

**DISCIPLINARY  
BOARD  
REPORTER**

Report of Lawyer Discipline Cases  
Decided by the Disciplinary Board  
and by the  
Oregon Supreme Court  
for 2013

**VOLUME 27**

*January 1, 2013, to December 31, 2013*

## 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 2013 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 27 DB Rptr \_\_\_\_ (2013).

In 2013, 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 ([www.osbar.org](http://www.osbar.org), click on Rules Regulations and 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, 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, 2013, 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.

DAWN EVANS  
*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 Nos. 09-08, 09-16, 09-17,  
) 09-18, 09-19, 09-81, 09-82, 09-83,  
KAREN E. READ, ) 09-84, and 09-130  
)  
Accused. )

Counsel for the Bar: Linn D. Davis

Counsel for the Accused: None

Disciplinary Board: Duane A. Bosworth, Chairperson  
Lisa M. Caldwell  
Howard I. Freedman, Public Member

Disposition: Violations of RPC 1.1, RPC 1.3, RPC 1.4(a),  
RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC  
1.16(c), RPC 1.16(d), RPC 3.3(a)(1), RPC 8.1(a)(2),  
RPC 8.4(a)(3), and RPC 8.4(a)(4). Trial Panel Opinion.  
Disbarment.

Effective Date of Opinion: January 5, 2013

**TRIAL PANEL OPINION**

The Formal Complaint of the Oregon State Bar was filed on February 3, 2010. The Accused was served with the Formal Complaint on March 9, 2010, but did not timely file an Answer. The Accused filed a Motion for Additional Time, along with a Declaration, on April 23, 2010. An Order of Default was entered, however, on April 28, 2010 by the State Disciplinary Board Chairperson. No opposition or further response to the order was filed. In late June 2010, this Trial Panel was appointed. The Trial Panel requested legal memoranda from the parties on the issues of whether the factual allegations in the Formal Complaint constituted the disciplinary rule violations alleged and, if so, what would be the appropriate sanction.

The Oregon State Bar (hereinafter “Bar”) filed its memorandum on November 17, 2010, as ordered. The Accused did not file a memorandum as ordered. Instead, she advised the Trial Panel that she was entering medically necessary inpatient treatment, represented as lasting 30 days. (Later, broad representations were offered about extensive outpatient treatment that followed.) Over time, the Trial Panel gave the Accused extensions, attempted

to set a hearing, and set deadlines for the Accused to file a memorandum. She did not file a memorandum. The Trial Panel deliberated on two occasions in June 2011, following repeated attempts to gain a response from the Accused. On June 22, 2011, and again on July 12, 2011, the Accused asked for additional time.

Following receipt of that second request, on July 13, 2012 the Trial Panel informed the Accused that it had deliberated and intended to issue an opinion in the absence of any response. On July 15, the Accused advised that she had been actively working to obtain legal representation and believed she would obtain named representation shortly. She advised that she had informed Mr. Davis at the Bar of this development. The Accused's new attorneys advised that they contacted the Bar on July 20, 2011, seeking an opportunity to file a Sanctions Memorandum on behalf of the Accused. The attorneys reported that the Bar objected. On August 19, 2011, the Accused filed, through attorney Judith Parker of Hinshaw & Culbertson, a Motion for Leave to File Late Sanctions Memorandum, together with a Memorandum and multiple exhibits.

On August 22, 2011 the Bar advised that if the Accused's Motion were to be considered, the Bar needed until September 9, 2011 to respond. The Trial Panel considered the Motion and on August 29, 2011 asked the Bar whether it objected to the Motion. On September 9, 2011, the Bar submitted its objection. All anticipated a reply from the Accused. None was forthcoming, however. It appears that at some juncture Hinshaw & Culbertson ceased its representation, although this did not become clear until later. Apparently without this knowledge, on March 21, 2012, the Bar inquired of the status of the matter. The Trial Panel deliberated and decided on April 11, 2012 that the Accused could submit a sanctions memorandum by May 14, 2012, and that the Bar could conduct discovery with regard to any issue raised by the memorandum. On May 10, 2012, attorney Allison Rhodes advised that Hinshaw & Culbertson no longer represented the Accused.

In the following months, despite repeated written promptings and inquiries, the Accused has made no further appearance in this matter.

### **Rulings**

1. The Accused's Motion for Leave to File Late Sanctions Memorandum was granted on April 11, 2012. The Memorandum and materials in support of that Motion were considered by the Trial Panel. No further submission has been made by the Accused despite the Trial Panel's order and subsequent inquiries.

2. By virtue of BR 5.8(a) and the entry of an Order of Default in this proceeding, the factual allegations in the Formal Complaint are deemed to be true.

### **Findings of Fact**

The Trial Panel finds that all facts alleged by the Bar in the Formal Complaint have been proven by clear and convincing evidence.

### **Conclusions**

The Trial Panel concludes that the proven facts constitute the disciplinary rule violations alleged by the Bar in the Formal Complaint. Thus, the Bar has proven by clear and convincing evidence that the Accused violated the following disciplinary rules:

**First Cause of Complaint**—RPC 1.15-1(d)

**Second Cause of Complaint**—RPC 8.1(a)(2)

**Third Cause of Complaint**—RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(c), RPC 1.16(d), and RPC 8.4(a)(4)

**Fourth Cause of Complaint**—RPC 8.1(a)(2)

**Fifth Cause of Complaint**—RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC 1.16(a)(2), and RPC 8.4(a)(3)

**Sixth Cause of Complaint**—RPC 8.1(a)(2)

**Seventh Cause of Complaint**—RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 3.3(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4)

**Eighth Cause of Complaint**—RPC 8.1(a)(2)

**Ninth Cause of Complaint**—RPC 8.1(a)(2)

**Tenth Cause of Complaint**—RPC 1.3, RPC 1.4(a), and RPC 1.15-1(c)

**Eleventh Cause of Complaint**—RPC 8.1(a)(2)

**Twelfth Cause of Complaint**—RPC 1.3, RPC 1.4(a)

**Thirteenth Cause of Complaint**—RPC 8.1(a)(2)

**Fourteenth Cause of Complaint**—RPC 1.3, RPC 1.4(a), RPC 1.15-1(c), RPC 1.16(d), and RPC 8.4(a)(3)

**Fifteenth Cause of Complaint**—RPC 8.1(a)(2)

**Sixteenth Cause of Complaint**—RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), RPC 1.16(d), RPC 8.4(a)(3), and RPC 8.4(a)(4)

**Seventeenth Cause of Complaint**—RPC 8.1(a)(2)

**Eighteenth Cause of Complaint**—RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.16(d), RPC 8.4(a)(3), and RPC 8.4(a)(4)

**Nineteenth Cause of Complaint—RPC 8.1(a)(2)**

**Sanction**

Having found that the Accused violated provisions of the Rules of Professional Conduct, we next determine the appropriate sanction to impose for those violations. In Oregon, we are guided by the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) and case law from the Oregon Supreme Court.

**ABA Standards.** The ABA *Standards* require consideration of (1) the duty violated by the Accused; (2) the Accused’s mental state; (3) the actual or potential injury that the misconduct caused; and (4) any aggravating or mitigating circumstances.

1. **Duty Violated.** The Accused engaged in 54 violations of her duties in ten different client matters. The facts surrounding these 54 violations are provided in the Formal Complaint. Case no. 09-08 is hereinafter referred to as the Siegel matter; case no. 09-16 is referred to as the Buchholz matter; case no. 09-17 is referred to as the Dawson matter; case no. 09-18 is referred to as the Farr matter; case no. 09-19 is referred to as the Hitt matter; case no. 09-81 is referred to as the Krinke matter; case no. 09-82 is referred to as the Karanutosos matter; case no. 09-83 is referred to as the Perry matter; case no. 09-84 is referred to as the Weiss matter; and case no. 09-130 is referred to as the Swearingen matter. The violations can be summarized as follows:

The Accused’s violation of RPC 1.1 (competence) in the Weiss, Krinke, Karanutosos, Hitt, and Swearingen matters, and RPC 1.3 (diligence/neglect) and RPC 1.4(a) (duty to communicate with client) in the Weiss, Krinke, Karanutosos, Buchholz, Dawson, Farr, Hitt, and Swearingen matters, breached her general duty to act with reasonable promptness and diligence in representing those clients. *Standards*, § 4.4.

The Accused’s violation of duties set forth in RPC 1.15-1(a) (duty to safeguard property of another) in the Hitt matter; RPC 1.15-1(c) (duty to maintain client funds in a lawyer trust account) in the Buchholz and Farr matters; and RPC 1.15-1(d) (duty to promptly deliver property to which the client is entitled) in the Siegel, Weiss, Krinke, and Hitt matters, breached her general duty to preserve client property. *Standards*, § 4.1.

The Accused’s misrepresentations about her efforts or the status of the legal matters in the Krinke, Karanutosos, Farr, Hitt, and Swearingen matters violated her general duty of candor to her clients, *Standards*, § 4.6; or where the misrepresentations were made to opposing counsel or the court, violated her duties owed to the legal system. *Standards*, § 6.1. The Trial Panel notes that in the Karanutosos and Swearingen matters, misrepresentations were made to the court.

The Accused violated RPC 1.16(a)(2) (mandatory withdrawal) in the Krinke matter; RPC 1.16(c) (failure to comply with applicable law upon withdrawal from representation) in the Weiss matter; RPC 1.16(d) (failure to take proper steps upon the termination of

representation) in the Weiss, Farr, Hitt, and Swearingen matters; and RPC 8.1(a)(2) (failure to respond to disciplinary inquiries) in all ten matters. These actions or omissions violated her general duties as a professional.

2. **Mental State.** Many of the Accused's violations were intentional, even including protracted failures to act despite the urging of a client or the lawyer's knowledge of a duty to act. The Accused made multiple, intentional misrepresentations to clients, to opposing counsel, and to courts. The Accused intentionally converted funds with knowledge she had not earned them. The Accused intentionally held client's property, files, and documents. The Accused demonstrated she was aware of disciplinary investigation but the pattern of failure to respond suggests intent, and is at the least knowledge.

As noted, some of the Accused's failures to act began as negligence. The facts suggest a heightened mental state in their protraction.

3. **Injury.** In the Siegel matter, the Accused wrongfully withheld \$2,713.35 after depositing \$20,000 in her trust account.

In the Krinke matter, the Accused permitted a creditor to obtain a second default judgment for about \$3,500 more than the judgment set aside.

In the Buchholz matter, the Accused collected a \$250 fee for a will she never completed.

In the Farr matter, the Accused collected a \$1,000 fee without having earned it and failed to take any substantive action on her client's behalf.

In the Hitt matter, the Accused undertook to represent three employees in employment discrimination claims. The Accused lost or destroyed two paychecks provided to her by one claimant. The Accused failed to file an EEOC claim, missed the statute of limitations for filing a state civil rights claim, and lost the right to claim attorney fees. The Accused repeatedly failed to respond to new counsel or provide the files. The remaining state case was dismissed for lack of prosecution. The claims were lost.

In the Weiss matter, the Accused undertook to represent plaintiff in personal injury claims but failed to file a tort claim notice, failed to meet the statute of limitations, failed to name the right defendant, and in other procedural and substantive ways failed to pursue the claims, resulting in their loss.

In the Karanutosos matter, the Accused undertook to represent plaintiff in a breach of contract claim and made misrepresentations to her client and to the court, resulting in significant expenditures of money and effort, and substantial delay.

Similarly in the Dawson and Swearingen matters, the Accused repeatedly failed to act, resulting in significant expenditures of money and effort, and resulting in delay.

In the Perry matter, as in all ten matters, the Accused's failure to respond resulted in significant effort by the Bar, a more time-consuming investigation, and diminished public respect in creating an inability to respond to clients.

In all ten matters, the Accused caused loss of time and significant anxiety in and aggravation to her clients, all considered matters of injury.

**4. Aggravating and Mitigating Circumstances.**

The following factors are considered in aggravation:

- a. Dishonest or selfish motive. On two occasions, the Accused misappropriated a client's or another's funds. More frequently she lied to her clients, counsel, and the courts in order to protect herself.
- b. Pattern of misconduct. The Accused has committed 54 violations of the rules of conduct, incurred in 10 matters over a period of approximately two years.
- c. Bad faith obstruction of the disciplinary proceeding. The Accused has not participated in the proceedings or responded from the outset except to seek delay, which has then been followed by a failure to respond as ordered.
- d. Indifference to making restitution. The Trial Panel is not aware of any effort at restitution.

The following factors are considered in mitigation:

- a. Absence of a prior disciplinary record. The Accused did not have a reported problem from her admission in 1995 through approximately mid-2007, when these matters began.
- b. Personal or emotional problems. In the Motion to File Late Sanctions Memorandum, the Trial Panel received some information regarding the Accused's depression, substance abuse, and treatment. The Trial Panel considered information that the Accused "froze" in the face of the complaints against her.
- c. Delay in disciplinary proceedings. The Accused has been provided a multitude of extensions and the Accused has been repeatedly prompted to respond.

**Disposition**

We have considered the presumptive sanction, the aggravating and mitigating factors, and Oregon case law. The facts establish that the Accused dishonestly converted the funds of a client. The Oregon Supreme Court has been consistent in stating that requires disbarment. In addition: 1) the Accused engaged in a broad pattern of violations; and 2) the Accused failed to participate in this disciplinary proceeding in virtually every way, despite

extraordinary efforts to obtain her response. The Trial Panel concludes the Accused should be disbarred.

Dated the 31st day of October, 2012.

/s/ Duane A. Bosworth  
Trial Panel Chairperson

/s/ Lisa M. Caldwell  
Trial Panel Member

/s/ Howard I. Freedman  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 12-152
	)	
MARK KRAMER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Mary A. Cooper
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 4.2(a). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	February 8, 2013

**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 4.2(a).

DATED this 8th day of February, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Nancy M. Cooper  
 Nancy M. Cooper, Region 5  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Mark Kramer, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 12, 1981, 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 seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 19, 2012, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 4.2 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 Michele Rowan in an action which resulted in a stipulated judgment awarding her visitation with her minor grandchild. The child’s father, Nathan Underhill, was represented by attorney Gary Hamilton. After entry of the judgment, Rowan notified the Accused that Underhill had emailed her that he did not intend to honor her ordered summer visitation.

6.

On June 29, 2012, in the early hours of the morning, the Accused emailed Underhill directly, advising him he would be in contempt if he tried to cancel Rowan’s summer visitation without first obtaining a court order. The Accused should have recalled when he mistakenly made the direct contact that Underhill was represented by Hamilton.

7.

After being informed of his error, the Accused promptly contacted Hamilton, acknowledged his error and apologized.

### Violations

8.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 7, he violated RPC 4.2.

### 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 to the profession to avoid improper communications with individuals in the legal system. *Standards*, § 6.3.
- b. **Mental State.** The Accused acted negligently, that is, he failed to heed a substantial risk that circumstances existed or that a result would follow, which failure deviated from the standard of care that he should have exercised. *Standards*, p. 7.
- c. **Injury.** There was no actual injury in that Underhill responded to the Accused’s message by immediately contacting Hamilton, and the Accused promptly acknowledged his error and apologized. There was, however, potential injury in that the Accused’s email could have caused Underhill anxiety and/or induced him to act without legal counsel.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused’s prior disciplinary offenses. *Standards*, § 9.22(a).

In December 2004, the Accused was admonished for communicating with a represented party in violation of RPC 4.2(a)’s predecessor, DR 7-104(A)(1), by including a transmittal letter to such party accompanying ORCP 7 service advising such party that service was being made because the party’s attorney would not accept service.

In July 2001, the Accused was also admonished for communicating with the court without notice to opposing counsel, in violation of DR 7-110(B), by failing to serve opposing counsel with an affidavit of disqualification directed to the court.

2. The Accused's substantial experience in the practice of law. *Standards*, § 9.22(i),
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. The Accused acted without a dishonest or selfish motive. *Standards*, § 9.32(b).
  2. By promptly acknowledging his error and apologizing, the Accused attempted to rectify the consequences of his misconduct. *Standards*, § 9.32(d).
  3. The Accused had a cooperative attitude towards the disciplinary process. *Standards*, § 9.32(e).

10.

Under the ABA *Standards*, a public 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. *Standards*, § 6.33.

11.

Oregon case law is in accord. See discussion of sanctions under predecessor rule in *In re Lewelling*, 296 Or 702, 705, 678 P2d 1229 (1984). See also, *In re McGavic*, 22 DB Rptr 248 (2008) (public reprimand for violation of RPC 4.2, among several other rules); *In re Jagger*, 9 DB Rptr 11 (1995) (public reprimand).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 4.2.

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.

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.

Cite as *In re Kramer*, 27 DB Rptr 8 (2013)

EXECUTED this 29th day of January, 2013.

/s/ Mark Kramer

Mark Kramer, OSB No. 814977

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 Nos. 11-90 and 12-149
	)	SC S061028
D. RAHN HOSTETTER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	Calon Nye Russell and Dayna E. Underhill
Disciplinary Board:	None
Disposition:	Violations of DR 5-105(E), RPC 1.7(a), and RPC 1.8(a). Stipulation for Discipline. 18-month suspension, all but 6 months stayed, 12-month probation.
Effective Date of Order:	March 8, 2013

**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 eighteen months. All but six months of which are to be stayed pending a twelve-month probationary period. The Accused must adhere to all conditions the Oregon State Bar has imposed. The suspension is effective fifteen days from the date of this order.

/s/ Thomas A. Balmer  
Chief Justice, Supreme Court

**STIPULATION FOR DISCIPLINE**

D. Rahn Hostetter, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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, 1978, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Wallowa 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 22, 2012, 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 1.8(a) in the Wieck matter, and DR 5-105(E) and RPC 1.7(a) in the Olsen 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.

### **Wieck Matter (Case No. 11-90)**

#### **Facts**

5.

On or about December 8, 2003, the Accused and his wife entered into a contract to purchase real estate (hereinafter “contract”) from Gregory and Claudette Wieck (hereinafter “Wiecks”). Under the contract, the Accused and his wife agreed to purchase a number of parcels of real property from the Wiecks by making certain annual payments. As each of the first five annual payments was made to them, the Wiecks were required to execute a warranty deed transferring certain parcels to the Accused and his wife. Section 2.4 of the contract allowed the Wiecks to exempt from the sale a 40-acre parcel under certain circumstances, and section 10 of the contract granted the Wiecks an option to purchase from the Accused and his wife a one-half ownership interest in another parcel. The Wiecks’ right to exempt the 40-acre parcel and the option to purchase both expired on April 15, 2008; the Wiecks did not exercise either option.

6.

Beginning in about June 2006 and through December 2009, the Accused represented the Wiecks in Measure 37/49 claims with respect to those parcels at issue in the contract that the Wiecks either owned or in which they otherwise had an interest. The Accused and the Wiecks agreed that they would split any benefits received as a result of the Measure 37/49 claims.

7.

In January 2008, the Accused and his wife borrowed funds from a bank. The Accused intended to use the loan proceeds to make partial payment to the Wiecks and for the Accused's personal use. The loan was secured by a trust deed on the parcels of land the Accused and his wife were purchasing from the Wiecks under the contract. As part of that transaction, the Wiecks signed a trust deed subordinating their interests in the parcels to the bank's interest.

8.

In January 2008, the Accused borrowed \$50,000.00 from the Wiecks.

9.

With regard to the agreement described in paragraph 6, the trust deed described in paragraph 7, and the loan described in paragraph 8, there is a dispute between the Accused and the Wiecks as to whether the terms of those transactions were fully disclosed and transmitted in writing in a manner that could reasonably be understood by the Wiecks. There is no dispute that the Accused failed to give the Wiecks a reasonable opportunity to or advise them in writing of the desirability of seeking the advice of independent legal counsel, and failed to obtain their written informed consent to the essential terms of the transactions and the Accused's role in the transactions, including whether he was representing them.

### **Violations**

10.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 9, he violated RPC 1.8(a).

### **Olsen Matter (Case No. 12-149)**

11.

Between January 2000 and May 2002, Elk Mountain Cattle Company (hereinafter "Elk Mountain") or its principals, or both, borrowed funds from Community Bank. For each transaction, all or some of them executed promissory notes and trust deeds.

12.

Between May 2003 and February 2005, the Accused represented Elk Mountain and its principals in modifying the loan agreements with Community Bank. At the same time, the Accused was representing Community Bank in other matters.

13.

In the loan modification matter, the Accused's representation and the objective interests of Elk Mountain and its principals were adverse to the objective interests of Community Bank.

14.

Insofar as his clients' informed consent was available to permit the Accused to continue with the multiple representations, the Accused failed to obtain such consent, after full disclosure, from Elk Mountain and its principals.

### **Violations**

15.

The Accused admits that, by engaging in the conduct described in paragraphs 11 through 14, he violated DR 5-105(E) for conduct prior to January 1, 2005, and RPC 1.7(a) for conduct after December 31, 2004.

### **Sanction**

16.

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 a duty he owed to the Wiecks, and to Elk Mountain and its principals, to either avoid conflicts of interest or to adequately disclose and obtain consent when a conflict of interest was present. *Standards*, § 4.3.
- b. Mental State.** The Accused should have known that his representation of the Wiecks, and Elk Mountain and its principals, implicated conflicts of interest.
- c. Injury.** Neither the Wiecks, nor Elk Mountain and its principals, sustained actual monetary injury. However, there was the potential for injury because they did not appreciate that the Accused's loyalty to them might be divided.

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

1. Prior disciplinary offenses. In 1997, the Accused was suspended for 90 days for violating DR 1-102(A)(3), DR 5-104, and ORS 9.527(4). *In re Hostetter*, 11 DB Rptr 195 (1997). In 2001, the Accused was admonished for engaging in a current client conflict of interest. In 2010, the Accused was suspended for 150 days for violating DR 5-105(C)/RPC 1.9(a), and DR 1-102(A)(3)/RPC 8.4(a)(3). *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010). *Standards*, § 9.22(a).
2. Selfish motive. The trust deed referenced in paragraph 7 and the loan referenced in paragraph 8 benefitted the Accused and his wife. *Standards*, § 9.22(b).
3. Pattern of misconduct. In the Wieck matter, the Accused engaged in three transactions over the course of two years. *Standards*, § 9.22(c).
4. Multiple offenses. *Standards*, § 9.22(d).
5. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1978. *Standards*, § 9.22(i).

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

1. Absence of dishonest or selfish motive. The Accused did not act dishonestly or with a selfish motive in the Olsen matter. *Standards*, § 9.32(b).
2. Free and full disclosure/cooperative attitude toward the proceeding. *Standards*, § 9.32(e).
3. Character or reputation. Members of the legal community are willing to attest to the Accused's good character. *Standards*, § 9.32(g).
4. Remorse. The Accused is remorseful that his and his wife's long-term friendship with the Wiecks was destroyed. *Standards*, § 9.32(l).

17.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards*, § 4.32.

18.

Violation of a conflict of interest rule, by itself, warrants a 30-day suspension. *In re Hostetter, supra*, at 603. Here, the Accused engaged in four conflict of interest violations.

The court has imposed varying lengths of suspensions for somewhat similar misconduct. On the low end are: *In re Campbell*, 345 Or 670, 202 P3d 871 (2009) (60-day suspension for violations of DR 2-106(A) and DR 5-105(C) where lawyer knowingly engaged in an improper conflict and the aggravating circumstances, including prior discipline, outweighed the mitigating circumstances); *In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999) (4-month suspension for lawyer who knowingly committed three violations of DR 5-101(A), and one violation of DR 5-104(A) and DR 5-105(E) in transactions with one client, but otherwise had a 30-year unblemished disciplinary record); *In re Gildea*, 325 Or 281, 936 P2d 975 (1997) (120-day suspension of lawyer who engaged in 8 violations, including DR 5-101(A), DR 5-101(B), and DR 5-104(A), where the lawyer acted negligently and the aggravating circumstances, including a prior reprimand, outweighed the mitigating circumstances); *In re Melmon*, 322 Or 380, 908 P2d 822 (1995) (lawyer violated DR 5-105(E) three times and DR 1-102(A)(3) once when she represented multiple clients in three transactions and in one transaction misrepresented the true owner of an airplane in a bill of sale. Even though the mitigating circumstances outweighed the aggravating circumstances, a 90-day suspension was appropriate where the lawyer acted knowingly and there was potential for injury to clients); and *In re Germundson*, 301 Or 656, 724 P2d 793 (1986) (63-day suspension for violations of DR 1-102(A)(3), DR 5-101(A), and DR 5-104(A) where lawyer attributed his conduct to the use of alcohol and expressed a determination not to use alcohol in the future).

On the high end are: *In re Schenck*, 345 Or 350, 194 P3d 804 (2008) (1-year suspension of lawyer who violated DR 5-101(A)(1), DR 5-101(B), DR 5-104(A), DR 5-105(E), and RPC 8.1(a)(2) in connection with his representation of two sisters. The lawyer in that proceeding also had a prior disciplinary record. Unlike in this proceeding, the lawyer there knowingly failed to respond to the Bar. The court found that these two factors plus the lawyer's knowing mental state compounded the seriousness of the violations); *In re Alstatt*, 321 Or 281, 936 P2d 975 (1997) (1-year suspension of lawyer who violated DR 5-101(A), DR 2-106(A), and DR 1-102(A)(4) when he borrowed funds from a client and, then when the client died, received attorney fees from the estate without prior court approval as required by statute. A one-year suspension was appropriate because there were several aggravating circumstances and only one mitigating circumstance); and *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984) (7-month suspension for violation of DR 5-104(A), where lawyer borrowed money from a client and had previously been reprimanded for similar misconduct).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 18 months, all but 6 months of which are stayed pending 12 months of probation, for violation of DR 5-105(E), RPC 1.7(a), and RPC 1.8(a), the sanction to be effective 15 days after the stipulation is approved.

20.

Probation is a sanction that can be imposed when a lawyer's right to practice law needs to be monitored or limited. *Standards*, p. 23. However, the probationary conditions must make sense in light of the misconduct at issue. *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

21.

In this case, probation is appropriate because, since the conduct at issue in this matter, the Accused has taken some steps to better educate himself, has implemented office procedures intended to bring potential conflicts to his attention, and there have been no further complaints concerning his conduct. Probation is intended to assist the Accused in maintaining his current course and to monitor his practice over a period of time.

22.

During the period of suspension and probation, the Accused shall comply with the following conditions:

- a. Comply with all the provisions of this Stipulation, the Oregon Rules of Professional Conduct, and ORS Chapter 9.
- b. Within 120 days of the effective date of this stipulation, the Accused shall arrange for the PLF to review the Accused's conflict of interest systems, including forms, and shall provide to Disciplinary Counsel's Office a list of changes recommended by the PLF and a plan as to how and when each change will be implemented.
- c. No later than 60 days after the date specified in paragraph 22(b), and every 120 days thereafter, the Accused shall submit a report to Disciplinary Counsel's Office attesting how and when each recommendation made by the PLF was implemented. If a recommendation has not yet been implemented, the report shall explain why and describe efforts the Accused has made to implement it.
- d. No later than 60 days after the date specified in paragraph 22(b), and every 120 days thereafter, a private ethics counsel acceptable to the Bar shall review with the Accused his firm's files and records to determine whether there may be conflicts between firm clients or between the interests of the Accused and a firm client.
- e. The Accused shall obtain ethics advice from the Bar, or from a private ethics counsel if the advice is reduced to writing and is disclosed to the Bar upon request, before the Accused enters into a business transaction, other than a

retail consumer transaction, with any person or entity that is or was a client of the Accused's firm.

