funds in his lawyer trust account and maintained in the account his own funds in excess of what he needed to pay bank service charges or minimum balance requirements.

**Violations**

16.

The Accused admits that by engaging in the conduct described in paragraphs 12 through 15, he violated RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.4(a)(3) should be and, upon the approval of this stipulation, is dismissed.

**Sanction**

17.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental

state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duties Violated.** The Accused violated duties to clients by failing to deposit and maintain funds in trust and by failing to maintain adequate records. *Standards*, § 4.0. He also violated his duty to Atterberry to avoid improper conflicts of interest. *Standards*, § 4.3.
- b. **Mental State.** With regard to the trust account irregularities, the Accused acted negligently in that he was unaware that unearned client funds were not deposited in, or were withdrawn from, his trust account. However, when he later received information suggesting that the manner in which the trust account was being operated was deficient, he knowingly failed to promptly investigate the discrepancies.

The Accused acted negligently in the Atterberry matter. He failed to recognize the possibility that Atterberry would rely on the Accused to protect his interests in the boat purchase and Park Place matters.

- c. **Injury.** There was no actual monetary injury or loss in either the Atterberry or Trust Account matters. Because of the undisclosed conflicts, there was the potential for injury to Atterberry. Because of the Accused's failure to establish and follow proper accounting procedures, there was substantial potential injury to clients and others who could have been deprived of funds they were entitled to receive.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. In 1997, the Accused was reprimanded for violating DR 7-109(C) (payment of witness contingent upon the outcome of a case). *In re Lafky*, 11 DB Rptr 9 (1997). In 1999, the Accused was reprimanded for violating DR 2-110(A)(2) (failing to properly withdraw). *In re Lafky*, 13 DB Rptr 114 (1999). In 2003, the Accused was suspended for 30 days for violating DR 5-105(E) (current-client conflict of interest). *In re Lafky*, 17 DB Rptr 208 (2003). In 2005, the Accused was admonished for violating DR 9-101(A) (failing to deposit and maintain client funds in trust). *Standards*, § 9.22(a). Under the factors identified in *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997), the prior offenses are given some weight in this matter.
  2. Pattern of misconduct. *Standards*, § 9.22(c).
  3. Multiple offenses. *Standards*, § 9.22(d).
  4. Substantial experience in the practice of law. The Accused has been a lawyer in Oregon since 1985. *Standards*, § 9.22(i).

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. *Standards*, §9.32(a).
  2. Efforts to rectify consequences of misconduct. In 2009, before the Bar received a complaint, the Accused had the Professional Liability Fund review his trust account procedures and records. They suggested numerous changes, which the Accused implemented. *Standards*, § 9.32(d).
  3. Remorse. *Standards*, § 9.32(l).

18.

Under the *Standards*, 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. *Standards*, § 4.12. Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. *Standards*, § 4.33.

19.

Under somewhat similar circumstances, lawyers have received suspensions of various lengths. *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (one-year suspension when, for a number of years, the lawyer failed to properly maintain his trust account and then failed to cooperate in the Bar's investigation into his conduct); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (60-day suspension of lawyer who inadvertently mishandled client funds); *In re Wyllie*, 331 Or 606, 19 P3d 338 (2001) (four-month suspension of lawyer who engaged in a current-client conflict of interest and, as a result of sloppy and careless office practices, mishandled client funds); *In re Starr*, 326 Or 328, 952 P2d 1017 (1998) (six-month suspension of lawyer who failed to deposit client funds into trust on two occasions and failed to notify a client that she had received funds on four occasions); *In re Gildea*, 325 Or 281, 936 P2d 975 (1997) (four-month suspension of lawyer who, on two occasions, engaged in prohibited self-interest conflict, and failed to deposit client funds into trust and provide an accounting).

The Accused's conduct here is more egregious than in *In re Eakin*, but not as egregious as in *In re Skagen* and in *In re Starr*.

20.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for four months for violation of RPC 1.7(a)(2), RPC 1.8(a), RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(d), the sanction to be effective beginning on August 27, 2011.

21.

In addition, on or before September 1, 2011, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$403.25 incurred for deposition costs. Should the Accused fail to pay \$403.25 in full by September 1, 2011, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

22.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for R. Grant Cook, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Mr. Cook has agreed to accept this responsibility.

23.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

24.

The Accused acknowledges that if this Stipulation for Discipline is approved by the Disciplinary Board on or after June 1, 2011, he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

25.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 19th day of May 2011.

/s/ Kevin T. Lafky

Kevin T. Lafky

OSB No. 852633

EXECUTED this 24th day of May 2011.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin

OSB No. 862028

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-129  
)  
RICK KLINGBEIL, )  
)  
Accused. )

Counsel for the Bar: Jon P. Stride, Stacy J. Hankin  
Counsel for the Accused: David J. Elkanich  
Disciplinary Board: David W. Green, Chair; Charles R. Hathaway; Patricia E. Martin, Public Member  
Disposition: No violation of RPC 3.3(a)(1), RPC 8.4(a)(2), RPC 8.4(a)(3), and RPC 8.4(a)(4). Trial Panel Opinion. Dismissed.  
Effective Date of: June 14, 2011

**OPINION OF THE TRIAL PANEL**

This matter came regularly before a trial panel of the Disciplinary Board consisting of David W. Green, Esq., Chair; Charles R. Hathaway, Esq.; and Patricia E. Martin, Public Member, on January 18, 19, and 31, 2011, at offices situated at 900 SW Fifth Avenue, Portland, Oregon. Jon P. Stride and Stacy J. Hankin represented the Oregon State Bar. David J. Elkanich represented the Accused.

The Trial Panel has considered the pleadings, trial memoranda, and arguments of counsel. The Trial Panel also considered all testimony and exhibits that were presented by the parties. Based on the findings and conclusions made below, we find that the Accused did not violate RPC 3.3(a)(1), RPC 8.4(a)(3), RPC 8.4(a)(4), or RPC 8.4(a)(2).

**INTRODUCTION**

The Complaint: A Formal Complaint was filed on January 6, 2010, against the Accused that asserted violations of the Oregon Rules of Professional Conduct (“RPC”). The Oregon State Bar (“the Bar”) claimed that in a declaration submitted by the Accused in support of a motion for summary judgment in a lawsuit, the Accused knowingly made three false statements of fact in the declaration. As a result, the Bar claimed that the Accused violated RPC 3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal),

RPC 8.4(a)(3) (conduct involving misrepresentation that reflects adversely on a lawyer's fitness to practice law), RPC 8.4(a)(4) (conduct prejudicial to the administration of justice), and RPC 8.4(a)(2) (criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer).

The Answer: An Answer was filed on February 7, 2010, by the Accused, and an Amended Answer was filed on October 12, 2010, by the Accused. The Accused admitted many of the facts in the Complaint but denied the allegations in the Bar's complaints.

Witnesses, Exhibits, and Transcript: The Bar called as witnesses Daniel E. O'Leary (former partner at the Jolles, Bernstein and Garone law firm), Ann Morstad (an insurance claims adjuster), Jeannine Smith (former secretary for the Accused), and the Accused. The Accused called as witness Brooks F. Cooper, Esq. (as an expert witness, as trial lawyer for personal injury cases involving minors and related matters, including use of conservatorships on behalf of a minor on personal injury claims). The Accused also testified on his own behalf.

The Bar introduced Exhibits 1 through 30, 31, 32, 33, 34, 35 through 39, 40 and 42, all of which were admitted as Exhibits (referred to in this opinion as "Ex."). Exhibit 41 was identified but not introduced as an Exhibit. The Accused introduced Exhibits 1 through 21, all of which were admitted as Exhibits (referred to in this opinion as "Def. Ex.").

Capri-Iverson Reporting (Shellene L. Iverson) provided court reporting services. The transcript was received on February 17, 2011. The Bar moved to correct the transcript on March 1, 2011, and the Accused moved to correct the transcript on March 8, 2011. The Trial chairperson settled the corrections to the transcript on March 8, 2011.

### **FINDINGS OF FACT**

The Accused is an attorney admitted to practice law in the state of Oregon since 1993 and is a member of the Bar. Over his 18 years of law practice, the Accused has not been disciplined by any bar association. (Tr. at 294.)

On June 18, 2000, [REDACTED] ("[REDACTED]"), the minor son of Richard and Sharon LaPointe ("the LaPointes"), was injured in a fall from a waterslide at ThrillVille USA ("ThrillVille"). The LaPointes contacted the Accused, an associate attorney at Jolles, Bernstein and Garone ("J&B Firm"), and met with the Accused to have him represent them. The LaPointes signed a retainer agreement with the J&B Firm to "enforce a cause of action against ThrillVille (and any others who may be liable), in causing injuries to our son [REDACTED]" (Ex. 1 at 1.)

The Accused represented the LaPointes on this matter while at the J&B Firm until November 2001, when he terminated his employment with the J&B Firm. (Tr. at 329.) During this time period, his work for the LaPointes included: (i) visiting the ThrillVille site and taking photographs (Tr. at 176); (ii) monitoring with the LaPointes whether [REDACTED]'s

medical bills had been paid by ThrillVille or its insurance company (Ex. 30; Tr. at 249); (iii) attempting to create a dialogue with ThrillVille or its insurance company about the injury and possible claims (Tr. at 345); (iv) on February 9, 2001, sending a letter to ThrillVille (when it was nonresponsive) on behalf of ██████ that stated that he was interested in resolving claims related to medical and other expenses; (v) on or about February 28, 2001, drafting a complaint against ThrillVille that named Richard LaPointe, individually and as guardian to ██████, as the plaintiff (Ex. 2; Tr. at 345); (vi) sending the draft complaint to ThrillVille with a demand letter (Ex. 26 at 5); (vii) on or about March 13, 2001, the Accused or his secretary (Jeannine Smith), having a check drawn for the filing fees for the draft complaint (Tr. at 168, 352); (viii) on March 26, 2001, sending a letter to ThrillVille stating that the complaint had not been filed because of a stated intent to resolve the matter and enclosing medical bills (Ex. 26 at 10); (ix) on March 27, 2001, sending medical records and related materials to Ann Morstad, the insurance investigator/adjuster who was handling or advising on the claim, on behalf of the insurance carrier for ThrillVille (Ex. 26 at 8); (x) on June 21, 2001, sending a letter to the LaPointes asking them to make an appointment with a neurosurgeon, Dr. Butler, at Oregon Health & Science University (Def. Ex. 4); (xi) making subsequent phone calls to Dr. Butler about the injury; and (xii) on September 27, 2001, sending a copy of the Butler report to ThrillVille's insurer (Ex. 26 at 12).

While at the J&B Firm, no retainer agreement was made specifically with the parents as conservator or as guardian ad litem, and no legal documents were prepared to seek a conservatorship or guardian ad litem for ██████. (Tr. at 346, 353–354.)

██████ received medical treatment for the injury and some follow-up medical care. At the Accused's recommendation, ██████ was also evaluated by Dr. Butler to determine if there were immediate claims that might be made and to establish a baseline for future use if there were deterioration in ██████'s condition or functioning ability. (Tr. at 331.) Dr. Butler expressed the opinion that ██████ had some impairment. (Ex. 5.)

While at the J&B Firm, the Accused's representation of the LaPointes included the consideration of other possible claims that the LaPointes might have in connection with the injury incident and subsequent medical expenses. The Accused considered a possible claim for medical injury to Mrs. LaPointe, for posttraumatic stress disorder ("PTSD"). (Tr. at 386.) The Accused did the groundwork for possible recovery of medical expenses under the rationale of *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 US 204 (2002), in which reimbursement of medical expenses can be obtained from an insurer, and the insurer may not have a lien or enforceable claim (under theories of subrogation) against the medical plan that covers the plaintiff (referred to as the *Great Western/Knudson* theory). (Tr. at 309–311, 396.) Mr. LaPointe expressed concern about the LaPointes bearing medical expenses and asked whether he might receive paid time off under the Family Medical Leave Act. (Tr. at 301–302, 306, 312.)

The insurance claims adjuster, Ann Morstad, investigated the claims related to the [REDACTED] injury for the liability insurance company that insured ThrillVille at the time of [REDACTED]'s injury. (Tr. at 108.) Ms. Morstad investigated the claim and advised the insurance company. She had only one face-to-face meeting with the LaPointes and the Accused. (Tr. at 117, 131.) Ms. Morstad's meeting with the LaPointes occurred after the Accused's phone calls and letter to the insurance company indicating that a suit would be filed. (Ex. 23 at 5, 8, 10.) Ms. Morstad met with the Accused, [REDACTED] and the LaPointes in or around March or April 2001. (Tr. at 117.) ThrillVille did not have medical coverage that would reimburse costs for injuries whether or not there was any negligence by the insured. (Tr. at 120.) ThrillVille did have liability insurance that covered claims arising from its negligence. Ms. Morstad's conclusion from her investigation was that ThrillVille was not liable for negligence in connection with [REDACTED]'s injury. (Tr. at 133.)

The Accused terminated employment at the J&B Firm and subsequently entered into a settlement agreement with the firm ("Settlement Agreement"). (Ex. 4.) The Settlement Agreement included a list of clients and client case files ("Client Cases") as Exhibit A for matters being handled by the Accused. The J&B Firm transferred the client files and records to the Accused for the Client Cases. The parties agreed, inter alia, that the J&B Firm would be reimbursed for its costs and receive one-third of any attorneys' fees that the Accused subsequently obtained on the Client Cases, and that the Accused and his new firm would be reimbursed for its costs and receive two-thirds of any attorneys' fees obtained on the Client Cases. (Ex. 4 at 3.)

After leaving the J&B Firm, the Accused continued to represent the LaPointes. A new retainer agreement was signed with Mrs. LaPointe on December 18, 2001. (Ex. 29 at 2.)

[REDACTED] was approximately 14 years old at the time of the accident in 2000. (Tr. at 317.) The LaPointes did incur medical expenses because of [REDACTED]'s accident. Kaiser's or ThrillVille's insurer paid or reimbursed the medical expenses, except for the costs of Dr. Butler. (Tr. at 396–397.) An independent medical exam conducted on behalf of the insurance company in January 2003 concluded that the closed-head injury was mild, was resolved, or went away. (Tr. at 375.) On January 27, 2003, Dr. Butler performed a second neurophysical examination after which he concluded that [REDACTED] had some difficulties that he attributed to the injury. (Ex. 29 at 15.) In 2003–2004, Mrs. LaPointe contacted the Accused to express concern that [REDACTED] had failed to grow after the ThrillVille injury. (Tr. at 350.) The belief was that the closed-head injury that [REDACTED] suffered at ThrillVille may have damaged the pituitary gland, causing the cessation of growth. (Tr. at 373.)

[REDACTED] turned 18 years old and was no longer a minor on May 18, 2004. In November 2004, [REDACTED] signed a contingent fee agreement with the Accused for representation in "enforcing a cause of action against Thrill Ville USA, Inc." (Tr. at 376; Ex. 25 at 29.) A suit was filed in January 2005 and settled in September 2006 in connection with a mediation with the Hon. John Skmas as mediator. (Tr. at 377.) As part of the settlement of claims in the case,

Thrillville agreed to pay a gross settlement amount of \$225,000, of which \$140,000 was paid to ██████ \$14,131.14 was allocated to costs, and \$70,868.86 was allocated to attorney fees (the “█████ Settlement”). (Ex. 11.) The Accused notified the J&B Firm on July 27, 2006, about the settlement and requested a statement of the firm’s costs. (Ex. 15.) The J&B Firm faxed the statement of costs to the Accused on August 2, 2006 (Ex. 15), and sent reminder communications to him about the case on October 10, 2006, and November 3, 2006 (Ex. 15), and letters on December 6, 2006, and December 19, 2006 (Ex. 16, 17). No payment was made to the J&B Firm, and a suit was then filed on behalf of the J&B Firm in January 2008 (“J&B Suit”), seeking specific performance of the Settlement Agreement and payment of the attorney fees and costs that the firm claimed it was owed from the ██████ Settlement. (Ex. 18.) An amended complaint was filed on March 18, 2008. (Ex. 21.)

In the J&B Suit, the Accused filed a motion for summary judgment on May 19, 2008. (Ex. 24.) To support the summary judgment motion, the Accused prepared and filed a Declaration on May 19, 2008 (“the Declaration”), which included the following statements:

7. At no time during the course of representation of Richard and/or Sharon LaPointe did anyone execute a *guardian ad litem* on behalf of ██████ La Pointe. Instead, because of the anticipated difficulty and high cost of proving liability in the case, and the seemingly minor injury suffered by their son, the inquiry centered primarily on recovery of their medical bills through a med-pay insurance provision, or through other means such as negotiation.

8. There was no present intention to file or pursue a case on behalf of ██████ La Pointe at any time while I was employed by J&B, or at any time before the Agreement was executed several months later.

\* \* \*

27. The ██████ *LaPointe v. Thrill Ville USA, Inc.* case was litigated, and settled at mediation in July, 2006. Neither Richard LaPointe nor Sharon LaPointe were present at the mediation, nor were any of their potential interests represented or protected at the mediation.

(Ex. 25 at 2, 6.)

The J&B Firm opposed the Accused’s motion and responded to it. Counsel for the J&B Firm contacted the Accused and pointed out that the statement in paragraph 27 of the Declaration was inaccurate because the mediation documentation included signatures by the LaPointes indicating they were present. (Tr. at 378.) Counsel for the J&B Firm disagreed with the statement in paragraph 7 that the inquiry the Accused pursued on this matter while at the J&B Firm “centered primarily on recovery of their medical bills through a med-pay insurance provision, or through other means such as negotiation.” (Ex. 25 at 2.) Counsel for the J&B Firm disagreed with the statement in paragraph 8 that “[t]here was no present

intention to file or pursue a case on behalf of ██████ LaPointe.” (Ex. 25 at 6.) Counsel for the J&B Firm prepared and submitted to the Accused a Declaration of Jeanine Smith (“Smith Declaration”). (Ex. 26.) The Smith Declaration included, inter alia, notes made by the Accused and copies of documents drafted by the Accused while at the J&B Firm. (Ex. 26 at 3–4.)

In the J&B Suit, the court did not hear or decide the Accused’s motion for summary judgment. Instead, the matter went into mediation and the parties settled it. (Tr. at 379.)

Brooks Cooper, as an expert witness, opined as to the nature of claims that can be asserted for a minor’s injuries and the need for a conservatorship to be established. While at the J&B Firm, the Accused represented the LaPointes in connection with the injury to ██████

### **DISCUSSION AND CONCLUSIONS OF LAW**

The Bar has the burden of establishing the Accused’s misconduct in this proceeding by clear and convincing evidence. BR 5.2. Clear and convincing evidence means that the truth of the facts asserted is highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

The Complaint charged the Accused with violation of four provisions of the RPCs as a result of the three statements in the Declaration that are listed above. We will discuss them in the same order as they appear in the Declaration.

1. Was the Accused’s statement in paragraph 7 of the Declaration a false representation, that the Accused’s representation of Richard and/or Sharon LaPointe centered primarily on recovery of their medical bills through a med-pay insurance, or through other means such as negotiations?

The Trial Panel considered the testimony of the Accused on his representation of the LaPointes while at the J&B Firm. The Trial Panel also considered the testimony of Mr. Cooper, as an expert witness, as to the nature of claims that can be asserted for a minor’s injuries and the need for a conservatorship to be established.

The Accused and Mr. Cooper point out that it would have been necessary to seek a guardian ad litem or conservatorship to enforce a claim on behalf of ██████ while he was a minor. The Accused noted that there was no retainer agreement with the parents as conservator or guardian ad litem and no filing made to seek a conservatorship. However, the Trial Panel was not persuaded that the language of the retainer agreement or that these other factors indicated that the Accused was not doing the necessary legal work to provide the basis for the filing of an action on behalf of ██████

From the record, it appears that the Accused used good judgment in not rushing to the courthouse with a suit based on the facts as known while at the J&B Firm. A claim filed then might well have led to a settlement of the case prior to the discovery of the major injury that ██████ suffered. ██████’s cessation of growth was not discovered until years later. But, the

Accused followed industry practice that Mr. Cooper testified was common to personal injury litigators on claims involving minors by initially setting up their client matter with the parents, with the knowledge that more would be needed (a guardian ad litem appointment in connection with the filing of a suit and a retainer agreement with the guardian ad litem) if and when a claim was filed on behalf of the minor.