- f. In the reports referenced in paragraph 22(c) the Accused shall also attest that he has reviewed his firm's cases with private ethics counsel and determined either that there are no conflicts of interest or that he has complied with applicable provisions of the conflict of interest rules, and that he obtained ethics advice from the Bar, or from a private ethics counsel, as provided in paragraph 22(e). The reports shall be approved by private ethics counsel.
- g. The Accused shall bear the financial responsibility for the cost of all services required under the terms of this Stipulation for Discipline.
- f. In the event the Accused fails to comply with the conditions of his probation, the Bar may initiate proceedings to revoke the Accused's probation pursuant to Rule of Procedure 6.2(d) and impose the stayed period of suspension. In the event the Accused successfully completes his probation, he shall be reinstated unconditionally after the expiration of the probationary term, without further order of the Disciplinary Board or the Supreme Court.

23.

In addition, on or before the date the Accused submits his application for reinstatement from the term of imposed suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$637.50, incurred for deposition costs. Should the Accused fail to pay \$637.50 in full by then, the Bar may thereafter reject his application for reinstatement and, without further notice to the Accused, obtain 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.

24.

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 imposed suspension. In this regard, the Accused has arranged for D. Zachary Hostetter and Rebecca J. Knapp, active members 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 D. Zachary Hostetter and Rebecca J. Knapp have agreed to accept this responsibility.

25.

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.

26.

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.

27.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: None.

28.

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 24th day of January, 2013.

/s/ D. Rahn Hostetter

D. Rahn Hostetter

OSB No. 782477

EXECUTED this 28th day of January, 2013.

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 Nos. 11-120 and 11-122  
 )  
MARK O. COTTLE, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Marc D. Blackman  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.1(a)(2). Stipulation for Discipline. 30-day suspension.  
Effective Date of Order: May 1, 2013

**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 thirty (30) days, effective May 1, 2013, for violations of RPC 1.3 (Case Nos. 11-120 and 11-122), RPC 1.4(a) (Case Nos. 11-120 and 11-122), RPC 1.5(a) (Case No. 11-122), RPC 1.15-1(a) (Case No. 11-120), RPC 1.15-1(c) (Case No. 11-122), RPC 1.15-1(d) (Case Nos. 11-120 and 11-122), and RPC 8.1(a)(2) (Case No. 11-120).

DATED this 17th day of March, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ Pamela E. Yee  
Pamela E. Yee, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Mark O. Cottle, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 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 November 19, 2011, and January 14, 2012, the SPRB authorized formal disciplinary proceedings against the Accused for alleged violations of the Oregon Rules of Professional Conduct in two separate client matters.

5.

On January 24, 2012, a Formal Complaint was filed against the Accused pursuant to the authorization of the SPRB, alleging violations in the Mike Klauss matter (Case No. 11-120), of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to communicate with client), RPC 1.15-1(a) (failure to maintain client money in trust and maintain adequate records of it), RPC 1.15-1(d) (duty to return client property promptly upon request), and RPC 8.1(a)(2) (failure to respond to the lawful request of a disciplinary authority).

6.

In the Steven Tycksen matter (Case No. 11-122), the alleged violations are RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to communicate with a client), RPC 1.5(a) (charge or collect an illegal or clearly excessive fee or expense), RPC 1.15-1(c) (failure to deposit client funds into trust and withdraw them only as earned), and RPC 1.15-1(d) (failure to promptly deliver property client is entitled to receive).

7.

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**

#### **Klauss Matter—Case No. 11-120**

8.

On February 2, 2007, Mike Klauss (hereinafter “Klauss”) paid the Accused a retainer of \$1,836 to file for and obtain the dissolution of his marriage. The Accused charged a fee of \$1,500 for an uncontested dissolution and \$336 for filing fees. The Accused deposited Klauss’ funds into his lawyer trust account.

9.

In or about February 2007, the Accused prepared Klauss’ petition for dissolution and other supporting documents. Some of the information Klauss provided for the petition was incomplete and inaccurate, but the Accused failed to verify the accuracy of the information in the petition or obtain Klauss’ signature on the petition. Although the petition was incomplete, and unfiled, in February 2007, the Accused withdrew \$1,736 from his lawyer trust account: \$1,400 for document preparation and \$336 for the filing fee.

10.

The Accused failed to take any other action to advance Klauss’ matter until June 2007, when he realized that the petition had not been filed and that Klauss had not been notified. The Accused returned the \$336 to his lawyer trust account, re-contacted Klauss and obtained an updated client information form. The Accused noticed that the allegations of the petition he had prepared differed from the information in the updated form and made changes to the original petition for dissolution. From June 2007, until about January 2010, the Accused failed to take any other action to either close or advance Klauss’ dissolution.

11.

On January 19, 2010, Klauss requested that the Accused close his case, provide him copies of any work completed, and refund the unused portion of the fee. The Accused returned \$266 to Klauss. Because the Accused had withdrawn most of Klauss’ money from trust, Klauss decided to pursue the dissolution once again with the Accused as his lawyer. On December 1, 2010, the Accused prepared a third petition for dissolution. Once again, the Accused failed to obtain Klauss’ signature on the petition and failed to file it.

12.

Between October 2010, and December 2, 2010, Klauss repeatedly asked the Accused to advise him regarding the status of the dissolution and for an accounting of the fees. The

Accused failed to render an accounting and, after December 2, 2010, failed to respond to Klaus's attempts to contact him.

13.

On February 15, 2011, Klaus wrote the Accused and asked about the status of his dissolution and requested an accounting of his fee. The Accused did not respond.

14.

On March 3, 2011, Klaus complained to the Oregon State Bar regarding the Accused's handling of his dissolution. On July 13, 2011, Disciplinary Counsel's Office (hereinafter "DCO") requested that the Accused respond to Klaus's allegations on or before August 3, 2011. The Accused requested and was given an extension of time to respond until August 15, 2011. The Accused did not respond thereafter. On August 25, 2011, DCO again requested that the Accused respond to Klaus's complaint by September 1, 2011. The Accused did not respond.

### **Violations**

15.

The Accused admits that, by engaging in the conduct described in paragraphs 8 through 14, he neglected a legal matter entrusted to him in violation of RPC 1.3, and failed to keep his client reasonably informed about the status of a matter and promptly comply with requests for information in violation of RPC 1.4(a).

16.

The Accused further admits that, by charging Klaus a filing fee without having filed the dissolution petition with the court, he violated RPC 1.15-1(a). The Accused admits that his failure to promptly provide Klaus with his file violated RPC 1.15-1(d). Finally, the Accused admits that his failure to timely respond to inquiries and lawful demands for information from DCO violated RPC 8.1(a)(2).

### **Steve Tycksen Matter—Case No. 11-122**

17.

In November 2009, Utah attorney Steven Tycksen (hereinafter "Tycksen") contacted the Accused to help him collect a judgment in an amount of approximately \$500,000 against an individual in Portland, Oregon. The Accused agreed to take the case for a contingency fee of 25% percent of the amount collected, plus expenses.

18.

On November 25, 2009, Tycksen delivered to the Accused a copy of a certified exemplified copy of a judgment in the *Alles Funding, LLC v. W. Chris Jones* case

(hereinafter “Alles matter”) and a check for the recording fee in the amount of \$50.00. The Accused did not open a file or otherwise originate a case within his office for the Alles matter. On December 9, 2009, the Accused deposited the check into his general account without verifying the purpose for which the check had been written.

19.

Between February 19, and April 26, 2010, Tycksen repeatedly requested the Accused to advise him as to the status of the Alles matter. The Accused failed to communicate with Tycksen or respond to Tycksen’s attempts to communicate with him.

20.

On May 28, and June 28, 2010, Tycksen asked the Accused to return the recording fee he had paid to the Accused. The Accused did not respond to those requests.

21.

From November 25, 2009, to November 24, 2010, the Accused failed to take any action to advance Tycksen’s collection matter or to refund Tycksen’s filing fee.

### **Violations**

22.

The Accused admits that, by engaging in the conduct described in paragraphs 17 through 21, he neglected a legal matter in violation of RPC 1.3. The Accused admits that his failure to respond to Tycksen’s requests for information constituted a failure to respond to reasonable requests by a client for information, in violation of RPC 1.4(a). The Accused acknowledges that charging Tycksen for services he never performed constituted charging or collecting a clearly excessive fee, in violation of RPC 1.5(a). The Accused also admits that he failed to properly deposit and maintain Tycksen’s funds in trust until fees were earned or expenses incurred and failed to promptly deliver property the client was entitled to receive, in violations of both RPC 1.15-1(a) and RPC 1.15-1(d).

### **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.** In both matters, the Accused violated duties he owed to clients when he improperly handled client funds, neglected client matters, and failed to act with reasonable diligence in representing and communicating with his clients. *Standards*, §§ 4.1, 4.4. The Accused also violated duties he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted negligently when he failed to deposit client funds into his lawyer trust account and when he failed to pursue the Tycksen matter, when he failed to pursue Klauss' matter, and when he failed to communicate with Klauss. The Accused's mental state became knowing after he received and failed to respond to telephone and email messages from Klauss and Tycksen. The Accused acted knowingly when he failed to timely provide an accounting to Klauss, when he failed to timely provide a refund to Tycksen, and when he failed to timely respond to the Bar.
- c. **Injury.** Both actual and potential injury are relevant to determining the sanction in a disciplinary case. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Klauss dissolution matter was delayed. Klauss was frustrated with the delay and the Accused's failure to respond to his inquiries about the case.  

The Accused caused actual injury to Tycksen in the Alles matter. His failure to prepare and maintain complete records, communicate with Tycksen, and promptly return Tycksen's filing fee delayed the filing of the judgment. Tycksen and his staff were required to devote additional time that would otherwise not have been spent to have the judgment entered.

The Bar sustained actual injury as a result of the Accused's failure to timely respond to its lawful requests for information. DCO expended additional time and resources pursuing the matter, and completion of the investigation was delayed because of the Accused's misconduct.
- 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 a lawyer in Oregon since 1989. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior disciplinary history. *Standards*, § 9.32(a).
  2. Absence of dishonest motive. *Standards*, § 9.32(b).

The *Standards* suggest that a period of suspension is the appropriate sanction. *Standards*, §§ 4.12, 4.42, and 7.2.

24.

Oregon case law is in accord. Generally, suspensions ranging from thirty (30) days to one year have been imposed on lawyers who have either neglected a client's legal matter or failed to adequately communicate with a client. *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (60-day suspension); *In re Redden*, 342 Or 393, 397–402, 153 P3d 113 (2007) (court canvassed prior relevant cases and imposed a 60-day suspension on a lawyer who failed to complete a client's legal matter); *In re Knappenberger*, 340 Or 573, 135 P3d 297 (2006) (court will generally impose a 60-day suspension when a lawyer knowingly neglects a client's legal matter).

The court has also held that a single instance of improperly dealing with client funds merits a suspension. See *In re Balocca*, 342 Or 279, 151 P3d 154 (2007) (attorney was suspended by court for 90 days, in large part for failing to deposit and maintain client funds in trust or thereafter account for or return them); *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (lawyer was suspended for 30 days where he treated funds received pursuant to an oral fee agreement as his own and failed to deposit them in trust); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (attorney received 60-day suspension, despite her absence of prior discipline, for her mistaken removal of a client's money from her lawyer trust account; her failure to maintain adequate lawyer trust account records; and her failure to return property to the client). Here, the Accused engaged in two instances of neglect, but his conduct was less egregious than the misconduct in *In re Snyder*, *supra*, and *In re Knappenberger*, *supra*. His mishandling of client funds was also less egregious than in *In re Balocca*, *supra*.

25.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for thirty (30) days for violation of the following: in the Klauss matter (Case No. 11-120), RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to communicate with client), RPC 1.15-1(a) (failure to maintain client money in trust and maintain adequate records of it), RPC 1.15-1(d) (duty to return client property promptly upon request), and RPC 8.1(a)(2) (failure to respond to the lawful request of a disciplinary authority). In the Tycksen matter (Case No. 11-122), RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to communicate with a client), RPC 1.5(a) (charge or collect an illegal or clearly excessive fee or expense), RPC 1.15-1(c) (failure to deposit client funds into trust and withdraw them only as earned), and RPC 1.15-1(d) (failure to promptly deliver property client is entitled to receive). The sanction is to be effective May 1, 2013.

26.

In addition, on or before April 1, 2013, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$906.60, incurred for the cost of the deposition (\$211.50) and transcript (\$695.10). Should the Accused fail to pay \$906.62 in full by April 1, 2013, 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.

27.

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 Tom Elliott (OSB No. 842124), an active member of the Oregon State Bar, to either take possession of or have on-going 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 Tom Elliott has agreed to accept this responsibility.

28.

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.

29.

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.

30.

The Accused represents that he is only admitted to practice law in Oregon. Other jurisdictions in which the Accused is admitted: none.

31.

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 Cottle*, 27 DB Rptr 22 (2013)

EXECUTED this 6th day of March, 2013.

/s/ Mark O. Cottle

Mark O. Cottle, OSB No. 892201

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson, OSB No. 970688

Assistant Disciplinary Counsel

**Cite as 353 Or 411 (2013)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)
	)
Complaint as to the Conduct of	)
	)
JEFFREY F. RENSHAW,	)
	)
Accused.	)

(OSB No. 10–08; SC S059839)

En Banc

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

Argued and Submitted January 10, 2013.

Marc D. Blackman, Ransom Blackman LLP, Portland, argued the cause and filed the brief for the Accused.

Stacy J. Hankin, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the briefs for the Oregon State Bar.

PER CURIAM

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

In this lawyer discipline proceeding, the Bar alleged that the Accused violated Rule of Professional Conduct (RPC) 8.4(a)(2), which prohibits criminal conduct that reflects adversely on a lawyer’s honesty and trustworthiness, and RPC 8.4(a)(3), which prohibits conduct involving dishonesty and misrepresentation that reflects adversely on a lawyer’s fitness to practice law. The trial panel found that the Accused had violated both rules, suspended him for one year, and imposed certain conditions on his reinstatement. On review, the Bar asks us to affirm the trial panel’s findings regarding the rule violations but contends that we should disbar the Accused. The Accused, for his part, acknowledges that he violated RPC 8.4(a)(3), contends that he did not violate RPC 8.4(a)(2), and submits that the sanction that the trial panel imposed was appropriate. On *de novo* review, we find that the Accused violated both rules and conclude that disbarment is the appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 10-143  
 )  
ANITA C. SMITH, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Marc D. Blackman  
Disciplinary Board: None  
Disposition: Violations of RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2). Stipulation for Discipline. 90-day suspension.  
Effective Date of Order: April 1, 2013

**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 April 1, 2013, for violations of RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2).

DATED this 28th day of March, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ James C. Edmonds  
James C. Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Anita C. Smith, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 her 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 June 10, 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 communicate with a client); RPC 1.15-1(d) (failure to promptly notify client of receipt of property); RPC 8.1(a)(1) (making a false statement of material fact in connection with a disciplinary matter); RPC 8.1(a)(2) (failure to cooperate with the lawful requests of a disciplinary authority); and RPC 8.4(a)(3) (engaging in conduct involving misrepresentation).

On November 15, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the SPRB, alleging violation of RPC 1.4(a), RPC 1.15-1(d), RPC 8.1(a)(1), RPC 8.1(a)(2), and RPC 8.4(a)(3). 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 September 1998, the Accused undertook to represent Gary C. Fairchild (hereinafter “Fairchild”), parent and guardian of a minor, M. D. (hereinafter “Minor”), in a personal

injury case. In September 1999, with Fairchild's knowledge and consent, the court appointed a third party to serve as *guardian ad litem* to file the personal injury case.

6.

On or about August 1, 2001, Minor was awarded an arbitration award/judgment in the amount of \$13,360.95, plus post-judgment interest. The Accused was unable to collect the judgment debt until the debtor refinanced the home to which the judgment lien attached. On November 8, 2006, AmeriTitle issued a check in the amount of \$22,311.66, payable to the Accused and the *guardian ad litem* for Minor. The Accused failed to promptly notify Fairchild that the judgment had been paid.

7.

On November 13, 2006, the Accused deposited the above-described check into her lawyer trust account. On November 16, 2006, the Accused disbursed to herself \$9,495.66 for legal fees, costs, and services performed in the personal injury matter. The Accused tendered the remaining \$12,816.00 to the *guardian ad litem*. The Accused failed to promptly notify Fairchild that the funds had been disbursed.

8.

On or about November 8, 2006, the *guardian ad litem* satisfied the judgment in favor of Minor. The Accused failed to advise either Fairchild or Minor's mother to advise them that the judgment in favor of Minor had been satisfied.

9.

On or about April 13, 2010, Fairchild brought his concerns to the attention of the Client Assistance Office of the Oregon State Bar (hereinafter "CAO"). CAO referred the matter to Disciplinary Counsel's Office (hereinafter "DCO") for further investigation.

10.

On May 11, 2010, DCO requested that the Accused respond to Fairchild's complaint and provide certain documents by June 1, 2010. The Accused knowingly failed to respond to DCO's requests. On or about June 16, 2010, by certified and regular mail, DCO again requested the Accused's response by June 22, 2010. The Accused knowingly failed to respond to that letter and to subsequent letters reminding her of her duty to respond.

11.

On December 8, 2010, DCO referred the investigation of the Accused's conduct to the Clackamas/Linn/Marion County Local Professional Responsibility Committee (hereinafter "LPRC") for investigation. The Accused knowingly failed to respond to the LPRC's attempts to contact her, and on April 20, 2011, the LPRC investigator subpoenaed the Accused to a deposition on May 5, 2011.

### Violations

12.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 11, she violated RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 8.1(a) and RPC 8.4(a)(3) should be, and upon approval of this stipulation are, 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 duties she owed to her client when she failed to communicate with Fairchild and failed to promptly notify him of the receipt of funds and satisfaction of the judgment. *Standards*, § 4.4. The Accused violated her duty to the profession to cooperate in the Bar’s investigation into her conduct. *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. The Accused acted knowingly when she failed to respond to the Bar’s inquiries. 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 she failed to inform her client for a long period of the status of his legal matter and failed to promptly notify her client of the satisfaction of judgment and receipt of funds.
- c. **Injury.** Injury can be either actual or potential. *Standards*, p. 7. Fairchild suffered actual injury in the form of anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000). In addition to causing anxiety and frustration to Fairchild, the Accused’s failure to promptly notify him of the receipt of funds resulted in unnecessary delay in retrieving funds for his daughter which were subsequently appropriated by the *guardian ad litem*.

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.** Aggravating circumstances include:
1. The Accused, having been admitted to practice in 1989, had substantial experience in the practice of law at the time of her misconduct. *Standards*, § 9.22(i).
  2. The Accused has a prior record of discipline. *Standards*, § 9.22(a). The Accused was reprimanded in 2003 for violations of DR 5-101(A) (conflict of interest: lawyer's self-interest) and DR 6-101(B) (neglect of a legal matter).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Health or Emotional problems. *Standards*, § 9.32. At the time of the misconduct, the Accused suffered from depression that had an impact on her ability to take necessary action.

14.

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

15.

The court imposed a four-month suspension where a lawyer engaged in comparable misconduct in two client matters and 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 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, that she was struggling with depression, and the remoteness of the Accused's prior disciplinary history, a 90-day suspension is appropriate.

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days for violations of RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2), the sanction to be effective April 1, 2013.

17.

In addition, on or before May 1, 2013, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$653.15, incurred for depositions and LPRC investigation costs. Should the Accused fail to pay \$653.15 in full by May 1, 2013, 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.

18.

The Accused acknowledges that she 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 her clients during the term of her suspension. The Accused is currently administratively suspended and does not have ongoing client files.

19.

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

20.

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 or the denial of her reinstatement.

21.

The Accused represents that she is admitted to practice law in Oregon only.

22.

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 Smith*, 27 DB Rptr 32 (2013)

EXECUTED this 14th day of March, 2013.

/s/ Anita C. Smith

Anita C. Smith, OSB No. 893597

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. 10-129  
 )  
D. SCOTT SUMMER, )  
 )  
Accused. )

Counsel for the Bar: Linn Davis  
Counsel for the Accused: None  
Disciplinary Board: Lianne M. Butterfield, Chairperson  
Ulanda L. Watkins  
Charles H. Martin, Public Member  
Disposition: Violation of RPC 3.1, RPC 3.3(a)(1), RPC 3.4(c),  
RPC 8.1(a)(1), RPC 8.1(a)(2), RPC 8.4(a)(3), and  
RPC 8.4(a)(4). Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: April 3, 2013

**OPINION OF TRIAL PANEL**

The Oregon State Bar (hereinafter “Bar”) filed a formal complaint in this matter on April 20, 2011. Appearing *pro se*, on June 16, 2011, D. Scott Summer (hereinafter “Accused”) filed an answer, wherein he denied the Bar’s allegations that he violated the Rules of Professional Conduct. The Bar was represented by Assistant Disciplinary Counsel Linn D. Davis (hereinafter “Bar Counsel”), and submitted trial memoranda in advance of the scheduled hearing, which took place on November 29, 2012. The Accused failed to appear at the hearing or submit any material for consideration. As a result, the Bar moved for default, and an Order of Default was entered against the Accused on January 30, 2013. The Bar presented its case to the Trial Panel, and the proceedings were concluded on that same day.

Based upon the findings and conclusions made below, we find that the Accused has violated RPC 3.1, RPC 3.3(a)(1), RPC 3.4(c), RPC 8.1(a)(1), RPC 8.1(a)(2), RPC 8.4(a)(3), and RPC 8.4(a)(4), and that the Accused should be disbarred from the practice of law.

## FACTS

The Bar's complaint includes two primary allegations against the Accused, as outlined below. The Bar's allegations are deemed admitted based on the Accused's failure to appear at the hearing or otherwise submit any evidence or testimony in his defense. Accordingly, an Order of Default was entered against the Accused.

### 1. First Cause of Complaint

#### a. The Accused's Filing of an Intentionally Misleading Affidavit

At some point prior to December 2007, the Accused undertook to represent Neil and Sherrie Fullmer (hereinafter "Fullmers") in a personal medical malpractice matter. On the Fullmers' behalf, in December 2007, the Accused filed a lawsuit in Multnomah County Circuit Court, styled as *Fullmer et al. v. Hill et al.*, Case No. 071215013 (hereinafter "*Fullmer v. Hill lawsuit*").

On or about June 3, 2009, after the case had lingered for some time, the defendants in the *Fullmer v. Hill lawsuit* filed a motion for summary judgment (hereinafter "MSJ"). The trial court set July 16, 2009, as the date for hearing on the MSJ. The Accused, however, failed to appear at the MSJ hearing, and the Accused also failed to file any response to the defendants' MSJ, except for an affidavit in opposition to the MSJ (hereinafter "Affidavit"), which was filed on July 16, 2009, the same date as the hearing. The Affidavit was not timely submitted. Nonetheless, the substance and misleading nature of the Affidavit is relevant to the charges in this disciplinary proceeding.

In the Affidavit, the Accused swore under the penalty of perjury and pursuant to ORCP 47 E<sup>1</sup> that he had consulted with and retained a qualified expert who was available and willing to testify to admissible facts and opinions creating a question of fact in the *Fullmer v. Hill lawsuit*. However, the Affidavit included false and misleading statements, and

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<sup>1</sup> **ORCP 47 E. Affidavit or declaration of attorney when expert opinion required.** Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. **The affidavit or declaration shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney** who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment. (Emphasis added.)

the Accused knew his statements were false and material to the decision-making process in the *Fullmer v. Hill lawsuit*.

On or about July 20, 2009, based upon the Accused's statements in the Affidavit, the trial court denied the defendants' MSJ, and the *Fullmer v. Hill lawsuit* proceeded to trial set for November 2, 2009. In the months thereafter, the defendants prepared for trial and expended substantial resources to prepare to defend against the Fullmers' claims.

On October 29, 2009, the Accused faxed a motion to postpone the trial date and withdraw as counsel. The trial court denied the Accused's motions, which were not only untimely but also not credible.

On or about November 2, 2009, the Accused appeared and informed the trial court (Circuit Court Judge Adrienne Nelson) and opposing counsel that the Accused was unable to go forward with the trial and that the Accused did not have a retained expert who was available and willing to testify to admissible facts and opinions creating a question of fact. Before November 2, 2009, the Accused became aware that he did not have (and could not retain) an expert who was available and willing to testify to admissible facts and opinions creating a question of fact sufficient to controvert the allegations of the moving party, the defendants. Yet, the Accused intentionally misled the court and opposing parties by stating otherwise.

**b. The Accused's Blatant Disregard of a Court Order**

Based on the above, the trial court dismissed with prejudice the *Fullmer v. Hill lawsuit*, and also retained jurisdiction to investigate the factual basis for the Affidavit. Judge Nelson also granted the defendants' motion to compel the Accused to be deposed, and to produce discovery documents regarding the representations contained within the Affidavit.

The Accused received notice that the trial court had ordered him to be deposed and produce documents regarding the statements contained within his Affidavit. Pursuant to the trial court's order, the defendants obtained a commission from the Idaho State Court and caused the Accused to be served with a subpoena *duces tecum*, which required the Accused to appear to testify and to produce documents on November 23, 2009. The Accused, however, willfully failed to comply with the deposition notice, the subpoena *duces tecum*, and the trial court's order. Without securing relief from the prior court order, the Accused failed to appear for the deposition.

**c. The Accused Intentionally Misled the Trial Court Judge, Filed the Affidavit in Bad Faith, and Prejudiced the Decision-Making Process**

Based on the Accused's failure to comply with the deposition notice and the subpoena, the defendants moved for sanctions. Judge Nelson set a hearing for December 18, 2009, and put the Accused on notice once again by ordering the Accused to appear at the

show cause hearing (hereinafter “OSC”) to determine whether defendants’ motion for sanctions should be granted.

In response to the OSC, the Accused again failed to physically appear. However, on the morning of December 18, 2009 (the date set for the OSC hearing), the Accused faxed a letter to Judge Nelson to explain the reason for the Accused’s absence. On the date and time set for hearing, Judge Nelson placed a call to the Accused and he therefore appeared via phone at the OSC hearing. The Accused stated that he was unable to travel to Portland to attend the hearing because of icy road conditions and limited visibility. Judge Nelson found that the Accused’s explanation lacked credibility.

After hearing all the evidence and arguments, Judge Nelson concluded that the Accused misrepresented the truth in his sworn Affidavit dated July 16, 2009, which included his statement that he had retained a qualified expert who had *actually* expressed an opinion and was willing to testify that there was a genuine issue of material fact.<sup>2</sup> As an officer of the Court, the Accused also misrepresented the truth in his letter to the Court dated December 18, 2009, regarding the identity of the expert referenced therein. In violation of ORCP 17, the Accused made false certifications in his signed pleadings wherein he stated that: None of the allegations of professional negligence contained in the Complaint or any of the amendments thereto were supported by any evidence.