At the same time, the Trial Panel concluded that the testimony of the Accused was credible, that the immediate priority was to be sure that the medical bills incurred by the LaPointes were paid, so that they would not bear out-of-pocket costs related to the injury. This concern may have been particularly expressed by Mr. LaPointe, and the Accused thought of it as a primary objective.

What made the case interesting to a personal injury litigator were the potential claims that the LaPointes and ██████ had that were in addition to the medical costs. These claims included a claim for damages if a link could be established (or reasonably alleged) between the injury and some impairment of ██████. The possible claims that Mrs. LaPointe might have had for traumatic suffering as a result of being present when the injury occurred were considered but not found to be worth pursuing, based on Oregon law.

The third segment of the Accused's work while he was at the J&B Firm related to possible claims that the LaPointes might have under the *Great Western/Knudson* theory for recovery of medical costs. These claims ultimately did not lead to a recovery, but preparatory work for making the claims was started while the Accused was at the J&B Firm.

The Trial Panel concluded that the legal representation that the Accused provided at the J&B Firm had three components: (a) representation of the parents on recovery of medical expenses, as necessary, so that they would not bear any costs related to the injury; (b) representation of the LaPointes on any damages claims that could be asserted, through a conservatorship or guardian ad litem (as necessary) on behalf of ██████ and (c) representation of the LaPointes on claims of injury to Mrs. LaPointe on the PTSD theory that the Accused considered or on claims for recovery of medical costs under *Great Western/Knudson* or other theories.

The Trial Panel concluded that the paramount objective during the time period in which the Accused was at the J&B Firm was the recovery of medical expenses, as necessary. It was a primary concern of Mr. LaPointe in particular. While Dr. Butler's report may have supported a claim for ongoing impairment to ██████ the evidence that the impairment was caused by the accident was not strong. Although some work was done to assess any impairment and to establish a baseline for future evaluations, ██████'s damages did not appear to be something that could (or should, given the statute of limitations for filing of claims for injuries to a minor who was still growing) be the immediate concern in the time period between the accident and the Accused's leaving the J&B Firm. As a result, the Trial Panel concluded that the *primary* focus, measured in immediacy and by the work as a whole,

while the Accused was at the J&B Firm, was on the parents' recovery of medical expenses. As a result, the Trial Panel concluded that the Accused's statement in paragraph 7 of the Declaration was not false, as alleged, but true.

2. Was the Accused's statement in paragraph 8 of the Declaration a false representation, that there was no present intention to file or pursue a case on behalf of ██████ at any time while the Accused was employed by the J&B Firm?

There is no doubt that the Accused did the preparatory work for a case to be filed against ThrillVille for damages as a result of the injury to ██████. For the reasons noted above, the Trial Panel was not persuaded that the technical distinctions as to what additional steps would need to have been taken to file a suit while ██████ was a minor or the wording of the retainer agreement indicated that all the work was being done on behalf of the parents (and none on behalf of ██████).

The Accused did communicate with ThrillVille about an intent to file a suit in March 2001. A check was drawn for payment of filing fees, although neither the Accused nor his secretary could remember which one of them requested the check. The Accused explained that the threat of a suit was used to try to get ThrillVille to respond. The Bar's witness, Ms. Morstad, testified that she had only one face-to-face meeting with the LaPointes and the Accused, and that the meeting apparently occurred after the Accused's phone calls and letter indicating that a suit would be filed.

While at the J&B Firm, the Accused had relatively little hard evidence that ██████'s injury at ThrillVille had caused current and future impairment. Ms. Morstad, the insurance adjuster, did not believe so, and there is no indication that either ThrillVille or the insurer was acknowledging any liability for negligence. Dr. Butler's initial examination was the only evidence of any ongoing impairment.

The Accused gave two reasons why the filing of a suit in 2001 was not advisable. First, the evidence of impairment caused by the injury was not strong enough, and the amount of the damages claim not large enough, to warrant the present filing of a suit. Second, a better strategy was to establish a baseline for ██████'s medical condition and monitor the situation to see if any medical problems developed as a result of the closed-head injury. There were several years remaining before the case would be barred by the statute of limitations. Impairment may not be presently apparent but may become apparent later. And, from his prior experience in dealing with claims involving closed-head injuries and children, the Accused believed that injuries to children who are growing may manifest themselves differently than for an adult. (Tr. at 327–331, 482–483.)

On balance, the Trial Panel concluded that the Accused's testimony as to the preparation of the draft complaint and communications about it were credible and that there

was no present intention to file a case while the Accused was at the J&B Firm, even though it was used as a threat.

The related question is whether there was a present intention to “pursue a case” on behalf of ██████ while the Accused was at the J&B Firm. The Bar’s observation was that, in preparing the Declaration and (later) in explaining what he meant in the Declaration, the Bar believed the Accused was parsing words and knowingly misrepresenting the facts. Some of the testimony in the record is conducive of that interpretation. Does pursuing a case only include a filed case? Is a claim the same as a case or different?

The “pursue a case” wording in paragraph 8 has to be read in conjunction with the words that precede it. Was there a “present intention to \* \* \* pursue a case” on behalf of ██████ while the Accused was at the J&B Firm? The Trial Panel concluded that the statement in the Declaration was not a knowingly false statement. The Accused did work on the case. The Accused did not intend to pursue it in that time period by filing a suit, unless additional evidence of impairment could be discovered, with a significant damages claim amount attached to it, that would outweigh the tactical advantage of waiting until more damages might be provable. The Accused testified as to his belief that the medical industry concurs that injuries to infants and youth who are not fully grown may not manifest themselves until later in life. There were legitimate tactical reasons to prepare the foundations for a case that would not be pursued until later. In this light, saying that there was no present intention to pursue a case on behalf of ██████ was true.

The Trial Panel had more concerns about the Accused’s statement in paragraph 8 than the other two statements that are the subject matter of the Bar’s Complaint. First, the Trial Panel was not persuaded by the Accused’s explanation that he intended a “case” here to mean the same as a “filed case,” or that a “claim” would have meant the same thing. The Accused should not conclude from our opinion in this case that the Trial Panel believes it is appropriate to parse words in drafting a sworn declaration (and especially so if the effect may be misleading to the court). Second, the Trial Panel had concerns about whether the Accused properly distinguished fact from legal argument in preparing his motion for summary judgment and the Declaration. There is a difference between drafting a motion in which the attorney makes his legal arguments and preparing a declaration in which a party summarizes the facts his testimony will show. It is perhaps easy to confuse the two, when an attorney is preparing a declaration as to what his *own* testimony would be in a case that he is arguing.

Having noted the concerns, the Trial Panel does not find that the evidence the Bar submitted is sufficient to show, by clear and convincing evidence, that the statement made by the Accused in paragraph 8 was false. The Trial Panel concluded that the statement being made was true, although a more lengthy version of what the Accused was trying to summarize (rather than the cryptic conclusion) would have been clearer as to what was being said in paragraph 8 of the Declaration.

3. Was the Accused's statement in paragraph 27 of the Declaration a false representation, that neither Richard LaPointe nor Sharon LaPointe were present at the mediation?

The Accused admits that the statement in paragraph 27 of the Declaration was inaccurate. The Accused testified that he had relied on his memory as to who was at the mediation and did not remember that the LaPointes were present. (Tr. at 393.) The Accused testified that he did not intentionally make a false statement.

In paragraph 27, the Accused made a statement that was black-and-white. People are either at a meeting or not—there is no interpretation involved. The inaccuracy of the statement was noted fairly quickly by the other side to the J&B Suit and called to the Accused's attention. The Accused testified that he then checked with the LaPointes and discovered his memory was incorrect. (Tr. at 378.)

Did the Accused knowingly make a false statement? To some extent, the Bar's efforts to show that the Accused may have been carefully parsing words in paragraphs 7 and 8 of the Declaration undercut the Bar's argument here that the Accused was knowingly making a false statement. If the Accused were going to make a false statement knowingly, a clever parser of words would not do so on a statement that could easily be proven factually wrong. The Trial Panel carefully considered the testimony concerning paragraph 27 and concluded that the Accused's testimony was credible as to the circumstances in which he made the inaccurate statement.

The Accused did not offer a totally satisfactory explanation as to why he did not "fact check" his statement as to whether the LaPointes were at the mediation, rather than relying on his memory. An attorney's memory is not perfect. Checking his records before asserting a fact would have avoided a statement being made in the Declaration that was untrue.

The Trial Panel concluded that the Accused's statement in paragraph 27 of the Declaration was wrong, but not intentionally false.

### **DISPOSITION**

The Trial Panel found that there was no violation of RPC 3.3(a)(1), RPC 8.4(a)(3), RPC 8.4(a)(4), or RPC 8.4(a)(2). The Complaint is dismissed.

Cite as *In re Klingbeil*, 25 DB Rptr 142 (2011)

IT IS SO ORDERED.

DATED this 11th day of April 2011.

/s/ David W. Green

David W. Green  
Trial Panel Chair

/s/ Charles R. Hathaway

Charles R. Hathaway  
Trial Panel Member

/s/ Patricia E. Martin

Patricia E. Martin  
Public Member

**Cite as 350 Or 480 (2011)**  
**IN THE SUPREME COURT**  
**OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

J. MARK LAWRENCE,

Accused.

(OSB No. 08-115; SC S058778)

En banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted May 2, 2011. Filed June 30, 2011.

Paula Lawrence, McMinnville, argued and cause and filed the briefs for Accused.

Stacy Hankin, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The complaint is dismissed.

**SUMMARY OF THE SUPREME COURT OPINION**

The issue in this lawyer disciplinary proceeding is whether the Accused, by releasing a partial transcript of a juvenile hearing to the press, violated Rule of Professional Conduct (RPC) 8.4(a)(4), which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. A trial panel found the accused guilty of violating RPC 8.4(a)(4) and suspended him for 60 days. We review the decision of the trial panel de novo. ORS 9.536(2); BR 10.6. Because we conclude that the Bar failed to prove by clear and convincing evidence that the Accused's conduct caused prejudice to the administration of justice, we dismiss the complaint.



2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1978, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On September 30, 2009, an Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), RPC 8.1(a)(2), and RPC 8.4(a)(3). The matters alleged in the Amended Formal Complaint were heard by a trial panel of the Disciplinary Board on June 14 and June 15, 2010.

5.

On October 15, 2010, the trial panel issued an opinion finding the Accused had violated RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), and RPC 8.1(a)(2). The panel further determined that the Accused should be suspended from the practice of law for seven months. A copy of the trial panel opinion is part of the record presently before the court.

6.

The Accused timely filed a request for Supreme Court review pursuant to BR 10.3.

7.

The parties have since reached agreement on an appropriate outcome in this proceeding as reflected in this Stipulation for Discipline and ask the Supreme Court to approve the stipulation as a final disposition of the proceeding. Contingent upon that approval, the Accused withdraws his request for review.

**Case No. 09-28**

**Clayton Matter**

8.

On or about August 21, 2006, James D. Clayton (hereinafter “Clayton”) filed a petition for postconviction relief in the Circuit Court of the State of Oregon for the County of Malheur, *James D. Clayton v. Jean Hill, Superintendent, Snake River Correctional Institution*, Case No. CV06085328P (hereinafter “Postconviction Case”). The court denied

Clayton's claims and on July 3, 2007, filed a general judgment in favor of the defendant in the Postconviction Case. About July 26, 2007, Clayton filed a notice of appeal, Case No. CA A 136351 (hereinafter "Clayton Appeal").

9.

On or about July 31, 2007, the court appointed counsel to represent Clayton in the Clayton Appeal. About August 17, 2007, the Accused was substituted as counsel to represent Clayton. Thereafter, the Accused filed several motions for extension of time to file the opening brief and, about March 13, 2008, filed the opening brief.

10.

The Accused provided Clayton with a copy of the opening brief. Clayton reviewed the brief and identified what he perceived to be factual errors and other concerns. About April 1, 2008, Clayton sent a letter and an excerpt from the trial transcript of his case to the Accused. Clayton asked the Accused to correct the brief and to explain why certain issues were not raised, and notified that he wished to raise the issues in his appeal. The Accused reviewed Clayton's letter, reviewed the brief and the applicable law, and concluded that there was no good-faith basis on which to make the changes that Clayton requested. The Accused did not communicate his conclusion to Clayton.

11.

On or about April 29, 2008, a notice of association of attorney James Cunningham (hereinafter "Cunningham") was filed with the Court of Appeals concerning Clayton's Appeal. Commencing May 10, 2008, and until July 14, 2008, the Accused was suspended from the practice of law for violations of the Code of Professional Responsibility and Rules of Professional Conduct.

12.

About June 7, 2008, Clayton sent another letter to the Accused asking for a response to his concerns and requests. About June 26, 2008, Cunningham sent Clayton a reply which notified Clayton that the Accused was suspended from the practice of law and that Cunningham had been associated as counsel to answer questions and monitor the appeal during the time the Accused was suspended from the practice of law. Cunningham represented that the Accused was reviewing the opening brief and the errors Clayton identified, and after the Accused was reinstated, would notify Clayton if he believed any of the errors needed to be corrected. The letter was sent to the Snake River Correctional Institution.

13.

About July 14, 2008, Clayton sent a third letter to the Accused about his concerns and requests. Clayton asked the Accused to contact him at the Columbia River Correctional Institution, where he had since been moved. The Accused did not take action to amend or

modify the opening brief, and did not respond to Clayton's questions or requests or otherwise communicate with Clayton.

14.

About August 21, 2008, Clayton brought his concerns to the attention of the Client Assistance Office of the Oregon State Bar. On September 2, 2008, the Client Assistance Office requested the Accused's explanation. Thereafter, about October 6, 2008, the Accused filed a motion to correct errors in the opening brief and sent a copy of the motion to Clayton.

**Case No. 09-29**

**Thorne Matter**

15.

About May 5, 2005, Walter Thorne (hereinafter "Thorne") filed a petition for habeas corpus alleging inadequate medical care in the Circuit Court of the State of Oregon for the County of Malheur, *Walter S. Thorne v. Jean Hill, Superintendent, Snake River Correctional Institution*, Case No. CV05054415M (hereinafter "Habeas Corpus Case").

16.

On March 1, 2007, unbeknownst to the Accused, Thorne filed a civil complaint in the United States District Court for the District of Oregon, *Walter S. Thorne v. Jean Hill, Superintendent, Snake River Correctional Institution and others*, USDC Case No. 07-CV-00318-TC, seeking money damages for injuries he allegedly sustained as a result of medical malpractice and violations of his civil rights while he was incarcerated and in the custody and control of the Oregon Department of Corrections (hereinafter "Federal Civil Case").

17.

The court filed a general judgment dismissing Thorne's Habeas Corpus Case about April 9, 2007. About April 25, 2007, Thorne filed a notice of appeal in the Court of Appeals, Case No. CA A 135469 (hereinafter "Habeas Appeal"). On June 27, 2007, the Accused was substituted as counsel to represent Thorne in the Habeas Appeal. About August 24, 2007, the Accused filed an opening brief, and on September 6, 2007, he forwarded a copy of the brief to Thorne.

18.

The Accused informed Thorne that when Thorne was released from custody, the State would likely move successfully to dismiss the Habeas Appeal as moot.

19.

On December 5, 2007, Thorne was released from custody, but subject to postprison supervision. Before and after Thorne was released from custody, Thorne telephoned the

Accused each month to ask about the status of his appeal. After Thorne was released from custody, he promptly provided the Accused with his telephone number and addresses.

20.

Respondents in the Habeas Appeal filed motions for extensions of time to file the respondents' brief in October 2007, and then again on February 15, 2008. Thorne called the Accused later in February 2008, and the Accused reported to Thorne that the State had requested an extension of time.

21.

On March 26, 2008, the respondents filed a motion to dismiss the Habeas Appeal because Thorne had been released from custody and the state was no longer responsible for his medical care. Pursuant to ORAP 7.05(3), the Accused had 14 days to file a response or a request for an extension of time to do so. The Accused did not provide Thorne with a copy of the motion or otherwise notify him that it had been filed. The Accused concluded that there was no good-faith basis upon which to oppose the State's motion or further advocate on behalf of Thorne. The Accused did not file a response or request an extension of time to do so. The Accused did not inform Thorne of his professional judgment that he could not oppose the State's motion to dismiss the Habeas Appeal and that he would not do so.

22.

Commencing May 10, 2008, and until July 14, 2008, the Accused was suspended from the practice of law for violations of the Code of Professional Responsibility and Rules of Professional Conduct. About late May or early June 2008, Thorne telephoned the Accused to determine the status of his appeal. The Accused told Thorne that he was suspended and could not discuss Thorne's case. The Accused told Thorne to call him again in July 2008, after the Accused's license to practice law was reinstated. The Accused did not provide Thorne with a copy of the respondents' motion to dismiss. The Accused did not tell Thorne that the respondents had filed a motion to dismiss Thorne's Habeas Appeal or that he had not filed a response.

23.

On June 3, 2008, the Court of Appeals filed an order granting respondents' motion to dismiss Thorne's Habeas Appeal. As a result, the Court of Appeals did not address the merits of Thorne's Habeas Case or Habeas Appeal.

24.

In July 2008, Thorne again telephoned the Accused. The Accused represented that he had some papers for Thorne and when he could find them he would send the papers to Thorne. The Accused did not tell Thorne that the respondents had filed a motion to dismiss Thorne's Habeas Appeal or that the court had granted the motion. The Accused did not send any papers to Thorne.

25.

On August 7, 2008, the Court of Appeals filed a judgment of dismissal in Thorne's Habeas Appeal. The Accused did not provide Thorne with a copy of the judgment, the motion to dismiss, or the order granting the motion, and did not notify Thorne about them until on or about August 27, 2008, after Thorne contacted the Oregon State Bar for assistance communicating with the Accused.

**Case No. 09-104**

**Ortiz/Parksion Matter**

26.

On August 14, 2006, Jose De La Rosa Ortiz (hereinafter "Ortiz") filed a petition for postconviction relief in the Circuit Court of the State of Oregon for the County of Malheur, *Jose De La Rosa Ortiz v. Jean Hill, Superintendent, Snake River Correctional Institution*, Case No. CV06085314P (hereinafter "Postconviction Case"). The court denied Ortiz's petition, and on January 4, 2008, filed a general judgment in favor of the defendant in the Postconviction Case. About January 22, 2008, Ortiz filed a notice of appeal, Case No. CA A 137893 (hereinafter "Ortiz Appeal").

27.

About January 23, 2008, the court appointed counsel to represent Ortiz in the Ortiz Appeal. Thereafter, the Accused was substituted as counsel to represent Ortiz. At all material times, Ortiz was married to Sonja Parksion (hereinafter "Parksion").

28.

In April 2008, Parksion delivered documents to the Accused concerning Ortiz's Postconviction Case and appeal.

29.

About April 30, 2008, the Accused filed a motion for extension of time to file the opening brief in the Ortiz Appeal. Commencing May 10, 2008, and until July 14, 2008, the Accused was suspended from the practice of law for violations of the Code of Professional Responsibility and Rules of Professional Conduct.

30.

While under the supervision of another lawyer, the Accused prepared the opening brief for the Ortiz Appeal, and filed it on or about May 28, 2008. Ortiz received a copy of the brief. Neither the Accused nor the other lawyer discussed the issues contained in the brief with Ortiz before the brief was filed.

31.

About October 29, 2008, the Attorney General's Office filed the respondent's brief in the Ortiz Appeal. The Accused sent a copy of the brief to Ortiz.

32.

The Accused initiated three separate telephone conferences with Ortiz to explain to his client the issues raised in the postconviction appeal. These three telephone conferences were held on November 17, 2008, December 9, 2008, and January 9, 2009.

In the first conference, on November 17, 2008, the Accused explained the appellate process to Ortiz, including the rule that any issue raised on appeal must be preserved by motion, petition, or objection in the trial court. The Accused explained that no new evidence or argument could be raised for the first time on appeal. The Accused explained the factual and legal underpinnings for the main issue that had been raised in the postconviction appeal, that is, the issue of whether or not Ortiz had received the effective assistance of counsel at his trial in the underlying criminal case.

The Accused held the second of the three telephone conferences with Ortiz on December 9, 2008. He again explained that under Oregon law, actual innocence is not a claim that can be raised in postconviction unless it can be fashioned into something that the trial lawyer did wrong. In the Accused's mind, there was nothing that he hadn't discussed or resolved as of that second telephone conversation with Ortiz.