After receipt of the Accused’s above-referenced facsimile, and after hearing argument from the Accused via phone, Judge Nelson continued the hearing to rule on sanctions, and set a new hearing date for February 2, 2010. Judge Nelson also ordered the Accused to personally appear for the continued hearing date of February 2, 2010. The Accused, however, knowingly failed to appear as ordered, and the trial court issued a warrant calling for the Accused to be brought before the court. (Months later, the Accused appeared through counsel, and the warrant was ultimately vacated.)

By engaging in the foregoing conduct as alleged in the Bar’s First Cause of Complaint, the Accused violated the Rules of Professional Conduct. He did so by:

knowingly advancing a legal position in a proceeding without a basis in law or fact;

knowingly making a false statement of fact to a tribunal or failing to correct a false statement of material fact previously made to a tribunal;

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<sup>2</sup> Specifically, the Accused informed Judge Nelson that he had consulted with Dr. Marshall F. Priest (hereinafter “Dr. Priest”), Neil Fullmer’s treating physician, on July 8 or July 9, 2009, and that Dr. Priest had told the Accused, in substance that: (i) the defendants had failed to timely diagnose Neil Fullmer’s heart condition and that the failure to do so did not meet the appropriate standard of care; and (ii) Dr. Priest was willing to testify regarding the defendants’ failure to meet the appropriate standard of care. The Accused’s representations were false, and the Accused knew they were false and material to the decision-making process.

knowingly disobeying an obligation under the rules of a tribunal;  
engaging in conduct involving dishonesty or misrepresentation that reflects adversely on fitness to practice law; and  
conducting himself in a manner prejudicial to the administration of justice.

Based on the above, we find that the Accused violated RPC 3.1, RPC 3.3(a)(1), RPC 3.4(c), RPC 8.4(a)(3), and RPC 8.4(a)(4). At the time that the Accused submitted his Affidavit in opposition to the MSJ, the Accused knew there was no legal or factual basis to assert the legal position he advanced. He acted dishonestly, unprofessionally, and in bad faith.

## **2. Second Cause of Complaint**

On or about June 28, 2010, and August 2, 2010, after the Accused had previously failed to respond to repeated inquiries from the Oregon State Bar's Client Assistance Office regarding his conduct in the *Fullmer v. Hill lawsuit*, Bar Counsel demanded a response from the Accused. The Accused clearly received notice of Bar Counsel's requests, but knowingly failed to timely respond.

On or about October 22, 2010, Bar Counsel referred to a Local Professional Responsibility Committee of the Oregon State Bar (hereinafter "LPRC") the investigation of the Accused's above-described conduct in the *Fullmer v. Hill lawsuit*. The Accused was notified of the referral by letter on that same day. For an extended period of time, the Accused failed to respond to inquiries from the LPRC. Finally, on or about February 11, 2011, when he spoke with the assigned LPRC investigator, the Accused responded as follows:

In July 2008, Dr. Priest told the Accused he would give the expert testimony required to pursue the *Fullmer v. Hill lawsuit*;

In August 2009, Dr. Priest told the Accused that, while he remained of the opinion that the defendants did not meet the standard of care, he would not give the necessary expert testimony; and

Dr. Robert L. Oksenholt in Lincoln City subsequently agreed to provide the necessary expert testimony, but withdrew that agreement immediately prior to the trial of the *Fullmer v. Hill lawsuit*.

On or about February 14, 2011, the Accused caused to be received by the LPRC investigator a copy of the letter dated January 25, 2011. This was the same letter the Accused had previously mailed to the Idaho State Bar. That letter stated, *inter alia*, that:

The Accused had conferred with Dr. Priest on July 9, 2009, and Dr. Priest had stated unequivocally that the defendants had failed to meet the standard of care in the treatment of Mr. Fullmer;

Dr. Priest had agreed to give expert testimony in the *Fullmer v. Hill* lawsuit;

Soon thereafter, Dr. Priest had informed the Accused that, although his opinion remained that the defendants had failed to meet the standard of care in Mr. Fullmer's case, he would not so testify; and

The Accused later learned that Dr. Oksenholt, Mr. Fullmer's treating physician in Lincoln City, would give the necessary expert testimony, but just prior to trial, he learned that Dr. Oksenholt had withdrawn his offer to so testify.

The above representations offered by the Accused to the LPRC were materially false and misleading, and knowingly made by the Accused. It is clear from the record that the Accused intended to mislead the intended recipients.

The foregoing conduct of the Accused, as alleged in the Bar's Second Cause of Complaint, constitutes knowingly making a false statement in a disciplinary matter, knowingly failing to respond to a lawful demand for information from a disciplinary authority, and conduct involving dishonesty or misrepresentation, in violation of RPC 8.1(a)(1), RPC 8.1(a)(2), and RPC 8.4(a)(3), respectively.

## FINDINGS

### **1. The Accused violated RPC 3.1.**

RPC 3.1 provides in relevant part:

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

The Accused made false representations in his Affidavit and in his letter to Judge Nelson dated December 18, 2009 (the latter of which pertained to the availability and willingness of a retained expert to testify to admissible facts and opinions that appeared to create a genuine issue of material fact for trial). The Accused's representations had no factual basis, and the Accused knew they were false and material to the decision-making process of the intended recipients. The Accused's knowing repetition of falsehoods was highly prejudicial to the administration of justice, and the Accused harmed the substantive rights of

the parties by causing them to incur unnecessary delay and added legal costs. The Accused's above-described actions violate RPC 3.1.

**2. The Accused violated RPC 3.3(a)(1).**

RPC 3.3(a)(1) provides in relevant part:

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

The Accused made false representations in his affidavit filed on or about July 16, 2009, and in this letter dated December 18, 2009, addressed to Judge Nelson. The Accused's representations were false, and the Accused knew they were false and material to the decision-making process of the intended recipients; the representations constituted violations of RPC 3.3(a)(1).

**3. The Accused violated RPC 3.4(c).**

RPC 3.4(c) provides in relevant part that a lawyer shall not:

- (c) 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 Accused failed to comply with the trial court's orders and judicial process when Judge Nelson attempted to investigate the Accused's basis for filing the Affidavit. The Accused's failure violated his duty to comply with obligations under the rules of a tribunal, and the Accused's conduct was highly prejudicial to the administration of justice. Additionally, the Accused's unsworn letter dated December 18, 2009, unsupported by any other evidence, offered a misleading explanation for his conduct that the Accused knew was false. The Accused repeatedly and intentionally failed to produce documents or submit to examination by his opposing counsel, and by Judge Nelson. These actions were in violation of RPC 3.4(c).

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

RPC 8.4(a)(3) provides in relevant part that it is professional misconduct for a lawyer to:

- (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

RPC 8.4(a)(4) provides in relevant part that it is professional misconduct for a lawyer to:

- (4) engage in conduct that is prejudicial to the administration of justice.

The Accused filed the Affidavit without an adequate factual basis. The Affidavit was improperly filed at the last minute to defeat the defendants' MSJ. The Accused knew the Affidavit was false when made, as the Accused clearly had not "retained any expert" that was prepared to testify to a key issue in the underlying dispute. In preparations for trial, the Accused was clearly aware that he lacked the necessary medical expert evidence to survive a dispositive motion, yet the Accused perpetuated the fraud upon the Court and failed to take corrective steps to cure the misleading nature of his Affidavit. As a result, the Accused maintained a case that he knew lacked the required expert testimony to go forward. In doing so, the Accused thereby prejudiced the administration of justice and the rights of the opposing parties.

The Accused also violated RPC 8.4(a)(3) and RPC 8.4(a)(4) by knowingly repeating his falsehoods with respect to the content and use of his Affidavit.

**5. The Accused violated RPC 8.1(a)(1) and RPC 8.1(a)(2).**

RPC 8.1(a)(1) provides in relevant part that 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:

- (1) knowingly make a false statement of material fact;

RPC 8.1(a)(2) provides in relevant part that 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:

- (2) 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.

Beginning on June 28, 2010, the Accused had notice of his obligation to timely provide information regarding the allegations asserted by the defendants' attorney, Rodney K. Norton, in his supplemental motion for sanctions. The Accused received the Bar's correspondence, but failed to timely and adequately respond. Ultimately, the Accused's only response was evasive and incomplete as it offered no explanation for the lack of earlier cooperation, which delayed the Bar's investigation. We find that the Accused clearly violated RPC 8.1(a)(1) and RPC 8.1(a)(2).

## SANCTION

**A. ABA Standards.**

The American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991)(Amended 1992) (hereinafter "*Standards*") are considered in determining the

appropriate sanction. *In re Spencer*, 335 Or 71, 85–86, 58 P3d 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. Finally, whether the sanction is consistent with Oregon law is also considered. *In re Jaffe*, 331 Or 398, 408-09, 15 P3d 533 (2000).

1. **Duties Violated.** Applying the *Standards* to the instant action it is clear that:
  - a. The Accused’s false Affidavit (and statements contained therein) violated his duty of candor to the court. *Standards*, § 6.1.
  - b. By maintaining an action on a false basis and disregarding the court’s orders, the Accused abused the legal process. *Standards*, § 6.2.
  - c. The Accused’s conduct before the court and in the disciplinary investigation also showed a failure to maintain personal integrity and violated duties he owed as a professional. *Standards*, § 5.1, 7.0.
2. **Mental State.** The Accused’s conduct demonstrates both intent and knowledge. He acted knowingly and intentionally in the following ways:
  - a. Filing a false and misleading Affidavit that enabled him to continue the Fullmers’ action;
  - b. Withholding for several months that he had not retained and did not have an expert to provide testimony at trial that would create a genuine issue of material fact;
  - c. Failing to appear and produce documents and failing to appear before Judge Nelson;
  - d. Failing, over an extended period, to respond to lawful requests for information from disciplinary authorities; and
  - e. Misstating, to disciplinary authorities, the events that occurred.

*Standards*, p. 7, 9–10, § 3.0.

3. **Injury.** For the purpose of determining an appropriate disciplinary sanction, the Trial Panel may take into account both actual and potential injury. *Standards*, § 3.0; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused’s misconduct caused:
  - a. potential injury to the legal system, which relies on the integrity of our lawyers;
  - b. actual injury to the defendants in the *Fullmer v. Hill lawsuit*, who suffered continuing anxiety and were forced to prepare for trial,

expending many hours, and tens of thousands of dollars when no trial was justified;

- c. actual injury to the defendants, the court, and the legal system as a result of the Accused's failure to appear and comply with court orders in the investigation of his false affidavit; and
- d. actual injury to the legal profession due to the Accused's unprofessionalism and knowing failure to respond to lawful request for information from disciplinary authorities at the Bar. His eventual false response was a further barrier to the regulation of the profession.

**4. Aggravating Circumstances.** Before imposing sanctions, we also consider the existence of any aggravating factors. *Standards*, § 9.22.

- a. Prior disciplinary history. The Accused's prior history of fraud, deceit, attempted theft, and misrepresentation is a highly aggravating factor.<sup>3</sup> In 2004, the Trial Panel of the Oregon State Bar Disciplinary Board determined that the Accused violated DR 1-102(A)(2) when he committed the criminal act of attempted theft by deception under Idaho's criminal code, and because "theft reflects adversely on a lawyer's honesty, trustworthiness, and fitness to practice law." *See In re Sumner*, 19 DB Rptr 57 (2005). On review of the decision of the Disciplinary Board, by written decision dated February 3, 2005, the Oregon Supreme Court affirmed the Trial Panel's decision, and concluded that the Accused violated DR 1-102(A)(2) (commission of a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness to practice law), DR 1-102(A)(3) (conduct involving fraud, deceit, or misrepresentation), and DR 7-102(A)(5) (knowingly making false statements of fact in course of client's representation). *See In re Sumner*, 338 Or 29, 105 P3d 848 (2005).<sup>4</sup>

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<sup>3</sup> In determining the weight of prior disciplinary offenses, 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 offenses; 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 195, 200, 951 P2d 149 (1997).

<sup>4</sup> The underlying facts in this matter include a finding that the Accused made false and deceitful statements of facts contained in a demand letter to an insurance company against whom the Accused sought damages on behalf of his personal injury client. Notably, the Oregon Supreme court concluded that "the accused committed [the criminal act of attempted theft by deception] with the intent to wrongfully deprive Boise Cascade [an innocent 3rd

Accordingly, the Oregon Supreme Court suspended the Accused from the practice of law for a period of 180 days.

Not long after the Oregon sanctions were imposed, the Accused engaged in this more serious (but similar) misconduct. *Standards*, § 9.22(a).

- b. Pattern of misconduct. The Accused demonstrated a pattern of misconduct that included: (i) the prior fraudulent conduct related to the Idaho disciplinary action; (ii) the filing of the false Affidavit; (iii) the failure to correct his falsehood; and (iv) the evasion of court and Bar investigations regarding his fraud upon the court. *Standards*, § 9.22(c).
- c. Multiple offenses. The Accused violated multiple rules by his misconduct, breaching duties he owed to the court, the legal system, and the profession. *Standards*, § 9.22(d).
- d. Substantial experience in the practice of law. The Accused was admitted to practice law in Oregon and Idaho in 1996. Therefore, he had been engaged in the practice of law in Oregon and Idaho for over a dozen years when he committed the present misconduct. *Standards*, § 9.22(i).

**5. Mitigating Circumstances.** The presence of mitigating factors is the final criteria to be considered before imposing sanctions. *Standards*, 9.32. By contrast to the above, and in mitigation, three key factors should be noted.

- a. Personal or emotional Problems; physical or other disability. First, the Accused did not appear to defend himself, but the record includes circumstantial evidence that he has suffered (and may still be suffering) from personal or emotional problems, physical disability, and/or mental disability. *See Standards*, § 9.32(c), (h), and (i). Unfortunately, Bar Exhibit 12 (Motion to Postpone Trial and to allow Withdrawal of Counsel) and Bar Exhibit 29 (D. Scott Summer's Motion to Set Over Hearing) are the only evidence in support of a finding that the Accused suffers from a physical disability, or personal or emotional problems. Those Exhibits contain statements made in pleadings signed by the Accused, in a last ditch effort to postpone court proceedings. Upon consideration of the motion to postpone the

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party] of property [e.g., insurance proceeds for the Accused's personal injury client]." There is ample basis to conclude that the Accused's actions in the subject disciplinary matter are part his demonstrated pattern of offering intentionally misleading mistruths in order to continue to advance his clients' interests. This conduct not only offends the concept of personal integrity, but it also erodes the public's trust in the legal profession.

trial (Bar Exhibit 12), and after hearing the Accused's oral argument, Judge Nelson denied the motion as she was apparently unpersuaded by the Accused's arguments.

Given the fact that the Accused did not appear before this Trial Panel, and has given us no basis to otherwise favorably weigh in his favor any credibility arguments, we conclude that the statements contained in Exhibits 12 and 29 are not reliable and there is no adequate basis to otherwise conclude that the Accused violated the subject Rules of Professional Conduct because of a verifiable medical condition (the details of which were *not* offered into evidence). Based on the record before us, therefore, to the extent that the Accused claims to have suffered any personal or emotional problems, or physical disability, that claim lacks credibility.

- b. Imposition of other penalties or sanctions. In addition to the above, as a second potential mitigating factor, pursuant to *Standards*, § 9.32(k), it is noteworthy that the Accused has already suffered the imposition of other penalties or sanctions. (Trial court Judge Nelson previously imposed monetary sanctions for the very same wrongful acts.) That imposition of penalties, however, does not meet the need to protect the public from any further ethical violations by the Accused.
- c. Absence of a dishonest or selfish motive. Finally, the third mitigating factor is the apparent lack of evidence to support a finding that the Accused acted with personal (selfish) motive. The Bar contends that the Accused's "false affidavit enabled him to continue the pursuit of the personal injury action upon which his fees relied. [And, the Accused] engaged in further misconduct in an attempt to evade responsibility for his false affidavit." (OSB Trial Memo, p. 13.) The above, however, does not necessarily constitute *self-motive*. Almost all court cases involve litigators who pursue those actions upon which their fees rely. Generally, lawyers earn their living by selling their time invested in client matters and, to some degree, lawyers also sell their knowledge and legal expertise. As advocates, lawyers are obligated to advance and protect their clients' causes, and lawyers' fees often rely upon the lawyers' success in doing so.

In this case, the fact that the Accused pursued a course of action that would have (and did) keep his clients' medical malpractice case alive through the summary judgment phase does not mean that the Accused acted with self-motive. As an advocate, the Accused was ethically obliged to zealously advocate his clients' interests and survive

dispositive motions. For this reason, we conclude that this case lacks the *self-motive* element as an aggravating circumstance for purposes of sanctions.

**B. Preliminary Sanction Analysis.**

Prior to considering aggravating and mitigating circumstances, the *Standards* generally recommend disbarment in comparable matters. Specifically, disbarment is generally appropriate when a lawyer:

1. Engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. *Standards*, § 5.11(b);

2. With intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. *Standards*, § 6.11;

3. Knowingly violates a court order to rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding. *Standards*, § 6.21; and

4. 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.

Because the Accused's filing of the Affidavit constitutes an intentionally deceptive and dishonest action, disbarment is warranted as a preliminary sanction. The analysis under the *Standards* leads the panel to conclude that a term of disbarment is the appropriate sanction for the violations committed by the Accused.

**CONCLUSION**

The Accused failed to appear. Therefore, by way of default, the Bar met its burden of proof as to all the charges alleged in the complaint. Having established by clear and convincing evidence that the Accused violated RPC 3.1, RPC 3.3(a)(1), RPC 3.4(c), RPC 8.1(a)(1), RPC 8.1(a)(2), RPC 8.4(a)(3), and RPC 8.4(a)(4), and that the Accused has a prior disciplinary record that includes prior charges of dishonesty, the Bar argued that the Accused should be disbarred.

The Accused violated his duty to the public to maintain standards of personal integrity, and his duty of candor and trustworthiness.<sup>5</sup> As the court stated *In re Davenport*, 334 Or 298, 314, 49 P3d 91 (2002), “it is fundamental that a lawyer who is placed under oath to tell the truth has a duty to so do.” (String citations omitted.)

In this case, the Accused offered false statements and misrepresentations under oath and in a letter to the court. He knowingly<sup>6</sup> misled the court and therefore violated RPC 3.3(a)(1) and RPC 3.1 by asserting a position and delaying trial with no good faith basis for doing so. The Accused’s actions were also highly prejudicial to the administration of justice and, therefore, in violation of RPC 8.4(a)(4). The Accused also failed to honestly, timely, and adequately respond with regard to the disciplinary investigation against him, in violation of RPC 8.1(a)(1) and RPC 8.1(a)(2).

The Accused has demonstrated that he will not conform his conduct to the professional standards vital to the functioning of the legal system, the protection of the public, and the integrity of the profession. Therefore, the Accused should be disbarred.

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. The *Standards* alone, before considering aggravating factors, provide authority for disbarment. In this case, the aggravating factors further support that disposition.

The decision of the Trial Panel is unanimous.

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<sup>5</sup> Clearly, the Accused violated his duty to the public to maintain standards of personal integrity pursuant to RPC 8.4(a)(3) and RPC 8.4(a)(4). Moreover, the mental state of the Accused was intentional. An intentional state of mind represents a “conscious objective or purpose to accomplish a particular result.” *Standards*, §§ 10, 13 (defining “intent”). The Accused had the conscious objective to mislead Judge Nelson. Finally, the Accused’s conduct caused *actual* injury to the defendants in the underlying case. That *actual* injury was not only monetary and non-monetary, but also significant and material.

<sup>6</sup> In Oregon, for purposes of a particular rule violation, the finding that an accused lawyer acted “knowingly” does not preclude a finding that the accused also acted “intentionally” for purposes of the sanction analysis. *See In re Flannery*, 334 Or 224, 47 P3d 891 (2002).

Dated this 1st day of February, 2013.

/s/ Lisanne M. Butterfield  
Lisanne M. Butterfield, Trial Panel Chairperson

/s/ Ulanda L. Watkins  
Ulanda L. Watkins, Trial Panel Member

/s/ Charles H. Martin  
Charles H. Martin, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case Nos. 11-57 and 11-111  
 )  
PAUL H. KRUEGER, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Allison D. Rhodes and Dayna E. Underhill  
Disciplinary Board: Leah A. Johnson, Chairperson  
David W. Green  
Dr. John Rudoff, Public Member  
Disposition: Trial Panel Opinion. Dismissed.  
Effective Date of Opinion: April 16, 2013

**TRIAL PANEL OPINION**

This matter came regularly before a trial panel of the Disciplinary Board consisting of Leah A. Johnson, Chairperson, David W. Green, and Dr. John Rudoff, Public Member, on December 3, 4, 5, and 6, 2012, at offices situated at 1000 SW Broadway, Portland, Oregon. Closing arguments were submitted in writing by the parties due to time restraints. Kellie F. Johnson represented the Oregon State Bar (hereinafter “Bar”). Allison Rhodes and Dayna Underhill represented the Accused, Mr. Paul Krueger.

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 1.3, WRPC 1.3, or RPC 1.7(a)(2) in the Smith matter (Case No. 11-57), or RPC 1.3, RPC 1.7(a)(2), or RPC 8.4(a)(4) in the Miller matter (Case No. 11-111).

**INTRODUCTION**

The proceedings consisted of two distinct cases and will be referred to as the “Smith Matter” (Case No. 11-57) and the “Miller Matter” (Case No. 11-111). There were no prehearing procedural disputes and the parties proceeded on their initial filings.

**The Amended Complaint:** An Amended Formal Complaint (hereinafter “Complaint”) was filed on November 22, 2010 against the Accused that asserted violations of the Oregon Rules of Professional Conduct. In the Smith Matter, the Bar claimed that the Accused violated RPC 1.3 (neglect of a legal matter) and its Washington equivalent, WRPC 1.3 (neglect of a legal matter), and RPC 1.7(a)(2) (self-interest conflict). In the Miller Matter, the Bar claimed that the Accused violated RPC 1.3 (neglect of a legal matter), RPC 1.7(a)(2) (self interest conflict), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

**The Answer:** An Answer was filed on December 19, 2011 by the Accused. The Accused admitted many of the facts in the Complaint but denied the allegations in the Bar’s Complaint.

**Witnesses, Exhibits and Transcript:** The Bar called as witnesses: Mr. Lyle Bosket (the attorney at the Gatti & Gatti law firm who worked with the Accused on the Smith matter); Ms. Kimberly Smith (the client in the Smith Matter); Mr. Richard Gatti (one of the partners of the Gatti & Gatti law firm); Mr. David Keys (property manager and registered agent for the Anderson’s Clark Creek Village Apartment property); Mr. Robert Winkler (an insurance defense attorney who represented the parties who owned the Clark Creek Apartments); Ms. Anne Foster (an attorney engaged by Mr. Keys to represent Clark Creek Apartments and George and Kathleen Anderson); and the Accused, Mr. Paul Krueger. The Accused also testified on his own behalf.

The Bar introduced Exhibits 1 through 17, 19, 22 through 29, 32 through 40, and 42 through 99, all of which were admitted as Exhibits (each is referred to in this opinion as a “Bar ex”). The Accused introduced Exhibits 201 through 214, and 216 through 222, all of which were admitted as Exhibits (each is referred to in this opinion as a “Def ex”).

Capri-Iverson Reporting (Adele P. Edwards and Shellene L. Iverson) provided court reporting services. The transcript was received on or about January 14, 2013.

## **THE SMITH MATTER 11-57**

### **FINDINGS OF FACT**

The Accused represented Kimberly Smith in a personal injury case as a result of an accident that occurred in the state of Washington. The Accused is not licensed to practice in Washington. At the time of the initial representation, he was an associate at the law firm of Gatti & Gatti<sup>1</sup>, headquartered in Salem, Oregon. According to the testimony of the Accused,

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<sup>1</sup> The Accused was never a partner at the firm and had no controlling interest in the firm according to the testimony of Mr. Richard Gatti, Mr. Lyle Bosket, and the Accused. He was an associate and did not have hiring or firing authority over any other associate, including Mr. Bosket.

Mr. Lyle Bosket, and Mr. Richard Gatti, each attorney at the firm was responsible for his own client caseload. Each attorney at the firm maintained his own individual calendars and Gatti & Gatti did not have a general firm calendar for court appearances or other important dates. It was also the testimony of these witnesses that there were at least two attorneys at the firm who were licensed to practice law in Washington, and it was the common practice of the firm for the lawyers with Washington licenses to file cases arising in Washington and then assist the attorney responsible for the case, that is, the attorney who had been handling the case from its inception at the firm, in appearing *pro hac vice*.

According to the testimony of the Accused and Ms. Kimberly Smith, the client had a prolonged recovery period from her car accident related injuries, due in part to an unrelated intervening worker's compensation injury and claim. It is important to note that Ms. Smith was easily agitated as a witness and this degree of agitation suggests that she may have been easy to manipulate. Twenty (20) months elapsed from the Accused's initial representation of Ms. Smith (the contingent fee agreement, dated April 20, 2005, Bar ex 1) to the filing of the Complaint in Washington state (dated February 8, 2007, Bar ex 5). Much of that time was spent waiting for Ms. Smith to update the Accused as to her condition, waiting for her to become medically stationary, ordering medical records from various providers, and drafting the demand letter to the insurance carrier. It was the Accused's testimony that the prolonged interval between initial representation and filing was standard practice in personal injury law practices. This was because earlier filing risked impairing his ability to file for the complete damages that his client allegedly sustained.

During that time period, the Accused sent eight letters to Ms. Smith and met with her in person on at least one occasion after the initial consultation. The Bar implied, through the exhibits they offered and the direct testimony of Ms. Smith, that the Accused had sent only three letters during that time period. On cross exam, Ms. Smith testified that after being reminded of the additional letters sent to her by the Accused, including a 12 pages written "demand letter" (Def ex 206), she had been "kept in the loop" by him. (TR 209:5-8.) Smith also admitted to extended periods of not opening her mail at all.

The case was not filed in Washington by the Accused, but by another attorney at the firm, Lyle Bosket. Mr. Bosket testified that he did not look at the file prior to preparing and filing the Complaint. The case was filed in the proper venue, King County, Washington. The court set a filing deadline of July 27, 2007, for the parties to file supporting motions and confirmation of joinder, a required pleading under Washington rules. Mr. Bosket did not tell the Accused about the July 27 filing deadline. The Accused never saw the notice from the court regarding the July 27 deadline. Mr. Bosket did not file the appropriate pleadings by July 27, 2007. (Bosket diversion agreement, 4:11-17.)

On August 21, 2007, the King County court set a show cause hearing for September 25, 2007, for the plaintiff's failure to file the confirmation of joinder by July 27. Mr. Bosket had filed the confirmation of joinder on September 17 and thus assumed that he did not need

to attend the show cause hearing. Mr. Bosket never told the Accused about the missed July 27 filing deadline nor did he tell him about the show cause hearing scheduled on September 25.

During the aforementioned dates on the Smith file, the Accused was in the process of leaving the Gatti & Gatti firm. The firm and the Accused made this agreement on July 31, 2007. On August 23, 2007, his relationship ended abruptly even though the Accused and the firm had originally decided to have his last day be October 1, 2007. This abrupt termination made it difficult for the Accused to access his files at the Gatti & Gatti firm.