On January 9, 2009, the Accused held the third of the three telephone conferences with Ortiz. He explained to Ortiz again the factual and legal underpinnings for the main issue that had been raised in the postconviction appeal.

33.

About February 17, 2009, the Court of Appeals scheduled oral argument for April 15, 2009, and sent notice to the Accused. The Accused did not notify Ortiz or Parksion of the date scheduled for oral argument, but instead moved to withdraw from the case. Without notice to or consultation with Ortiz or Parksion, the Accused notified the Court of Appeals that he waived oral argument.

34.

Between mid-January 2009 and the spring of 2009, notwithstanding the three teleconferences that the Accused held with his client, Ortiz continued to claim that he did not understand why certain issues were not raised on his appeal. Being of the view that everything had been adequately expressed to Ortiz and that Ortiz was unwilling to accept the advice, the Accused did not respond to Ortiz's and Parksion's attempts to communicate with him after January 9, 2009.

35.

From November 14, 2008, through the spring of 2009, Parksion made multiple requests for the return of the documents she delivered to the Accused. The Accused did not timely comply with Parksion's requests. Parksion and Ortiz filed a complaint with the Bar concerning the Accused's conduct in March 2009. After inquiry by the Bar, the Accused returned Parksion's documents to Parksion about April 15, 2009.

**Case No. 09-105**

**Creach Matter**

36.

About July 19, 2002, Timothy Creach (hereinafter "Creach") was convicted of multiple felony and misdemeanor sexual offenses, *State of Oregon v. Timothy Creach*, Douglas County Circuit Court Case No. 02CR0886FE. About August 29, 2002, Creach filed a notice of appeal concerning his criminal conviction. The Accused was appointed to represent Creach on appeal. About March 3, 2004, the court affirmed Creach's convictions without opinion. Creach asked the Accused to file a petition for review. On May 19, 2004, the Accused filed a petition, which the court denied on June 29, 2004.

37.

About April 12, 2007, Creach sent the Accused a letter asking for information concerning the appeal of his criminal case. On May 2, 2007, the Accused acknowledged Creach's request and reported that he would look for the file. About May 21, 2007, the Accused sent Creach another letter in which he reported that he was still searching for the file, and invited Creach to call him collect on one of the specified "call" days. Creach never called the Accused.

38.

After May 21, 2007, Creach did not receive any documents or communication from the Accused, and about February 24, 2008, Creach sent the Accused another letter and request for documents concerning his appeal.

39.

About March 30, 2008, the Accused responded to Creach's February 24, 2008, letter. The Accused stated that he had no idea Creach was still waiting to hear from him and that the file was closed. The Accused also reported that he would set up a telephone conference with Creach. Thereafter, the Accused did not schedule a telephone conference with Creach, and otherwise did not communicate with him. He did, however, reiterate his request that Creach call him collect on one of the designated "call" days. Creach did not call the Accused.

40.

About November 20, 2008, Creach sent another letter to the Accused and stated that he was still waiting to hear from him. Creach also asked about other issues related to his case. The Accused did not respond, but contends that he did not receive that letter.

41.

Between about May 2007 and April 2009, the Accused did not provide Creach with the documents and other information he requested. About April 23, 2009, Creach complained to the Bar.

42.

The Accused failed to properly safeguard Creach's file over the course of an office move and remodeling. After Creach's complaint was referred to Disciplinary Counsel's Office for further investigation, the Accused reported he had lost Creach's file. The Accused subsequently recreated portions of the file and delivered them to Creach.

### **Violations**

43.

The Accused admits that by engaging in the conduct described in paragraphs 8 through 14, he failed to keep Clayton reasonably informed about the status of the legal matter and to promptly comply with reasonable requests for information, in violation of RPC 1.4(a). The Accused admits that by engaging in the conduct described in paragraphs 15 through 25, he failed to keep Thorne reasonably informed about the status of the legal matter and to promptly comply with reasonable requests for information, in violation of RPC 1.4(a). The Accused admits that by engaging in the conduct described in paragraphs 26 through 35, he failed to keep Ortiz and Parksion reasonably informed about the status of the legal matter and to promptly comply with reasonable requests for information, in violation of RPC 1.4(a), and that he failed to promptly deliver file materials to Parksion, in violation of RPC 1.15-1(d). The Accused admits that by engaging in the conduct described in paragraphs 36 through 42, he failed to keep Creach reasonably informed about the status of the legal matter and to promptly comply with reasonable requests for information, in violation of RPC 1.4(a), and that he failed to appropriately safeguard client property, in violation of RPC 1.15-1(a). Upon further factual inquiry, the parties agree that any charges alleged by the Bar in this proceeding but not specifically admitted by the Accused in this stipulation, regardless of whether violations were found by the trial panel, should be and, upon the approval of this stipulation, are dismissed.

## Sanction

44.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** In all four matters, the Accused violated his duty to act with reasonable diligence and promptness in representing a client. *Standards*, § 4.4. In the Ortiz/Parksion and Creach matters, the Accused also violated his duty to preserve client property. *Standards*, § 4.1.
- b. **Mental State.** In each of these matters the clients repeatedly contacted the Accused for information or property to which they were entitled. The Accused knew that he was not discharging his duties to communicate. The Accused acted negligently in failing to properly safeguard and preserve Clayton’s file materials and in failing to deliver promptly the documents back to Parksion.
- c. **Injury.** The Accused caused actual and potential injury to his clients, the legal system, and the profession. The Accused caused his clients actual frustration because he failed to communicate with them or attend to their requests in a timely fashion. The Accused caused actual injury to Parksion, who was required to obtain a second copy of documents the Accused failed to promptly return, and to Creach, whose file was lost.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A prior record of discipline. *Standards*, § 9.22(a). The Accused has a prior history of two stipulations for discipline that involves some similar instances of misconduct, adjudicated prior to or during his misconduct in the present cases. In September 2006, the Accused was suspended for 30 days for violations of DR 6-101(B) and RPC 1.3 (neglect of a legal matter) and RPC 1.4 (failure to communicate) in four different client matters. *In re Groom*, 20 DB Rptr 19 (2006). In May 2008, the Accused was suspended for one year, with all but 10 months stayed subject to a one-year probation, for multiple violations in three matters of DR 6-101(B) and RPC 1.3 (neglect of a legal matter), RPC 1.4(a) and (b) (failure to communicate), DR 7-101(A)(2) (intentional failure to carry out a contract of employment), DR 7-106(A) (failure to comply with an order of the court), RPC 8.4(a)(3) (misrepresentation), and ORS 9.160 and RPC 5.5(a) (practicing law while suspended). *In re Groom*, 22 DB Rptr 124 (2008).

2. A pattern of misconduct. *Standards*, § 9.22(c). The Accused committed similar violations in four different client matters over a similar time period. The violations continue a pattern of misconduct that has existed since the Accused's misconduct in the first disciplinary matter for which he was sanctioned.
  3. Multiple offenses. *Standards*, § 9.22(d). The Accused violated multiple rules involving different duties owed to his clients.
  4. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused has practiced law since 1978 and has specialized in the appellate representation of criminal defendants.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Remorse. *Standards*, § 9.32(l). The Accused has expressed remorse for his failure to properly handle client property and keep his clients better informed about their legal matters.
  2. Cooperative attitude. *Standards*, § 9.32(e).
  3. Good character and reputation. *Standards*, § 9.32(g).
  4. Absence of dishonest or selfish motive. *Standards*, § 9.32(b); *In re Carpenter*, 337 Or 226, 240–241, 95 P3d 203 (2004). The misconduct was not directed at achieving financial gain.

45.

Under the *Standards*, suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. The *Standards* also provide that suspension is generally appropriate when a lawyer knows or should know he is dealing improperly with client property and causes injury or potential injury to a client. *Standards*, § 4.12.

46.

The court imposed a six-month suspension under somewhat similar circumstances in *In re Devers*, 317 Or 261, 855 P2d 617 (1993). Devers, who had a prior disciplinary history, knowingly neglected to pursue the legal matters of three clients and failed to respond to their attempts to contact him and gain possession of their files. Devers also knowingly failed to respond to bar authorities in the state that originally investigated his misconduct. Here, the Accused's misconduct involves similar violations of the duty to communicate and to properly handle client property. While the Accused's prior similar disciplinary history is more extensive than the lawyer in Devers, the Accused's misconduct does not include a knowing failure to cooperate with and respond to Bar authorities. Where the court has imposed more lengthy suspensions for similar violations of the duty to communicate and to preserve client

property, those cases have typically involved additional violations such as a failure to respond to disciplinary inquiries. See, e.g., *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (“*Chandler III*”) (two-year suspension imposed on lawyer at his third disciplinary proceeding involving neglect of a legal matter, failure to turn over client property, and failure to cooperate with Bar authorities).

47.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended 180 days for violation of RPC 1.4(a), RPC 1.15-1(a), and RPC 1.15-1(d), the sanction to be effective immediately upon approval of the stipulation.

48.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Stephen J. Williams, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused’s client files and serve as the contact person for clients in need of the files during the term of the Accused’s suspension. The Accused represents that Stephen J. Williams has agreed to accept this responsibility.

49.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

50.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

Cite as *In re Groom*, 25 DB Rptr 154 (2011)

EXECUTED this 13th day of May 2011.

/s/ David E. Groom

David E. Groom

OSB No. 78231

EXECUTED this 17th day of May 2011.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 03222

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-24
	)	
STEVEN D. BRYANT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.3 and RPC 1.4(a). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	August 1, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.3 and RPC 1.4(a).

DATED this 1st day of August 2011.

/s/ William B. Crow  
 William B. Crow  
 State Disciplinary Board Chairperson

/s/ Carl W. Hopp  
 Carl W. Hopp, Region 1  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Steven D. Bryant, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on December 16, 1991, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Deschutes County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On April 12, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.3 and RPC 1.4(a). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Facts**

5.

In July 2007, pursuant to a stipulated general judgment (hereinafter “judgment”), Christopher Kryzanek’s (hereinafter “Kryzanek”) former wife was awarded custody of the couple’s child while Kryzanek was awarded standard parenting time and ordered to make monthly child support payments to his former wife. Kryzanek’s child support obligations were to be enforced by the State of Oregon through wage withholding. The Accused represented Kryzanek in the matter.

6.

Between July 2007 and the summer of 2009, Kryzanek and his former wife informally altered the parenting schedule such that each of them had the child 50% of the time. The new schedule was not reflected in any written documents, and Kryzanek continued to pay the monthly child support obligation provided for in the judgment.

7.

In June 2009, Kryzanek’s former wife filed a motion to increase Kryzanek’s monthly child support obligation. On September 11, 2009, the State of Oregon issued a proposed administrative order (hereinafter “proposed order”) increasing Kryzanek’s child support obligation. The increased amount was based, in part, on the original judgment which awarded

Kryzanek only 23% of the parenting time. Kryzanek had until October 11, 2009, to request a hearing disputing the proposed order.

8.

On October 8, 2009, Kryzanek retained the Accused to request a hearing to dispute the proposed order and obtain a written agreement with his former wife that reflected his 50% parenting time. The Accused failed to timely request a hearing disputing the proposed order.

9.

In November 2009, the Accused filed a motion for show cause to modify parenting time and child support and a motion for a status quo order and, in early December 2009, served Kryzanek's former wife. In a January 5, 2010, telephone conversation, Andrew Mathers (hereinafter "Mathers"), who represented Kryzanek's former wife, made a settlement proposal to the Accused.

10.

The Accused failed to timely communicate the settlement proposal to Kryzanek, failed to request a hearing on the motions he had filed, failed to respond to Mather's settlement proposal, and failed to consummate a settlement.

11.

In December 2009, the State of Oregon finalized the proposed order and, beginning in January 2010, withheld the increased child support payments from Kryzanek's paychecks. The Accused failed to appeal the order.

12.

Beginning in early March 2010, and until Kryzanek terminated the Accused's representation on June 7, 2010, the Accused failed to respond to Kryzanek's reasonable requests for information.

### **Violations**

13.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 12, he violated RPC 1.3 and RPC 1.4(a).

### **Sanction**

14.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by

considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duties Violated.** The Accused violated duties he owed to Kryzanek to pursue his legal matter and communicate with him. *Standards*, § 4.4.
- b. **Mental State.** Initially, the Accused acted negligently. However, after he received numerous messages from Kryzanek, the Accused knowingly failed to pursue the matter and respond.
- c. **Injury.** Kryzanek sustained actual injury in that for a year he paid significantly more in monthly child support obligations than he should have.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1991. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  3. Cooperative attitude toward the proceeding. *Standards*, § 9.32(e).

15.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standards*, § 4.42(a). 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. *Standards*, § 4.43.

16.

Generally, lawyers who knowingly neglect a legal matter or fail to keep clients informed are suspended. *In re Snyder*, 348 Or 307, 232 P3d 952 (2010); *In re Redden*, 342 Or 393, 153 P3d 113 (2007); *In re Schaffner*, 232 Or 472, 918 P2d 803 (1996).

However, where, as in this case, the mitigating circumstances outweigh the aggravating circumstances, and the lawyer did not engage in any other misconduct, a reprimand is the more appropriate sanction. *In re Maloney*, 24 DB Rptr 194 (2010); *In re Pieretti*, 24 DB Rptr 277 (2010); *In re Freudenberg*, 22 DB Rptr 195 (2008).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violation of RPC 1.3 and RPC 1.4(a).

18.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 15th day of June 2011.

/s/ Steven D. Bryant

Steven D. Bryant  
OSB No. 915302

EXECUTED this 17th day of June 2011.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin  
OSB No. 862028  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 11-11  
)  
CHARLES Z. EDELSON, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.16(a)(1), and  
RPC 8.1(a)(2). Stipulation for Discipline. 90-day  
suspension.  
Effective Date of Order: August 22, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days for violation of RPC 1.3, RPC 1.4(a), RPC 1.16(a)(1), and RPC 8.1(a)(2), the sanction to be effective upon approval of the stipulation.

DATED this 22nd day of August 2011.

/s/ William B. Crow  
William B. Crow  
State Disciplinary Board Chairperson

/s/ Nancy Cooper  
Nancy Cooper, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Charles Z. Edelson, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 13, 1983, and has been a member of the Oregon State Bar continuously since that time. At all relevant times herein the Accused’s office and place of business was located in Multnomah County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On March 14, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.3, RPC 1.4(a), RPC 1.16(a)(1), and RPC 8.1(a)(2). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

On or about September 17, 2008, the Accused undertook to represent Bennett G. Johnson (hereinafter “Johnson”) in an Oregon workers’ compensation matter. At the time the Accused undertook to assist Johnson, Johnson had received a favorable determination in an Order on Reconsideration. SAIF Corporation, the insurer for Johnson’s employer, had appealed.

6.

On or about October 23, 2008, the Accused was notified that the appeal was assigned to Administrative Law Judge John Mark Mills (hereinafter “Judge Mills”), and a hearing in the matter was scheduled for November 13, 2008.

7.

The Accused recommended to Johnson, and Johnson thereafter agreed, to permit the Accused to submit the case on the record with written arguments from the parties.

8.

SAIF Corporation, represented in Johnson's matter by attorney James B. Northrup (hereinafter "Northrup"), also agreed to submit the case on the record with written arguments from the parties.

9.

On or about November 12, 2008, Northrup and the Accused engaged in a telephone conference with Judge Mills regarding the Johnson matter. With the participation of Northrup and the Accused, Judge Mills established that SAIF Corporation's brief in support of the appeal was due within 14 days; the Accused's brief on behalf of Johnson was due within 14 days thereafter; and Northrup's reply brief was due within seven days after the Accused filed Johnson's brief.

10.

On or about November 13, 2008, Northrup filed a brief on behalf of SAIF. The Accused's brief on behalf of Johnson was due by on or about November 27, 2008. The Accused did not file a brief on behalf of Johnson by November 27, 2008, or at any time thereafter.

11.

On or about December 5, 2008, Johnson contacted the Accused regarding the brief and the Accused assured Johnson he would file a brief on her behalf by the next day.

12.

On or about December 31, 2008, Northrup contacted the Accused regarding the brief. The Accused informed Northrup that the Accused would file a brief on behalf of Johnson within the next few days.

13.

Between December 5, 2008, and February 3, 2009, Johnson contacted the Accused's office several times for information regarding the filing of a brief on her behalf. Although the Accused was aware of Johnson's attempts to reach him for information regarding the brief in her matter, the Accused did not respond.

14.

On or about February 3, 2009, Johnson reached the Accused by telephone and demanded the Accused file a brief by Friday, February 6, 2009. The Accused assured Johnson that he would file a brief on her behalf.

15.

On or about February 9, 2009, the Accused discussed the appeal with Johnson and he promised to file a brief on her behalf.

16.

Between February 9, 2009, and on or about April 21, 2009, Johnson contacted the Accused's office several times for information regarding the brief. Although the Accused was aware that Johnson was attempting to reach him regarding the brief, the Accused did not respond.

17.

The Accused reached the opinion that he could not write a brief on behalf of Johnson that advanced any argument of merit or that would have any significant prospect of prevailing, and he decided he would not file a brief on behalf of Johnson.

18.

The Accused did not withdraw from the representation of Johnson after deciding that he would not file a brief on her behalf.

19.

On or about March 18, 2009, Johnson mailed a letter to Judge Mills complaining that the Accused had not yet filed a brief on her behalf. On or about March 23, 2009, Judge Mills directed the Accused to file Johnson's brief within 10 days and to provide an explanation for the Accused's delay. The Accused did not respond to Judge Mills or provide any explanation for the delay. The Accused did not file Johnson's brief and, on or about May 5, 2009, Judge Mills rendered a decision in the matter.

20.

Following Judge Mills' May 5, 2009, decision, Johnson's claims remained pending. The Accused did not withdraw from the representation of Johnson or pursue Johnson's interests in the matter after the decision.

21.

Following Judge Mills' May 5, 2009, decision, Johnson attempted to communicate with SAIF Corporation employees regarding her claims but encountered difficulties because the Accused had not withdrawn from representation.

22.

In April 2010, Johnson complained to the Oregon State Bar Client Assistance Office (hereinafter "Client Assistance Office") about the conduct of the Accused and a response was requested from the Accused. In May 2010, the Accused submitted to the Client Assistance Office a general response regarding the facts and issues raised by Johnson's complaint.

23.

In August 2010, the Client Assistance Office forwarded Johnson's complaint to Oregon State Bar Disciplinary Counsel for further investigation. On or about August 27, 2010, Disciplinary Counsel for the Bar mailed an inquiry to the Accused pursuant to BR 2.6 that demanded he provide by September 17, 2010, various file documents relating to the concerns Johnson had expressed about the Accused's representation. Although the Accused received the inquiry, he knowingly failed to respond and he did not request an extension of time in which to do so.

24.

On or about September 30, 2010, Disciplinary Counsel for the Bar mailed a second inquiry to the Accused demanding that he provide by October 7, 2010, information in response to its letter of August 27, 2010. Although the Accused received the inquiry, he knowingly failed to respond and he did not request an extension of time in which to do so.

25.

On or about October 14, 2010, Disciplinary Counsel for the Bar mailed a third letter to the Accused urging him to provide information in response to its letters of August 27, 2010, and September 30, 2010. Although the Accused received the letter, the Accused knowingly failed to respond.

### **Violations**

26.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 25, he violated RPC 1.3, RPC 1.4(a), RPC 1.16(a)(1), and RPC 8.1(a)(2).

### **Sanction**

27.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to act with reasonable diligence and promptness in representing a client. *Standards*, § 4.4. The Accused also violated duties he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted knowingly in that he was aware he was not diligently filing Johnson's brief. The Accused was also aware that, following

his determination that he would not file a brief, he was not promptly informing Johnson of his decision and withdrawing from her representation. The Accused knew he was not responding to disciplinary authorities after his initial response to Johnson's complaint.

- c. **Injury.** The Accused's misconduct caused frustration and anxiety to his client, who lost her opportunity to contest SAIF's appeal. It also caused some needless delay and expenditure of judicial and bar resources.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Prior disciplinary offenses. *Standards*, § 9.22(a). The Accused was previously reprimanded for failing to cooperate with investigatory requests from disciplinary authorities. *In re Edelson*, 13 DB Rptr 72 (1999).<sup>1</sup>
  - 2. Multiple offenses. *Standards*, § 9.22(d).
  - 3. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Remorse. *Standards*, § 9.32(l).
  - 2. Remoteness of prior offenses. *Standards*, § 9.32(m).

28.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standards*, § 4.42(a). 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. *Standards*, § 7.2.

29.

The court imposed a four-month suspension where a lawyer engaged in comparable misconduct in two client matters and also failed to timely and fully respond to disciplinary inquiries regarding those matters. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008). Koch had been reprimanded for similar misconduct only four years earlier. The court also imposed a four-month suspension in *In re Murphy*, 349 Or 366, 245 P3d 100 (2010). In that case a

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<sup>1</sup> When evaluating prior offenses, the court reviews all offenses prior to imposition of the sanction in the current case. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997). In determining the weight of each offense, the court considers: "(1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) the timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar." *In re Jones*, 326 Or at 200.

lawyer was found to have violated RPC 1.3 and RPC 1.4(a) in one matter, and RPC 8.1(a)(2) in that matter and two others. Given that the Accused's misconduct involved a single client matter and the remoteness of the Accused's prior disciplinary history, a 90-day suspension is appropriate.

30.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days for violation of RPC 1.3, RPC 1.4(a), RPC 1.16(a)(1), and RPC 8.1(a)(2), the sanction to be effective upon approval of the stipulation.

31.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

32.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

33.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 18th day of August 2011.

/s/ Charles Z. Edelson

Charles Z. Edelson

OSB No. 831880

EXECUTED this 18th day of August 2011.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 03222

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-133  
)  
THOMAS K. ONO, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: David J. Elkanich  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.15-2(m) and RPC 8.1(a)(2).  
Stipulation for Discipline. Public Reprimand.  
Effective Date of Order: August 25, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violations of RPC 1.15-2(m) and RPC 8.1(a)(2).

DATED this 25th day of August 2011.

/s/ William B. Crow  
William B. Crow  
State Disciplinary Board Chairperson

/s/ William G. Blair  
William G. Blair, Region 4  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Thomas K. Ono, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 28, 2007, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in the County of Multnomah, State of Oregon.

3.

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

4.

On December 2, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.15-2(m) (failure to comply with annual certification of lawyer trust account) and RPC 8.1(a)(2) (failure to respond to lawful requests from a disciplinary authority). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Facts**

5.

Pursuant to RPC 1.15-2(m), every member of the Bar is required to certify annually, on a form and by a due date prescribed by the Bar, that the lawyer is in compliance with RPC 1.15-1 and RPC 1.15-2(m) (hereinafter “IOLTA Certification”).

6.

In December 2009, the Bar mailed an IOLTA Certification compliance form to all active Bar members and established February 1, 2010, as the due date for filing the IOLTA Certification. The Accused failed to complete and submit the form.

7.

The Accused did not comply with the IOLTA Certification pursuant to the requirements of RPC 1.15-2(m) for the year 2010. The Accused is now in compliance for the year 2010.

8.

At various times from May to August 2010, the Bar asked and the Accused failed to respond to lawful inquiries of the Disciplinary Counsel's Office ("DCO").

### **Violations**

9.

The Accused admits that by failing to file his IOLTA Certification and by failing to respond to inquiries from DCO he violated RPC 1.15-2(m) and RPC 8.1(a)(2).

### **Sanction**

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duties to the profession to comply with the rules attendant to practicing law in this jurisdiction and to timely respond to Bar inquiries in disciplinary investigations. *Standards*, § 7.0.
- b. **Mental State.** There are three recognized mental states under the *Standards*. "Intent" is the conscious objective or purpose to accomplish a particular result. *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 of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

The Accused negligently failed to file his annual IOLTA Certification, but knowingly failed to respond to one or more Bar inquiries.

- c. **Injury.** An injury need not be actual, but may be only potential to support the imposition of a sanction. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, the Accused's conduct caused some actual injury in that the Bar was forced to expend time and resources in repeated efforts to obtain his compliance.
- d. **Aggravating Circumstances.** There are no aggravating circumstances.
- e. **Mitigating Circumstances.** Mitigating circumstances include:

1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
2. Absence of a selfish motive. *Standards*, § 9.32(b).
3. Inexperience in the practice of law. *Standards*, § 9.32(f).

11.

Under the *Standards*, a public reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.3.

12.

Oregon case law also supports the imposition of a public reprimand. *See, e.g., In re Kay*, 19 DB Rptr 200 (2005) (lawyer publicly reprimanded for failing to timely file his compliance affidavit before resuming the practice of law); *In re Barteld*, 23 DB Rptr 198 (2009); *In re Dixon*, 17 DB Rptr 190 (2002).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall receive a public reprimand for violations of RPC 1.15-2(m) and RPC 8.1(a)(2).

14.

This Stipulation for Discipline has been approved by the SPRB and is subject to review by Disciplinary Counsel of the Bar. This stipulation will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 6th day of May 2011.

/s/ Thomas K. Ono  
Thomas K. Ono  
OSB No. 074865

EXECUTED this 11th day of May 2011.

OREGON STATE BAR

By: /s/ Kellie F. Johnson  
Kellie F. Johnson  
OSB No. 970688  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 11-16  
)  
RAND E. OVERTON, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: Bruce L. McCrum  
Disciplinary Board: None.  
Disposition: Violation of RPC 8.4(a)(2) and ORS 9.527(2).  
Stipulation for Discipline. 60-day suspension.  
Effective Date of Order: August 25, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 60 days, the sanction to be effective the day the Stipulation for Discipline is approved for violation of RPC 8.4(a)(2) and ORS 9.527(2).

DATED this 25th day of August 2011.

/s/ William B. Crow  
William B. Crow  
State Disciplinary Board Chairperson

/s/ William G. Blair  
William G. Blair, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Rand E. Overton, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 15, 1989, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Lincoln County, Oregon.

3.

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

4.

On March 10, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 8.4(a)(2) and ORS 9.527(2). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

Between 2001 and 2010, the Accused was an Assistant District Attorney for Lincoln County. In that position, he was responsible for enforcing child support obligations on behalf of the State of Oregon.

6.

In December 2008, the Accused filed a motion to show cause for remedial contempt against Sheila Snyder (hereinafter “Snyder”), in which he alleged that Snyder had failed to pay child support obligations. The matter was set for a hearing on May 21, 2009.

7.

On May 21, 2009, Snyder pled guilty to contempt and was sentenced to 24 months of probation. In relevant part, the court’s order required Snyder to make the support payments

and maintain monthly contact with the Lincoln County District Attorney's Child Support Unit. After the plea hearing, Snyder met the Accused and was told that he would be supervising her probation.

8.

During one or more subsequent telephone conversations between the Accused and Snyder, the Accused, with the intent to obtain sexual gratification, knowingly made sexually inappropriate comments to Snyder.

9.

Under ORS 162.415, it is unlawful for a public servant to, with the intent to obtain a benefit or to harm another, knowingly perform an act constituting an unauthorized exercise in official duties.

10.

On November 30, 2010, the Accused was charged with six counts of violating ORS 162.415, four of which related to Snyder, and two of which related to incidents similar to those described in paragraph 8 herein, but concerning two other women involved in child support obligation matters in which the Accused represented the State of Oregon. The Department of Justice investigated another similar incident involving a fourth woman, but, because of statute of limitation issues, no charges were brought against the Accused.

11.

On December 14, 2010, the Accused was convicted of one count of violating ORS 162.415, a Class A misdemeanor, with regard to conduct involving Snyder.

### **Violations**

12.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 11, he violated RPC 8.4(a)(2) and ORS 9.527(2).

### **Sanction**

13.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to maintain the public trust and not engage in criminal conduct. *Standards*, §§ 5.0, 5.2.
- b. **Mental State.** The Accused acted knowingly in that he had a conscious awareness of the nature or attendant circumstances of his conduct, but did not have a conscious objective or purpose to accomplish a particular result. At the time the Accused made the inappropriate statements, he believed he was being humorous. It was only later that he realized his comments were inappropriate.
- c. **Injury.** Snyder sustained actual injury in that she was subjected to unwanted sexual comments and perceived that she might have to subject herself to unwanted sexual contact if she was to satisfy the terms of her probation. The prosecutor's office also sustained actual injury in that the Accused's criminal conduct reflected poorly on the office.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. *Standards*, § 9.22(b).
  2. Multiple offenses. *Standards*, § 9.22(d).
  3. Vulnerability of victim. *Standards*, § 9.22(h).
  4. Substantial experience in the practice of law. The Accused has been a lawyer in Oregon since 1989. *Standards*, § 9.22(i).
  5. Illegal conduct. *Standards*, § 9.22(k).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Personal or emotional problems. The Accused believes he was suffering from personal and/or emotional problems and has obtained treatment for those problems. *Standards*, § 9.32(c).
  3. Cooperative attitude toward the proceeding. *Standards*, § 9.32(e).
  4. Imposition of other penalties or sanctions. The Accused pled guilty to engaging in criminal conduct and was fired from his job. *Standards*, § 9.32(k).
  5. Remorse. The Accused has apologized to the victims. *Standards*, § 9.32(l).

14.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly engages in certain low-level criminal conduct that seriously adversely reflects on the lawyer's fitness to practice. *Standards*, § 5.12. Suspension is also generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures

or rules, and causes injury or potential injury to a party or to the integrity of the legal process. *Standards*, § 5.22.

15.

Suspensions have been imposed under similar circumstances. *In re Ashcroft*, 25 DB Rptr 36 (2011) (60-day suspension imposed on lawyer who, while acting as a circuit court judge, had a criminal matter specially assigned to him and thereafter had a personal relationship with the defendant.); *In re Steinke Healy*, 17 DB Rptr 59 (2003) (60-day suspension of lawyer convicted of two counts of public indecency).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 8.4(a)(2) and ORS 9.527(2), the sanction to be effective the day this Stipulation for Discipline is approved.

17.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has no clients or client files at this time.

18.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

19.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

20.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 18th day of July 2011.

/s/ Rand E. Overton

Rand E. Overton

OSB No. 893296

EXECUTED this 19th day of July 2011.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin

OSB No. 862028

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-70  
)  
AMY L. McCAFFREY, )  
)  
Accused. )

Counsel for the Bar: Martha M. Hicks  
Counsel for the Accused: Richard G. Helzer  
Disciplinary Board: None.  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b),  
RPC 1.5(a), RPC 1.16(a)(2), RPC 1.16(d), and  
RPC 8.4(a)(3). Stipulation for Discipline.  
60-day suspension.  
Effective Date of Order: September 4, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for sixty (60) days, effective ten (10) days after the date of this order, for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.4(a)(3).

DATED this 25th day of August 2011.

/s/ William B. Crow  
William B. Crow  
State Disciplinary Board Chairperson

/s/ William G. Blair  
William G. Blair, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Amy L. McCaffrey, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 20, 2001, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Washington County, Oregon.

3.

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

4.

On December 6, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.4(a)(3) of the Rules of Professional Conduct. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

On or about October 23, 2006, the Accused undertook to represent Tonja Miles (hereinafter “Miles”) to petition for the dissolution of Miles’ marriage. Miles paid the Accused a flat fee of \$1,336 to obtain the dissolution of her marriage. The Accused filed a petition for the dissolution of Miles’ marriage on November 7, 2006. Thereafter, the Accused neglected Miles’ matter in one or more of the following respects:

- (a) Failed to file a proof of service of the petition on Miles’ husband;
- (b) Failed to file a motion for a default judgment after Miles’ husband was served with the petition and made no answer or appearance;
- (c) Failed to respond to a March 5, 2007, notice from the court of its intent to dismiss Miles’ petition for lack of prosecution;

- (d) Failed to promptly reinstate Miles' case after the court dismissed it on April 12, 2007;
- (e) Once the case was reinstated, failed until October 24, 2007, to remind Miles that Miles was required to attend parenting classes before the court would enter a judgment of dissolution of marriage;
- (f) Failed to respond to a second notice from the court of its intent to dismiss Miles' petition for lack of prosecution;
- (g) Failed to promptly take steps to reinstate Miles' case after the court dismissed it a second time on September 25, 2007; and
- (h) Failed to take any other substantial action to obtain the dissolution of Miles' marriage.

6.

In March 2007, the Accused knowingly failed to disclose to Miles that the court intended to dismiss her case for lack of prosecution, and after April 12, 2007, failed to disclose to Miles that the court had dismissed her case. The Accused knew this information was important to Miles when she failed to disclose it to Miles. Instead, the Accused represented to Miles that the delay in obtaining a default judgment in her case was attributable to the court. This representation was misleading, and the Accused knew it was misleading and material to Miles when she made it.

7.

Upon motion by the Accused, the court reinstated Miles' case on June 21, 2007. Thereafter, the Accused knowingly failed to disclose to Miles that the court again intended to dismiss her case for lack of prosecution. After the court dismissed Miles' case for the second time on September 25, 2007, the Accused knowingly failed to disclose to Miles that her case had been dismissed. On September 26, 2008, the court denied the Accused's second motion to reinstate Miles' case. Thereafter, the Accused knowingly failed to disclose to Miles that the court had refused to reinstate her case. This information was material to Miles, and the Accused knew it was material when she failed to disclose it.

8.

After August 2008, the Accused did not respond to Miles' attempts to communicate with her, stopped practicing law, and transferred to inactive membership in the Oregon State Bar on November 24, 2008, without taking the steps necessary to protect Miles' interests or to refund the unearned portion of the flat fee Miles had paid.

9.

Throughout the time the Accused represented Miles, the Accused was experiencing physical and mental health problems that materially impaired her ability to represent Miles,

but did not withdraw from the representation or inform Miles of her physical and mental health problems.

### **Violations**

10.

The Accused admits that by engaging in the conduct described in this stipulation, she violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.4(a)(3) of the Rules of Professional Conduct.

### **Sanction**

11.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated her duties of diligence and candor to her client. *Standards*, §§ 4.4, 4.6. She also violated her duties as a professional to refrain from charging excessive fees and to properly withdraw from representation. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted knowingly in making misrepresentations to her client about or failing to disclose the status of the client’s case. In all of her other conduct, the Accused acted negligently. *Standards*, at 7.
- c. **Injury.** Miles suffered actual injury in that she did not receive from the Accused the services for which she had paid and was delayed in obtaining the dissolution of her marriage and the child support award she sought. *Standards*, at 7.
- d. **Aggravating Circumstances.** Aggravating factors include:
  1. The Accused displayed a pattern of misconduct. *Standards*, § 9.22(c); and
  2. The Accused committed multiple offenses. *Standards*, § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused has no prior disciplinary record. *Standards*, § 9.32(a);
  2. The Accused was suffering from significant physical and emotional problems during her representation of Miles which impaired her ability to attend adequately to her practice. *Standards*, § 9.32(c);

3. The Accused has demonstrated a cooperative attitude toward these proceedings. *Standards*, § 9.32(e);
4. The Accused recognized that her physical and emotional problems were interfering with her ability to practice law and voluntarily transferred to inactive status with the Bar. *Standards*, § 9.32(j); and
5. The Accused has displayed remorse for her conduct. *Standards*, § 9.32(l).

12.

*Standards*, §§ 4.42 and 4.62, suggest that a period of suspension is generally appropriate when a lawyer engages in a pattern of neglect or knowingly misrepresents the nature or extent of services performed and causes injury or potential injury to the client.

13.

Oregon case law is in accord. See *In re Dugger*, 299 Or 21, 697 P2d 973 (1985), where the lawyer was suspended for 63 days for neglecting a client matter, misstating the status of the case to his client, and failing to cooperate with the Bar's investigation. See also *In re Redden*, 342 Or 393, 153 P3d 113 (2007), where the lawyer was suspended for 60 days for neglecting a client matter for 17 months. Finally, see *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003), where the court suspended the lawyer for neglect of a client's case (including failure to inform the client that the court had dismissed it and failing to respond to the client's attempts to contact him) for over a year.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of sixty (60) days for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.16(a)(2), RPC 1.16(d), and RPC 8.4(a)(3), the sanction to be effective ten (10) days after this stipulation is approved. In addition, should the Accused seek reinstatement to active membership in the Bar after the expiration of the term of her suspension, she shall be required to make a formal application under and meet the requirements of BR 8.1.

15.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The sanction provided for herein was authorized by the SPRB on September 11, 2010. The parties agree this stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 27th day of May 2011.

/s/ Amy L. McCaffrey

Amy L. McCaffrey

OSB No. 010756

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks

OSB No. 751674

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-80  
)  
TIMOTHY E. NIELSON, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None.  
Disciplinary Board: Pamela E. Yee, Chair  
Colin D. Lamb  
Allen M. Gabel, Public Member  
Disposition: Violations of RPC 1.15-2(m) and RPC 8.1(a)(2).  
Trial Panel Opinion. 120-day suspension.  
Effective Date of Opinion: August 30, 2011

**DISCIPLINARY OPINION**

**SECTION ONE: INTRODUCTION**

**Date and Nature of Charge:** By Formal Complaint dated March 16, 2010, the Oregon State Bar (“OSB”) has charged the Accused with violation of RPC 1.15-2(m) and 8.1(a)(2) of the Oregon Rules of Professional Conduct.

Oregon Rules of Professional Conduct:

Rule 1.15-2(m)

Every lawyer shall certify annually on a form and by a due date prescribed by the Oregon State Bar that the lawyer is in compliance with Rule 1.15-1 and this rule. Between annual certifications, a lawyer establishing an IOLTA account shall so advise the Oregon Law Foundation in writing within 30 days of establishing the account, on a form approved by the Oregon Law Foundation.

Rule 8.1(a)(2)

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful

demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

**The Accused.** The Accused is Timothy E. Nielson, OSB No. 960161, having an office and place of business in Washington County, Oregon.

**Summary of Complaint.** The Accused was licensed to practice law and, as such, was required by Rule 1.15-1 to hold property of a client or third person separate from the lawyer's own property. Funds shall be kept in a Lawyer Trust Account. Further, pursuant to RPC 1.15-2(m), every lawyer shall certify annually on a form and date certain that the lawyer is in compliance with Rule 1.15-1 (the IOLTA Certification). The Accused failed to file the 2008 annual IOLTA Certification. The form had been mailed to the Accused by the OSB. The filing deadline was January 31, 2009. The Accused did not return the form by January 31, 2009, or at any point during 2009. OSB notified the Accused by letter dated April 24, 2009, that he failed to submit his IOLTA Certification. On June 9, 2009, a letter was sent to the Accused by OSB disciplinary counsel that he was being investigated for failure to comply with RPC 1.15-2(m). Although the Accused requested an extension of time to respond to the June 9, 2009, letter, he failed to reply at any time.

The Accused was notified by letter, dated July 21, 2009, from OSB Disciplinary Counsel's Office ("DCO") that the matter was being referred to the Local Professional Responsibility Committee ("LPRC") due to his failure to respond. The LPRC member, Jeffrey Chicoine, requested an interview by letter, sent certified mail, return receipt requested. The Accused signed the receipt on September 15, 2009. Although Chicoine exchanged voice mail and e-mail messages with the Accused for a period of 32 days, the Accused provided a number of excuses for delaying the interview. On November 24, 2009, the LPRC closed its attempts to meet with the Accused.

**Default.** The Accused was served with the Formal Complaint and Notice to Answer by first-class mail and publication pursuant to the Oregon Supreme Court's Order dated June 11, 2010. The Order of Default was submitted to the Disciplinary Board Trial Panel chair with a copy to the Accused on August 31, 2010. The Accused has failed to appear within the time provided by the OSB Rules of Procedure.

An Order of Default was entered of record by the Disciplinary Board Trial Panel Chair on December 7, 2010. The matter was then referred to a Disciplinary Board Trial Panel for sanctions. On March 9, 2011, the Trial Panel Chair sent a letter to the Accused and DCO asking if either party desired a hearing on the imposition of sanctions. Both parties were advised to request a hearing by March 23, 2011. The Accused requested a hearing by personal delivery of a written statement on March 23, 2011, at close to 6:00 p.m. Thereafter, DCO submitted a Memorandum Regarding Sanction dated June 7, 2011, which was mailed to the Accused. No prehearing statement or responsive memorandum were received by the Trial Panel from the Accused.

The Accused failed to appear at the hearing.