Mr. Bosket also filed the appropriate paperwork to have the Accused admitted to the case *pro hac vice*. However, Mr. Bosket did not understand that the procedure in King County allowed the Accused to be admitted without further notice or actions from the court after the initial filing of the *pro hac vice* petition. The Accused had been relying on Mr. Bosket's knowledge of Washington law and also did not know that he had been admitted to the case on a *pro hac vice* basis. This did not change the attorney of record on the Washington case, and the Accused did not receive notices from the court regarding the case; those were all directed to Mr. Bosket. It is a matter of settled testimony, both in this hearing and in the Bosket diversion agreement, that Bosket did not provide appropriate information to the Accused with regard to requirements for joinder or repair of that defect. Kellie Johnson is the Bar attorney of record for the diversion agreement of May 2012.

#### **DISCUSSION AND CONCLUSIONS OF LAW**

The Bar has the burden to prove the elements of the Complaint by clear and convincing evidence. The clear and convincing standard means that the facts are highly probable. BR 5.2; *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

#### **First Cause of the Complaint:** Violation of RPC 1.3 and WRPC 1.3.

The Bar has alleged that the Accused neglected the Smith matter by:

- A. failing to determine the status of the *pro hac vice* petition;
- B. by failing to file the confirmation of joinder; and
- C. by failing to attend the show cause hearing on September 25, 2007, and as a result of these failures, the Smith Complaint was dismissed by the court.

A. and B. Neglect of a legal matter is not a result of a single incident or mistake, but rather is viewed as a course of conduct. *In re Magar*, 335 Or 306, 319, 66 P3d 1014 (2003). In this case, the Accused, not being admitted to practice in Washington, was relying on the assumed expertise of his fellow associate at the firm, Mr. Bosket. Indeed, Mr. Bosket was the attorney of record in the Smith matter and bore at least equal responsibility with the Accused for the case in terms of litigation. The Bar agrees with this proposition according to the terms of the diversion agreement between the Bar and Mr. Bosket. (Diversion agreement, 4:4.)

The Bar's claims against the Accused fail under the stipulated facts and terms of the diversion agreement with Mr. Bosket. The relevant stipulated facts:

“The Accused (Mr. Bosket) failed to timely file the confirmation of joinder in Smith's case and *failed to inform Krueger* or Smith that he had missed the deadline. He also did nothing thereafter to track the status of the case in the Washington court; failed to take any action on the court's September 25, 2007, order to show cause because he believed further action was unnecessary once he had filed the confirmation of joinder on September 17, 2007; and *failed to tell Krueger or Smith that a show cause hearing was pending.*” *Supra*. (emphasis added)

This diversion agreement was signed by Bar counsel Kellie Johnson on May 31, 2012.

C. The Accused was in the process of terminating his employment with the Gatti & Gatti firm during this critical time of the Smith case. The Gatti firm nevertheless withheld the Accused's files from him between August 23, 2007, and September 19, 2007, when 80 open files were delivered to him in a box panel truck. The Accused never received the notices of hearing dates from the Washington court either because he was not the attorney of record (the notice was addressed to Mr. Bosket, Bar ex 10), or because the notices were not properly filed within the firm during the chaos of his departure. The record is unclear as to why he did not receive the court notice but it is clear that the Bar did not establish that he received the notice and neglected it. The Bar has failed to meet their burden on the first cause of action.

**Second Cause of the Complaint:** Violation of RPC 1.7(a)(2).

The Bar alleges that the Accused violated RPC 1.7(a)(2):

- A. by attributing all of the error on the Smith case to Bosket;
- B. by failing to advise Ms. Smith of available alternatives to her case being dismissed;
- C. by advising Ms. Smith only to pursue claims of legal malpractice rather than reinstating or refiling the personal injury case; and
- D. by failing to obtain Ms. Smith's informed consent to his continued representation.

A lawyer may have a conflict of interest with a client stemming from a fear of a malpractice claim if the risk of a malpractice claim is high and not easily remedied. However, “the bar must show by clear and convincing evidence that the lawyer's error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer's professional judgment.” *In re Knappenberger*, 337 Or 15, 29, 90 P3d 614 (2004).

A. The Bar alleges that the Accused tried to “blame” Mr. Bosket for the dismissal of the Smith case. As it happens, the Bar itself has held Mr. Bosket responsible for the dismissal of the case. It is bewildering how the Bar would expect the Accused to be held accountable for missing a filing deadline and court hearing on a case in which he was not the attorney of record, that he did not know about, and that another attorney has already admitted responsibility for and for which he has been disciplined. The Bar alleges that the Accused should have tried to repair the case by refiling it instead of pursuing a malpractice claim. In fact, the Accused did ask Mr. Bosket to do so but Mr. Bosket refused. The Accused was not an attorney licensed in Washington and could not do it without the assistance of a Washington attorney. Failing to pursue a repair method of the Bar’s choosing is not an ethics violation.

B. The Bar alleges that the Accused failed to advise Ms. Smith of available alternatives to her case being dismissed. This is contrary to the testimony of the witnesses, including Ms. Smith (Tr. 183:21). The Accused tried to get Mr. Bosket, an attorney licensed in Washington, to refile or reinstate the case. Mr. Bosket refused.

C. The Bar has offered no such evidence that the Accused advised Ms. Smith to “only” pursue a claim of legal malpractice to repair the dismissed case. On the contrary, the Accused advised Ms. Smith by phone on November 21, 2007, that her case had been dismissed in Washington and that she may have a claim for malpractice against him and the Gatti & Gatti firm. He followed up with a letter dated December 4, 2007. (Bar ex 29.) The letter specifically advised Ms. Smith that she should consult another lawyer about her rights and remedies. The Accused even took the additional steps of notifying the PLF of the malpractice claim and helping Ms. Smith find a lawyer to represent her in the course of that malpractice claim. When it became clear that the statute of limitations would run on the malpractice claim, the Accused voluntarily signed a tolling agreement to suspend the statute. Mr. Bosket and the Gatti & Gatti firm refused to sign the agreement and the case was filed. Nothing about the Accused’s behavior indicates that he was acting out of fear of a malpractice claim. Indeed, he confronted it head on and took all the steps he was able to take to remedy the error on Ms. Smith’s case.

D. Finally, the Bar alleges that the disclosure letter the Accused sent to Ms. Smith was inadequate because it did not acknowledge how the dismissal of the case could have an impact on his professional judgment. It was clear from the testimony of Mr. Bosket, Mr. Bosket’s signed stipulation, and the testimony of the Accused that the Accused believed that he was not responsible for the dismissal of the case and therefore did not so advise his client. This panel agrees. It was not the Accused’s error that caused the case to be dismissed and therefore dismissal would not have an impact on his professional judgment. His disclosure letter was adequate.

**THE MILLER MATTER, 11-111**  
**FINDINGS OF FACT**

The Accused represented Ms. Miller in a personal injury claim as a result of a “slip and fall” accident at an apartment complex in Salem, Oregon. The legal name of the complex was a source of much confusion and difficulty throughout the course of the case, even in the pleadings submitted to this panel.

The Complaint on the Miller case was filed on the last day of the statute of limitations. Ms. Miller became homeless following her accident and became difficult to locate and often failed to keep in contact with the Accused. However, at the time of retaining the Accused, Ms. Miller reported that she fell at her apartment complex located at 3318 Willow Court SE in Salem, Oregon, and that the apartments were called the Clark Creek Apartments.

Prior to filing the Complaint, the Accused checked with the Secretary of State, Corporation Division to determine the appropriate entity to name as the defendant in the suit. The search discovered an assumed business name (that was no longer active) of Clark Creek Apartments registered to George and Kathleen Anderson. There was also an entity named Clark Creek Villages (CCV) registered to the Andersons. The Accused filed the complaint in Multnomah County naming the Clark Creek Apartments (CCA), George and Kathleen Anderson individually, and several other individuals who had come to light during his investigation but that were not relevant to the ethics claims. The Accused served the registered agent for the Anderson’s property, Mr. David Keys.

Mr. Keys then contacted the Accused by phone and said that the Accused had sued the wrong people, that the Andersons did not own the Clark Creek Apartments (CCA), rather, they only owned the Clark Creek Village Apartments (CCVA). He asked that the Accused immediately dismiss the Andersons. The Accused refused to do so based only on the word of Mr. Keys, given that the case had been filed at the statute of limitations, and suggested that Mr. Keys contact an attorney.

Mr. Keys did just that by immediately walking to the office of his corporate attorney, Anne Foster. According to the testimony of Ms. Foster, Mr. Keys was very angry and upset and demanding that something be done immediately. On April 3, 2008, Ms. Foster sent what is commonly referred to as an “ORCP 69 letter” to the Accused. (Bar ex 50.) The letter advised the Accused that Ms. Foster was representing the Andersons and CCV, invoked rule ORCP 69 requesting notice prior to a default, and stated that she looked forward to working with him on the case. It is important to note that Ms. Foster is the attorney that handles the corporation work for Mr. Keys and his title company, Norris & Stevens. She is not the attorney that handles insurance claims or premises liability issues. She testified that she believed the Andersons did have premises liability insurance for their rental property, but she did not recall ever tendering defense of the personal injury claim to the insurance carrier.

When asked to submit documentation that she tendered the claim to the insurance carrier, she was unable to do so.

In the meantime, the Accused was contacted by Mr. Robert Winkler, an insurance defense attorney. Mr. Winkler was well known to the Accused and they had previously worked together at an insurance defense firm. They had a relationship of mutual respect and trust. Mr. Winkler told the Accused that the Accused “had the right defendant” in the Miller suit, but asked him to amend the pleadings to change the name of the defendant to a single entity, Clark Creek. He also asked the Accused to move the venue to the proper county, Marion County. Mr. Winkler assured the Accused that the Andersons were not the correct defendants and could be dismissed from the Complaint.

At the time of this discussion between Mr. Winkler and the Accused, the Andersons had not yet been personally served with the Complaint. Because the Complaint had been filed on the last day of the statute of limitations, the Accused needed to personally serve them by the sixtieth day or the Complaint against them would be dismissed by operation of law. With the assurances of Mr. Winkler, the Accused advised his process server that the Andersons were “not the proper party- Do not subserve.” (Accused ex 221 and 222.) With regards to the entity of the assumed business name Clark Creek Apartments, the Accused directed his process server “Wrong entity- Do not serve.” (Def ex 220.) By operation of law, all of the Andersons’ interests, both personally and as a business entity, were dismissed from the case on June 25, 2008. The Accused testified that he called Ms. Foster’s office and spoke either with her or her assistant and told them that he would not be pursuing a claim against the Andersons in any capacity. He did not remember the exact date, but believed it was after the time April 29, 2008, when he received a letter from Mr. Winkler indicating his involvement with the case.

Mr. Winkler and the Accused continued to communicate with each other regarding the terms of the amended Complaint and the appropriate names of the defendant/defendants to the suit. The communication was complicated because Mr. Winkler was unable to disclose information about the identity of the true insured defendants due to client confidentiality. The Accused was in a position of taking Mr. Winkler at his word to use the name “Clark Creek” as the named defendant.

On August 19, 2008, venue was moved from Multnomah County to Marion County. The case was transferred without any of the discussed amendments and as such, the Andersons were still listed on the caption even though they had been dismissed two months prior. Mr. Winkler testified that he believed the amendments would be made prior to the transfer of venue. The Accused testified that he had intended to have Mr. Winkler file his answer first, to insure that certain affirmative defenses were waived, and then make the agreed upon amendments. An answer was not filed before November 28, 2008, when the court sent a notice to the Accused of the pending dismissal of the case for want of prosecution.

When the Accused received the notice on December 8, 2008, he (through a staff member) sent “ten day” letters to the defense attorneys listed in his computer database: Mr. Winkler and Ms. Foster. The letter invoked ORCP 69 and advised the defense attorneys that if they did not file an answer in ten days, he would move for a default against their clients. The letter sent to Ms. Foster was in error as the Andersons and all of their interests had been dismissed from the case six months prior. The letter was, according to the testimony of the Accused and Mr. Winkler, a “form letter” in civil personal injury cases. The Accused also testified that it was, procedurally, the first of many steps an attorney would have to take in order to obtain a default. A default is not an automatic court order on the eleventh day. The letter was the only contact the Accused had had with Ms. Foster since he left a message for her in (probably) May that the Andersons were dismissed. In other words, he had not contacted her about the change of venue, discovery, or any other matter which would indicate to Ms. Foster that her clients were still active in the case.

It is relevant to the events following the December 8 letter to note that 2008 was the year that the Willamette Valley experienced an unprecedented and prolonged snow storm. Many attorneys were unable to travel to their offices and several courts and county offices were closed at various times during the two week snowfall.

In response to the December 8 letter, Ms. Foster sent a letter to the Accused by fax on December 16 and left him a voice message. In the letter, Ms. Foster says that her client is Mr. Keys, not the Andersons or Clark Creek Village Apartments (the buildings actually owned by the Andersons). She also says that she wants the Accused to “voluntarily dismiss your suit against the Andersons.” (Bar ex 66.) Ms. Foster testified she learned, between December 16 and December 18 that the Andersons had already been dismissed.

The Accused received both the fax and voice message by remote location. The Accused testified that he contacted Ms. Foster’s office at least twice and spoke with people at the office, although not directly with Ms. Foster. He did not know who he spoke with as he used some “internal lines” to avoid the firm’s voicemail system. He asked the two people he spoke with to pass the message along to Ms. Foster that the Andersons were out of the case and to call him “after they dug out (of the snowstorm).” Ms. Foster denies receiving the messages.

When the parties were unable to confer prior to December 18, Ms. Foster prepared and filed a Rule 21 Motion against the plaintiff and requested oral argument. Mr. Winkler also prepared a Rule 21 Motion to memorialize the agreement that he had with the Accused regarding the pleadings. Although the Accused and Mr. Winkler were not in complete agreement on all issues, they were confident they could resolve their pleadings amendments. When the Accused received the service copy of Ms. Foster’s Rule 21 Motion, he determined that it could be explained to the court at oral argument because she did not represent any of the defendants in the lawsuit and therefore did not file a written response. The Andersons had long ago been dismissed and their property, Clark Creek Village Apartments had never been

named. Indeed, he did not believe Ms. Foster even had standing to file a Rule 21 Motion as she did not represent any parties in the case.

The hearing on the Rule 21 Motions was scheduled for May 7, 2009. On February 27, 2009, the Accused filed the amended Complaint. It did not name the Andersons, nor did it name Clark Creek Village Apartments, the entity owned by the Andersons. It did name Clark Creek, the entity name agreed upon by the Accused and Mr. Winkler because Ms. Miller did fall at the Clark Creek Apartments. The Accused believed this rendered Ms. Foster's Rule 21 Motion to be moot as the Amended Complaint did not reference her clients.

Nevertheless, Ms. Foster appeared at the Rule 21 hearing and waived oral argument. The Accused requested oral argument pursuant to UTCR 5.050 and the court refused. The court then ruled from the bench that the plaintiff (client of the Accused) was liable for Ms. Foster's attorney fees pursuant to ORCP 71 by finding that the December 8, 2008, letter he sent to her was a "false certification to the court." The Accused filed an appeal of that order, with the consent of his client. The appeal was later settled out of court and paid by the Accused personally. Ms. Foster originally billed her clients in excess of \$20,000 for the Miller premises liability claim that she did not turn over to the insurance carrier and in which her clients had been dismissed less than 60 days after the suit was filed. She later reduced the bill to less than half, and the Andersons paid between \$4,000 and \$5,000 out of pocket.

## DISCUSSION AND CONCLUSIONS OF LAW

### **Third Cause of the Complaint:** Violation of RPC 1.3.

The Bar alleges that the Accused violated RPC 1.3 by:

- A. failing to dismiss parties between May 2008 and February 2009;
- B. between May 2008 and February 2009 failing to respond to Ms. Foster's messages and letters;
- C. by delaying filing the amended Complaint from December 2008 to February 2009;
- D. by failing to communicate with opposing counsel and forcing Ms. Foster to file a Rule 21 Motion; and
- E. by failing to respond to Ms. Foster's Rule 21 Motion resulting in a judgment against his client for attorney fees.

A. The Bar alleges that the Accused failed to dismiss parties he "knew were not responsible" from the Miller Complaint between May 2008 to February 2009. The case was filed on the last day of the statute of limitations and therefore service must be affected within 60 days of the Complaint being filed, May 7, 2008. The Accused directed his process server that the Andersons and their entity, Clark Creek Village Apartments, were not the correct defendants and not to complete service on them, thereby judicially "dismissing" them.

The Accused did not have a duty to dismiss the Andersons on the request of Mr. Keys nor even Ms. Foster. Doing so absent additional investigation would have been a violation of his ethical duties to his client. *In re Magar*, 66 P3d 1014, 1022, 66 P3d 1014 (2003). When he had the assurances of a trusted colleague that he had the correct, insured defendant, he then took the necessary steps to dismiss the Andersons. He did not need to dismiss an entity owned by the Andersons because their entity, Clark Creek Village Apartments, had never been named or sued. He is not ethically responsible for Ms. Foster's assumptions or misunderstandings on that point. He is also not ethically responsible for Ms. Foster checking the status for her own clients on OJIN or with the courts should she be concerned.

B. The Bar alleges that the Accused violated RPC 1.3 by failing to respond to Ms. Foster's messages and letter between May 2008 and February 2009. The Accused testified that he left a message for Ms. Foster after speaking with Mr. Winkler sometime after April 29, 2008, informing her that he would be dismissing her clients. There was no need for them to communicate again before the letter that the Accused mistakenly sent in December 2008. When the Accused became aware that Ms. Foster had received the "ten day letter," he testified that he left two messages for her at her law firm, with unknown people, during a snowstorm. Ms. Foster testified she was not able to get into the office for several days during December. There appeared to be missed communication on both sides, but that does not constitute an ethics violation.

C. The Bar alleges that the Accused neglected the case by delaying the filing of the amended Complaint from December 2008 to February 2009. The Accused testified that he understood Mr. Winkler would file an answer of "general denial" first, thereby waiving certain affirmative defenses, and then he would amend the Complaint. He believed this was the safest course of action for his client to be certain he had the correctly named insured defendant. Mr. Winkler also stated twice in letters that he would file his answer after venue had been changed. Protecting his client's interest is not neglect, even if it delays the case. *In re Magar, supra*.

D. The Bar alleges that the Accused failed to communicate with Ms. Foster in December 2008, thereby "forcing" her to file a Rule 21 Motion. The Accused testified to the contrary. It is not an ethics violation of neglect because opposing counsel does not get a message or does not consider less costly and time consuming responses to a letter sent in error.

E. Finally, in the third cause, the Bar alleges that the Accused violated RPC 1.3 by failing to respond to Ms. Foster's Rule 21 Motion thereby resulting in a judgment against his client for her attorney fees. The Accused testified that it was his intention to respond to her motion at oral argument. The Andersons had already been dismissed and their property had never been named, so the Accused assumed that it would be a matter easily resolved orally. For reasons that are unclear on the record, the judge in Marion County would not allow the Accused to speak at oral argument when Ms. Foster waived it, in violation of

UTCR 5.050. Furthermore, the Accused had filed the amended Complaint six weeks before the hearing, further clarifying the roles of the party. He did not expect that Ms. Foster would be awarded attorney's fees. It is not an ethics violation to have a court rule against an attorney when the attorney has made good faith, legally reasonable decisions on a case. The Bar has not provided any legal precedent to the contrary.

The Bar has failed to meet their burden on all allegations of the third cause of the Complaint.

**Fourth Cause of the Complaint:** Violation of RPC 1.7(a)(2) and RPC 8.4(a)(4).

In the fourth and final cause of the Complaint, the Bar alleges that:

- A. the Accused had a personal conflict of interest to avoid a malpractice claim, and violated RPC 1.7(a)(2) and RPC 8.4(a)(4) by failing to advise Ms. Foster that he would dismiss the claims against the Andersons, thereby forcing her to file a Rule 21 Motion;
- B. failing to respond to Ms. Foster's Rule 21 Motion or by anticipating that Ms. Foster would waive oral argument and that she would request that his client would be held in default;
- C. that his failure to respond to the Rule 21 Motion would result in a judgment against his client of \$3,000; and
- D. that filing an appeal of the court's ruling subjected his client to a risk of additional costs and fees.

A. As previously summarized, the Accused is not ethically responsibly for the choices Ms. Foster made. He did not have a conflict of interest with his client because Ms. Foster filed a Rule 21 Motion. With regards to conduct prejudicial to the administration of justice:

To establish a violation of those rules, the Bar must show that:

“(1) the accused lawyer's action or inaction was improper; (2) the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding; and (3) the accused lawyer's conduct had or could have had a prejudicial effect upon the administration of justice. The administration of justice includes both the procedural functioning of the proceeding and the substantive interests of parties to the proceeding. Prejudice may arise from several acts that cause some harm or a single act that causes substantial harm to the administration of justice.” *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003) (synthesizing test from *In re Haws*, 310 Or 741, 746–48, 801 P2d 818 (1990)) (citations omitted).

*In re Paulson*, 346 Or 676, 683, 216 P3d 859 (2009). The panel does not find that the Bar has met the first element. A letter sent by mistake, and absent all indication that it was

intentional, is not an improper act, and the Bar has not provided any evidence or precedence to suggest otherwise.

B. As previously summarized, the Accused did not commit an ethics violation by failing to respond to Ms. Foster's Rule 21 Motion. Further, this panel is unaware of how an attorney should be able to anticipate an unlikely strategy by opposing counsel, especially when it involves an attorney requesting a default in a case when she does not represent any of the parties to that case. The Accused's conduct was not prejudicial to the administration of justice for reasons set out above.

C. and D. The court's decision in this case was confusing to the Accused and to this panel. The panel is unaware of any case law whereby a signed letter to another attorney is a "certification to the court" such that it triggers sanctions for attorney fees pursuant to ORCP 71, and Bar counsel did not provide any case law to support that contention. This is important because it is why the Accused chose to appeal the case: in his professional opinion, the court's ruling was without merit, and it was in his client's best interest to appeal the decision. This panel is unaware of any case law or ethics rules that make it a conflict of interest to file a good faith appeal of a judicial ruling. The Accused testified that he explained the risks of appealing to his client and she consented. This is neither a conflict of interest nor conduct prejudicial to the administration of justice. The Bar has not met their burden on the fourth cause of the Complaint.

### **CONCLUSION**

This trial took four days of testimony and countless hours of attorney time for a relatively straightforward case that was lacking in evidence, let alone evidence that reached the level of clear and convincing. The Bar failed to meet its burden on every allegation.

### **DISPOSITION**

The Trial Panel found that there were no violations of RPC 1.3, WRPC 1.3, or RPC 1.7(a)(2) in the Smith matter (Case No. 11-57), or of RPC 1.3, RPC 1.7(a)(2), or RPC 8.4(a)(4) in the Miller matter (Case No. 11-111). The Accused is acquitted and the Complaint is dismissed.

IT IS SO ORDERED.

Dated this 11th day for February, 2013.

Signed:

/s/ Leah A. Johnson  
Leah A. Johnson, Chairperson

/s/ David W. Green  
David W. Green

/s/ John Rudoff  
Dr. John Rudoff

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 11-58 and 12-151
	)	
ERIC J. FJELSTAD,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violations of RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), RPC 3.5(b), RPC 5.3(a), and RPC 8.4(a)(4). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	July 12, 2013

**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 thirty (30) days, effective July 12, 2013, for violations of RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), RPC 3.5(b), RPC 5.3(a), and RPC 8.4(a)(4).

DATED this 18th day of April, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Nancy M. Cooper  
 Nancy M. Cooper, Region 5  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Eric J. Fjelstad, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 Multnomah County, Oregon.

3.

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

4.

On December 13, 2012, an Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging in the Luby matter (Case No. 11-58), violation of RPC 3.3(a)(1) (false statement of fact to tribunal), RPC 3.3(d) (failure to disclose material facts in an *ex parte* appearance), RPC 3.5(b) (*ex parte* communication with the court), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). In the Bijlani matter (Case No. 12-151), the Bar alleged that the Accused has violated RPC 1.4(a) (failure to communicate), RPC 1.15-1(a) (failure to promptly deliver client’s property), and RPC 5.3(a) (failure to supervise nonlawyer assistant). 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.

#### **Luby Matter:**

In 2009, the Accused represented Kory Williams to foreclose a construction lien. The defendant, PMP, LLC, was represented by Kevin Luby (hereinafter “Luby”). On December 9, 2009, the court erroneously dismissed the case on the grounds that it had not been

submitted to arbitration. In fact, the relief sought was not subject to the mandatory arbitration requirements of ORS 36.405.

6.

The Accused and Luby briefly discussed the erroneous dismissal on December 14, 2009, while attempting to settle the case. However, settlement negotiations broke down, and on January 8, 2010, the Accused filed an *ex parte* motion to set aside the dismissal. The Accused did not serve this motion on Luby or inform Luby of the day and time of his *ex parte* appearance.

7.

The Accused's motion was denied by the court because the original complaint filed by the Accused's predecessor counsel alleged that the case was "subject to mandatory arbitration." The court told the Accused that he must remove this language before it could grant the motion to set aside. On January 15, 2010, the Accused filed a motion for leave to amend, accompanied by an amended complaint. The Accused did not serve Luby with a copy of the motion to amend or inform him of the exact date and time of his *ex parte* appearance. On January 21, 2010, the court reinstated the case and set a new trial date of April 1, 2010. Notices of the trial date were sent to both parties.

8.

On or about February 18, 2010, after receiving a trial notice from the court, Luby requested that the Accused provide him copies of the motions and any other documents the Accused had filed with the court. On or about February 22, 2010, Luby reiterated his request for copies of the motions and the motion to amend. On February 22, 2010, the Accused gave Luby copies of all the motions and supporting affidavits he had filed with the court. On March 30, 2010, Luby moved to vacate the orders the Accused had obtained on his motion to amend.

9.

**Bijlani Matter:**

In 2005, Savita Bijlani (hereinafter "Bijlani") hired the Accused to pursue two employment discrimination claims against her employer, the Bureau of Labor and Industries (hereinafter "BOLI"). In 2006, both cases settled for \$2,500 payable to Bijlani and \$9,000 to the Accused for attorney's fees. However, shortly after the parties had agreed to the settlement, Bijlani had second thoughts and did not sign the settlement agreement.

10.

A couple of weeks later, in November 2006, the Accused received two checks (for \$2,500 and \$9,000, respectively) from BOLI pursuant to the settlement agreement. He did not tell Bijlani that he had received them, nor did he return them to the State because the

settlement had failed, but put them in his office desk drawer. In March 2007, Stephen Krohn (hereinafter “Krohn”) with the Department of Justice wrote to the Accused and told him the checks were no longer negotiable and enclosed two new checks for the same amounts. The Accused failed to tell Bijlani he received the replacement checks and placed both checks in his desk drawer. Later in March 2007, the Accused deposited the \$9,000 check into his business checking account.

11.

Between 2006 and 2007, Bijlani told the Accused she wanted to pursue a third claim against BOLI. Bijlani’s case involved related worker’s compensation claims, and the Accused refused to represent Bijlani regarding those claims. Bijlani hired Shelley Edling (hereinafter “Edling”) to represent her in this matter. Between June and July 2007, Edling contacted the Accused and told him that BOLI had agreed to mediate the worker’s compensation claims and re-open Bijlani’s discrimination claims in a global settlement. On July 23, 2007, the Accused, Bijlani, and Edling participated in a mediation with BOLI. BOLI agreed to pay Bijlani an additional \$2,500 (for a total of \$5,000) to settle all her claims and pay the Accused another \$500 in attorney fees. On that day, Bijlani signed a release of all claims.