## **SECTION TWO: FINDINGS OF FACT**

When an Order of Default is entered, the allegations in the Formal Complaint are deemed true. BR 5.8(a). Therefore, the Accused is found to have failed to comply with RPC 1.15-2(m) by failing to certify annually that he was in compliance with Rule 15.1 and RPC 8.1(a)(2) in that the Accused failed to respond to the LPRC as to information concerning his failure to file the required certificate per RPC 1.15-2(m).

## **SECTION THREE: CONCLUSIONS OF LAW**

**RPC 1.15-2(m) and RPC 8.1(a)(2)**. See SECTION ONE for verbatim of Rules.

The OSB must establish by clear and convincing evidence that the Accused's misconduct violated the standards governing professional responsibility. Since the Accused did not respond, the facts as alleged are deemed true and the violations are admitted.

There is no reason put before the Trial Panel as to why the certification required by RPC 1.15-2(m) was not filed or as to why the Accused did not meet with the LPRC member and provide the information the LPRC requested. The Accused knew that he had not completed the certificate required by RPC 1.15-1 as he received several letters from the OSB and DCO requesting completion and filing of the form. It appears the Accused ignored the OSB and DCO as to completing the certificate violating RPC 1.15-2(m). This caused a violation of the Accused's duty to the profession to complete the IOLTA Certification. The Accused then failed to cooperate with the LPRC despite repeated attempts by Chicoine to schedule an interview. Further, the Accused knowingly failed to adequately respond and cooperate with the LPRC investigator which is a violation of RPC 8.1 (a)(2).

## **SECTION FOUR: SANCTIONS**

Under the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), there are four factors to use to determine the appropriate sanction: (1) the duty violated, (2) the Accused's mental state, (3) the actual or potential injury caused by the misconduct, and (4) the existence of aggravating and mitigating circumstances. *Standards*, § 3.0. *In re Kluge*, 335 Or 326, 66 P3d 492, 507 (2003). The primary purpose of disciplinary proceedings is protection of the public. *In re Houchin*, 290 Or 433, 622 P2d 723 (1981).

The duty violated was that owed to the profession to comply with the rules attendant to practicing law in Oregon and to respond to an inquiry from the LPRC. The Accused's actions were knowing. The record does not reflect lack of notice from the OSB, DCO, or LPRC.

In light of the injury to the legal system, the profession and the public, there is actual injury. Under the *Standards*, § 7.2, when there is a violation of a duty owed to the profession,

suspension is generally appropriate if the lawyer knowingly engaged in the conduct. The Accused's actions of not responding adequately to the OSB, DCO, or LPRC coupled with his knowledge that he would have after practicing law for 13 years at the time of the violation constitutes knowledge of his failure to comply.

After considering factors 1 through 3 of *Standards*, § 3.0, for sanctions, any aggravating or mitigating circumstances are then examined for adjusting the sanction. *Standards*, § 9.2, sets forth the factors which may be considered for aggravation. Mitigating factors are set forth at § 9.3.

The Trial Panel Finds no mitigating factors.

The aggravating factors consist of the fact that the Accused has practiced law for a considerable period of time and should have substantial experience. Also, the Accused has a prior disciplinary offense which resulted in a public reprimand in October 19, 2008, for neglect of a legal matter, failure to keep a client reasonably informed, and failure to comply with reasonable requests for information. *Standards*, §§ 9.22(a), 9.22(i).

Additionally, the Trial Panel is concerned as to the repeated pattern of intentional delay in this case which goes back to the OSB requesting completion of the IOLTA Certification. The Accused requested more time to respond due to his mail being mis-sorted and then a trip. He still failed to respond after the matter was referred to the LPRC. The Accused then had delays consisting of family matters, arranging for counsel, missing the appointment due to illness, then his car breaking down, to finally being unable to meet with the LPRC because his phone and Internet were not working.

The Accused requested a hearing of the Trial Panel on the very last day such a request could be made by the delivery of the request at a time beyond normal office hours (close to 6:00 p.m.). The Accused did not provide a Prehearing Statement and did not respond to an e-mail by the Trial Panel Chair as to his Prehearing Statement. The Accused failed to appear at the hearing and failed to contact the Trial Panel Chair.

In weighing the aggravating and mitigation circumstances, the sanction can be adjusted. The sanction can be reprimand, suspension, or disbarment. *Standards*, § 7.1, provides:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.

*Standards*, § 7.2, provides:

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.

There was knowing violation of RPC 1.15-2 (m) and RPC 8.1(a)(2), and, therefore, the Trial Panel finds suspension is warranted for the Accused. The Trial Panel noted that the cases cited by the OSB involved a failure to cooperate with a Bar investigation. The Supreme Court states in both *In re Miles*, 324 Or 218 (1996), and *In re Boucier*, 325 Or 429 (1997), that the failure to cooperate with a disciplinary investigation is a serious ethical violation. The Trial Panel finds that the conduct warrants a 120-day suspension.

**SECTION FIVE: DISPOSITION**

It is the decision of the Trial Panel that the Accused be suspended for 120 days for violation of RPC 1.15-2(m) and RPC 8.1 (a)(2) of the Oregon Rules of Professional Conduct.

DATED this 24th day of June 2011.

/s/ Pamela E. Yee

Pamela E. Yee  
OSB No. 873726  
Trial Panel Chair

CONCURRING MEMBERS:

/s/ Allen M. Gabel

Allen M. Gabel, Public Member

/s/ Colin D. Lamb

Colin D. Lamb  
OSB No. 691007  
Trial Panel Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-65
	)	
BRENT C. FOSTER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	Roy Pulvers
Disciplinary Board:	None.
Disposition:	Violation of RPC 8.4(a)(3). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	September 3, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 30 days for violation of RPC 8.4(a)(3), the sanction to be effective the day after the Stipulation for Discipline is approved.

DATED this 2nd day of September 2011.

/s/ William B. Crow  
 William B. Crow  
 State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
 Carl W. Hopp Jr., Region 1  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Brent C. Foster, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 30, 1999, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Hood River County, Oregon.

3.

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

4.

On July 16, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

Beginning in December 2008, the Accused was Special Counsel on Environmental Issues for the Oregon Department of Justice. Previously, the Accused had been the Executive Director of Columbia Riverkeepers (hereinafter “Riverkeepers”), a nonprofit organization in Hood River, Oregon, dedicated to protecting the Columbia River.

6.

In September 2009, Hood River County was criminally prosecuting a company and its owner for alleged pollution violations arising out of operations at the company. The prosecutor learned about a pool of liquid across a public road from the company. The prosecutor asked Riverkeepers to collect and test a water sample from the pool.

7.

Before September 2009, the Accused knew about the criminal matter in Hood River County and had provided some general legal advice to the prosecutor regarding the matter. The Hood River County prosecutor asked the Accused to encourage Riverkeepers to collect and test a sample from the pool.

8.

On October 9, 2009, the Accused and Riverkeepers' water quality coordinator drove to and parked their car down the road from the pool. They both walked toward the pool, but at some point the Accused alone walked to the pool and took a sample from it. They walked back to the car and Riverkeepers' water quality coordinator field-tested the sample collected by the Accused. The test results showed a pH level high enough to be classified as hazardous waste.

9.

Thereafter, the Hood River County prosecutor brought additional criminal charges against the owner and business.

10.

A hearing regarding the criminal matter was scheduled for April 13, 2010. On or about April 1, 2010, the Accused learned that one of his colleagues at the Department of Justice, who had been assigned to assist the Hood River County prosecutor in the criminal matter, intended to call Riverkeepers' water quality coordinator as a witness regarding the October 9, 2009, water sample collection and tests. The Accused's colleague was unaware that the Accused was the one who collected the sample. The Accused contacted his colleague and suggested that the sample and test results from October 9, 2009, not be used as evidence. The Accused did not state to his colleague that he had collected the sample.

11.

On April 12, 2010, the Accused misrepresented to others at the Department of Justice, including the Attorney General, that he was not the person who had collected the sample in October 2009.

12.

On April 20, 2010, the Accused resigned his position with the Department of Justice after voluntarily admitting to the Attorney General that he had not been truthful with him and others when he denied collecting the sample.

### Violations

13.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 12, he violated RPC 8.4(a)(3).

### Sanction

14.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated a duty he owed to the public to maintain personal integrity. *Standards*, § 5.1.
- b. **Mental State.** The Accused acted knowingly.
- c. **Injury.** The public’s confidence in the Office of Attorney General may have been negatively affected as a result of the Accused’s misrepresentations and the subsequent critical media coverage. There was the potential for significant injury in the criminal matter had misrepresentations about the Accused’s role been offered as evidence in that matter.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. The Accused sought to avoid any political consequences of having been actively involved in the water testing. *Standards*, § 9.22(b).
  2. Pattern of misconduct. *Standards*, § 9.22(c).
  3. Substantial experience in the practice of law. The Accused has been a lawyer in Oregon since 1999. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary history. *Standards*, § 9.32(a).
  2. Timely good-faith efforts to rectify the misconduct. On April 20, 2010, the Accused made a voluntary admission to the Attorney General and resigned his position. *Standards*, § 9.32(d).
  3. Cooperative attitude toward the proceeding. *Standards*, § 9.32(e).

4. Character or reputation. Members of the community are willing to attest to the Accused's good character and reputation. *Standards*, § 9.32(g).

15.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly engages in certain conduct that seriously adversely reflects on the lawyer's fitness to practice. *Standards*, § 5.12. Reprimand is generally appropriate when a lawyer knowingly engages in noncriminal conduct involving dishonesty, fraud, deceit, or misrepresentation and that reflects adversely on the lawyer's fitness to practice law. *Standards*, § 5.13.

16.

Although the Accused did not engage in criminal conduct, his misconduct had potentially serious consequences had it gone uncorrected, such that a suspension is appropriate. Oregon case law is in accord. *In re Fitzhenry*, 343 Or 86, 162 P3d 260 (2007) (120-day suspension imposed on lawyer who signed a management representation to auditors which he knew contained false statements); *In re Hopp*, 291 Or 697, 634 P2d 238 (1981) (60-day suspension of lawyer who represented to another lawyer that he was acting on behalf of a client when in fact there was no client and lawyer was acting on his own behalf).

In this case, unlike in the cases cited above, the Accused promptly and voluntarily corrected the misrepresentations which he had made to colleagues and the Attorney General.

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of RPC 8.4(a)(3), the sanction to be effective the day after this Stipulation for Discipline is approved.

18.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, during the term of the suspension, any active and open client matters will be handled by existing co-counsel.

19.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

20.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 23rd day of August 2011.

/s/ Brent C. Foster

Brent C. Foster

OSB No. 992637

EXECUTED this 24th day of August 2011.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin

OSB No. 862028

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-107  
)  
ROGER LEE CLARK, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: None.  
Disciplinary Board: Robert A. Miller, Chair  
Mary Lois Wagner  
Mitchell P. Rogers, Public Member  
Disposition: Violation of DR 9-101(C)(3) and RPC 1.7(a). Trial  
Panel Opinion. Reprimand.  
Effective Date of Opinion: September 7, 2011

**OPINION OF THE TRIAL PANEL**

**NATURE OF THE CASE**

The Oregon State Bar filed a formal complaint in this matter on or about December 3, 2009, and an amended formal complaint on March 14, 2011. The Accused filed an answer to the original complaint on December 1, 2010, and did not file a further answer to the amended complaint. The Bar submitted a trial memorandum in advance of the scheduled hearing which took place on April 7, 2011.

The Bar alleges in three causes of complaint that the Accused:

1. Failed to render an appropriate account of client funds, in violation of DR 9-101(C)(3) of the Code of Professional Responsibility.
2. Engaged in conduct that constituted a conflict of interest between two existing criminal clients by representing both clients simultaneously on charges arising from the same criminal episode, in violation of RPC 1.7 of the Oregon Rules of Professional Conduct.
3. Used information related to a former client to the disadvantage of that former client, in violation of RPC 1.9(c)(1) of the Oregon Rules of Professional Conduct.

The Accused defends the charges as follows:

1. He admits that he was retained by client Mackenzie in 2003 to represent him in a criminal matter.
2. He admits that he failed to obtain written consent from two criminal clients before undertaking to represent them simultaneously on criminal charges arising from the same criminal episode.
3. He admits that he failed to render an appropriate accounting to Mackenzie in 2003 for the flat fee paid to the Accused on behalf of Mackenzie.
4. He denies that he used information relating to the representation of a former client (Mackenzie) to the disadvantage of the former client in a subsequent proceeding.

### **FINDINGS OF FACT**

The trial panel expressly finds that all witnesses who testified before the panel at trial, including the Accused, were truthful, forthcoming, and credible in their testimony.

1. Regarding the Oregon State Bar's first cause of complaint.

The Accused admits he failed to render an appropriate accounting of payments totaling \$2,500 made to him on behalf of client Mackenzie for representation of Mackenzie in a 2003 criminal proceeding. (Tr. 12, 13.) The Accused charged an attorney fee of \$2,500 which represented a fixed fee per the April 23, 2003, retainer agreement (Ex. 2). The agreement did not recite that the fee was "earned upon receipt" and no subsequent accounting of the funds paid to the Accused was forthcoming from him to his client. (Tr. 201, 202.)

2. Regarding Oregon State Bar's second cause of complaint.

On August 9, 2006, clients Mackenzie and Westbrook were arrested and charged with crimes arising from a single criminal episode, including a search of their joint premises. They were subsequently charged with Unlawful Possession of Weapons and Unlawful Possession of Marijuana. (Tr. 23.) The Accused subsequently undertook to represent both Westbrook and Mackenzie on said charges. (Ex. 19 regarding Mackenzie, Ex. 24 regarding Westbrook and Tr. 174.)

During the Accused's representation of both clients a disagreement arose between the clients regarding the disposal of multiple weapons which had been seized from the clients by the police. (Tr. 176, 177.) At that point all communications ceased between the Accused and Mackenzie who subsequently discharged the Accused and hired new counsel. (Tr. 177.) All money paid to the Accused for representation of both Westbrook and Mackenzie was paid to the Accused by Westbrook. (Tr. 178.)

The Accused testified that the reason the Accused did not get written consent from both clients to represent each of them in their respective criminal proceedings was that he did

not feel he had an actual conflict of interest in representing both clients and that in his professional judgment he could give each one independent legal advice. (Tr. 179, 180.)

Client Westbrook eventually pled guilty to Attempted Possession of Firearms with Silencer and no contest to Attempted Felony Possession of a Firearm. (Ex. 32.) Westbrook's sentence included the forfeiture of all firearms which were seized from both clients and which were the subject of the dispute between Westbrook and Mackenzie. (Ex. 32.)

3. Regarding Oregon State Bar's third cause of complaint.

In December 2007, the Accused undertook to represent Westbrook in her attempt to purchase Mackenzie's interest in their jointly held real property. (Ex. 34.) Mackenzie hired separate counsel who advised the Accused that his representation of Westbrook against Mackenzie constituted a violation of RPC 1.9 and that Mackenzie would not consent to the Accused's representation of Westbrook. (Ex. 35.)

On January 18, 2008, the Accused responded to Mackenzie's attorney's contention that his representation of Westbrook was a conflict of interest, stating that in his opinion Mackenzie was "not a truthful person and makes allegations against everybody that doesn't agree with his less than accurate memory of events." (Ex. 36.) The Accused further stated in his January 18, 2008, letter to Mackenzie's attorney that Mackenzie had "accused former Douglas County Deputy District Attorney, Jeffrey Sweet, of telling him he could possess and use weapons once he was off probation from felony convictions—which Mr. Sweet adamantly denies. And, he also accused me and his former probation officer of making the same statements to him; when, in fact, I sent him literature and case law which told him the [sic] under federal law he was prohibited from possessing weapons ever again." (Ex. 36.)

On March 21, 2008, the Accused filed on behalf of Westbrook a complaint to quiet title of the real property owned jointly by Westbrook and Mackenzie. (Ex. 38.)

On or about June 13, 2008, Mackenzie's attorney filed a complaint for dissolution of a domestic partnership between Westbrook and Mackenzie. (Ex. 39.)

On July 3, 2008, the Accused wrote to Mackenzie's attorney confirming the Accused's representation of Westbrook in the domestic partnership matter and stating that Mackenzie had "lied in his affidavit when he states he was still living in Oregon in 2007; in fact, I drove Mr. Mackenzie to Colorado in 2006—when he moved back to his mother's home there. And, we can prove to the contrary with witnesses and court documents that he only returned to attend court in 2007, and then went right back to Colorado after court." (Ex. 40.)

## CONCLUSIONS OF LAW

1. Regarding first cause of complaint.

DR 9-101(C)(3) previously provided that a lawyer is required to render appropriate accounts to clients regarding client funds. The Accused admits that he failed to account to Mackenzie for the \$2,500 paid on his behalf in the 2003 criminal matter. Based on the evidence presented and the Accused's admission, the Bar has proven by clear and convincing evidence that the Accused violated DR 9-101(C)(3).

2. Regarding second cause of complaint.

RPC 1.7(a) provides that a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that representation of multiple clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person.

RPC 1.7(b) provides that notwithstanding the existence of a current conflict of interest, a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation of each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

The Accused's representation of clients Westbrook and Mackenzie in their 2006 criminal matters in Douglas County Oregon amounted to a current conflict of interest. As noted by the Bar in its trial memorandum, this case is similar to the facts of *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995). As in *Jeffery*, both Westbrook and Mackenzie had a "potential interest in convincing the trier of fact that he (or she) was less culpable than the other. Each had a potential interest in obtaining a favorable plea agreement in exchange for testifying against the other. In those circumstances, a likely conflict of interest existed." *In re Jeffery*, 321 Or at 370-371. Here, each client would have been best served by minimizing their individual involvement in the possession of weapons and marijuana cases by pointing the proverbial finger at the other defendant. Although the Accused believed that he could independently represent and advise each defendant, there still existed a significant risk that by representing both defendants the representation of one would materially limit the Accused's representation of the other. It is commonly recognized in the world of criminal

defense that codefendants routinely “sell out” their codefendants by cooperating in the investigation in exchange for sentencing concessions or, conversely, agreeing to “take the rap” for the other defendant in an effort to protect his or her cohort. Those scenarios would have required each defendant to consult with independent counsel.

Additionally, Mackenzie was opposed to any negotiations which included the forfeiture of the weapons, a position directly contrary to Westbrook’s eventual plea bargain that included the forfeiture of firearms. (Tr. 176, 177, Ex. 32.) Not only was there a significant risk of an actual conflict developing between the Accused’s respective clients, an actual conflict arose when the Accused negotiated for the forfeiture of the firearms which was directly opposed by Mackenzie. Consequently, the existing actual conflict between his clients made the Accused’s continued representation of both of them unethical regardless of whether they had previously consented in writing to his joint representation. The Bar has proven by clear and convincing evidence that the Accused violated RPC 1.7.

3. Regarding third cause of complaint.

RPC 1.9(c)(1) provides in relevant part that a lawyer who had formerly represented a client in a matter should not thereafter use information relating to that representation to the disadvantage of the former client except when the information has become generally known.

The Bar alleges that the Accused violated this rule as to his former client, Mackenzie, on three occasions:

- (1) By disclosing to Mackenzie’s subsequent attorney on January 18, 2008, that Mackenzie had been provided literature and case law by the Accused regarding Mackenzie’s inability to possess weapons;
- (2) By informing Mackenzie’s subsequent attorney on July 3, 2008, that the Accused knew Mackenzie’s assertion that he lived in Oregon in 2007 was false because the Accused drove Mackenzie in 2006 to live with his mother; and
- (3) By disclosing to Mackenzie’s attorney in the quiet title and partnership dissolution matters that the Accused was prepared to testify at trial about his personal knowledge of Mackenzie.

For the Bar to prevail in its third cause of complaint it must prove by clear and convincing evidence that the Accused used “information relating to the representation” of Mackenzie to the disadvantage of Mackenzie. The trial panel is not convinced by clear and convincing evidence that the Accused obtained the alleged information during or related to the Accused’s representation of Mackenzie, that the information revealed was protected information within the context of the rule, or that the Accused used such information to Mackenzie’s disadvantage.