12.

On July 26, 2007, the Accused received from the state a \$3,000 check (\$2,500 for Bijlani and \$500 for the Accused) made payable to his firm on Bijlani’s behalf. The Accused again failed to promptly tell Bijlani he had received the funds, nor did he return the check to the state, and placed the check in his desk drawer. On August 3, 2010, the Accused deposited the entire \$3,000 check into his firm’s business checking account.

13.

The Accused represented that on September 18, 2007, he wrote Bijlani to inform her that he had received the \$3,000 settlement proceeds and was “holding the check” for her. However, Bijlani never received the letter. Unaware of how long it would take to receive settlement proceeds, Bijlani waited two years before she had her husband contact the Accused to represent her in additional discrimination claims. Again on November 3, 2009, Bijlani hired the Accused on a contingency basis to represent her.

14.

BOLI was represented by Department of Justice lawyer, Marc Abrams (hereinafter “Abrams”). On August 31, 2010, Abrams deposed Bijlani and asked about her previous settlement agreement. Abrams told her that checks worth \$5,000 had been issued to her in 2007. Bijlani did not know that the Accused had received those settlement proceeds.

15.

On September 1, 2010, Abrams wrote the Accused that the State had mailed two sets of checks (in 2006 and 2007) in the amounts of \$2,500 and \$9,000 to his firm. On October 11, 2010, Bijlani demanded that the Accused send her the \$5,000 settlement proceeds.

16.

The Accused and Bijlani began to disagree about how to proceed in the case described in paragraph 13 above, and on October 15, 2010, the Accused informed Bijlani that he intended to withdraw from the representation. On October 18, 2010, Bijlani protested the Accused's withdrawal and again asked about her \$5,000.

17.

On November 1, 2010, Bijlani wrote the Accused and again inquired about her \$5,000. On November 2, 2010, Judge Jean K. Maurer denied the Accused's motion to withdraw from representing Bijlani in the case described in paragraph 13 above. On December 16, 2010, Bijlani asked the Accused to mail her the \$2,500 check payable to her that the Accused had in his possession. He did so and assured her that he would pay the remaining \$2,500 at a later date. In May 2011, the Accused paid Bijlani the remaining \$2,500.

### **Violations**

18.

The Accused admits that in the Luby matter, by engaging in the conduct described in paragraphs 5 through 17, he violated RPC 3.5(b) and RPC 8.4(a)(4). In the Bijlani matter, the Accused admits that he violated RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), and RPC 5.3(a).

Upon further factual inquiry, the parties agree that the charge(s) of alleged violation(s) of RPC 3.3(a)(1) (false statement of fact to tribunal) and RPC 3.3(d) (failure to disclose material facts in an *ex parte* appearance) should be and, upon the approval of this stipulation, are dismissed.

### **Sanction**

19.

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 his client to properly handle client property and to adequately communicate. *Standards*, §§ 4.1, 4.4. He also violated duties he owed to the legal system. *Standards*, §§ 6.1, 6.3.
- b. **Mental State:** The Accused's conduct demonstrates both negligence and knowledge. He acted knowingly when he failed to inform Luby that he would appear in court *ex parte* and file his motion to set aside the dismissal. The Accused acted negligently when he failed to deposit Bijlani's settlement funds into an interest bearing account. Initially, he acted negligently when he failed to communicate with Bijlani and notify her of the receipt of the settlement funds, but his mental state became knowing after he received the second installment of settlement funds and failed for more than six weeks to notify Bijlani that he had received it.
- c. **Injury:** There was actual and potential injury to the court and the opposing party as a result of the Accused's *ex parte* contact with the court in the Luby matter in that it forced the opposing party to incur the additional expense of moving to set aside the amended complaint.

Bijlani was actually injured when the Accused failed to inform her of the receipt of her settlement funds and failed adequately to supervise his secretary's handling of Bijlani's funds. Bijlani was also injured when the Accused failed to respond to her inquiries.

**d. Aggravating Circumstances:**

There are multiple offenses. *Standards*, §9.22(d).

The Accused has been an active member of the Oregon State Bar since 1989, which constitutes substantial experience in the practice of law. *Standards*, §9.22(i).

There is some evidence of selfish motives. *Standards*, §9.22(b).

- e. **Mitigating Circumstances:** The Accused has been cooperative toward these proceedings. *Standards*, §9.32(e).

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; and when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury to a party or cause interference or potential interference with the outcome of the legal proceeding. *Standards* § 4.12; § 6.32.

20.

Oregon case law is in accord. *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension for neglect); *In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996) (60-day suspension for neglect and failure to communicate); *In re Dugger*, 334 Or 602, 54 P3d 595 (2002) (60-day suspension for *ex parte* contact with the court); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (60-days suspension for removing client funds from trust before they were earned); *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (30-day suspension for failure to deposit client funds into trust and refund unearned fees).

21.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of RPC 3.5(b) and RPC 8.4(a)(4) in the Luby matter, and RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(d), and RPC 5.3(a) in the Bijlani matter, the sanction to be effective July 12, 2013.

22.

In addition, on or before September 1, 2013, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$260.50, incurred for his deposition. Should the Accused fail to pay \$260.50 in full by September 1, 2013, the Bar may thereafter, without further notice to the Accused, obtain 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.

23.

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 Kerry Smith, 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 Kerry Smith has agreed to accept this responsibility.

24.

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.

25.

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.

26.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: the State of Washington.

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 15th day of April, 2013.

/s/ Eric J. Fjelstad

Eric J. Fjelstad, OSB No. 892383

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 Nos. 11-123, 11-124, 12-58  
)  
MARIEL MARJORIE ETTINGER, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Ronald L. Roome, Chairperson  
Jennifer F. Kimble  
John G. McBee, DDS, Public Member  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.16(d),  
RPC 8.1(a)(2), RPC 8.1(c), RPC 8.4(a)(2), and RPC  
8.4(a)(3). Trial Panel Opinion. 2-year suspension.  
Effective Date of Opinion: April 30, 2013

**OPINION OF THE TRIAL PANEL**

**INTRODUCTION:**

After the Default of the Accused, Mariel Marjorie Ettinger, the Trial Panel Chairperson requested the Oregon State Bar to submit a Sanctions Memorandum. The Accused was given time to respond to the Bar’s Sanctions Memorandum, but did not do so. The Trial Panel then convened on January 30, 2013 to determine whether the Accused had violated certain disciplinary rules as alleged by the Oregon State Bar and, if so, what sanction would be appropriate. The Trial Panel consisted of attorney Jennifer F. Kimble, public member John G. McBee DDS, and attorney and Trial Panel Chairperson Ronald L. Roome.

**PROCEDURAL HISTORY:**

The Oregon State Bar filed a Formal Disciplinary Complaint against attorney Mariel Marjorie Ettinger (hereinafter “Accused) on March 20, 2012. She was served with the Complaint on September 27, 2012. The Accused, who was admitted to the Oregon State Bar in 2008, did not file an Answer to the Complaint or otherwise appear in this proceeding. The Bar then served the Accused with a ten-day notice of the Bar’s intent to seek an order of default. In doing so, the Bar gave the Accused until October 26, 2012 to file an Answer to the

Complaint. When the Accused again failed to respond, the Bar filed a formal Motion for Order of Default. The Disciplinary Board Regional Chairperson granted the Bar's Motion for Order of Default on November 12, 2012, concluding that the Accused was in default for not filing an Answer and ordering, as a result, that the allegations in the Bar's Formal Complaint be deemed true. *See* BR 5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004).

As a result of the Default by the Accused, it was not necessary to take testimony when the Trial Panel convened. Nor did the Accused request the Trial Panel to hear testimony with respect to the alleged disciplinary violations or with respect to determination of the appropriate sanction. The Trial Panel accepted the Oregon State Bar's position as stated in its Sanctions Memorandum.

#### **TRIAL PANEL OPINION:**

For the reasons set out below, the trial panel is unanimous in concluding that the Bar met its burden of proof, that the Accused violated the disciplinary rules as alleged by the Bar, and that the Accused should be suspended from the practice of law in the State of Oregon for a period of two (2) years.

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

In the Forest Dale Milich matter (Case No. 11-124), the Accused was charged by the Oregon State Bar with failing to refund the unearned portion of client funds deposited with the Accused, in violation of RPC 1.16(d), and with failing to respond to a lawful demand for information from Disciplinary Counsel's office, in violation of RPC 8.1(a)(2). The Accused represented Milich in 2010 on DUII and criminal menacing charges. Milich deposited funds with the Accused for his defense. While both the DUII and criminal menacing matters were still pending, the Accused disappeared and unearned client funds deposited with the Accused were not returned to Milich. Thereafter, Milich had to retain two different attorneys to defend him on the separate charges. Also, in an attempt to recover the unearned portion of the money he deposited with the Accused, Milich had to submit a claim to the Client Security Fund. The Accused then failed to respond when the Disciplinary Counsel's office initiated an investigation into the Accused's handling of Milich's funds.

In the Arden Abel matter (Case No. 11-123), the Accused was charged by the Oregon State Bar with neglecting a legal matter as a result of her failure to attend her client Abel's probation revocation hearing, in violation of RPC 1.3. She was also charged with failing to keep Abel reasonably informed about the status of his case and with failing to promptly reply to requests for information from Abel, in violation of RPC 1.4(a). Additionally, the Accused was charged with engaging in conduct prejudicial to the administration of justice when she caused a court hearing to twice be unnecessarily rescheduled. The Accused was appointed by the court in 2010 to represent Abel in a criminal proceeding. Subsequently, both the Accused and her client Abel failed to attend the client's scheduled probation revocation hearing. The court reset the hearing for later that same day and was then forced to reset the hearing for the

next month. The Accused represented to the court that she had filed a motion to continue the original hearing and that her client was in a residential treatment program at the time of the original hearing. The Accused later admitted to the court that these representations were mistaken. Thereafter, between July 2010 and March 2011, the Accused abandoned her client, failing to return calls from Abel, failing to inform him of the status of his case, and failing to inform him of court appearances.

The Oregon State Bar also charged the Accused with conduct reflecting adversely on her honesty, trustworthiness, and fitness to practice law, and with conduct involving dishonesty, in violation of RPC 8.4(a)(2) and RPC 8.4(a)(3). The Bar alleged that between August 2010 and August 2011, the Accused engaged in conduct that involved crimes or violations, including two arrests for Driving Under The Influence of Intoxicants, Reckless Driving, Failing to Perform the Duties of a Driver, Failure to Appear, Providing False Information to a Police Officer, Criminal Trespass, Initiating a False Police Report, Resisting Arrest, and violation of a diversion agreement/failure to obey a court order.

Additionally, the Oregon State Bar charged the Accused (Case No. 12-58) with failing to cooperate with the State Lawyer's Assistance Committee (hereinafter "SLAC"), in violation of RPC 8.1(c). SLAC is authorized by statute to investigate and resolve complaints or referrals regarding lawyers whose performance or conduct may impair their ability to practice law or may impair their professional competence. The Accused was referred by the Bar to SLAC in October 2010. However, despite her obligation to do so, the Accused failed to respond or otherwise cooperate with SLAC.

The Oregon State Bar also charged the Accused with failure to respond to lawful demands made by the Disciplinary Counsel's office in connection with a disciplinary matter, in violation of RPC 8.1(a)(2). On several occasions in early 2012 the Disciplinary Counsel's office requested the Accused to respond to a disciplinary complaint filed by SLAC. The Accused made no response to these requests about her conduct.

### SANCTIONS

As a result of the Default by the Accused, the facts of the underlying Rule violations, as set forth in the Formal Complaint, are deemed to be true. BR 5.8(a); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001).

The Trial Panel considered the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), Oregon case law and the Oregon State Bar's Sanction Memorandum. The *Standards* set out the four factors for the Trial Panel to consider in its evaluation of the Accused's conduct: (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 factors. *Standards*, §3.0.

1. **Duty Violated.** The Trial Panel found that the Accused Mariel Marjorie Ettinger violated important ethical duties she owed to her clients, to the legal system, and to the profession. She violated the duty she owed to her clients when she failed to act with reasonable diligence and promptness in representing her clients. *Standards*, §4.4. She also violated her duty of adequate communication with her clients. *Standards*, §4.6. Next, the Accused violated the duty she owed to the public when she engaged in a course of conduct involving dishonesty, deceit, misrepresentation, and the commission of several crimes, all of which reflected adversely on her honesty, trustworthiness, and fitness to practice law. *Standards*, §5.1. Finally, the Accused violated the duty she owed to the legal profession when she failed to cooperate with the State Lawyer’s Assistance Committee and failed to cooperate with the Oregon State Bar’s investigation into her conduct. *Standards*, §7.0.
2. **Mental State.** The Trial Panel found that the Accused acted 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*, §7. The Bar may rely upon the facts alleged in the complaint to establish the mental state of an accused lawyer. *In re Kluge I*, 332 Or 251, 262, 27 P3d 102 (2002). Further, because the Accused was in Default, the allegations in the Bar’s Formal Complaint are deemed to be true. *See* BR 5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004).

The Trial Panel found that the Accused acted knowingly when she failed to refund the unearned portion of Milich’s funds and when she abandoned her representation of him, taking no further action on his DUII and criminal menacing actions. Similarly, the Trial Panel found that the Accused acted knowingly when she neglected Abel’s matter and failed to communicate with Abel. She was aware of the Abel probation violation hearing and of telephone calls from Abel, putting her on notice that she was not attending to case matters entrusted to her. The Trial Panel further determined that the Accused acted knowingly when she engaged in actions involving the crimes and violations set out above. Finally, the Trial Panel determined that the Accused acted knowingly when she failed to respond to the Oregon State Bar’s inquiries in the Milich and SLAC matters.

3. **Actual or Potential Injury.** The Trial Panel found that the Accused caused injury to her clients, the public, the legal system, and the profession. “Injury” is harm to a client, the public, the legal system, or the profession that results from a lawyer’s misconduct. *Standards*, §7. Injury can be either actual or

potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The Accused's conduct caused actual and potential injury to Milich and Abel. The failure to return the unearned portion of Milich's funds resulted in loss of money to the client and, when the Accused disappeared, Milich was left to respond to his criminal matters without legal representation. The neglect of Abel's probation violation could have resulted in issuance of an arrest warrant against Abel for failure to appear and could have resulted in revocation of his probation. Failing to communicate with Abel caused actual injury in the form of client anxiety and frustration. See *In re Cohen*, 330 Or 489, 8 P3d 953 (2000) (client anxiety and frustration as a result of attorney neglect can constitute actual injury).

The Accused's criminal conduct caused injury to the profession by damaging the public's confidence in attorneys. *In re McDonough*, 336 Or 36, 44, 77 P3d 306 (2003).

The court sustained actual injury because the Accused's failure to appear caused additional work for the court, caused the court to spend more time on the matters than would have been required, and had the potential to disrupt the court's ability to efficiently manage its docket.

The Accused's failure to cooperate with the State Lawyer's Assistance Committee caused harm to the profession and the public, not the least of which was delaying intervention before any other client was or could have been adversely impacted.

Finally, the Accused's failure to cooperate with the Oregon State Bar's investigation into her conduct caused actual harm to both the legal profession and the public. Among other things, the Bar's investigation was delayed by the Accused's failure to respond and so too was the resolution of the complaint against her. *In re Miles*, 324 Or 219, 222, 923 P2d 1219 (1996).

4. **Aggravating or Mitigating Circumstances.**

"Aggravating Factors" are considerations that justify an increase in the degree of discipline to be imposed. *Standards*, §9.22. The Trial Panel found that a number of aggravating factors were present in this case. They include multiple offenses and a pattern of misconduct. *Standards*, §9.22(c), (d). Additionally, the Accused repeatedly refused to or failed to cooperate with the Oregon State Bar's investigation and prosecution. *Standards*, §9.22(g), (e). The claims against the Accused also included illegal conduct. *Standards*, §9.22(k). The

only potential mitigating circumstance was the Accused's absence of a prior disciplinary record. *Standards*, §9.32(a).

The Trial Panel found that under the circumstances addressed above the *Standards* warrant suspension of the Accused:

*Standards*, §4.12. Suspension is generally appropriate when a lawyer knows or should know that 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 the client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

*Standards*, §5.12. Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in *Standards*, §5.11, and that seriously adversely reflects on the lawyer's fitness to practice.

*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.

The Trial Panel also found that under the circumstances of this disciplinary proceeding Oregon case law warrants suspension of the Accused. *See In re Becker*, 309 Or 633, 789 P2d 663 (2000); *In re Parker*, 330 Or 541, 9 P3d 109 (2000); *In re McDonough*, 336 Or 36, 77 P3d 306 (2002).

Although the *Standards* recognize mitigating factors, the Trial Panel concluded that no mitigating factors were present in this case sufficient to reduce the Trial Panel's evaluation of the appropriate sanction. In particular, no information was presented to the Trial Panel to warrant mitigation of the sanction. *See In re Cohen*, 330 Or 489, 502, 8 P3d 953 (2000). The Trial Panel did note, however, that the Accused has no prior record of discipline.

### **SANCTION IMPOSED**

The purpose of sanctions is "to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system and the legal profession." *Standards*, §1.1; *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). Lawyer discipline is also intended to protect the public and the administration of justice from lawyers who conduct themselves dishonestly or who engage in illegal acts.

The Trial Panel concluded that the Accused is unable or unwilling to conform her conduct to the required ethical standards.

**ORDER**

For the foregoing reasons,

IT IS HEREBY ORDERED that the Accused, Mariel Marjorie Ettinger, is hereby suspended from the practice of law in the state of Oregon for a period of two (2) years.

/s/ Ronald L. Roome

Ronald L. Roome, OSB #880976

Trial Panel Chairperson

/s/ Jennifer F. Kimble

Jennifer F. Kimble, OSB #913376

Trial Panel Member

/s/ John G. McBee

John G. McBee, DDS

Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-35
	)	
ROBERT T. SCHERZER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	Wayne Mackeson
Disciplinary Board:	None
Disposition:	Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	April 30, 2013

**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 4.2.

DATED this 30th day of April, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Nancy M. Cooper  
 Nancy M. Cooper, Region 5  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Robert T. Scherzer, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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, 1979, 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 March 16, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 4.2. 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 December 2011, the Accused represented Regina Handley in a proceeding brought by her former husband to modify the parenting time provisions of their judgment of dissolution of marriage. Handley’s 13-year-old daughter was the subject of the modification proceedings, and on December 6, 2011, the court appointed counsel for the daughter. At all relevant times, the Accused knew the daughter was represented by counsel on the subject of parenting time with her father. On or about December 23, 2011, the Accused met with Regina Handley and had a brief conversation with the daughter regarding parenting time.

### **Violations**

6.

The Accused admits that, by engaging in the conduct described in paragraph 5, he violated RPC 4.2.

## 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 duty to the public to refrain from improper communications with represented parties. *Standards*, § 6.0
- b. **Mental State.** The Accused acted knowingly, i.e., with 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.
- c. **Injury.** The Accused caused no actual injury to any of the parties to the modification proceeding, having had no effect on the attorney-client relationship between the daughter and her lawyer and no effect on the outcome of the case. There was, however, the potential for his conduct to harm the interests of one or more of the parties. *Standards*, p. 6.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused has a prior record of discipline, having been admonished in May 2008 for communication with a represented party (OSB Case No. 08-56). *Standards*, § 9.22(a);
  2. The Accused has substantial experience in the practice of law, having been admitted to the Oregon State Bar in 1979. *Standards*, § 9.22(i); and
  3. His client’s daughter was a vulnerable victim due to her age. *Standards*, § 9.22(h)
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused did not act with a dishonest or selfish motive. *Standards*, § 9.32(b); and
  2. The Accused made a timely good faith effort to rectify the consequences of his conduct by offering to resign from representing his client in the case. *Standards*, § 9.32(d).

8.

Under the ABA *Standards*, 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 potential injury to a party or interference with the outcome of the legal proceeding. *Standards*, § 6.33. Suspension is generally appropriate when a lawyer acts knowingly and causes injury or potential injury. *Standards*, §6.32.

9.

Although the Accused acted knowingly, Oregon case law favors reprimand under similar circumstances. See *In re Knappenberger*, 338 Or 341, 360, 108 P3d 1161 (2005); *In re Newell*, 348 Or 396, 413, 234 P3d 967 (2010).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 4.2, the sanction to be effective upon approval of this stipulation 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.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: None.

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 16th day of April, 2013.

/s/ Robert T. Scherzer

Robert T. Scherzer

OSB No. 791052

EXECUTED this 23rd day of April, 2013.

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. 12-19  
 )  
MARK R. MALCO, )  
 )  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a). Stipulation for Discipline.  
Public Reprimand.  
Effective Date of Order: May 1, 2013

**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 1st day of May, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ Pamela Yee  
Pamela Yee, Region 4  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Mark R. Malco, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 24, 1976, 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 opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On March 7, 2012, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.2(a), RPC 1.3, RPC 1.4(a), and RPC 1.5(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.

On or about May 20, 2011, the Accused had a 2.5 hour consultation on an hourly basis with Beverly Ritz (hereinafter “Ritz”) regarding concerns Ritz had about the probate of her mother’s estate in Maryland and the handling of her mother’s property in trust. By the conclusion of that consultation, Ritz determined that she did not want to pursue any court action seeking to remove her brother as personal representative, alleging misappropriation of assets by her brother, or contesting the modification of her mother’s trust on the basis of undue influence or lack of capacity. Ritz asked the Accused to review documents she provided and determine how best to communicate her concerns to the Maryland attorney who represented her brother in the probate and trust matters. At the conclusion of the consultation Ritz paid the Accused \$800 for the consultation and some future services. Thereafter, the Accused carefully reviewed the documents Ritz had provided. The Accused also had several telephone conversations with Ritz, as a result of which Ritz mailed, on May 31, 2011, some pages that were missing from the documents she had earlier provided. During those conversations, the Accused informed Ritz that he was still in the process of researching Maryland laws.

6.

From May 20, 2011, through on or about June 28, 2011, in preparation for writing to the Maryland lawyer, the Accused reviewed the documents Ritz provided, conducted research regarding potential legal issues, and wrote a brief memo regarding those issues. By June 28, 2011, the Accused had performed billable work that he believed entitled him to fees in excess of the payment he had received, and a substantial amount of work for which he did not intend to bill Ritz. The Accused reached the belief that obtaining the necessary understanding of the documents and Maryland law, as well as identifying some preliminary basis for prompting the Maryland attorney to be more cautious in his dealings with Ritz and her brother, would require significantly more work than was originally anticipated. The Accused put off communicating with Ritz or the Maryland attorney until he completed the work he believed was necessary to proceed and he thereafter became involved with other matters. The Accused did not send Ritz an invoice describing his efforts, fees earned, or the need to pay any additional fees.

7.

Ritz telephoned the Accused from time to time in July 2011, seeking information regarding the status of her matter and the efforts of the Accused. The Accused did not return those calls.

8.

On or about July 31, 2011, the Accused received a letter from Ritz. In the letter, Ritz said she was puzzled that she had heard nothing more from the Accused and received no invoice for his services. The Accused did not respond to that letter or Ritz's subsequent telephone calls.

9.

On or about September 12, 2011, Ritz mailed the Accused a letter terminating her employment of the Accused. On September 13, 2011, prior to receiving Ritz's letter terminating his employment, but after the Accused became aware that Ritz had contacted the Bar about his failure to return her calls, the Accused completed the additional day of work he believed was necessary to formulate a plan for proceeding to communicate with the Maryland attorney, and he called Ritz to discuss the plan. Ritz did not return the Accused's calls and, on or about September 19, 2011, she sent the Accused a letter, confirming her decision to terminate the employment of the Accused.

10.

The Accused did not have a selfish motive for failing to earlier communicate with Ritz and no dishonesty was involved.

## Violations

11.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 9, he violated RPC 1.4(a), which provides “A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” Upon further factual inquiry, the parties agree that the charges of alleged violation(s) of RPC 1.2(a), RPC 1.3, and RPC 1.5(a) should be and, upon the approval of this stipulation, are dismissed.

## 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’s failure to more promptly communicate with his client is analyzed as a violation of a lawyer’s duty to act with reasonable diligence and promptness in representing a client. *Standards*, § 4.4.
- b. **Mental State.** By failing to ensure adequate communication with his client, the Accused acted negligently rather than knowingly, i.e., he failed to heed a substantial risk that circumstances existed or that a result would follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 7.
- c. **Injury.** The Accused’s failure to ensure adequate communication caused Ritz to suffer anxiety and frustration.
- d. **Aggravating Circumstances.** The following aggravating circumstance applies:
  1. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to the practice of law in Oregon in 1976.
- 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. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards*, § 9.32(e).

13.

Under the ABA *Standards*, reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in communicating with a client and causes injury or potential injury to a client. *Standards*, § 4.43.

14.

Oregon case law is in accord. The Disciplinary Board has approved stipulations for public reprimands for violations of RPC 1.4 where the analysis of factors under the *Standards* was similar to the present matter. *In re Deal*, 25 DB Rptr 251 (2011); *In re Hunt*, 25 DB Rptr 233 (2011).

15.

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

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.

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 24th day of April, 2013.

/s/ Mark R. Malco

Mark R. Malco  
OSB No. 762344

EXECUTED this 25th day of April, 2013.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis  
OSB No. 032221  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 11-66 and 12-18  
)  
C. DAVID HALL, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: None  
Disciplinary Board: Frank J. Weiss, Chairperson  
Lee Wyatt  
Merritt L. Linn, Public Member  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 8.4(a)(3), and  
RPC 8.4(a)(4). Trial Panel Opinion. 150-day  
suspension.  
Effective Date of Opinion: May 29, 2013

**OPINION OF THE TRIAL PANEL**

**INTRODUCTION**

This matter came on for hearing on September 6, 2012. The Trial Panel consisted of Frank Weiss, Chairperson, Lee Wyatt, and public member Dr. Merritt Linn.<sup>1</sup> Stacy Hankin represented the Bar, and the Accused appeared pro se.

**NATURE OF THE CASE**

The Accused attorney, admitted to practice law in Oregon since 1974, is charged with violations of the Rules of Professional Conduct in connection with two separate matters, the Nguyen Matter and the Welch Matter.

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<sup>1</sup> Dr. Linn fully participated in the trial of this case, and also participated in the deliberations of the trial panel following the trial. Dr. Linn concurred with the Panel's initial conclusion that the Accused had violated the Rules of Professional Conduct in the manner alleged, but was unable to participate in the drafting of the opinion or the deliberations concerning the appropriate sanction due to a serious illness. Therefore, the Trial Panel's opinion will be presented under the signature of the remaining two panel members.

The Nguyen Matter relates to the Accused's representation of Hue Nguyen (hereinafter "Nguyen") in connection with a personal injury claim arising out of a March 25, 2005, automobile accident. The Accused filed a lawsuit on Nguyen's behalf, which was ultimately dismissed as a result of the Accused failing to serve the defendant within the applicable time limit. The Accused is charged with neglecting a legal matter, failing to communicate, and engaging in a misrepresentation by omission as a consequence of failing to inform Nguyen of the dismissal of her lawsuit.

The Welch Matter pertains to the Accused's representation of Evelyn Nelson (hereinafter "Nelson") in connection with her service as the personal representative of her husband's estate. The Accused is charged with neglecting a legal matter and conduct prejudicial to the administration of justice as a consequence of his failure to respond to a court notice and an order to show cause arising out of Nelson's failure to file an annual accounting in the manner required by ORS 116.083(1)(a).

### **ISSUES TO BE DETERMINED**

The Bar alleges that grounds for discipline exist under the following Rules of Professional Conduct:

RPC 1.3, which provides that: "A lawyer shall not neglect a legal matter entrusted to the lawyer."

RPC 1.4(a), which provides that: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." (Nguyen Matter only.)

RPC 8.4(a)(3), which 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." (Nguyen Matter only.)

RPC 8.4(a)(4), which provides that it is professional misconduct for a lawyer to: "engage in conduct that is prejudicial to the administration of justice." (Welch Matter only.)

### **BURDEN OF PROOF AND RULES OF EVIDENCE**

The Bar has the burden of establishing misconduct warranting discipline by clear and convincing evidence. BR 5.2. The Oregon Evidence Code does not apply to Bar disciplinary proceedings. Instead, the standard for admissibility is governed by BR 5.1(a).

### **FINDINGS AS TO GUILT**

In reaching the findings set forth below, the Trial Panel considered the testimony of Judge Elizabeth Welch, Ms. Debbie Hoesly, and Ms. Hue Nguyen, all of whom were offered by the Bar, along with the Accused's testimony on his own behalf. In addition, the Trial Panel received and admitted Exhibits 1-43, all of which were offered into evidence by the

Bar without objection. With few exceptions, the Accused did not dispute the material facts supporting the charges against him. His defense focused on mitigating factors and explanations for his conduct. Each of the matters, and the charges related to each matter, will be addressed in turn.

### **The Nguyen Matter**

#### **RPC 1.3 (Neglect of a Legal Matter)**

As the Supreme Court has explained, “[a]lthough one act of negligence is not sufficient to violate RPC 1.3, either a course of neglectful conduct or an extended period of neglect is sufficient.” *In re Jackson*, 347 Or 426, 435, 223 P2d 387 (2009). The undisputed facts demonstrate both a course of neglectful conduct and an extended period of neglect.

In 2005, the Accused was engaged to represent Nguyen in connection with a claim for personal injuries that she sustained in a March 25, 2005, automobile accident. The Accused filed suit against Zoe Shipley (hereinafter “Shipley”), the driver of the other vehicle, on March 22, 2007, shortly prior to the expiration of the applicable two-year statute of limitations. The complaint sought \$75,000. There was no real dispute concerning liability, and the driver’s insurer had expressed an interest in settling the matter.

Shortly after filing the complaint, the Accused wrote to Shipley’s insurer, Farmers Insurance, and asked whether it would be willing to accept service on Shipley’s behalf. On April 4, 2007, Farmers responded and advised the Accused to proceed with service on Shipley directly. On April 18, the Accused wrote to defense counsel assigned to represent Shipley and asked whether she would be willing to accept service on Shipley’s behalf. The next day, on April 19, defense counsel wrote back and advised the Accused that she was not authorized to accept service.

The Accused never took any steps to personally serve Shipley. He testified that he believed service to be unnecessary because Shipley’s attorneys had served a request for production of documents, which he believed constituted an appearance in the case. However, in July 2007, the Accused received a notice from the court indicating that Shipley had not appeared and that a dismissal would be entered in 28 days if an answer was not filed or a final judgment entered by that time. Accordingly, even assuming he believed an appearance had been made, the Accused had notice that the court was under a different impression and that the case was in danger of being dismissed if appropriate steps were not taken. The Accused took no action in response to this notice. As a result, a judgment of dismissal was entered on August 28, 2007.

While there was some dispute about how often the Accused and Nguyen spoke, they both agreed that a conversation took place between them in July 2010. Following this conversation, the Accused testified that he went to the courthouse in September 2010 to view the file and, at that time, learned that the matter had been dismissed. He knew that he had an

obligation to advise Nguyen of this fact. Nonetheless, he failed to take prompt action to advise Nguyen of the dismissal. Finally, on November 22, 2010, Nguyen contacted the court on her own and learned of the dismissal for the first time. That same day, she emailed the Accused and inquired about the status of her case. In her email she also indicated that she had been unsuccessfully trying to contact him by phone but had not heard back.

At a minimum, the record demonstrates that the Accused: (i) failed to make any efforts to serve Shipley, despite being told twice that her agents would not accept service on her behalf; (ii) failed to take any action in response to the court's notice that the lawsuit would be dismissed within 28 days; and (iii) ignored the case so completely that he was not aware it had been dismissed in August 2007 until over three years had passed. Taken together, the Bar has met its burden of establishing by clear and convincing evidence that the Accused neglected a legal matter that was entrusted to him.

**RPC 1.4(a) (Failure to Communicate)**

Under RPC 1.4(a), lawyers are obligated to keep their clients reasonably informed about the status of their matters and promptly comply with reasonable requests for information.

The Accused does not meaningfully contest that he failed to keep Nguyen reasonably apprised of the status of her lawsuit. He did not advise her that the case was subject to dismissal after he received the court's July 2007 notice. He did not promptly inform her of the dismissal after he discovered it in September 2010. Finally, he did not communicate with Nguyen even after she wrote to him and expressly inquired about the dismissal in her November 22, 2010 email. Finally, according to his own testimony (which, as will be discussed below, is not entirely credible) he had virtually no contact with her between 2007 and July 2010.

Nguyen testified that every couple of months she would call the Accused on the phone and leave a message, but that he never returned her calls. She testified to having spoken with him a couple of times on the phone and to having met with him in his office when she was visiting Oregon, which she did each year during the summer. On the occasions that she was able to speak with him, Nguyen testified that he assured her that he was working on the case, or that he would be getting to work on it. He never advised her that it had been dismissed, or that he had taken no action on the file.

The Accused denies having these conversations with Nguyen. Instead, he claims to recall no contact with her between 2007 and July 2010. However, while the amount of times that they spoke is uncertain, Nguyen's testimony that she met with the Accused in his office during her annual summer trips to Portland was credible. Moreover, Nguyen's testimony that her calls to the Accused went unanswered is corroborated by her November 22, 2010, email, in which she states: "I have been trying contact you by phone but don't hear back from you."

“RPC 1.4 requires lawyers to maintain reasonably adequate communication with their clients by keeping clients informed about the status of their matters, by complying with reasonable requests for information, and by explaining matters to the extent reasonably necessary to permit clients to make informed decisions.” *In re Synder*, 348 Or 307, 315, 232 P3d 952 (2010). The evidence amply illustrates that the Accused did not satisfy this obligation.

Among other things, the Accused failed to timely communicate that the case had been dismissed. A failure to timely communicate bad news has historically been held to be a violation. *In re Snyder, supra, citing In re Coyner*, 342 Or 104, 108, 149 P3d 1118 (2006). The Accused also failed to keep Nguyen informed about the status of her case. Nguyen credibly testified that she spoke with the Accused on multiple occasions and that he completely failed to advise her that nothing had been, or would be, done on her case, much less tell her that it had been dismissed. Even if the Accused’s testimony that he had no contact with her from 2007 to July 2010 is credited, his failure to have any contact with his client for several years would in itself constitute a violation, particularly in light of the fact that she was actively trying to contact him. *In re Snyder*, 348 Or at 315 (RPC 1.4(a) violated when, for an eight-month period, lawyer failed to communicate with his client concerning tactical decisions and ignored the client’s repeated inquiries).

**RPC 8.4(a)(3) (Engaging in Misrepresentation)**

According to the Accused’s own testimony, he became aware that Nguyen’s case was dismissed in September 2010. Nonetheless, he never contacted her to advise her of this fact. Instead, Nguyen eventually learned of the dismissal herself when she called the court on November 22, 2010. Further, the Accused did not even respond when Nguyen emailed him on November 22 to advise him that she had learned that the matter had been dismissed and to ask him what the status of her case was.

A lawyer engages in conduct involving misrepresentation when the lawyer makes a representation, either directly or by omission, that the lawyer knows is false and material. *In re Hostetter*, 348 Or 574, 594–95, 238 P2d 13 (2010). “A lawyer acts knowingly by being consciously aware of the nature or attendant circumstances of the conduct, but not having a conscious objective to accomplish a particular result.” *In re Lawrence*, 332 Or 502, 513, 31 P3d 1078 (2001).

As the Supreme Court has explained, “[a] misrepresentation can be . . . simply an omission of fact that is knowing, false, and material in the sense that, had it been disclosed, the omitted fact would or could have influenced significantly the hearer’s decision making process.” *In re Obert*, 336 Or 640, 649, 89 P3d 1173 (2004). Thus, in *Obert*, the court concluded that a lawyer had violated the predecessor to RPC 8.4(a)(3) by failing to inform a client that his case was over after the lawyer learned that the client’s appeal had been dismissed and could not be reinstated. *Obert*, 336 Or at 650. The same analysis applies here.

The Accused was aware that, due to his error, Nguyen's case had been dismissed and could not be refiled, as the statute of limitations had long ago run. Yet, he took no steps to timely notify Nguyen of that fact and, instead, waited for her to discover the dismissal herself some months later. Under the circumstances, the Bar has met its burden to show a violation of RPC 8.4(a)(3).

### **The Welch Matter**

#### **RPC 1.3 (Neglect of Legal Matter)**

The Accused was engaged to represent Nelson in her capacity as personal representative of her husband's estate. The estate was admitted to probate on January 12, 2010. Pursuant to ORS 116.083(1)(a), Nelson was required to file an annual accounting with the court by March 13, 2012. The Accused was responsible for, at a minimum, advising Nelson that an annual accounting needed to be filed with the court by the March 13, 2011, deadline. He did not file the annual accounting, and did nothing to ensure that it was filed.

On April 18, 2011, the court sent a notice to the Accused indicating that a citation would be issued if the Accused did not file the annual accounting, or provide a written explanation for the delay, within 30 days. The Accused received this notice, but took no action in response to it.

Having received no response, on August 23, 2011, the court issued a Citation for Removal to Nelson, copied on the Accused, requiring Nelson and the Accused to appear personally in court on September 28, 2011, to show cause why Nelson should not be removed as personal representative. The Accused spoke with Nelson about the Citation and advised her that he would "take care of this." Nonetheless, he did not appear at the September 28 hearing, request an extension of the hearing date, or do anything else in response to the Citation.

When the Accused failed to appear in court, Judge Welch, who was presiding over the hearing, called the telephone number that the court had on file for the Accused, but there was no answer. A few minutes later, Judge Welch called again, and again received no answer. Thereafter, Judge Welch requested that her clerk verify the Accused's number with the Bar, and it was determined that the court had the correct number.

Due to Nelson's and the Accused's failure to appear, Nelson was removed as personal representative of her late husband's estate. A replacement representative was appointed. The new personal representative repeatedly called the Accused in an effort to obtain his file so that she could prepare the required annual accounting. For months he failed to respond to her calls. Nelson also refused to speak with the replacement personal representative because she believed that she was still the personal representative and that the Accused was her attorney. Eventually, the Accused responded to a formal demand letter from the replacement personal representative, which was sent to him over six months after her appointment.

As previously discussed, although one act of negligence is not sufficient to violate RPC 1.3, a course of neglectful conduct is sufficient. *In re Jackson*, 347 Or at 435. Here, there is clear and convincing evidence of such a course of conduct. First, the Accused failed to timely file the annual accounting. Second, the Accused took no action in response to the court's courtesy notice warning that a citation would be issued if the annual accounting was not filed. Third, the Accused did not file the annual accounting, or seek additional time to do so, in response to the court issuing a Citation for Removal. Fourth, the Accused failed to appear at the hearing set in the Citation, despite assuring his client that he would take care of it. Finally, the Accused failed to respond to the replacement personal representative's numerous attempts to contact him.

**RPC 8.4(a)(4) (Conduct Prejudicial to the Administration of Justice)**

RPC 8.4(a)(4) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice. To establish a violation of this rule, it must be shown that:

- (1) the accused lawyer's action or inaction was improper;
- (2) the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding;
- and (3) the accused lawyer's conduct had or could have had a prejudicial effect upon the administration of justice.

*In re Paulson*, 346 Or 676, 683, 216 P3d 859 (2009), quoting *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003).

The first two elements can be dealt with quickly, as they are plainly present here. The Accused engaged in improper conduct within the meaning of the rule when he failed to file the required annual accounting and failed to appear in court as was required by the Citation for Removal. See *In re Conduct of Rhodes*, 331 Or 231, 236, 13 P3d 512 (2000) (attorney's failure to adhere to contempt orders represented conduct prejudicial to the administration of justice). Similarly, there is little doubt that the Accused's conduct took place during the course of a judicial proceeding, as the conduct all took place in the context of Nelson's probate matter and, in particular, the Accused failed to respond to an explicit order to show cause issued by the court. The only remaining question is whether the conduct was prejudicial within the meaning of the rule.

The term "prejudice" in the context of the rule has been interpreted to require either: "1. Repeated conduct causing some harm to the administration of justice; or 2. A single act causing substantial harm to the administration of justice." *In re Haws*, 310 Or 741, 748, 801 P2d 818 (1990) (interpreting prior version of RPC 8.4(a)(4)).

In *Haws*, the accused was retained to initiate a bankruptcy proceeding in which his clients were required to pay over their non-exempt wages to the bankruptcy trustee. The clients sent the accused a money order for the required amount, but the accused did not

forward the payment to the trustee. A few months later, the trustee requested that the non-exempt wages be paid over, and the accused did not respond. Thereafter, the trustee made a second request for payment and the accused immediately made the payment. The Oregon Supreme Court determined that, on these facts, there was insufficient evidence to show that the conduct was repeated and that, although there was some harm caused to the judicial proceeding, the harm was not substantial. *Haws, supra*.

Here, unlike the case in *Haws*, there was repeated conduct causing some harm to the administration of justice. The Accused failed to file the annual accounting on time, and then failed to file the accounting or respond to the court's courtesy notice indicating that the accounting had not been filed and that a citation would soon be issued. Had the conduct stopped there, this case would be like *Haws* and the Trial Panel likely would have determined that there had not been repeated conduct. However, in this instance, the Accused engaged in additional conduct by failing to appear at the show-cause hearing established by the court in its Citation for Removal, or to take any action to obviate the need for that hearing. As a consequence, the court was forced to appoint a replacement personal representative. While the Accused's conduct did not cause substantial harm, there was sufficient evidence that it caused some harm by burdening the court with holding unnecessary hearings and issuing orders that would not have been required absent the Accused's conduct. As a consequence, the Bar has established a violation of RPC 8.4(a)(4).

### SANCTIONS

The determination of the appropriate sanction for violations of the rules governing the conduct of lawyers is guided by four factors: 1) the nature of the duty violated; 2) the mental state of the accused; 3) the actual or potential injury resulting from the conduct; and 4) the existence of aggravating and mitigating circumstances. *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"); *In re Biggs*, 318 Or 281, 294, 864 P2d 1310 (1994).

**Duties Violated.** In determining the nature of the ethical duty violated, the *Standards* assume that the most important ethical duties are those obligations that a lawyer owes to clients. These include:

- (a) the duty of loyalty;
- (b) the duty of diligence;
- (c) the duty of competence; and
- (d) the duty of candor.

In this instance the Accused's actions violated his duty to his clients in several respects. In particular, the Accused fell well short of fulfilling the duty of diligence. He failed to serve the defendant in the Nguyen Matter and then failed to heed the court's warning that the case would be dismissed if he failed to act within 28 days. Thereafter, he continued to

demonstrate a lack of diligence by, according to his own account, failing to take any action on the matter for an extended period—as exemplified by the fact that it took him over three years to discover that the case had been dismissed. The Accused followed a similar pattern in the Welch Matter, in which he failed to file the required annual accounting, failed to act in response to the court’s courtesy notice indicating that the accounting had not been filed, and, finally, failed to appear in response to the court’s Citation for Removal.

In addition, the Accused’s failure to timely advise Nguyen that her case had been dismissed represented a violation of the duty of candor. As an attorney, the Accused owed a duty to his client to advise her concerning unfavorable developments in her case.

In addition to the duties owed to clients, the Accused also violated duties owed to the legal system. Specifically, in the Welch Matter his failure to meet his obligations ultimately resulted in the court being required to hold an unnecessary hearing and issue an order replacing his client as the personal representative of her deceased husband’s estate.

**Mental State.** The *Standards* provide the following guidance in connection with considering an accused’s mental state:

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of 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 Bar does not argue that the Accused acted with “intent,” and the Trial Panel concludes that improper intent, within the meaning of the *Standards*, was not demonstrated here. Instead, the evidence demonstrated that the Accused acted with knowledge.

In particular, the Accused acted knowingly when he failed to respond to the court’s 28-day notice in the Nguyen Matter, and when he failed to promptly advise Nguyen of the dismissal of her case, despite being aware of his obligation to do so. His actions in the Welch Matter were also taken with knowledge. While the Accused’s initial failure to file the annual accounting was merely negligent, his failure to respond to the court’s courtesy warning and ultimate failure to respond to the Citation for Removal was knowing; he received both notices, was aware of the need to take action, and did nothing.

**Actual or Potential Injury.** Under the *Standards*:

“Injury” is harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct. The level of

injury can range from “serious” injury to “little or no” injury; a reference to “injury” alone indicates any level of injury greater than “little or no” injury.

Here, the Accused’s conduct in the Nguyen Matter resulted in an actual injury in that her lawsuit was dismissed at a time when it could not be re-filed. The legal system also suffered an actual injury as a consequence of the Accused’s actions in the Welch Matter, although the injury was not substantial.

**Baseline Sanction.** The *Standards* set forth the following applicable baseline sanctions:

*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*, § 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client.

*Standards*, § 6.22 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*, § 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Under the *Standards*, suspension is the presumptive sanction.

**Aggravating and Mitigating Circumstances.** The baseline sanction must be adjusted in light of any aggravating and mitigating circumstances that are found to be present.

The following aggravating circumstances identified in the *Standards* are found to be present:

*Standards*, § 9.22(a) Prior disciplinary offenses. In 1988, the Accused was admonished for conduct involving dishonesty and misrepresentation. In 1996, the Accused was reprimanded for knowingly failing to provide competent representation and neglecting a legal matter. *In re Hall*, 10 DB Rptr 20 (1996). In 2007, the Accused was reprimanded for engaging in misrepresentation. *In re Hall*, 21 DB Rptr 123 (2007).

*Standards*, § 9.22(c) A pattern of misconduct. The Accused evidenced a pattern of similar neglect and lack of diligence in both the Nguyen Matter and the Welch Matter. The pattern demonstrated in these matters was consistent with the pattern of conduct present in the Accused's prior disciplinary offenses.

*Standards*, § 9.22(d) Multiple offenses. The Accused violated a number of unrelated rules, including rules governing diligence (RPC 1.3), client communication (RPC 1.4(a)), and misrepresentation (RPC 8.4(a)(3)).

*Standards*, § 9.22(i) Substantial experience in the practice of law. The Accused has been practicing since 1974. He should have been aware that his conduct was inappropriate, especially in light of his prior experience with the disciplinary process.

The following mitigating circumstances are also found to be present:

*Standards*, § 9.32 Personal or emotional problems. During the period in question, the Accused suffered from diabetes, which resulted in him being required to undergo dozens of eye procedures. He also had a serious heart condition. His health problems were compounded by the fact that his daughter, who also served as his assistant, was diagnosed with a serious illness.

### **Sanctions Imposed**

The purpose of disciplinary proceedings “is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely [sic] properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.” *Standards*, § 1.1. Ultimately, “the purpose of a sanction is not to penalize the accused, but to protect the public and the integrity of the profession.” *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998).

The Accused's conduct in the Nguyen Matter closely resembles the conduct at issue in *In re Labahn*, 335 Or 357, 67 P3d 381 (2003). In *Labahn*, the accused knowingly neglected his client's tort claim by failing to file a proof of service in a timely manner, which resulted in the dismissal of the client's complaint. The lawyer then failed to inform his client about the dismissal and avoided the client's attempts to reach him. Only after hiring another lawyer to look into the matter more than a year later did the client discover that his case had been dismissed. After considering aggravating and mitigating circumstances, which were found to be offsetting, the court imposed a 60-day suspension. In reaching this conclusion, the court surveyed a number of similar cases resulting in comparable suspensions. *See, e.g., In re Dugger*, 299 Or 21, 697 P2d 973 (1985) (63-day suspension imposed when accused lawyer neglected client's case and misrepresented to the client the status of his case); *In re Morrow*, 297 Or 808, 688 P2d 820 (1984) (accused lawyer neglected to timely file a legal action, yet informed his client otherwise and advised client he was negotiating a settlement).

However, in this instance, the Accused engaged in two separate instances of neglect, rather than just one, as was the case in *Labahn*. Moreover, also unlike *Labahn*, the Accused here was found to have engaged in a misrepresentation. In *Obert, supra*, the court found that a misrepresentation comparable to the Accused's failure to advise Nguyen of the dismissal of her complaint warranted a 30-day suspension. *Obert*, 336 Or at 656.

In addition, the Accused engaged in conduct prejudicial to the administration of justice in connection with his handling of the Welch Matter. In comparable situations, the Oregon Supreme Court has found a reprimand to be warranted. *In re Conduct of Hartfield*, 349 Or 108, 116, 239 P3d 992 (2010) (reprimanding lawyer based upon his repeated failure to appear at scheduled hearings and failure to file an inventory or an accounting, resulting in his client being removed as conservator for her husband).

Finally, the Accused exhibited a pattern of misconduct both in connection with the Nguyen and Welch Matters and in prior matters that also resulted in disciplinary proceedings. The Accused's historical pattern of similar behavior tends to undermine his claim that the events here were the result of his health situation; instead, the events here appear to be consistent with an established pattern of behavior. As a result, the Trial Panel concludes that the aggravating circumstances outweigh the mitigating circumstances.

Accordingly, the Trial Panel concludes that a 60-day suspension is warranted for each instance of lack of diligence, and that an additional 30-day suspension is warranted for the Accused's misrepresentation and failure to communicate.

### CONCLUSION AND DISPOSITION

Having found by clear and convincing evidence that the Accused violated RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3), considered the relevant ABA *Standards*, and having evaluated the applicable Oregon case law, the Trial Panel makes the following disposition:

The Accused is suspended for 150 days.

IT IS SO ORDERED

Dated this 25th day of March 2013.

/s/ Frank J. Weiss

Frank J. Weiss, Trial Panel Chairperson

/s/ Lee Wyatt

Lee Wyatt

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-32
	)	
MARY J. GRIMES,	)	
	)	
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:	June 1, 2013

**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 1st day of June, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
 Carl W. Hopp, Jr., Region 1  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Mary J. Grimes, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On March 16, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 1.4(a). 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 January 2011, Jason and Nancy Adams were divorced Arizona residents who had decided to reconcile and move to Oregon. They had two minor children and Nancy had an adult child from a prior relationship. On January 22, 2011, as they passed through California on the way to Oregon, the Adams’ travel trailer malfunctioned and Nancy died of carbon monoxide poisoning. National Interstate Insurance agreed to pay policy limits (\$100,000) to Nancy’s children, pending probate court approval.

6.

On December 12, 2011, Jason Adams hired the Accused to establish a guardianship/conservatorship for the minor children, paying a nonrefundable retainer of \$1,000.00.

7.

The matter turned out to be more complicated than the Accused initially thought. Although a guardianship/conservatorship could be filed for Adams’ children in Oregon, the insurer told the Accused that it wanted a probate court to determine the appropriate beneficiaries (Nancy had died intestate) and the proper distribution between them, which a

guardianship/conservatorship would not do. However, the Accused questioned whether Oregon was the appropriate venue for a probate action. The Accused discovered that Nancy Adams did not own property in Oregon and began researching whether venue for the probate would be appropriate in California or Arizona.

8.

Between February and July 2012, Adams repeatedly emailed and otherwise tried to communicate with the Accused with requests for updates or news about her progress. Although the Accused claims she spoke with Adams occasionally by phone, she admits she was not adequately responsive to him during this period. On August 16, 2012, Adams complained to the Bar about her lack of communication. The Accused thereafter withdrew from Adams' representation and refunded \$600 of the retainer.

### **Violations**

9.

The Accused admits that, by engaging in the conduct described in paragraph 8, she violated RPC 1.4(a).

### **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 duty to her client to respond diligently to his inquiries. *Standards*, § 4.4.
- b. **Mental State.** The Accused acted negligently, that is, she failed to heed a substantial risk that circumstances existed or that a result would follow, which failure deviated from the standard of care that she should have exercised. *Standards*, p. 7.
- c. **Injury.** The client suffered some injury in the form of anxiety or frustration. However, the legal matter was not adversely affected by the Accused's lack of responsiveness to his inquiries.
- d. **Aggravating Circumstances.** Aggravating circumstances include:

1. The Accused's prior disciplinary offenses. *Standards*, § 9.22(a). *In re Grimes*, 25 DB Rptr 242 (2011) (reprimand for violations of RPC 1.5(a), RPC 1.15-1(a), and RPC 1.15-1(c)); *In re Grimes*, 18 DB Rptr 300 (2004) (one-year suspension, all but 60 days stayed, for violation of DR 1-102(A)(4), DR 2-110(A)(2), and DR 6-101(B)); *In re Grimes*, 15 DB Rptr 241 (2001) (public reprimand for violation of DR 9-101(C)(3)). In 2001, the Accused was admonished for neglecting a legal matter.
  2. The Accused's substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. The Accused acted without a dishonest or selfish motive. *Standards*, § 9.32(b).
  2. By refunding part of the retainer, the Accused attempted to rectify the client's dissatisfaction over her misconduct. *Standards*, § 9.32(d).
  3. The Accused had a cooperative attitude towards disciplinary process. *Standards*, § 9.32(e).

11.

Under the ABA *Standards*, a public 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 the client. *Standards*, § 4.43. An admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client. *Standards*, § 4.44.

12.

Oregon case law is in accord. *See, e.g., In re Hunt*, 25 DB Rptr 233 (2011) (public reprimand for violations of RPC 1.4(a) and RPC 1.4(b)).

13.

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).

14.

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.

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 17th day of May, 2013.

/s/ Mary J. Grimes

Mary J. Grimes, OSB No. 880525

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. 12-170  
)  
WILLIAM L. GHIORSO, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: Calon Nye Russell  
Disciplinary Board: None  
Disposition: Violations of RPC 1.8(a) and RPC 1.8(e).  
Stipulation for Discipline. Public Reprimand.  
Effective Date of Order: July 2, 2013

**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 1.8(a) and RPC 1.8(e).

DATED this 2nd day of July, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ James C. Edmonds  
James C. Edmonds, Region 6  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

William L. Ghiorso, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 21, 1990, 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 February 6, 2013, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.8(a) and RPC 1.8(e). 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 April 2, 2007, Robert Timm (hereinafter “Timm”) retained the Accused to represent him in a claim for personal injuries he sustained on March 6, 2007.

6.

On or about July 6, 2007, the Accused and Timm jointly borrowed funds from a third person (hereinafter “first loan”).