The Accused's January 18, 2008, letter to Mackenzie's subsequent attorney (Ex. 36) references information given to Mackenzie by the Accused, not the other way around. The rule forbids a client's former lawyer from using "information relating to the (former) representation" to the disadvantage of the former client. The comments following the rule state that paragraph C of the rule makes clear that the duty not to use *confidential* information to the client's disadvantage continues after the conclusion of the representation, except where the information has become generally known. The January 18, 2008, letter from the Accused does not specify when the Accused sent Mackenzie information regarding weapons possession. It could have been before, during, or after the Accused's representation of Mackenzie. Whatever information that the Accused provided to Mackenzie, it was not confidential information conveyed to the Accused by Mackenzie. Nor was it information that is not generally known. Even Mackenzie's ex-girlfriend and roommate, Westbrook, testified at trial that it was common knowledge to her that "felons can't possess firearms or shouldn't be around them." (Tr. 39, 40.)

It is also unclear who actually provided the Accused with the information referenced in his January 18, 2008, letter to Mackenzie's attorney. The statements or accusations allegedly made by Mackenzie may not have been made to the Accused. Westbrook testified at trial that Mackenzie told her that his attorney (the Accused), probation officer, and the District Attorney told him that he could possess weapons at the conclusion of his probation. It may be that Westbrook advised the Accused of Mackenzie's statements. If so, they would not be confidential information to be protected by the Accused. In any event, it is unclear from the records who in fact provided that information to the Accused.

It is for all of the above-stated reasons that the trial panel concludes that the Bar has failed to prove by clear and convincing evidence that the contents of the Accused's January 18, 2008, letter (Ex. 36) violated RPC 1.9(c)(1).

The July 3, 2008, letter to Mackenzie's attorney by the Accused (Ex. 40)—which states in part that the Accused had driven Mackenzie to Colorado in 2006—also fails to constitute a violation of RPC 1.9(c)(1). The contents of that letter divulges no client confidences. The fact that the Accused transported Mackenzie to Colorado in 2006 was generally known to Westbrook, her family, and Mackenzie's family. (Tr. 41, 42.) It was also known to Mackenzie's physician, Dr. Scott Mendelson, who recorded that fact in Mackenzie's Mercy Medical Center Discharge Summary (Ex. 14) when Mackenzie was released from his civil commitment in November of 2005. Furthermore, the Accused states that he "can prove to the contrary with witnesses and court documents that he only returned to attend court in 2007, and then went right back to Colorado after court." (Ex. 40.) That representation does not infer that the Accused would testify as a witness, only that other witnesses would be presented along with court documents to prove Mackenzie's residence at a particular time. The Bar has failed to prove by clear and convincing evidence that the contents of Exhibit 40 violated RPC 1.9(c)(1).

The Bar further alleges that in subsequent negotiations between the Accused and Mackenzie's lawyer, the Accused stated that he was prepared to testify at trial about his personal knowledge of Mackenzie. (OSB Trial Memo, p. 9.) However, the Bar presented no evidence as to what personal knowledge was possessed by the Accused nor whether it was obtained during the Accused's former representation of Mackenzie.

Mackenzie's attorney in the 2008 civil proceedings was concerned that the Accused would testify about things he previously learned about Mackenzie and that Mackenzie was also concerned about such possibility. (Tr. 152.) Yet neither Mackenzie's attorney, other witness, or exhibits identified what "specific things" the Accused would have testified about. Without knowing the content and source of the information the Accused was supposedly prepared to testify about, it is impossible to determine whether said information was of the kind protected by RPC 1.9(c)(1). The Bar acknowledged in its closing argument that "the definition of information relating to the representation, when you learn the information, it has to be either information protected by the attorney/client privilege . . . and other information gained in a current or former professional relationship." (Tr. 213.) The Bar failed to present clear and convincing evidence that the Accused was prepared to testify against Mackenzie and divulge protected, confidential information and has not proven a violation by the Accused of RPC 1.9(c)(1).

### SANCTION

The trial panel has considered the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") and Oregon case law.

#### A. *Standards*

*Standards*, § 3.0, lists the factors to be considered in imposing sanctions. They include (1) the ethical duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating factors.

##### 1. Duties Violated.

The trial panel has found the Accused guilty of violating *Standards*, § 4.1 (failure to preserve the client's property), and § 4.3 (failure to avoid conflicts of interest).

##### 2. Mental State.

The trial panel finds that the Accused acted negligently when he failed to account to Mackenzie for the \$2,500 flat attorney fee received on behalf of Mackenzie in 2003, and negligently failed to recognize a conflict of interest between Mackenzie and Westbrook regarding the Accused's representations

of those clients in the 2006 criminal matters and in failing to obtain their written consent to his simultaneous representation.<sup>1</sup>

3. Injury.

The trial panel finds that there was potential for injury to Mackenzie resulting from the conflict of interest created by the Accused's dual representation of Mackenzie and Westbrook in the 2006 criminal matters. Had Mackenzie not eventually discharged the Accused and hired substitute counsel, Mackenzie could have received a sentence in the criminal matter more adverse to him had he not consulted independent counsel.

There was also potential for injury to Mackenzie when the Accused failed to provide him with an accounting of the \$2,500 flat fee in 2003; However, the degree of potential injury to Mackenzie was minimal as Mackenzie never requested an accounting, never questioned whether the fees were earned, and never questioned the propriety of the fee arrangement.

4. Preliminary Sanction.

*Standards*, § 4.13, provides for reprimand when a lawyer is negligent in dealing with client property and causes potential injury to a client.

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

5. Aggravating Circumstances.

The only aggravating factor is the Accused's substantial experience in the practice of law, being licensed in the state of Oregon since 1997. *Standards*, § 9.22(i).

6. Mitigating Circumstances.

The following mitigating circumstances apply:

- (a) Absence of a prior disciplinary record. *Standards*, § 9.32(a);
- (b) Absence of a dishonest or selfish motive. *Standards*, § 9.32(b);
- (c) Cooperative attitude toward proceedings. *Standards*, § 9.32(e); and
- (d) Remorse. *Standards*, § 9.32(l).

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<sup>1</sup> The Bar conceded that the Accused acted negligently in committing these two violations. (OSB Trial Memo, p. 10.)

B. Oregon Case Law

The Oregon Supreme Court has previously noted that “[T]he ABA *Standards*, which represent a comprehensive authority concerning sanctions and lawyer discipline cases, serve as a helpful guide to this court—although not as binding authority—in determining issues surrounding the determination of the appropriate sanction in a given circumstance.” *In re Cohen*, 330 Or 49, 499, 8 P3d 953 (2000).

In support of the Bar’s position for sanctions they cite *In re Knappenberger II*, 338 Or 341, 361, 108 P3d 1161 (2005), for the proposition that the Accused should be suspended at least 30 days for an improper conflict of interest. (OSB Trial Memo, p. 13.) That case is of little assistance to the trial panel. The Supreme Court concluded that attorney Knappenberger’s conduct was intentional, not negligent as the Bar concedes in the present case. The court further found that as to the conflict of interest allegation the attorney’s conduct was knowing; again, not negligent. The court also concluded that the conflict-of-interest violation caused actual injuries to the clients, that Knappenberger had several prior disciplinary violations, that the involved clients were vulnerable because they were employees of the accused, and that the accused had a “selfish motive and committed multiple offences.” *Knappenberger II*, 338 Or at 358. The *Knappenberger II* court did recognize that reprimand is generally appropriate when a lawyer negligently accepts a representation that creates a conflict of interest and that suspension is appropriate when a lawyer does so knowingly or intentionally. *Knappenberger II*, 338 Or at 359.

This case more closely resembles *In re Cohen*, 316 Or 657, 853 P2d 286 (1993). In that case the accused was found guilty of violating then DR 5-105(E) which provided that a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict. The court found that at the beginning of his representation of two clients which were husband and wife there was a likely conflict of interest between them. As Cohen’s representation continued there developed an actual conflict of interest, yet nevertheless the accused continued to represent both clients. In discussing the appropriate sanction the court found that the accused had acted negligently in failing to provide full disclosure at the outset of representation, and that he acted knowingly when he continued to represent both husband and wife after an actual conflict of interest came to his attention. The court further noted that there was no actual injury to either client. Upon finding that the mitigating factors outweighed the aggravating factors in the case and that the accused’s clients were not actually injured, the court concluded that a reprimand was the appropriate sanction. *In re Cohen*, 316 Or at 664.

In the present case, although the Accused violated two separate ethical rules, DR 9-101(C)(3) and RPC 1.7, both violations involve the same clients and resulted in no actual injury to either client. He acted negligently with regard to both violations and the mitigating factors far outweigh the one aggravating circumstance.

Cite as *In re Clark*, 25 DB Rptr 207 (2011)

The trial panel believes that the suggested sanctions under the *Standards* are appropriate and that the Accused is hereby reprimanded for his negligent violation of DR 9-101(C)(3) and RPC 1.7.

DATED this 7th day of July 2011.

/s/ Robert A. Miller

Robert A. Miller  
OSB No. 732050  
Trial Panel Chair

/s/ Mary Lois Wagner

Mary Lois Wagner  
OSB No. 804285  
Trial Panel Member

/s/ Mitchell P. Rogers

Mitchell P. Rogers  
Trial Panel Public Member

**Cite as 351 Or 106 (2011)**  
**IN THE SUPREME COURT**  
**OF THE STATE OF OREGON**

In the Matter of the Application for  
Admission to Practice Law:

JUSTIN ROBERT STEFFEN,

Applicant.

(SC S059555)

En banc

On review from a recommendation of the Board of Bar Examiners.

Submitted on the record June 27, 2011. Filed September 22, 2011.

No appearance for the Oregon State Bar.

No appearance *contra*.

PER CURIAM

Application denied.

**SUMMARY OF THE SUPREME COURT OPINION**

Justin Robert Steffen (Applicant) seeks admission to the Oregon State Bar. Applicant submitted his admission application to the Board of Bar Examiners (board) in November 2010. On his application, he indicated that he had past-due debts and judgments. The board asked applicant for additional information about those debts and judgments. Applicant did not respond to that request for about three months, at which point applicant advised the board that he had filed for bankruptcy. Applicant took the position that the board could not inquire about his past-due financial obligations, because to do so would violate federal law. The board made further efforts to investigate the circumstances of applicant's debts and financial obligations, and applicant continued not to cooperate fully. The board now recommends that this court deny applicant's request for admission to the Oregon bar based on applicant's failure to cooperate with its investigation. We agree with the board's recommendation and deny applicant's admission.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-127
	)	
JAMES DODGE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	Robert J. Gunn
Disciplinary Board:	None.
Disposition:	Violations of RPC 1.3 and RPC 1.4(a). Stipulation for Discipline. 90-day suspension.
Effective Date of Order:	December 1, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for ninety (90) days, effective December 1, 2011, for violations of RPC 1.3 and RPC 1.4(a).

DATED this 27th day of September 2011.

/s/ William B. Crow  
 William B. Crow  
 State Disciplinary Board Chairperson

/s/ Nancy M. Cooper  
 Nancy M. Cooper, Region 5  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

James Dodge, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 22, 1983, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On February 17, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter or promptly comply with reasonable requests for information). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

In or about September 2006, the Accused undertook to represent Tete Mensah (hereinafter “Mensah”) to recover damages for injuries Mensah had sustained in an automobile accident that occurred on January 6, 2006. Thereafter, the Accused entrusted the management and investigation of Mensah’s claim to his nonlawyer legal assistant.

On or about June 29, 2007, the Accused filed litigation on behalf of Mensah and entrusted the management of this litigation to his legal assistant who was unfamiliar with the Oregon Uniform Trial Court Rules, in particular, UTCR Rule 7.020. Thereafter, the defendants failed to file an answer to Mensah’s complaint.

6.

On October 22, 2007, because the defendants had failed to file an answer to Mensah's complaint, and pursuant to UTCR 7.020, the court notified the Accused of its intention to dismiss Mensah's case for lack of prosecution. Thereafter, the Accused failed to obtain a judgment of default, require the defendants to file an answer, or take any other action to avoid dismissal by the court of Mensah's case. On December 4, 2007, with notice to the Accused, the court dismissed Mensah's case for lack of prosecution. Thereafter, the Accused failed to take any action to reinstate the case, despite reminders from opposing counsel and his office staff of the need to do so, until on or about February 6, 2008, when he filed a motion to reopen. The motion was denied by the court.

7.

Between about October 22, 2007, to about March 24, 2008, the Accused failed to inform Mensah that the court intended to dismiss his case because the defendants had not filed an answer, failed to inform Mensah that the court had dismissed his case, and failed to inform Mensah that the statute of limitations had run on his claim, subject, however, to ORS 12.220(2). On March 24, 2008, the Accused informed Mensah of the status of his case and advised him to contact the Professional Liability Fund about a possible professional malpractice claim.

### Violations

8.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 7 herein, he violated RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter or promptly comply with reasonable requests for information).

### Sanction

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty of diligence to his clients. *Standards*, § 4.4. The *Standards* provide that the most important ethical duties are those obligations a lawyer owes to his or her clients. *Standards*, p. 5.

- b. **Mental State.** 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. *Standards*, p. 9. The Accused knowingly failed to attend to Mensah's case and knowingly failed to respond to his inquiries.
- c. **Injury.** Injury is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. *Standards*, p. 9. Injury can be actual or potential. *Standards*, p. 27. Mensah suffered actual injury as a result of the Accused's neglect. His case was dismissed, and he was denied his day in court. During the representation, Mensah suffered frustration at the Accused's repeated lack of response, which is also actual injury. See *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner II*, 325 Or 421, 426–427, 939 P2d 39 (1997).
- d. **Aggravating Factors.** Aggravating factors include:
  - 1. The Accused has substantial experience in the practice of law, having been admitted to the Oregon bar in 1992 and to the Texas bar in 1984. *Standards*, § 9.22(i); and
  - 2. The Accused has a record of prior discipline: (1) in 1997, he was reprimanded for violation of DR 7-104(A)(1) (communicating with a represented party), *In re Dodge*, 11 DB Rptr 135 (1997); (2) in 2002, he was suspended for two years with 21 months stayed pending completion of two-year probation for violation of DR 1-102(A)(3) (conduct involving misrepresentation), DR 1-102(A)(4) (conduct prejudicial to the administration of justice), DR 1-103(C) (failure to cooperate with the Bar), DR 2-106(A) (illegal fee), DR 2-110(A)(2) (improper withdrawal), DR 2-110(B)(4) (failure to withdraw when employment terminated), DR 6-101(A) (lack of competence), DR 6-101(B) (neglect of a legal matter), DR 7-101(A)(2) (failure to carry out a contract of employment), DR 9-101(C)(3) (failure to render an accounting, and failure to return client property), *In re Dodge*, 16 DB Rptr 278 (2002); and in 2008, he was reprimanded for violation of RPC 3.4(c) (disobeying an obligation under the rules of a tribunal) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice), *In re Dodge*, 22 DB Rptr 271 (2008).
- e. **Mitigating Factors.** Mitigating factors include:
  - 1. The Accused did not act with a dishonest or selfish motive. *Standards*, § 9.32(a).

10.

Under the *Standards*, suspension is appropriate where a lawyer engages in a knowing neglect of a client matter, including a knowing failure to communicate with his clients. *Standards*, § 4.42.

11.

Oregon cases reach a similar conclusion. *See, e.g., In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension where lawyer advised the trial court that a matter was resolved and the case could be taken off the hearing docket, but then failed to have the opposing party sign the stipulation he drafted or submit it to the court for nearly two years); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension where lawyer failed to timely serve a complaint or notify his client for more than a year that the case had been dismissed); *In re Schaffner I*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension—60 days for knowing neglect of single client matter and 60 days for failure to cooperate with the Bar); *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997) (two-year suspension for knowing neglect of a single client matter, failure to promptly return client property, and failure to cooperate with the Bar); *In re Parker*, 330 Or 541, 9 P3d 107 (2000) (four-year suspension for failure to cooperate with the Bar and for neglecting the lawyer's practice for sustained periods of time, which resulted in the in neglect of four client matters).

The Accused's conduct is not as egregious as that in *In re Schaffner II* or *In re Parker* because the Accused has cooperated with the Bar and may have been suffering from a medical condition that contributed to his conduct. However, in light of the Accused's prior disciplinary record for similar conduct, a sanction greater than that imposed in *Redden*, *LaBahn*, or *Schaffner I* is appropriate for the Accused's misconduct.

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days for violation of RPC 1.3 and RPC 1.4(a), the sanction to be effective December 1, 2011.

13.

In addition, on or before February 15, 2012, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$484.40 incurred for deposition expenses. Should the Accused fail to pay \$484.40 in full by February 15, 2012, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

14.

Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid

foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Matthew A.C. U'Ren, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Matthew A.C. U'Ren has agreed to accept this responsibility.

15.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

16.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

17.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 21st day of September 2011.

/s/ James Dodge

James Dodge  
OSB No. 830337

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson  
OSB No. 970688  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 11-83  
)  
THOMAS P. McELROY, )  
)  
Accused. )

Counsel for the Bar: Martha M. Hicks  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violations of RPC 1.15-1(a) and RPC 1.15-1(c).  
Stipulation for Discipline. Public Reprimand.  
Effective Date of Order: October 18, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violations of RPC 1.15-1(a) and RPC 1.15-1(c).

DATED this 18th day of October 2011.

/s/ William B. Crow  
William B. Crow  
State Disciplinary Board Chairperson

/s/ Nancy M. Cooper  
Nancy M. Cooper, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Thomas P. McElroy, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 20, 2001, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On July 16, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.15-1(a) and RPC 1.15-1(c) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

Between March 2010 and March 2011, when the Accused’s clients paid advances for fees or costs by credit card, the funds were deposited directly into the Accused’s office general account and then transferred into his lawyer trust account. On or about February 3, 2011, the Accused wrote a nonsufficient funds check against his lawyer trust account. The resulting overdraft of the account was caused by a failure by the Accused in March 2010 to transfer an advance for fees paid by a client by credit card out of his office general account and into his lawyer trust account. Thereafter, the Accused made payments on behalf of this client from his lawyer trust account, even though the client had no money in the account. The Accused did not discover his March 2010 error until March 2011.

### **Violations**

6.

The Accused admits that by engaging in the conduct described in paragraph 5, he violated RPC 1.15-1(a) and RPC 1.15-1(c).

## Sanction

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to preserve client property. *Standards*, § 4.1.
- b. **Mental State.** The Accused was under the mistaken impression that lawyer trust accounts could not be used as merchant services accounts. Consistent with this belief, the Accused established his office general account as a merchant services account to receive credit card payments by clients. In doing so, he acted negligently in that he failed to be aware of a substantial risk that unearned fees would be deposited directly into his office general account, which failure was a deviation from the standard of care that a reasonable lawyer would exercise under the circumstances. *Standards*, at 6.
- c. **Injury.** No client suffered the loss of any money from the Accused’s conduct. However, insofar as the Accused made payments from his trust account on behalf of the client described in paragraph 5 above, the clients whose funds were used to make the payments were injured.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused was admonished in 2006 for violations of RPC 1.15-1(a) and RPC 1.15-1(c) with regard to his trust accounting practices. *Standards*, § 9.22(a). This admonition is relevant as an aggravating factor under *In re Cohen*, 330 Or 489, 500–501, 3 P2d 953 (2000).
  2. The Accused engaged in a pattern of misconduct involving multiple offenses. *Standards*, § 9.22(c), (d).
  3. The Accused has substantial experience in the practice of law, having been admitted to the Bar in 2001. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused did not act with a dishonest or selfish motive and within minutes of the overdraft made a good-faith effort to rectify the consequences of his conduct. The Accused subsequently educated himself in proper lawyer trust accounting. *Standards*, § 9.32(a), (d).

2. The Accused made full and free disclosure to Disciplinary Counsel's Office and displayed a cooperative attitude toward the investigation of his conduct. *Standards*, § 9.32(e).

8.

Under the *Standards*, a public reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards*, § 4.13.

9.

Decisions of the Disciplinary Board are in accord. See *In re Arneson*, 22 DB Rptr 331 (2006) (lawyer reprimanded for violations of RPC 1.15-1(d) and RPC 1.15-1(e)); *In re Lounsbury*, 24 DB Rptr 53 (2010) (lawyer reprimanded for violations of RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d)); *In re Coran*, 24 DB Rptr 269 (2010) (lawyer reprimanded for violations of RPC 1.5(c)(2), RPC 1.15-1(a), and RPC 1.15-1(c)).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.15-1(a) and RPC 1.15-1(c), the sanction to be effective on the date this stipulation is approved by the Disciplinary Board.

11.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

12.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The SPRB approved the sanction provided for herein on July 16, 2011. The parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re McElroy*, 25 DB Rptr 224 (2011)

EXECUTED this 7th day of October 2011.

/s/ Thomas P. McElroy

Thomas P. McElroy

OSB No. 010763

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks

OSB No. 751674

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 10-132
	)	
THEODORA HSIA LENIHAN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violations of RPC 1.15-2(m) and RPC 8.1(a)(2). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	October 25, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for sixty (60) days, effective on the date this order is signed, for violations of RPC 1.15-2(m) and RPC 8.1(a)(2).

DATED this 25th day of October 2011.

/s/ William B. Crow  
 William B. Crow  
 State Disciplinary Board Chairperson

/s/ Nancy M. Cooper  
 Nancy M. Cooper, Region 5  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Theodora H. Lenihan, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 25, 2008, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business when practicing in Oregon in Multnomah County. She currently resides in the County of Denver, State of Colorado.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On December 2, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.15-2(m) (failure to comply with annual certification of lawyer trust account) and RPC 8.1(a)(2) (failure to respond to lawful requests from a disciplinary authority). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

#### Facts

5.

Pursuant to RPC 1.15-2(m), every member of the Bar is required to certify annually, on a form and by a due date prescribed by the Bar, that the lawyer is in compliance with RPC 1.15-1 and RPC 1.15-2(m) (hereinafter “IOLTA Certification”).

6.

In December 2009, the Bar mailed an IOLTA Certification compliance form to all active Bar members and established February 1, 2010, as the due date for filing the IOLTA Certification. The Accused failed to complete and submit the form.

7.

The Accused did not comply with the IOLTA Certification requirements of RPC 1.15-2(m) for the year 2010.

8.

At various times from May to August 2010, the Bar asked and the Accused failed to respond to lawful inquiries of the Disciplinary Counsel's Office ("DCO") regarding her IOLTA Certification compliance.

### **Violations**

9.

The Accused admits that by failing to file her IOLTA Certification and by failing to respond to inquiries from DCO, she violated RPC 1.15-2(m) and RPC 8.1(a)(2).

### **Sanction**

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated her duties to the profession to comply with the rules attendant to practicing law in this jurisdiction and to timely respond to Bar inquiries in disciplinary investigations. *Standards*, § 7.0.
- b. **Mental State.** There are three recognized mental states under the *Standards*. "Intent" is the conscious objective or purpose to accomplish a particular result. *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 of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

The Accused knowingly failed to file her annual IOLTA Certification, and knowingly failed to respond to one or more Bar inquiries.

- c. **Injury.** An injury need not be actual, but may be only potential to support the imposition of a sanction. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, the Accused's conduct caused some actual injury in

that the Bar was forced to expend time and resources in repeated efforts to obtain her IOLTA compliance and cooperation with the Bar inquiry.

- d. **Aggravating Circumstances.** There are no aggravating circumstances.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  - 2. Absence of a selfish motive. *Standards*, § 9.32(b).

11.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

12.

Oregon case law also supports the imposition of a suspension. *See, e.g., In re Nielson*, 25 DB Rptr 196 (2011) (suspension for violations of RPC 1.15-2(m) and RPC 8.1(a)(2)); *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (lawyer suspended for failing to maintain his trust account as an interest-bearing account and for failing to timely comply with disciplinary authority discovery request); *In re Klosterman*, 23 DB Rptr 204 (2009).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall receive a 60-day suspension for violations of RPC 1.15-2(m) and RPC 8.1(a)(2).

14.

This Stipulation for Discipline has been approved by the SPRB and is subject to review by Disciplinary Counsel of the Oregon State Bar. This stipulation will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 11th day of October 2011.

/s/ Theodora Hsia Lenihan  
Theodora Hsia Lenihan  
OSB No. 084006

OREGON STATE BAR

By: /s/ Kellie F. Johnson  
Kellie F. Johnson  
OSB No. 970688  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-10
	)	
J. KEVIN HUNT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.4(a) and RPC 1.4(b). Stipulation for Discipline. Reprimand.
Effective Date of Order:	November 1, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.4(a) and RPC 1.4(b).

DATED this 1st day of November 2011.

/s/ William B. Crow  
 William Crow  
 State Disciplinary Board Chairperson

/s/ Anthony A. Buccino  
 Anthony A. Buccino, Region 7  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

J. Kevin Hunt, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 14, 1984, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On March 9, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.4(a) (failure to keep a client reasonably informed of the status of a matter) and RPC 1.4(b) (failure to explain a matter to the extent necessary to enable the client to make informed decisions regarding the representation). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Facts**

5.

In April 2009, after unsuccessful attempts to locate Oregon counsel for Wyoming resident Vicki Miller (“Miller”), at Miller’s request the Accused agreed to represent Miller pro bono at a May 8, 2009, Lane County, Oregon, hearing on a petition for modification of custody of Miller’s son filed by Miller’s ex-husband. The court ruled against Miller and ordered her to pay child support.

6.

Following the May 8, 2009, modification hearing, one or more drafts of the proposed judgment were sent by opposing counsel, Morgan Diment (“Diment”), to the Accused. The Accused did not provide copies of any drafts to Miller or consult with her about their content.

7.

On June 17, 2009, Diment filed a request for attorney fees and properly served a copy of this motion on the Accused. The Accused did not notify Miller of Diment’s request for

fees, or of his belief that there was no basis to object to it. Thereafter, the Accused took no action to oppose the motion.

8.

On or about July 21, 2009, the court notified the Accused that it had signed and entered a supplemental judgment against Miller for attorney fees. The Accused did not send a copy of the supplemental judgment to Miller or otherwise notify her that it had been entered.

### **Violations**

9.

By failing to notify Miller of the receipt and substance of the judgment and of Diment's motion and supplemental judgment for attorney fees, the Accused violated RPC 1.4(a) and (b).

### **Sanction**

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty of diligence to his client. *Standards*, § 4.4. The *Standards* provide that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, at 5.
- b. **Mental State.** The Accused acted knowingly insofar as he failed to pass along important information to his client. "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. *Standards*, at 7.

The Accused contends that at the time of his receipt of Diment's filings, he held the belief that he was no longer acting as Miller's lawyer. However, he also acknowledges that because he did not notify Diment or the court that he was no longer representing Miller, there was no other way for Miller to obtain this information other than through the Accused.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused's failure to communicate with Miller about Diment's filings caused actual injury to Miller in the form of anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney neglect

can constitute actual injury under the *Standards*); *In re Schaffner*, 325 Or 421, 426–427, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989). Nonetheless, because the judge had already ruled on the issues raised in the filings, the Accused’s lack of communication did not ultimately affect Miller’s legal matter.

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

1. A prior record of discipline. *Standards*, § 9.22(a). The Accused was previously reprimanded in 2007 for violations of RPC 1.4(a) and RPC 8.1(a)(2) (failure to respond to a lawful demand for information from a disciplinary authority) in connection with his pro bono representation of a client in her potential appeal of an unemployment benefits compensation matter arising from two adverse Employment Department decisions. *In re Hunt*, 21 DB Rptr 29 (2007).
2. Substantial experience in the practice of law. *Standards*, 9.22(i). The Accused was admitted in Oregon in 1984.

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

1. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b). The Accused accepted Miller’s case pro bono.
2. Full and free disclosure and cooperation in these disciplinary proceedings. *Standards*, § 9.32(e).
3. Physical disability. *Standards*, § 9.32 (h). The Accused was recovering from illness and hospitalization during some of the time that the misconduct in this case occurred.
4. Remorse. *Standards*, § 9.32(l). The Accused has expressed his regret that he did not pass along information to Miller or timely notify Diment of his withdrawal from the matter.

11.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standards*, § 4.42. However, when the aggravating and mitigating factors are considered, a reprimand is the appropriate result.

12.

Oregon cases reach a similar conclusion. See *In re Misfeldt*, 24 DB Rptr 25 (2010); *In re Dames*, 23 DB Rptr 105 (2009); *In re Nielson*, 22 DB Rptr 286 (2008); *In re Farthing*, 22 DB Rptr 281 (2008) (all reprimanded for violations of RPC 1.4(a) or RPC 1.4(a) and (b)).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.4(a) and (b), the sanction to be effective upon approval by the Disciplinary Board.

14.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

15.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 26th day of October 2011.

/s/ J. Kevin Hunt

J. Kevin Hunt  
OSB No. 842529

EXECUTED this 28th day of October 2011.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott  
OSB No. 990280  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-59
	)	
C. FREDRICK BURT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Mary A. Cooper
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 8.1(a)(2). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	December 5, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 8.1(a)(2).

DATED this 5th day of December 2011.

/s/ William B. Crow  
 William B. Crow  
 State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
 Mary Kim Wood, Region 6  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

C. Fredrick Burt, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 22, 1983, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 14, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for an alleged violation of RPC 8.1(a)(2) (knowing failure to respond to lawful demands for information from a disciplinary authority) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

On January 18, 2011, the Bar received a complaint from Claude M. Forbes (hereinafter “Forbes”), who alleged that he had asked the Accused for a copy of his file, but the Accused had ignored his requests. In April and May 2011, Disciplinary Counsel’s Office (hereinafter “DCO”) asked the Accused to respond to Forbes’ complaint. Although the Accused received those inquiries, he failed to respond to them. DCO assigned the matter to be investigated to the Local Professional Responsibility Committee (hereinafter “LPRC”).

6.

The Accused cooperated with the LPRC’s investigation. The LPRC determined that there was no evidence that Forbes had ever requested his file from the Accused before filing his Bar complaint and there was therefore no probable cause to assert that the Accused had failed to provide Forbes’ file promptly upon request.

### Violations

7.

The Accused admits that by failing to respond to inquiry from DCO in April and May 2011, described in paragraphs 5 and 6, he violated RPC 8.1(a)(2).

### Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated his duty to the profession to respond to inquiry by a disciplinary authority. *Standards*, § 7.0.
- b. **Mental State.** By failing to respond to DCO’s inquiries, the Accused acted knowingly, which the *Standards* define as acting with a conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result. *Standards*, at 7.
- c. **Injury.** Both actual and potential injury are relevant to determining sanction in a disciplinary case. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused’s failure to respond resulted in the expenditure of additional investigatory resources by the Bar.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused was admitted to practice in 1983, and thus has substantial experience in the practice of law. *Standards*, § 9.22(i).
  2. The Accused was previously admonished for similar misconduct in 2007. In that matter, the Accused failed to respond to inquiry by DCO, but thereafter cooperated with the LPRC investigator. An admonition for similar conduct is relevant to a sanction analysis under *In re Cohen*, 330 Or 489, 8 P3d 953 (2000). *Standards*, § 9.22(a).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. After the matter was referred to the LPRC, the Accused cooperated with the investigation of this disciplinary matter. *Standards*, § 9.32(e).
  2. The Accused did not have a dishonest or selfish motive. *Standards*, § 9.32(b).

9.

Under the *Standards*, a public reprimand is generally appropriate when the lawyer has received an admonition for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession. *Standards*, § 8.3(b).

10.

Oregon case law is in accord. See *In re Van Ziepel*, 60 DB Rptr 71 (1992) (second offense of a failure to respond to a disciplinary authority justified a public reprimand, even when underlying complaint was ultimately dismissed). See also *In re Edelson*, 13 DB Rptr 72 (1999).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 8.1(a)(2).

12.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 29th day of November 2011.

/s/ C. Fredrick Burt

C. Fredrick Burt  
OSB No. 830240

OREGON STATE BAR

By: /s/ Mary A. Cooper

Mary A. Cooper  
OSB No. 910013  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 11-78  
)  
MARY J. GRIMES, )  
)  
Accused. )

Counsel for the Bar: Jeffrey D. Sapiro  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c). Stipulation for Discipline. Reprimand.  
Effective Date of Order: December 14, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c).

DATED this 14th day of December 2011.

/s/ William B. Crow  
William B. Crow  
State Disciplinary Board Chairperson

/s/ Carl W. Hopp  
Carl W. Hopp, Region 1  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Mary J. Grimes, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 15, 1988, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Deschutes County, Oregon.

3.

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

4.

On July 19, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c) of the Rules of Professional Conduct. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

In or about April 2009, the Accused undertook to represent Patricia R. Brown (hereinafter “Brown”) in a dissolution of marriage proceeding filed in Crook County Circuit Court, No. 08-DS-0148. The Accused agreed to represent Brown for a flat fee of \$2,000, with an additional \$1,000 due if the matter went to arbitration. Any additional attorney fees beyond these sums were to be negotiated at a later time between the Accused and Brown. There was no written attorney fee agreement between the Accused and Brown at the beginning of the attorney-client relationship or at any time thereafter.

Brown paid the Accused attorney fees of \$2,000 on or about April 17, 2009, and \$1,000 on or about June 29, 2009, the latter sum for services related to an arbitration.

6.

Thereafter, the dissolution did not resolve through negotiation or arbitration. The Accused charged Brown and sought to collect from her an additional amount for attorney fees that Brown had not agreed to pay.

7.

When Brown paid the Accused the \$2,000 and \$1,000 referred to in paragraph 5 above, the Accused did not deposit those sums into a lawyer trust account, and did not thereafter maintain those sums in a lawyer trust account. The Accused had not rendered services to Brown to an extent that all the sums paid could have been considered earned fees at the time of payment.

### Violations

8.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 7, she violated RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c).

### Sanction

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The Accused violated the duty owed to clients to preserve client property, *Standards*, §4.0, and the duty owed to the profession not to charge excessive fees, *Standards*, §7.0.
- b. **Mental State.** The Accused acted negligently, not knowingly or intentionally, defined in the *Standards* as a failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. The Accused intended to discuss and enter into an agreement with her client regarding the basis for additional attorney fees if the dissolution did not resolve through negotiation or arbitration, but overlooked doing so. The Accused also believed that the attorney fees paid by Brown were paid on a flat fee basis and could be deposited directly into the Accused’s business account even in the absence of a written fee agreement. She now understands that without a written agreement, funds paid by a client must be treated as client

funds and maintained in a lawyer trust account until earned. *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007).

- c. **Injury.** For purposes of sanction, injury from a lawyer's misconduct can be actual or potential. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Here, the client was billed for more than she believed she had agreed to pay to the Accused and the funds she did pay were not accorded the protections of client funds deposited in a lawyer trust account. However, the Accused at first reduced the amount of additional fees she sought from Brown and now has waived any right to those additional fees, such that Brown did not incur actual injury.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. The Accused has a prior disciplinary record, consisting of a reprimand in 2001 for insufficient trust account records, *In re Grimes*, 15 DB Rptr 241 (2001), and a one-year suspension in 2004, with all but two months stayed during a two-year probation, for neglecting post-conviction relief cases, *In re Grimes*, 18 DB Rptr 300 (2004). *Standards*, § 9.22(a). However, those prior offenses are somewhat remote in time and dissimilar to the pending charges;
  - 2. The Accused committed multiple offenses. *Standards*, § 9.22(d);
  - 3. The Accused has substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. The Accused did not act with a dishonest or selfish motive. *Standards*, § 9.32(b);
  - 2. The Accused has agreed to waive any further attorney fees from Brown. *Standards*, § 9.32(d);
  - 3. The Accused has made full and free disclosure and exhibited a cooperative attitude toward the proceedings. *Standards*, § 9.32(e);
  - 4. As noted above, the Accused's prior offenses, at least the 2001 reprimand, are remote in time. *Standards*, § 9.32(m).

10.

Under the *Standards*, a reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes potential injury to the client, and when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes potential injury to the client. *Standards*, §§ 4.13, 7.3.

11.

Oregon disciplinary sanctions are consistent with the *Standards*. See *In re Paulson*, 335 Or 436, 71 P3d 60 (2003) (reprimand for excessive fee); *In re Potts*, 301 Or 57, 718 P2d 1363 (1986) (reprimand for excessive fee in probate matter); *In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) (reprimand for negligent deposit of client funds into business account); *In re Rose*, 20 DB Rptr 237 (2006) (reprimand for premature withdrawal of funds from trust account based on mistaken belief that written fee agreement existed); *In re Joiner*, 18 DB Rptr 314 (2004) (reprimand for deposit of retainer directly into a business account based on mistaken belief that fee could be treated as nonrefundable flat fee earned on receipt). Although suspensions have been imposed for violations of the rules to which the Accused stipulates herein, those sanctions are typically based on more aggravated facts or are in cases in which aggravating factors outweigh mitigating factors in the sanctions analysis. *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007); *In re Eakin*, 334 Or 238, 48 P2d 147 (2002).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violations of RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c), the sanction to be effective immediately upon the approval of this stipulation.

13.

The Accused acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension.

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 6th day of December 2011.

/s/ Mary J. Grimes

Mary J. Grimes

OSB No. 880525

EXECUTED this 12th day of December 2011.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro

Jeffrey D. Sapiro

OSB No. 783627

Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 09-95 and 09-96
	)	
WILLIAM E. CARL,	)	SC S058149
	)	
Accused.	)	

Counsel for the Bar:	Susan Roedl Cournoyer
Counsel for the Accused:	John C. Fisher
Disciplinary Board:	None.
Disposition:	Stipulated Petition to Revoke Probation and Impose Stayed Suspension. 335-day suspension.
Effective Date of Order:	December 15, 2011

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration of the court.

The court accepts the Stipulation for Discipline. The disciplinary probation and stay of suspension are revoked. The Accused is suspended from the practice of law in the State of Oregon for a period of 335 days, effective the date of this order.

December 15, 2011	<u>/s/ Paul J. De Muniz</u>
DATE	CHIEF JUSTICE

**STIPULATED PETITION TO REVOKE PROBATION AND IMPOSE STAYED  
SUSPENSION**

The Oregon State Bar (“the Bar”) hereby petitions the Oregon Supreme Court to revoke William E. Carl’s pending three-year probation and impose the 335-day stayed suspension in this attorney discipline matter.

**Background**

On January 21, 2010, this court issued an order accepting a Stipulation for Discipline whereby Salem attorney William E. Carl (“Carl”) was suspended from the practice of law for a period of one year for violations of RPC 8.4(a)(2) (committing a criminal act that reflects adversely upon honesty, trustworthiness, or fitness as a lawyer in other respects) and ORS

9.527(2) (conviction of a felony under the laws of this state). All but 30 days of the one-year suspension was stayed pending a three-year probation. *In re Carl*, 24 DB Rptr 17 (2010).

Pursuant to that probation, Carl was required to comply with all provisions of the Rules of Professional Conduct (“RPCs”) and ORS chapter 9. Stipulation for Discipline ¶ 12(a); *In re Carl*, 24 DB Rptr at 21.

On July 29, 2011, a Polk County Circuit Court jury found Carl guilty of one count of tampering with physical evidence (ORS 162.295(1)(a)) and two counts of endangering the welfare of a minor (ORS 163.575(1)(b)). Both offenses are Class A misdemeanors. ORS 162.295(2), 163.575(2). The trial judge also found Carl guilty of possessing less than one ounce of marijuana, a violation. Judgment of conviction was entered on August 11, 2011. *State v. William Ellison Carl*, Polk County Circuit Court Case No. 11P50101.

At a meeting on September 17, 2011, the State Professional Responsibility Board directed Disciplinary Counsel to petition this court to revoke Carl’s probation.

### Discussion

Bar Rule of Procedure (“BR”) 6.2(d) provides in relevant part:

Revocation. Disciplinary Counsel may petition the . . . Supreme Court . . . to revoke the probation of any attorney for violation of any probationary term imposed by . . . the Supreme Court. The . . . court may order the attorney to appear and show cause, if he or she has any, why the attorney’s probation should not be revoked and the original sanctions imposed. The . . . court . . . may appoint a trial panel of the Disciplinary Board to conduct the show cause hearing and report back to the . . . court. The . . . court . . . shall thereafter rule on the petition. . . . A petition for revocation of an attorney’s probation shall not preclude the Bar from filing independent disciplinary charges based on the same conduct as alleged in the petition.