7.

There is a dispute regarding whether the first loan described in paragraph 6 herein was fair and reasonable to Timm. There is no dispute that the Accused did not fully disclose the terms of the first loan in writing, that the Accused did not advise Timm in writing of the desirability of seeking the advice of independent legal counsel and did not give Timm a reasonable opportunity to seek the advice of independent legal counsel, and that the Accused did not obtain written informed consent from Timm to the essential terms of the first loan and

the Accused's role in the transaction, including whether the Accused was representing Timm in the transaction.

8.

On or about July 30, 2007, the Accused entered into an agreement with the lender referenced in paragraph 6 to remove Timm as a borrower on the first loan.

9.

On or about that same day, the Accused agreed to lend funds to Timm (hereinafter "second loan").

10.

There is a dispute as to whether the second loan described in paragraph 9 herein was fair and reasonable to Timm, and whether the Accused sent and Timm received a letter from the Accused disclosing the terms of the second loan in writing and advising Timm of the desirability of seeking the advice of independent legal counsel. There is no dispute that the Accused did not obtain written informed consent from Timm to the essential terms of the second loan and the Accused's role in the transaction, including whether the Accused was representing Timm in the transaction.

11.

Beginning on or about July 30, 2007, the Accused advanced to Timm financial assistance other than the expenses of the personal injury litigation.

### **Violations**

12.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 11, he violated RPC 1.8(a) and RPC 1.8(e).

### **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 avoid improper conflicts of interest. *Standards*, § 4.3.

- b. **Mental State.** The Accused acted negligently.
- c. **Injury.** There was the potential for injury to Timm.
- 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 a licensed lawyer in Oregon since 1990. *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).

14.

Under the *ABA Standards*, 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.

15.

Reprimands have been imposed under similar circumstances. *In re Bailey*, 21 DB Rptr 64 (2007) (reprimand imposed on lawyer who loaned funds to a corporate client when the client was relying upon the lawyer to protect its interests in the loan transaction); *In re Wright*, 17 DB Rptr 132 (2003) (reprimand imposed on lawyer who invested a client's estate funds in a corporation in which the lawyer held a 50% interest without obtaining proper consent from the client).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violation of RPC 1.8(a) and RPC 1.8(e).

17.

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.

18.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the

final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: None.

19.

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 June, 2013.

/s/ William L. Ghiorso

William L. Ghiorso

OSB No. 902706

EXECUTED this 24th day of June, 2013.

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. 11-76  
 )  
EDGAR J. STEELE, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Frank J. Weiss, Chairperson  
Leah A. Johnson  
John Rudoff, MD, Public Member  
Disposition: Violations of RPC 8.4(a)(2) and ORS 9.527(2).  
Trial Panel Opinion. Disbarment.  
Effective Date of Opinion: July 16, 2013

**OPINION OF THE TRIAL PANEL**

**PROCEDURAL HISTORY**

This matter is before this Trial Panel of the Oregon State Bar Disciplinary Board in connection with Case No. 11-76. The Trial Panel consisted of Frank Weiss, Chairperson, Leah Johnson, attorney member, and Dr. John Rudoff, public member.

On January 13, 2012, the Bar filed its Formal Complaint against the Accused in this matter, and he was served on September 27, 2012. The Accused failed to file an answer or otherwise appear in connection with the Formal Complaint. After providing the Accused ten days' advance notice of its intent to seek an order of default, the Bar filed a Motion for Order of Default. On November 1, 2012, the motion was granted and an order was issued finding the Accused to be in default and holding that the matters alleged in the Formal Complaint were deemed to be true. *See* BR 5.8(a).

On February 20, 2013, the Bar filed a sanctions memorandum based upon the facts set forth in the Formal Complaint, which were deemed true as a result of the Accused's default. The Accused filed no response to the sanctions memorandum. In the absence of a response by the Accused, the Trial Panel met and reached its conclusion as outlined below.

The facts are summarized briefly and are borrowed heavily from the Formal Complaint since they are not in dispute given the Accused's default.

### **NATURE OF THE CASE**

The Accused is charged with violation of the Rules of Professional Conduct in connection with his May 5, 2011, conviction in United States District Court for the District of Idaho for a variety of felonies arising out of a murder for hire plot in which the Accused attempted to hire a third person to kill his wife and mother-in-law. Because the allegations of the Formal Complaint are deemed to be true, the Trial Panel must decide whether the facts alleged demonstrate the violation of one or more of the Rules of Professional Conduct and, if so, determine the appropriate sanction.

### **ISSUES TO BE DETERMINED**

The Bar alleges that grounds for discipline exist under the following statutes or Rules of Professional Conduct:

ORS 9.527(2), which provides that a Bar member may be disbarred, suspended, or reprimanded if: “[t]he member has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of the conviction shall be conclusive evidence.”

RPC 8.4(a)(2), which provides that it is professional misconduct to: “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

### **BURDEN OF PROOF**

The Bar has the burden of establishing misconduct warranting discipline by clear and convincing evidence. BR 5.2. The Oregon Evidence Code does not apply to Bar disciplinary proceedings. Instead, the standard for admissibility is governed by BR 5.1(a).

### **FINDINGS AS TO GUILT**

On May 5, 2011, in the United States District Court for the District of Idaho, in a proceeding captioned *United States v. Edgar J. Steele*, No 1:10-CR-148-BLW, the Accused was convicted of the following felonies:

- A. 18 U.S.C. § 1958 (Unlawful Use of Interstate Commerce Facilities in the Commission of Murder for Hire);
- B. 18 U.S.C. § 844(h) (Unlawful Use of Explosive Material to Commit Federal Felony);

- C. 18 U.S.C. § 924(c)(B)(ii) (Unlawful Possession of a Destructive Device in Relation to a Crime of Violence); and
- D. 18 U.S.C. § 1512(b)(3) (Tampering with a Victim).

Each of these felonies is punishable by death or imprisonment and therefore may be the basis for disbarment, suspension, or reprimand under ORS 9.527(2).

The above charges relate to the Accused's offer to pay an individual named Larry Fairfax \$25,000 to kill the Accused's wife and mother-in-law. The federal government made audio recordings of the Accused making arrangements to have Fairfax murder the women. In addition, the employees of an auto repair shop found a pipe bomb strapped underneath the Accused's wife's car. The Accused was convicted of the intentional hire of Fairfax to commit the murder of his wife and mother-in-law.

The Accused's conduct, in connection with his efforts to arrange for the murder of his wife and mother-in-law, constituted committing a criminal act or acts that reflect adversely on his fitness to practice law in violation of RPC 8.4(a)(2).

### SANCTION

The determination of the appropriate sanction for violations of the rules governing the conduct of lawyers is guided by four factors: 1) the nature of the duty violated; 2) the mental state of the accused; 3) the actual or potential injury resulting from the conduct; and 4) the existence of aggravating and mitigating circumstances. *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"); *In re Biggs*, 318 Or 281, 294, 864 P2d 1310 (1994).

**Duties Violated.** By committing criminal acts that reflect adversely on his fitness as a lawyer, the Accused violated his duty to the public by failing to maintain his personal integrity. *See, e.g., In re Conduct of Albrecht*, 333 Or 520, 545, 42 P3d 887 (2002) (finding that attorney violated his duty to the public by engaging in a money laundering scheme).

**Mental State.** The *Standards* provide the following guidance in connection with considering an accused's mental state:

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of 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.

In this case, the Accused acted with intent when he solicited a third person to carry out a murder for hire.

**Injury.** “[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction.” *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). At a minimum, the Accused’s criminal acts caused actual or potential harm to the legal profession in that his behavior undermined the public’s confidence in the integrity of the law. *See, e.g., In re Conduct of Davenport*, 334 Or 298, 319, 49 P3d 91 (2002). Furthermore, his conduct exposed his wife and mother-in-law to potential injury.

**Baseline Sanction.** Under the *Standards*, disbarment is generally appropriate when “a lawyer engages in serious criminal conduct a necessary element of which includes . . . the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses....” *Standards*, § 5.11(a). Although conviction for murder for hire has not been the subject of prior Oregon opinions, disbarment is consistent with the sanction that has been imposed in circumstances involving analogous situations, including cases involving arguably less serious crimes. *See In re Kirkman*, 313 Or 181, 830 P2d 206 (1982) (disbarment appropriate when accused falsified judgment of dissolution, falsely declared himself to be divorced, and committed bigamy); *Application of Nash*, 317 Or 354, 855 P2d 1112 (1993) (refusing to reinstate attorney who was disbarred for committing sodomy).

**Aggravating and Mitigating Factors.** Under the *Standards*, engaging in illegal conduct and committing multiple offenses are both aggravating factors that could justify an enhanced sanction. *See Standards*, § 9.22(d) and (k). The Accused’s lack of a prior disciplinary record is a mitigating factor. *Standards*, § 9.32(a).

The mitigating factor, when taken together with the aggravating factors, is not sufficient to justify modifying the presumptive sanction of disbarment established in Section 5.11(a) of the *Standards*. Moreover, the presumptive sanction of disbarment is particularly appropriate in this instance in light of the fact that the Accused acted with intent, the most culpable mental state, with respect to at least some of his criminal conduct.

### CONCLUSION AND DISPOSITION

Having found by clear and convincing evidence that the Accused violated ORS 9.527(2) and RPC 8.4(a)(2), considered the relevant ABA *Standards*, and evaluated the applicable Oregon case law, the Trial Panel makes the following disposition:

The Accused is disbarred.

IT IS SO ORDERED.

Dated this 10th day of May, 2013

/s/ Frank J. Weiss  
Frank J. Weiss, Trial Panel Chairperson

/s/ Leah A. Johnson  
Leah A. Johnson, Trial Panel Member

/s/ John Rudoff  
Dr. John Rudoff, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-79  
 )  
JON C. REALI, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Craig A. Crispin, Chairperson  
Frank J. Weiss  
Charles H. Martin, Public Member  
Disposition: Violation of RPC 8.1(a)(2). Trial Panel Opinion.  
120-day suspension.  
Effective Date of Opinion: July 16, 2013

**OPINION OF THE TRIAL PANEL**

This matter came for consideration before a Trial Panel of Craig A. Crispin, Chairperson, Frank J. Weiss, attorney member, and Charles H. Martin, public member. The Oregon State Bar is represented by Kellie F. Johnson, Assistant Disciplinary Counsel. The Accused made no appearance before the Bar or the Trial Panel and was not represented by counsel.

**FINDINGS AND CONCLUSIONS**

The Accused was admitted to the Oregon State Bar on September 26, 2003. On November 14, 2012, the Bar filed its Formal Complaint against the Accused in this matter, and he was served with it on December 13, 2012. Thereafter, the Accused failed to file an Answer or otherwise appear in this proceeding.

After giving the Accused a ten-day notice of its intent to seek an order of default, the Bar filed a Motion for Order of Default. On January 28, 2013, the Disciplinary Board Regional Chairperson granted the Bar's motion with an order finding the Accused in default and ordering that the allegations in the Bar's Formal Complaint be deemed true. With the Default Order, the Bar's factual allegations against the Accused have been proven. *See* BR

5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001).

Specifically, based on the default order, the Trial Panel finds as follows:

(1) In January 2012, the Accused’s former partners, Nicholas Dazer and Orland Medina of Kinetic Law Group LLP, filed a complaint with the Oregon State Bar’s Client Assistance Office (hereinafter “CAO”) regarding the Accused’s conduct in a patent matter.

(2) The CAO requested that the Accused give his account of the matter on January 25, 2012. He failed to respond to the request or to the CAO’s subsequent February 27, 2012 inquiry.

(3) On March 7, 2012, the Disciplinary Counsel’s Office (hereinafter “DCO”) requested the Accused to respond to the complaint and asked additional questions. The Accused failed to respond to the DCO inquiry.

(4) The Accused telephoned Assistant Disciplinary Counsel, Susan Cournoyer, on April 11, 2012, to indicate that he had received the DCO’s letters, but needed a week to respond. Thereafter, the Accused failed to respond.

(5) On June 7, 2012, Cournoyer referred the matter to the Region 5 Local Professional Responsibility Board (hereinafter “LPRC”). The LPRC investigator by letter to the Accused asked him to submit several documents to the LPRC. The Accused failed to respond.

(6) The requests by the OSB CAO, the OSB DCO, and the Region 5 LPRC were made in connection with a disciplinary matter.

(7) The Accused’s failures to respond to the inquiries of the OSB CAO, the OSB DCO, and the Region 5 LPRC were knowing.

(8) The requests for information by the OSB CAO, the OSB DCO, and the Region 5 LPRC were lawful demands for information from a disciplinary authority.

(9) The Accused makes no claim that the information requested was protected confidential information under RPC 1.6.

(10) The Bar has established by clear and convincing evidence that the Accused knowingly failed to cooperate with the Bar and knowingly failed to respond to requests for information by the OSB CAO, the OSB DCO, and the Region 5 LPRC in violation of RPC 8.1(a)(2).

## OPINION

Despite the default order entered in this case deeming the factual allegations to be true, the Trial Panel must determine whether the facts alleged by the Bar constitute the

disciplinary rule violations alleged, and, if so, what sanction is appropriate. *In re Koch*, 345 Or 444, 198 P3d 910 (2008); *In re Kluge*, 332 Or 251, 253, 27 P3d 102 (2001).

RPC 8.1(a)(2) reads:

- (a) 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:
  - (1) \* \* \* \*; or
  - (2) 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.

Taking the factual allegations in the Formal Complaint as true, *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004), the Trial Panel finds that the Bar has established by clear and convincing evidence that a complaint alleging a violation by the Accused of the RPC was filed with the Oregon State Bar’s CAO; that the CAO twice requested the Accused to respond to its inquiry about the complaint, but that the Accused failed to respond to either request; that in March 2012, the DCO requested the Accused to respond to the complaint and asked additional questions; that the Accused failed to provide information in response to the DCO inquiry, but did telephone Assistant Disciplinary Counsel, Susan Cournoyer, on April 11, 2012, stating he had received the DCO’s letters, but needed a week to respond; that thereafter, the Accused provided none of the requested information or otherwise respond; and that after referral of the matter to the Region 5 LRPC in June 2012, the LPRC investigator by letter to the Accused asked him to submit several documents to the LPRC, but the Accused failed to respond.

An RPC 8.1(a)(2) violation requires that the Accused “knowingly” fail to respond to the Bar’s information demand. The lawyer must have actual knowledge of the facts. Knowledge can be inferred from circumstances. RPC 1.0(h). The facts alleged in the complaint may be used establish the mental state of an accused lawyer. *In re Kluge I*, 332 Or 251, 262, 27 P3d 102 (2001).

The Accused’s April 11, 2012 telephone call to Assistant Disciplinary Counsel establishes that the Accused acted knowingly in failing to respond to the inquiries of the DCO of the Oregon State Bar. The Accused had knowledge of the Bar’s and its designees’ requests for information, but knowingly failed to respond and cooperate with the Bar’s investigation of the complaint submitted against him, which constitutes a violation of RPC 8.1(a)(2). *See In re Haws*, 310 Or 741, 750, 801 P2d 818 (1990) (“Obviously, in the case where the accused failed to respond at all, he violated DR 1–103(C)”).

## SANCTION

The Bar urges the Trial Panel to impose a suspension of 120 days.

In fashioning a sanction, the Trial Panel considers the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) and Oregon case law. *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1983). The *Standards* require an analysis of four 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. **Duties Violated.** The Accused violated his duty owed to the profession when he knowingly failed to cooperate with the Bar’s investigation into his conduct. *Standards*, p. 5.

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*, p. 5.

3. **Injury.** The Accused’s failure to cooperate with the Bar’s investigation into his conduct caused actual harm to both the legal profession and to the public. The Accused’s failure to cooperate delayed the Bar’s investigation and, consequently, the resolution of the complaint against him. *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996). *See also In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (the court concluded that, when a lawyer persisted in his failure to respond to the Bar’s inquiries, the Bar was prejudiced because it had to investigate in a more time consuming way, and the public respect for the Bar was diminished because the Bar could not provide a timely and informed response to complaints).

4. **Aggravating Factors.** The following aggravating factor applies:

(a) Intentionally failing to comply with rules or orders of the disciplinary agency. *Standards*, § 9.22(e).

5. **Mitigating Factors.** One mitigating circumstance is admitted by the Bar.

(a) Absence of prior disciplinary record. *Standards*, § 9.32(a).

The court has emphasized a no-tolerance approach to non-cooperation with the Bar. In *Miles*, 324 Or at 222–23, the court found that a lawyer’s failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation that warrants a suspension. When a lawyer fails to cooperate with the Bar, the correspondence that the Bar must generate increases, as does the workload of volunteer lawyers and members of the public serving on the State Professional Responsibility Board (SPRB) and the Local Professional Responsibility Committees (LPRCs). *In re Haws*, 310 Or 741, 751, 801 P2d 818 (1990).

A lawyer's failure to cooperate is not merely a technical violation of the Oregon Rules of Professional Conduct. The Oregon Supreme Court has clearly and repeatedly stated that the duty of honesty and cooperation in a disciplinary investigation is no less important than a lawyer's other responsibilities under the disciplinary rules. *See, e.g., In re Whipple*, 320 Or 476, 489, 886 P2d 7 (1994); *In re Haws*, 310 Or 741, 756, 801 P2d 818 (1990) (Gillette, J., concurring) ("the members of the Bar [should be] on notice that their obligations under [former] 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 Arbuckle*, 308 Or 135, 141, 775 P2d 832 (1989) ("the stonewalling of the Bar in its pursuit of potential disciplinary violations, will not be taken lightly").

The ABA *Standards* state that a suspension generally is appropriate when the lawyer "knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system." *Standards*, § 7.2. In *Miles*, the court imposed a 120-day suspension when a lawyer failed to cooperate with the Bar and where no substantive charges were brought. In *In re Hereford*, 305 Or 69, 756 P2d 30 (1988), a lawyer was suspended for 126 days for non-cooperation, even though he was found not guilty of all other charges. *See also In re Parker*, 330 Or 541, 551, 21 P3d 107 (2000); *In re Schaffner*, 323 Or 472, 481, 918 P2d 803 (1996).

The Trial Panel finds that the intentional, knowing, and repeated refusal by the Accused to respond to the Bar's inquiries and demands for information constitutes a serious violation of the conduct expected of a member of the Oregon State Bar and resulted in material injury to the legal system and the public. The Accused acted in complete disregard for the process, required the expenditure of large amounts of time and energy by the system, and failed to live up to his responsibilities as a lawyer. Under these circumstances, the Trial Panel concludes that the sanction imposed be significant and hereby suspends the Accused for a period of 120 days.

#### **DISPOSITION**

It is the decision of the Trial Panel that the Accused be suspended for a period of 120 days.

IT IS SO ORDERED.

Dated this 13th day of May, 2013.

/s/ Craig A. Crispin  
Craig A. Crispin, Trial Panel Chairperson

/s/ Frank J. Weiss  
Frank J. Weiss, Trial Panel Member

/s/ Charles H. Martin  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-98  
 )  
DWIGHT P. BILLMAN, )  
 )  
Accused. )

Counsel for the Bar: Michael F. Conroyd; Stacy J. Hankin  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violations of RPC 1.2(a), RPC 3.3(a)(1), and RPC  
8.4(a)(3). Stipulation for Discipline. 30-day suspension.  
Effective Date of Order: September 24, 2013

**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 thirty (30) days, effective sixty (60) days from the date the Stipulation for Discipline is approved for violations of RPC 1.2(a), RPC 3.3(a)(1), and RPC 8.4(a)(3).

DATED this 26th day of July, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ James C. Edmonds  
James C. Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Dwight P. Billman, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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, 1970, 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 opportunity to seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 13, 2012, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 3.3(a)(1), 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.

### Facts

5.

On September 22, 2010, petitioner Dustin Turner (hereinafter “Turner”) and respondent Dawn Schrage (hereinafter “Schrage”) signed a stipulated limited judgment in the Polk County Circuit Court matter *Turner and Schrage*, No. 10P-2402. Pursuant to that judgment Turner was awarded temporary custody of Turner and Schrage’s minor child and Schrage was awarded temporary parenting time.

6.

On April 7, 2011, pursuant to a written fee agreement, the Accused undertook to represent Schrage in the matter which was set for trial on April 8, 2011. With the signed fee agreement, Schrage provided the Accused with a proposed parenting plan that she had sent to

the court and which provided her with sole legal custody of the child and parenting time for Turner. At the time, Schrage was living in Alaska. Trial was reset to May 10, 2011.

7.

On April 27, 2011, because Schrage had not made any payments as required by the written fee agreement, the Accused sent her a letter stating that he would not be able to represent her interests at the May 10, 2011 hearing and enclosed a motion to withdraw. Within a few days, the Accused received funds from Schrage's mother. On May 5, 2011, Schrage sent funds to the Accused along with documentation he had asked for. Schrage received the Accused's April 27, 2011 letter sometime after May 5, 2011.

8.

Sometime after April 27, 2011, the Accused decided that he would not withdraw from representing Schrage, but instead would try to help her.

9.

On May 9, 2011, Turner's lawyer sent a proposed stipulated judgment to the Accused which provided for Turner to have sole legal and physical custody of the child, for Schrage to have one week of parenting time four times during the following year, and required Schrage to undergo a urinalysis test if Turner believed that she was under the influence of drugs or alcohol during her scheduled parenting time. Later that day, the Accused made a counterproposal. Turner's lawyer responded with another stipulated judgment allowing for Schrage to speed up her parenting time if she chose to do so. On May 9, 2011, the Accused left a telephone message for Schrage about the negotiations, but never spoke with her and never obtained her authority to resolve the matter.

10.

At the May 10, 2011 hearing, Turner's lawyer recited the agreed upon settlement terms into the record. In response to the court's inquiry, the Accused represented that he had run the terms of the settlement past Schrage and that it was agreeable to her. At the time the Accused made those representations, he knew they were false.

11.

On May 11, 2011, Turner's lawyer sent the proposed stipulated general judgment to the Accused for his and Schrage's signature. The Accused sent the judgment to Schrage on May 25, 2011. Schrage did not respond and the Accused did not follow-up with her. When the Accused did not return an executed stipulated judgment, Turner's lawyer submitted a general judgment to the court which it signed on June 29, 2011. Schrage subsequently filed a motion to have the judgment set aside, which was denied.

### Violations

12.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 11, he violated RPC 1.2(a), RPC 3.3(a)(1), and RPC 8.4(a)(3).

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(4) should be and, upon the approval of this stipulation, are 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 most important duties are those which a lawyer owes a client. *Standards*, p. 5. The Accused violated a duty he owed to Schrage to abide by her decisions concerning the objectives of representation, including her decision whether to settle. *Standards*, § 4.4. The Accused also violated a duty he owed to the court not to make false statements. *Standards*, § 6.0.
- b. **Mental State.** The Accused acted knowingly. While the Accused believed he was acting in Schrage’s best interests, he knew that she had not agreed to the proposal made by Turner’s lawyer. The Accused also knew that his representations to the court, although made with good intentions, were nonetheless false.
- c. **Injury.** Schrage, the court, and Turner sustained actual injury. Schrage never either resolved the case on terms that were agreeable to her or got her day in court. The court made a decision based upon inaccurate information. The parties and the court spent time and resources dealing with a motion to set aside the judgment which would not have been filed had the Accused accurately informed the court that he had not obtained Schrage’s agreement to the settlement.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Multiple offenses. *Standards*, § 9.22(d).

2. Vulnerability of victim. Schrage, because of her remote location and financial situation, relied heavily on the Accused to pursue her objectives. *Standards*, § 9.22(h).
3. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1970. *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. Full and free disclosure or cooperative attitude. *Standards*, § 9.32(e).

14.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to the client. *Standards*, § 4.42. Suspension is also generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. *Standards*, § 6.12.

15.

Reprimands or short suspensions have been imposed when a lawyer fails to abide by a client's objectives. *In re Bailey*, 25 DB Rptr 19 (2011) (reprimand of lawyer who settled a case without the client's authority); *In re Clarke*, 22 DB Rptr 320 (2008) (60-day suspension of lawyer who, among other things, decided that client's appeal had no merit and, without consulting with the client, allowed the appeal to be dismissed).

Suspensions of varying lengths have been imposed on lawyers who have made misrepresentations to the court. *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006) (lawyer suspended for 180 days for making misrepresentations to the court and opposing counsel in connection with postponement of a trial); *In re Morris*, 326 Or 493, 953 P2d 387 (1998) (120-day suspension of lawyer who altered and then filed with the court a final account for services rendered as counsel for a personal representative after the statement had already been signed and notarized); *In re Jones* 326 Or 195, 951 P2d 149 (1997) (45-day suspension of lawyer who signed bankruptcy documents in blank notwithstanding the existence of a perjury clause).

In this case, because the Accused did not act with a selfish or dishonest motive and has practiced law for over 40 years without any prior discipline, a 30-day suspension is the most appropriate sanction.

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 30 days for violation of RPC 1.2(a), RPC 3.3(a)(1), and RPC 8.4(a)(3), the sanction to be effective 60 days from the date this stipulation is approved.

17.

In addition, on or before December 31, 2013, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$1,365.25, incurred for depositions. Should the Accused fail to pay \$1,365.25 in full by December 31, 2013, the Bar may thereafter, without further notice to the Accused, obtain 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.

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, the Accused is retiring from the practice of law and will close his law office before the effective date of the suspension.

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.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: None.

22.

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 27th day of June, 2013.

/s/ Dwight P. Billman

Dwight P. Billman

OSB No. 700179

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. 12-60  
)  
DAVID B. PETERS, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: None  
Disciplinary Board: F. Gordon Allen, Chairperson  
Charles J. Paternoster  
Carlos G. Calderon, Public Member  
Disposition: Trial Panel Opinion. Dismissed.  
Effective Date of Opinion: July 30, 2013

**DISCIPLINARY OPINION**

**A. The Charge**

By Formal Complaint dated April 23, 2012, the Oregon State Bar (hereinafter “Bar”) charged the Accused with a violation of RPC 8.4(a)(4) when the Accused engaged in conduct prejudicial to the administration of justice by removing an original “Petition to Enter Plea and Order Entering Plea” from the court file and substantially altering it after it had been signed by a judge and without permission from the court to do so. There is no dispute in the case as to the facts, and we found that the testimony of both witnesses was direct and entirely credible.

**B. The Issues**

*In re Jackson*, 347 Or 426, 437, 223 P3d 387 (2009), cited by the Bar, states the issues to be determined: (1) was the Accused’s action improper; (2) did the conduct occur during the course of a judicial proceeding; and (3) did the lawyer’s conduct have or could it have had a prejudicial effect upon the administration of justice?

**C. The Facts**

The Accused represented a client charged with driving under the influence and driving while suspended. There was no question about her guilt, and her past history was

such that she would certainly serve some time in jail. On May 10, 2011, the Accused and his client appeared in front of Judge Kirsten Thompson in Washington County Circuit Court where his client and Judge Thompson signed the plea order at issue here. The client pled guilty to the DUII, but the driving while suspended charge was to be dismissed.

There was no agreement on the sentence. Because the client was gainfully employed by a school district, the parties agreed to postpone sentencing to June after school let out. The parties appeared on June 16, 2011, for sentencing. Because Judge Thompson was not available, they were sent to Judge Price. The events at issue took place in Judge Price's courtroom before and after he took the bench.