Carl violated the terms of his probation by failing to comply with all provisions of ORS chapter 9 and the RPCs. He committed and was convicted of tampering with physical evidence, a crime involving moral turpitude: it is intentional and involves dishonesty, deceit, or illegal activity for personal gain. *See In re Nuss*, 335 Or 368, 376, 67 P3d 386 (2003) (setting forth factors indicating moral turpitude). Carl was thus convicted of a misdemeanor involving moral turpitude in violation of ORS 9.527(2). Furthermore, his convictions of endangering the welfare of a minor demonstrate that he committed a criminal act that reflects adversely upon his honesty, trustworthiness, or fitness to practice in other respects; Carl violated RPC 8.4(a)(2).

While BR 6.2(d) sets forth the procedure whereby the court could order Carl to appear and show cause why his probation should not be revoked and the stayed sanction imposed, such action will not be necessary. As indicated by his signature below, Carl

stipulates to revocation of the probation and imposition of the remaining 335 days of the one-year suspension, to become effective immediately upon the court's order on this petition.

**Conclusion**

Pursuant to BR 6.2(d) and the stipulation of the parties, the court should revoke Carl's disciplinary probation and impose the remaining 335 days of his suspension, effective immediately.

DATED this 23rd day of November 2011.

OREGON STATE BAR

By: /s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer

OSB No. 863381

Assistant Disciplinary Counsel

IT IS SO STIPULATED:

/s/ William E. Carl

William E. Carl

OSB No. 022679

/s/ John C. Fisher

John C. Fisher

OSB No. 771750

Counsel for William E. Carl

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-72
	)	
GARY F. DEAL,	)	
	)	
Accused.	)	

Counsel for the Bar:	Mary A. Cooper
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.4(a). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	December 19, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.4(a).

DATED this 19th day of December 2011.

/s/ William B. Crow  
 William B. Crow  
 State Disciplinary Board Chairperson

/s/ Jack A. Gardner  
 Jack A. Gardner, Region 2  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Gary F. Deal, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 1977, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

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

4.

On July 16, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.4(a) (failure to keep client reasonably informed about the status of a matter and promptly comply with reasonable requests for information) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### **Facts**

5.

The Accused was appointed to represent Sean Hennigar (hereinafter “Hennigar”) on November 18, 2009, in a criminal matter. Hennigar asked the Accused to obtain a continuance of the first hearing, scheduled for December 23, 2009. The Accused did so, but then failed to notify Hennigar when the court rescheduled the hearing to February 18, 2010.

6.

Between November 18, 2009, and February 18, 2010, the Accused did not communicate with Hennigar about the status of his case. He also failed to respond to status inquiries from Hennigar and Hennigar’s relatives and girlfriend.

### **Violations**

7.

The Accused admits that by engaging in the conduct described in paragraphs 5 and 6, he violated RPC 1.4(a).

## Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duties Violated.** In violating RPC 1.4(a), the Accused violated his duty to communicate adequately with his client. *Standards*, § 4.4.
- b. **Mental State.** By failing to ensure adequate communication with his client, the Accused acted negligently, which is the failure to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 7.
- c. **Injury.** Both actual and potential injury are relevant to determining sanction in a disciplinary case. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused’s inadequate communication caused his client anxiety and frustration.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused was admitted to practice in 1977, and thus has substantial experience in the practice of law. *Standards*, § 9.22(i).
  2. The Accused was previously admonished under *former* DR 6-101(B) (predecessor to current RPC 1.4(a)), for similar misconduct in 1996. In that matter, the Accused failed to return the client’s telephone calls and written correspondence. An admonition for similar conduct is relevant to a sanctions analysis under *In re Cohen*, 330 Or 489, 8 P3d 953 (2000). *Standards*, § 9.22(a).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused cooperated with the investigation of this disciplinary matter. *Standards*, § 9.32(e).
  2. The Accused’s prior offense, though similar in nature, was remote in time. *Standards*, § 9.32(m).

9.

Under the *Standards*, a public reprimand is generally appropriate when a lawyer negligently fails to act with reasonable diligence in representing a client, and causes injury or potential injury to the client. *Standards*, § 4.43.

10.

Oregon case law is in accord. *In re Paxton*, 280 Or 797, 572 P2d 1032 (1977) (lawyer reprimanded and put on probation for one year for neglecting a client's matter and failing to respond to client inquiries). The Disciplinary Board has likewise approved stipulations for public reprimands for such misconduct. See *In re Later*, 22 DB Rptr 340 (2008).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violating RPC 1.4(a), the sanction to be effective upon approval by the Disciplinary Board.

12.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The SPRB approved the sanction provided for herein on July 16, 2011. The parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 30th day of November 2011.

/s/ Gary F. Deal  
Gary F. Deal  
OSB No. 771553

OREGON STATE BAR

By: /s/ Mary A. Cooper  
Mary A. Cooper  
OSB No. 910013  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 11-48  
)  
JUSTIN E. THRONE, )  
)  
Accused. )

Counsel for the Bar: Susan Roedl Cournoyer  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.4(a) and RPC 1.15-1(d). Stipulation  
for Discipline. 30-day suspension.  
Effective Date of Order: December 29, 2011

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 30 days for violations of RPC 1.4(a) and RPC 1.15-1(d), the sanction to be effective seven days after the date of this Order.

DATED this 22nd day of December 2011.

/s/ William Crow  
William Crow  
State Disciplinary Board Chairperson

/s/ Megan Annand  
Megan Annand, Region 3  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Justin E. Throne, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “the Bar”) hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on January 4, 2002, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Klamath County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On April 15, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.4(a) and RPC 1.15-1(d) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

#### Facts

5.

- (a) In April 2010, a Florida resident (“the client”) retained the Accused to effect a forfeiture under a sales contract involving a parcel of unimproved real property he owned in Oregon. The client told the Accused that he considered the matter urgent because he had a new buyer for the property. The client paid a \$1,000 retainer, which the Accused deposited into his trust account on April 27, 2010.
- (b) Having heard nothing from the Accused for the next month, the client called the Accused on May 27, 2010, and requested a status report and projected completion date. The Accused did not respond. Every few weeks thereafter, the client repeated these requests. Although the Accused’s receptionist assured the client each time he called that the Accused would mail him a declaration of forfeiture to sign shortly, the Accused did not actually send a declaration to the client until July 28, 2010.

- (c) By letter dated June 25, 2010, the client requested that the Accused return any unearned portion of his retainer and provide a statement of legal services performed. The Accused did not provide an accounting until September 28, 2010, and then only in response to an inquiry by the Bar. The Accused's accounting showed that, after disbursing costs incurred and fees earned, he still held funds in his trust account that the client was entitled to receive. However, the Accused did not deliver these funds to the client until July 25, 2011. During the 13-month period between the client's first request for a refund and the Accused's return of the funds, the client occasionally told the Accused that the Accused could keep the money if he would complete the forfeiture. However, the Accused did no further work on the matter after mid-August 2010.

### Violations

6.

The Accused admits that by engaging in the conduct described in paragraphs 5(a) through 5(c), he violated RPC 1.4(a) and RPC 1.15-1(d).

### Sanction

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** By failing to respond to the client's reasonable requests for information and failing to promptly return client property upon request, the Accused violated duties owed to his client. *Standards*, § 4.4.
- b. **Mental State.** In failing to promptly respond to his client's reasonable requests for information, the Accused acted with negligence, which is defined as the failure to heed a substantial risk that circumstances exist or that a result will follow, which failure deviates from the standard of care a reasonable lawyer would exercise in the situation. *Standards*, p. 7. In failing to promptly refund the unearned portion of his client's retainer upon request, the Accused acted with knowledge, the conscious awareness of the nature or attendant circumstances of his conduct but without a conscious objective or purpose to accomplish a particular result. *Standards*, p. 7.
- c. **Injury.** Injury can be actual or potential. *Standards*, p. 27. The client suffered actual injury as a result of the Accused's failure to promptly return the

unearned portion of his retainer in that he lost the use of his funds for 13 months. The client also suffered frustration at the Accused's repeated lack of response, which is an actual injury. See *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner II*, 352 Or 421, 426–427, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** One aggravating factor is present in this matter:
1. The Accused was admonished in November 2010 for violating RPC 1.3 (neglect) and RPC 1.4(a) (failure to communicate) arising from his handling of a small estate affidavit proceeding. *Standards*, § 9.22(a). An admonition letter is considered “prior discipline” if it involves similar misconduct. *In re Cohen*, 330 Or at 500–501.
- e. **Mitigating Circumstances.** Mitigating circumstances in this matter include:
1. The Accused did not act with a dishonest or selfish motive. *Standards*, § 9.32(a);
  2. The Accused made full disclosure to the Bar and cooperated in these proceedings. *Standards*, § 9.32(e); and
  3. The Accused has expressed remorse. *Standards*, § 9.32(l).

8.

Under the *Standards*, 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. *Standards*, § 4.12. The *Standards* suggest that reprimand is generally appropriate when a lawyer negligently fails to act with reasonable diligence in representing or communicating with a client and causes injury or potential injury to the client. *Standards*, § 4.43.

9.

Oregon cases reach a similar conclusion. For example, in *In re Snyder*, 348 Or 307, 232 P3d 952 (2010), an attorney was suspended for 30 days for violating RPC 1.4(a) and RPC 1.15-1(d). Snyder's failure to communicate with his client spanned approximately nine months and his failure to return the client's files spanned approximately two years. He had no record of prior discipline. See also *In re Feest*, 18 DB Rptr 287 (2004) (30-day suspension for neglect and failure to communicate over a three-year period, failure to deposit funds into trust and failure to return funds when requested over a six-month period; attorney had previously been admonished for neglect).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violations of RPC 1.4(a) and RPC 1.15-1(d), which suspension shall commence seven days after the disciplinary board approves this stipulation.

11.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Matthew T. Parks, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Mr. Parks has agreed to accept this responsibility.

12.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

13.

The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 23rd day of November 2011.

/s/ Justin E. Throne

Justin E. Throne  
OSB No. 020030

EXECUTED this 12th day of December 2011.

OREGON STATE BAR

By: /s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer  
OSB No. 863381  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-144  
)  
ROBERT E. HILL, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None.  
Disciplinary Board: Paul B. Heatherman, Chair  
Carl W. Hopp Jr.  
John G. McBee, Public Member  
Disposition: Violation of RPC 3.4(c), RPC 3.5(d), RPC 4.2, RPC  
5.5(a), RPC 8.4(a)(4), and ORS 9.160. Trial Panel  
Opinion. Eight-month suspension.  
Effective Date of Opinion: January 4, 2012

**TRIAL PANEL OPINION**

The Oregon State Bar filed a Formal Complaint against the Accused on or about January 19, 2011. The Accused filed an Answer on or about January 31, 2011. This matter came before the Trial Panel of the Disciplinary Board consisting of Paul B. Heatherman, Chair; Carl W. Hopp Jr., Member; and John McBee, Public Member, on August 2, 2011. Amber Bevacqua-Lynott represented the Oregon State Bar. The Accused represented himself pro se.

The Trial Panel has considered the pleadings and arguments of counsel. The Trial Panel also considered all testimony and exhibits that were presented by the parties. Based on the findings and conclusions made below, we find that the Accused violated RPC 5.5(a), RPC 4.2, RPC 3.4(c), and RPC 3.5(d). We further determine that the Accused should be suspended from the practice of law for a period of eight months, and, if he chooses to become licensed to practice law in the State of Oregon, shall apply for formal reinstatement. BR 8.1.

**FINDINGS OF FACT**

In the early 1990s, the Accused befriended and frequently visited with a 79-year old woman named Bonnie Frey. In the mid 1990s, Ms. Frey began a relationship with a man

named Venard Catterall, who was 92 years of age. Frey and Catterall maintained a close relationship for about 14 years.

In or around 1997, Frey developed Alzheimer's disease and began to mentally decline. In December of 2007, the Accused, who was already retired from a career with the Umatilla County District Attorney's Office, transferred his Bar membership to inactive status.

Near the end of the Frey-Catterall relationship, Catterall was not helpful in ensuring that Frey was taking her medications, was not taking other steps to care for Frey (who had become unable to care for herself), and Catterall was not driving his vehicle safely. In July of 2009, Frey's children decided to move Frey to Ashley Manor, an Alzheimer's treatment facility.

In August of 2009, Frey's son AJ Frey retained counselors Sally Anderson-Hansell and Eva Temple to petition the court to appoint a guardian and conservator for Frey. Attorney Robert Collins represented Frey in the guardian/conservatorship application process. In the same month, the Accused contacted Collins to say that he was "advocating for Venard [Catterall]," took the position that Frey was in Ashley Manor against her will, and strongly suggested that Frey be moved back into Catterall's home so that they could be together.

The Accused also contacted the State Long-Term Care Ombudsman on Catterall's behalf, whereupon the Ombudsman informed Ashley Manor that it had no legal authority to restrict Frey's visitors. On September 14, 2009, the Accused contacted Temple to object to AJ's decision to block Catterall's visits to Frey, and told Temple that he would file a formal objection in the guardianship proceeding. The Accused filed an objection with the court, and included his name and bar number in the signature block.

On September 16, 2009, the Accused spoke with Temple and stated that he did not object to the guardianship appointment if he and others could have unrestricted access to Frey at Ashley Manor. Thereafter, AJ permitted unrestricted visits to Frey, but the Accused nevertheless notified Temple that he would not be withdrawing his objection.

After the Accused learned that AJ permitted unrestricted visits to Frey, the Accused, with others, visited Frey. Immediately thereafter the Accused had Catterall's daughter, Sheila Catterall, file an objection with the court objecting to AJ as the guardian/conservator. On September 23, 2009, the Accused filed a motion to set a guardianship hearing, and advocated that venue take place in Pendleton. The Accused signed the motion, set forth his Bar number, and indicated that he was signing as "Friend of Bonnie Frey and Venard Catterall" and "Friend of the Court." On October 2, 2009, the Accused filed a four-page motion in support of his objection, and again included his Bar number in the signature block.

On October 15, 2009, a hearing took place and the Accused appeared with Catterall and Sheila. He brought with him a number of witnesses and documents. Judge Dan Hill presided. The Accused attempted to put on a case but Judge Hill denied the request. The Accused then became upset as all witnesses were to be excluded, including the Accused. He objected to the proceeding itself, calling it a sham. Judge Hill threatened to hold the Accused in contempt if he continued to refuse to leave the courtroom, and the Accused rebuked the Judge, claiming that he had “brought his toothbrush.” After the Accused continued with disruptions, Judge Hill held him in contempt, although no sanctions were imposed.

Had the Accused not interfered with the guardianship/conservator proceedings, the estate would have incurred less than \$2,000 in attorney fees. Frey’s final attorney fee amount amounted to over \$30,000, much in part to the Accused’s interference.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **A. Unauthorized Practice of Law.**

“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” RPC 5.5(a).

“Except as provided in this section, a person may not practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar.” ORS 9.160.

The practice of law includes appearing in court or in formal proceedings, preparing and filing documents with the court, and giving advice to clients concerning rights and duties in a legal matter. *In re Koliha*, 330 Or 402, 406–407, 9 P3d 102 (2000); *In re the Application of Monaco*, 317 Or 366, 369–370, 856 P2d 311 (1993); *Oregon State Bar v. Wright*, 280 Or 693, 696, 573 P2d 283 (1977); *In re Whipple*, 320 Or 476, 886 P2d 7 (1994).

While unlicensed, the Accused initiated and engaged in discussions with attorneys Temple and Collins on substantive and procedural matters of the guardianship and conservatorship, drafted or helped draft the objection and memorandum in support of his position against the appointment, contacted the Ombudsman in further attempts to build his case, inserted his Bar number on various formal documents filed with the court, and, at the objection hearing, attempted to present a case in chief on behalf of Catterall.

The Accused argues that he knew Frey for 20 years and that his primary motive was to assist Frey and Catterall. This Trial Panel is not prepared to create a new category of retired attorneys who practice law without a license for altruistic reasons. The requirement of an active license is critical to protect the public and to perpetuate the public’s confidence in the legal profession.

**B. Unauthorized Communication with a Represented Party.**

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (A) the lawyer has the prior consent of the lawyer representing such other person;
- (B) the lawyer is authorized by law or by court order to do so; or
- (C) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyers. [RPC 4.2.]

As the Accused contacted Collins to advocate on behalf of Catterall, the Accused knew that Collins represented Frey. Once the Accused learned that AJ had permitted unrestricted visits to Ashley Manor, the Accused visited Frey with Sheila and Catterall, and must have discussed the guardianship-conservatorship case with Frey, directly or through Sheila, as Sheila next filed the objection with the court. Therefore, the Accused facilitated improper communication with a represented party on the subject of the representation, and has violated RPC 4.2.

**C. Knowingly Disobeying an Obligation Under the Rules of a Tribunal and Engaging in Conduct Intended to Disrupt a Tribunal.**

"A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." RPC 3.4(c).

"A lawyer shall not engage in conduct intended to disrupt a tribunal." RPC 3.5(d).

In this case, at the objection hearing, the Accused continued to refuse to answer questions despite the Judge's repeated orders to do so. The primary basis for the Accused's refusal was that the process "was a sham." This Trial Panel holds that absent a legally cognizable reason, refusal to follow rules of the court equate to the refusal to follow orders of the court.

The Accused's references to the hearing as a "sham," his refusal to be excluded as a witness, his retort to the Judge's warning that he was bordering on contempt—"I brought my toothbrush"—and his refusal to answer questions when asked despite the Judge's admonitions were clearly disruptive to the proceeding.

**D. Conduct Prejudicial to the Administration of Justice.**

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

Here, the Accused's unauthorized interference with the guardianship-conservatorship process resulted in Frey's estate incurring over \$30,000, rather than less than \$2,000, in

attorney fees. These actions, together with the obstructive behavior at the hearing, also unnecessarily delayed the administration of justice.

## SANCTION

The ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) are considered in determining the appropriate sanction. *In re Spencer*, 335 Or 71, 85–86, 58 P2d 228 (2002). The Standards require that the Accused’s conduct be analyzed by the following factors: (1) the ethical duty violated, (2) the attorney’s mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances. *Standards*, § 3.0.

### 1. Duty Violated.

The Accused violated his duty to refrain from practicing law without a license. He also made or facilitated improper communications with a represented party, and violated his duties to the legal system when he wrongfully interfered with a legal proceeding and committed acts prejudicial to the administration of justice.

### 2. Mental State.

The Trial Panel has determined that the Accused was aware that he was unlicensed while practicing law, knew that Frey was represented when communicating or facilitating case-related communications with her, and was fully aware of what he was doing when disrupting the court at the hearing.

### 3. Actual or Potential Injury.

As stated above, the Accused’s actions harmed the estate by over \$30,000 in unnecessary legal fees.

### 4. Aggravating Factors.

1. **Prior Discipline.** The Accused was previously disciplined in 1998 for violating DR 3-101(B) (practicing law in violation of regulations of the profession), for having represented his former wife in an Oregon Department of Revenue audit proceeding. This resulted in a letter of admonition.
2. **A Pattern of Misconduct.** The incidents outlined above represent a pattern of wrongdoing in several respects.
3. **Multiple Offenses.** In the present case, this Trial Panel has determined that the Accused’s conduct gives rise to four separate offenses.
4. **Refusal to Acknowledge Wrongful Nature of Conduct.** The Accused has repeatedly maintained that his altruistic motives excuse his conduct. Even at the closing of the hearing, the Accused insisted that his actions were not improper and were completely excusable.

5. Vulnerability of Victim. Both Catterall, at age 92, and Frey, afflicted with Alzheimer's, were vulnerable.
6. Substantial Experience in the Practice of Law. The Accused was admitted to practice law in Oregon in 1988.

**5. Factors in Mitigation.**

1. The Accused has fully cooperated with the Bar in this process.
2. The Accused had not committed a Bar offense since 1998.

**DISPOSITION**

The Accused is suspended from the practice of law for eight months. The Trial Panel is aware that suspension may not serve its purpose in this case, as the Accused has without authorization practiced law for others now twice. Accordingly, the Trial Panel orders that the Accused apply for formal reinstatement under BR 8.1 should he choose to become licensed in Oregon in the future.

DATED this 19th day of October 2011.

/s/ Paul B. Heatherman

Paul B. Heatherman  
Trial Panel Chair

/s/ Carl W. Hopp, Jr.

Carl W. Hopp Jr.  
Trial Panel Member

/s/ John G. McBee

John G. McBee  
Trial Panel Public Member



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