The prosecutor told the Accused that he intended to recommend 180 days of incarceration. The client had hoped to serve her jail time during the summer vacation and resume her employment when school opened. The Accused advised the prosecutor that his client would argue for a shorter sentence. The prosecutor responded that the State would not then agree to dismiss the driving while suspended charge.

The Accused took the May 10 Order from the court file and added a phrase stating that the client would plead guilty to both the DUII and the driving while suspended charges. He added an acknowledgment by the client that the maximum sentence for driving while suspended was one year. He added an acknowledgment of the potential fine and an express confession that the client's license had been suspended at the time of the arrest. He showed the altered Order to the prosecutor who had no objection. The Accused intended to explain what he had done and why when the judge took the bench.

The clerk observed the alteration of the original, signed order, and advised Judge Price in his chambers. When Judge Price took the bench he raised the impropriety immediately. The Accused explained what he had done and why. Judge Price proceeded to require a new order, and he made sure that all procedures required by the new Order were done correctly.

#### **D. Opinion**

As to whether the Accused's actions were improper, it is certainly not proper to alter an original court order after it has been signed and without permission from the court. We find, however, under the circumstances, that the Accused made a mere mistake and had no intent to deceive the court or to gain advantage for himself or his client. We further find that the Accused intended to fully disclose to the court what he had done a few minutes later when the judge took the bench.

As to the second issue, there is no dispute that the conduct occurred in the course of a judicial proceeding.

As to the third issue, we find that the Accused's conduct had no effect upon the administration of justice. The judge's clerk went back to chambers and advised the judge of the alteration, and the judge immediately raised the issue upon taking the bench.

We also find that the Accused's actions could not have had an effect on the administration of justice because he fully disclosed his actions to opposing counsel, and he intended to explain to the judge what he had done when the judge took the bench. He was precluded from demonstrating this intent because, as stated above, the judge raised the subject before the Accused was afforded an opportunity to explain. Based upon our observation of the Accused, his testimony, and the circumstances, we find that the Accused had the intent to explain to the court what he had done. We find that the Accused contemplated preparing a new order if the court did not want to proceed based on the altered order. However misguided his thinking, we see no risk that the Accused's actions might have had an effect on the administration of justice.

**E. Aggravating Circumstances**

The Accused committed serious ethical violations in 1997 and 2001. We commend the Bar for its cautious and fair treatment of those violations. The Bar did not argue that they should be considered in assessing the Accused's credibility, and the Bar generously conceded in its Trial Memorandum that the violations were "remote in time." (Tr. Mem. p. 10, ln 3) We think the Bar is correct.

**CONCLUSION**

A warning and rebuke from the bench might well have been in order here, but we find that the requirements for a violation of RPC 8.4(a)(4) have not been met.

DATED: May 16, 2013

/s/ F. Gordon Allen  
F. Gordon Allen, Trial Panel Chairperson

/s/ Charles J. Paternoster  
Charles J. Paternoster, Lawyer Member

/s/ Carlos Calderon  
Carlos Calderon, Panel Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 11-129  
 )  
JEFFREY E. BOLY, )  
 )  
Accused. )

Counsel for the Bar: Richard A. Weill; Linn D. Davis  
Counsel for the Accused: Richard A. Lee  
Disciplinary Board: Dylan M. Cernitz, Chairperson  
Theresa L. Wright  
Jonathan Levine, Public Member  
Disposition: Violation of DR 3-101(B). Trial Panel Opinion. 1-year  
suspension.  
Effective Date of Opinion: August 14, 2013

**TRIAL PANEL OPINION**

**I. PROCEDURAL HISTORY**

This matter came before the Oregon State Bar Disciplinary Board for trial on December 11, 13, 14, 17, and 18, 2012, January 24, 2013, and February 12, 2013. The Trial Panel consisted of Dylan M. Cernitz, Theresa L. Wright, and public member Jonathan Levine. Richard Weill, voluntary Disciplinary Counsel, and Linn Davis represented the Bar. Accused Frederick T. Smith (hereinafter “Smith”) appeared pro se. Accused Jeffrey E. Boly (hereinafter “Boly”) appeared and was represented by Richard A. Lee and Deanna L. Wray.

**The Smith Amended Formal Complaint (Ballantyne):** An Amended Formal Complaint was filed by Jeffrey D. Sapiro, Disciplinary Counsel for the Oregon State Bar, on February 23, 2012, which raised numerous violations of the Code of Professional Responsibility and the Oregon Rules of Professional Conduct relating to Smith’s representation of Robert Gerard Ballantyne, also at times referred to as “G.B.” Specifically, the Amended Formal Complaint alleges violations, and in some instances multiple violations, of the following rules:

DR 5-101(A)(1), Conflict of interest involving personal and financial interests;

- RPC 1.7(a)(2), Current conflict of interest involving personal interest of lawyer;
- DR 1-102(A)(3), Criminal conduct of lawyer which adversely reflects upon lawyer's fitness to practice law;
- DR 2-106(A), Collection of a clearly excessive fee;
- DR 9-101(A), Failure to place client funds in a clearly identifiable client trust account;
- DR 9-101(C)(3), Failure to maintain complete record of client funds or other client property;
- DR 9-101(C)(4), Failure to promptly disperse client funds to client;
- DR 5-104(A), Entering into business transaction with client with differing interests and failing to obtain client consent to such conflict;
- DR 7-102(A)(5), Knowingly making a false statement of law or fact;
- DR 7-102(A)(7), Knowingly counseling or assisting client in conduct lawyer knows to be illegal or fraudulent;
- RPC 1.15-1(d), Failure to promptly deliver client funds and accounting;
- RPC 1.8(a), Entering into a business transaction adverse to client;
- RPC 3.3(a)(3), Knowingly making a false statement of law or fact to a tribunal or failure to correct a false statement of material fact previously made;
- RPC 8.4(a)(3), Lawyer conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely upon lawyer's fitness to practice law;
- RPC 1.6, Revealing information relating to representation of client without obtaining client's informed consent; and
- RPC 8.1(a)(2), Failure to respond to requests for information by the disciplinary authority.

**The Smith Amended Complaint (OLCC):** An Amended Formal Complaint was filed by Jeffrey D. Sapiro, Disciplinary Counsel for the Oregon State Bar, on February 23, 2012, which raised violations of the Oregon Revised Statutes and the Oregon Rules of Professional Conduct relating to Smith's representation of Suki's Bar and Grill. Specifically, the Amended Formal Complaint alleges violations of the following rules:

- ORS 9.160, Practicing law while not an active member of the Bar;
- RPC 5.5(a), Unauthorized practice of law; and
- RPC 8.4(a)(3), Lawyer conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely upon lawyer's fitness to practice law.

**The Boly Formal Complaint:** A Formal Complaint was filed by Jeffrey D. Sapiro, Disciplinary Counsel for the Oregon State Bar, on February 23, 2012, which raised violations of the Oregon Rules of Professional Conduct relating to Boly's involvement with Robert Gerard Ballantyne, also at times referred to as "G.B." Specifically, the Formal Complaint alleges five violations of the following rule:

DR 3-101(B), Unlawful practice of law.

**The Smith Answer:** Smith filed an Answer to the Formal Amended Complaint on or about June 12, 2012, in which no affirmative defenses were asserted.

**The Boly Answer:** Richard Lee filed an Answer to the Formal Complaint, on behalf of Boly, on or about April 12, 2012, in which no affirmative defense were asserted.

**Witnesses, Exhibits, and Transcript:**

The Bar presented testimony from Anna Davis, Frederick T. Smith, Michael S. Morey, Robert G. Ballantyne, Nicole Bernhard-Lee, Linn Davis, Robert P. Johnson, Jeffrey E. Boly, and Lenette Rucker. Smith presented testimony from Seok Chung, The Honorable George A. Van Hoomissen, and Kevin P. O'Connell. Smith also testified on his own behalf. Boly presented testimony from The Honorable George A. Van Hoomissen, Linda Boly, Richard A. Lee, Kirk L. Emmons, Shari Jacobsen, and Joe Angel. Boly also testified on his own behalf.

The Bar introduced numerous exhibits. The following Bar exhibits were admitted: 1–273. Smith offered several exhibits, the following of which were admitted: 2000–2022. Boly offered numerous exhibits, the following of which were admitted: 1000–1100.

Shellene L. Iverson, CSR, of Capri-Iverson, provided the court reporting services. The Order Settling the Transcript was signed on April 10, 2013.

The Accused Frederick T. Smith passed away on May 3, 2013. As such, the Bar dismissed Case Nos. 11-22 and 11-37. This opinion will only address Case No. 11-129 relating to the Accused Jeffrey E. Boly.

## II. FINDINGS OF FACT

Throughout the period of time covered in the accusations in this matter both Smith and Boly were members of the Oregon State Bar. At all relevant times herein, Smith was an active member of the Bar maintaining a place of business in Multnomah County, with the exception of July 15, 2010, through September 13, 2010, during which time Smith was under disciplinary suspension. Boly is a member of the Oregon State Bar on "inactive" status since 1998, maintaining a residence in Multnomah County.

Robert Ballantyne (hereinafter "Ballantyne" or "G.B.") was a neighbor and family friend of Boly. In 1997, Ballantyne was involved in an automobile collision, which resulted in a personal injury lawsuit being filed in Multnomah County by Jeffrey A. Long (hereinafter

“Long”) on behalf of Ballantyne. In March 1998, Ballantyne became dissatisfied with Long’s representation as a consequence of Long placing the litigation in abatement due to difficulty with the medical evidence in the matter. As such, Ballantyne sought advice from Boly regarding Long’s handling of the matter and possible professional malpractice by Long. Boly referred Ballantyne to attorneys Peter Glazer (hereinafter “Glazer”) and Kirk Emmons (hereinafter “Emmons”) to pursue claims relating to the personal injury lawsuit and Long’s possible professional malpractice. Ballantyne subsequently retained Glazer and Emmons in 2000.

Ballantyne requested that Boly attend meetings with Glazer and Emmons to assist with Ballantyne’s understanding of all aspects of the litigation. Ballantyne’s insistence on Boly’s participation in the litigation was based upon Ballantyne’s self-perceived cognitive limitations and his considerable trust in Boly’s legal acumen. To that end, throughout the Glazer/Emmons representation of Ballantyne, Boly participated in nearly every meeting between Ballantyne and Glazer/Emmons. During these meetings, Boly served as a legal interpreter for Ballantyne, which was of great assistance to Glazer and Emmons. Additionally, Boly met with Glazer, without Ballantyne present, on a few occasions to discuss the personal injury and Long malpractice litigation. The extent to which Boly offered advice or comment regarding the merits of the lawsuit is unclear.

In October 2000, through the course of representation of Ballantyne in the personal injury lawsuit and potential Long malpractice claim, Glazer learned Ballantyne had been sexually abused by a priest (Father Laughlin) when Ballantyne was a child attending All Saints School in 1974–1975. Without Ballantyne’s consent, Glazer informed Boly of Ballantyne’s childhood sexual abuse. Glazer referred Ballantyne to attorney Michael S. Morey (hereinafter “Morey”), a lawyer with substantial experience prosecuting such claims. Ballantyne retained Morey, who, pursuant to a standard written contingent fee agreement dated February 27, 2001, pursued Ballantyne’s case against the Archdiocese of Portland for over two years. (Ballantyne was referred to as “G.B.” in said lawsuit.) Pursuant to the Morey contingent fee agreement, Morey was to receive thirty-three and one-third percent (33 1/3%) of any amount recovered whether through settlement or obtaining a judgment. Further, the contingent fee agreement provided if Morey was discharged during the pendency of the case, Morey may be entitled to all or part of the contingent fee if the work performed resulted in or contributed to the eventual recovery. See Exhibit #9.

Similar to the Glazer/Emmons representation, Boly actively participated in meetings with Morey and Ballantyne to discuss all aspects of the Archdiocese litigation. Additionally, Boly conducted independent research regarding the impact of sex abuse on the cognitive development of children. Further, Boly took great interest in gathering information regarding the value of similar priest sex abuse cases nationwide.

While the Ballantyne case against the Archdiocese of Portland was in its initial stages, Boly continued to assist Ballantyne and Glazer/Emmons with the personal injury

lawsuit and potential Long professional malpractice case. As a result, in March 2002 a civil negligence case was filed against Long in Multnomah County.

Meanwhile, Morey spent two years (2001–2003) preparing Ballantyne’s case, as well as several other victims’ cases, including substantial discovery, numerous depositions, and significant mediation preparation. Boly assisted Morey in preparing Ballantyne’s matter for mediation, including deposition transcript review, medical record review, and overall strategizing. In March 2003, mass mediation of the Archdiocese priest sex abuse cases occurred at the Gus J. Solomon Courthouse. Morey was representing ten (10) other victims of Father Laughlin and therefore all of the Father Laughlin cases were mediated contemporaneously over five (5) days with multiple mediators. During the course of negotiation, Morey offered to settle Ballantyne’s matter for \$980,000. The Archdiocese countered with \$650,000. Based upon Boly’s research and Morey’s experience, Ballantyne had an expectation that his case was worth in excess of \$1 million, and, therefore, declined the Archdiocese’s counteroffer. Mediation was set to continue July 7, 2003.

Ballantyne was upset with how the initial mediation transpired and the failure to reach settlement. The lack of success at mediation stressed the relationship between Morey and Ballantyne; however, Morey and Ballantyne continued to diligently prepare for the continued mediation, again with the assistance of Boly. To that end, Morey informed Thomas Dulcich, counsel for the Archdiocese of Portland, that Boly was going to play a more prominent role at the continued mediation and, therefore, the Archdiocese should be prepared to significantly increase their counteroffer.

During the course of mediation preparation in spring 2003, Ballantyne learned a referral fee agreement existed between Glazer and Morey involving the referral of Ballantyne’s case to Morey. The referral agreement was very upsetting to Ballantyne, so much so that Ballantyne asked Boly to begin looking for a new attorney to take over the Ballantyne representation.

In late spring 2003, Boly contacted Smith regarding the Ballantyne matter. Smith was obtaining an LLM in taxation at Georgetown at the time Boly reached out to him. Upon Smith’s return to Portland, Boly, Ballantyne, and Smith met at Smith’s house boat to discuss Smith taking over the representation of Ballantyne. On June 26, 2003, Boly prepared a written fee agreement that provided Morey’s fee would be paid based on the most recent offer from the Archdiocese (\$650,000), with Smith to be paid a contingent fee based on any further amount Smith obtained over and above the initial offer. Ballantyne executed the fee agreement on June 26, 2003. Smith declined to sign the proposed fee agreement presented by Boly. See Exhibit #27.

Despite the lack of a signed fee agreement, Smith undertook to represent Ballantyne at the July 7, 2003, mediation. Smith was aware of the terms of the executed fee agreement between Ballantyne and Morey at the time of the continued mediation. Further, Smith

undertook to represent Ballantyne at mediation without having first reviewed Morey's file. Unbeknownst to Morey, Smith appeared at the July 7, 2003, mediation reporting to be Ballantyne's new counsel. Morey, who had spent months preparing for the mediation, was informed by Smith at the mediation that Ballantyne was summarily terminating Morey's representation. Boly attended and assisted Ballantyne during the continued mediation. Mediation continued through July 10, 2003, at which time Smith accepted the Archdiocese's \$900,000 settlement offer on behalf of Ballantyne. The settlement was memorialized in a handwritten memorandum of understanding. The memorandum of understanding was executed by all parties and Boly (as a witness). The settlement was to be paid in scheduled payments of \$300,000; \$100,000; and \$500,000.

Upon learning that the case had been settled, Morey contacted Smith to initiate discussions about how the contingent fee would be divided between them. Ostensibly acting on behalf of Ballantyne, Smith did not participate in any such discussions. On July 22, 2003, attorney Michael Bloom (hereinafter "Bloom") on behalf of Morey filed a notice of attorney's lien and an action to recover Morey's costs and a reasonable fee (hereinafter "*Morey v. G.B.*").

On or about July 23, 2003, Smith drafted and presented Ballantyne with a contingent fee agreement different from the written agreement Ballantyne had signed on June 26, 2003. The fee agreement of July 23, 2003, provided Smith would receive a one-third contingent fee of all sums recovered, without defining said term. The fee agreement prepared by Smith was ultimately signed by both Smith and Ballantyne. Further, Smith advised Ballantyne to interlineate, "as of July 1, 2003," above Ballantyne's signature.

While the *Morey v. G.B.* lawsuit was progressing in the fall of 2003, the malpractice lawsuit previously filed by Ballantyne against Long, et al, had been dismissed on or about October 13, 2003. Boly, on behalf of Ballantyne, prepared several pleadings to reinstate the Long malpractice lawsuit, including Boly's own affidavit in support of reinstatement. In the motion to reinstate prepared by Boly on behalf of Ballantyne, Boly sought the affirmative relief of a six month continuance of the matter. Further, on October 14, 2003, Boly appeared, on behalf of Ballantyne, in Multnomah County Circuit Court, before the Honorable Dale R. Koch, to present Ballantyne's motion to reinstate. On November 17, 2003, Judge Koch issued a letter ruling denying Ballantyne's motion (prepared by Boly) for reinstatement.

For purposes of this opinion, the Trial Panel will not further recite the remaining ten years of litigation (2003–2013) involving the participation of Smith and Boly in the Ballantyne matter. Over the course of seven days of trial, the Bar and counsel for the Accused presented numerous exhibits and witnesses addressing the events which transpired from 2003–2013. The Trial Panel will limit its review of the facts to the relevant time period of Boly's conduct as alleged by the Bar and set forth above (June 1999 through November 2003).

### III. DISCUSSION of CASE No. 11-129

#### A. Burden of Proof.

The Bar has the burden of establishing Boly'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).

#### B. Unlawful Practice of Law.

At all times set forth in the Formal Complaint, DR 3-101(B) provided: "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." With few exceptions, none of which are applicable here, ORS 9.160 provides that 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.

The practice of law includes all personal contact in the nature of consultation, explanation, recommendation, advice, and selection or drafting of documents regarding legal issues or principles. *OSB v. Smith*, 149 Or App 171, 942 P2d 793 (1997).

Oregon has no statutory definition of the "practice of law." The Board of Governors of the OSB has defined the practice of law to include "(h)olding one's self out, in any manner, as an attorney or lawyer authorized to practice law in the State of Oregon; appearing, personally or otherwise, on behalf of another in any judicial or administrative proceeding; or providing advice or service to another on any matter involving the application of legal principles to rights, duties, obligations or liabilities." OSB Bylaws 20.1(B).

The Oregon Supreme Court has further defined the practice of law. The issue of whether conduct is the "practice of law" often turns on whether the act requires exercise of independent legal judgment. *See In re Devers*, 328 Or 230, 974 P2d 191 (1991) (negotiating on behalf of client, drafting and reviewing a settlement agreement constitutes practice of law); *Oregon State Bar v. Gilchrist*, 272 Or 552, 563, 538 P2d 913 (1975) (practice of law includes personal contact with clients "in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular (client's) problems . . ."); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 377 P2d 334 (1962) (practice of law includes drafting documents when informed or trained discretion must be exercised in drafting the document); *see also Taub v. Weber*, 366 F3d 966 (9<sup>th</sup> Cir 2004) (applying discretionary legal principles in connection with completion of bankruptcy forms is practice of law).

#### C. Allegations.

The Bar has charged Boly with five counts of the unlawful practice of law in violation of DR 3-101(B). Specifically, the Bar has alleged Boly unlawfully practiced law as follows:

- (1) Referring G.B. to Glazer to handle a potential malpractice claim against G.B.’s former attorney, Jeff Long. The Bar alleges Boly offered G.B. “opinions and advice” about the Long malpractice case, while Glazer was representing G.B. (1999–2003);
- (2) Offering G.B. “opinions and advice” about the sex abuse case, while Morey was representing G.B. The Bar alleges Boly “encouraged” G.B. to fire Morey, and retain Smith. (2000–2003);
- (3) Drafting and giving advice about a contingent fee agreement for G.B. to use in retaining Smith. (June 2003);
- (4) Advising G.B. about a separate contingent fee agreement prepared by Smith. The Bar also alleges Boly advised G.B. about the settlement agreement with the Archdiocese, while Smith was representing G.B. (July 2003); and
- (5) Assisting G.B. after Glazer withdrew from G.B.’s case against Long and the court dismissed the matter. The Bar alleges Boly appeared in court for G.B., and drafted a motion for G.B. (August 2003–November 2003).

**D. Trial Panel Findings.**

For each of the alleged violations set forth above, the Trial Panel finds:

- (1) The evidence presented at trial by both the Bar and counsel for Boly substantiates the Bar’s allegation that Boly attended meetings between Ballantyne and Glazer/Emmons relating to the Long malpractice claim. The Trial Panel finds the testimony of Kirk Emmons to be credible relating to Boly’s attendance and involvement at the meetings between Ballantyne and Glazer/Emmons. Specifically, Emmons testified that Boly’s role at said meetings was limited to explaining Glazer/Emmons’ analysis of the auto accident case and the Long malpractice case to Ballantyne in terms Ballantyne could understand. The Bar did not prove to the Trial Panel’s satisfaction that Boly offered independent legal advice to Ballantyne during the meetings with Glazer/Emmons. Rather, Boly served as a conduit between Ballantyne and Glazer/Emmons. To that end, the Trial Panel finds the Bar did not meet its burden of proof (clear and convincing evidence) regarding its allegation that Boly offered legal opinion and legal advice to Ballantyne with respect to the auto accident and Long malpractice matters.

Further, the Trial Panel does not find the act of referring Ballantyne to Glazer to constitute the unlawful practice of law in violation of DR 3-101(B).

- (2) The Trial Panel finds the Bar presented witnesses who gave credible testimony regarding Boly’s involvement in the assessment and handling of the sex abuse case at all relevant times herein. While Ballantyne presented as a

challenging witness at times, Ballantyne's testimony regarding Ballantyne's reliance on Boly's opinion as to the merits and value of the sex abuse case was found to be credible by the Trial Panel. Given the vulnerability of Ballantyne during the preparation of the sex abuse case for mediation, and during the mediations themselves, the Trial Panel is convinced Boly served to provide independent legal analysis as to the potential value of Ballantyne's case and to offer his opinion to both Ballantyne and Morey. Evidence presented at trial established Boly conducted his own research of priest sex abuse cases from across the United States and took a keen interest in the potential value of Ballantyne's case against the Archdiocese. Boly's own testimony confirmed his independent research of similar cases from across the nation, as well as scientific research regarding early childhood abuse on the developing brain. Coupled with Boly's long and successful legal career, the Trial Panel finds it implausible that Boly would play an active role in assisting Ballantyne and Morey with the preparation of the sex abuse case over a period of months without providing some form of independent legal analysis tailored specifically to Ballantyne's case. Further, the Bar clearly established Boly's awareness of Ballantyne's vulnerability and cognitive limitations, thus creating a heightened sense of reliance by Ballantyne on Boly. The Trial Panel is convinced Ballantyne relied heavily on Boly's advice regarding the sex abuse case and was not able to distinguish Boly's advice from that of active attorneys (i.e., Morey).

The Trial Panel finds the foregoing conduct by Boly constitutes the unlawful practice of law in violation of DR 3-101(B) by providing Ballantyne advice which involved Boly's application of legal principles to Ballantyne's rights, duties, obligations, or liabilities relating to the sex abuse case. *See* OSB Bylaws 20.1(B).

As for the Bar's allegation regarding Boly's referral of Ballantyne to Smith, the Trial Panel is convinced such referral showed a lack of judgment by Boly which led to significant harm to Ballantyne; however, such referral is not found to constitute the unlawful practice of law as defined above.

- (3) Exhibit #13, a fee agreement dated June 26, 2003, is found by the Trial Panel to be prepared by Boly individually on behalf of Ballantyne. Smith and counsel for Boly provided witness testimony, via Boly and Smith individually, that Ballantyne was referred to retired attorney John Brooke to provide independent counsel regarding a potential fee agreement between Smith and Ballantyne. The Trial Panel did not find such testimony to be credible. To the contrary, the Trial Panel finds the Bar met its burden of proof by clear and convincing evidence that Boly independently prepared, without meaningful

assistance by Brooke, said fee agreement on behalf of Ballantyne for presentation to Smith. At trial, there was no credible evidence offered to document Brooke's representation of Ballantyne, or involvement, in the drafting process. Also, the Trial Panel distinguishes the case at bar from *State ex re. Oregon State Bar v. Lenske*, 284 Or 23, 584 P2d 759 (1978), in that *Lenske* involved a disbarred attorney who drafted documents for an active attorney's review and adoption, as opposed to the case at bar where there was no credible evidence offered at trial that Brooke reviewed or adopted the June 26, 2003, fee agreement as his own work.

The Trial Panel finds the foregoing conduct by Boly constitutes the unlawful practice of law in violation of DR 3-101(B) by drafting said fee agreement which involved Boly's application of legal principles to Ballantyne's rights, duties, obligations, or liabilities relating to the sex abuse case. *See* OSB Bylaws 20.1(B).

- (4) The Trial Panel finds there was no credible evidence presented at trial that Boly advised Ballantyne regarding a contingent fee agreement prepared by Smith (Exhibit #29). Thus, the Trial Panel finds no violation of DR 3-101(B) by Boly as it relates to the contingent fee agreement prepared by Smith.

Evidence presented at trial by all parties clearly established Boly attended the follow-up mediation which occurred on or about July 7–10, 2003 at the offices of Schwabe, Williamson and Wyatt. Ballantyne provided credible testimony that Boly was very excited to participate in said mediation. Similarly, the Trial Panel finds Boly's demeanor while testifying at trial to his participation in said mediation corroborates Ballantyne's testimony. Additionally, the record is replete with evidence and testimony regarding Boly's independent research regarding the settlement value of priest sex abuse cases nationwide. Coupled with the fact that Smith had yet to obtain Morey's file at the time of mediation, and Smith had not previously litigated any sex abuse cases, the Trial Panel is convinced Boly offered independent legal analysis and advice to assist both Ballantyne and Smith in reaching settlement at the mediation. Exhibit #14 evidences Boly's significant involvement at mediation, as Boly was a signer to Memorandum of Understanding, which set forth the global settlement terms between the Archdiocese and Ballantyne.

Following mediation on July 21, 2003, counsel for the Archdiocese, Thomas V. Dulcich sent a letter to Smith regarding the Archdiocese's concern over the potential attorney fee litigation between Morey and Smith. Dulcich copied Boly on said letter as, "Jeffrey E. Boly, Esq." See Exhibit #23. On July 23, 2003, Boly wrote directly to Dulcich on Ballantyne's behalf discussing substantive settlement provisions and ongoing negotiations. This letter was

drafted for Boly's signature, not Smith's, included Boly's current contact information and was faxed to Dulcich from Boly's home. Further, the record established at trial provided that Boly was included on several pieces of correspondence between the parties' respective counsel in the days following mediation. As such, the Trial Panel finds that Boly did not make clear his inactive status to Dulcich and others involved in the mediation.

The Trial Panel finds the foregoing conduct by Boly constitutes the unlawful practice of law in violation of DR 3-101(B) by providing independent legal analysis and advice at mediation and drafting correspondence related thereto to counsel, all of which involved Boly's application of legal principles to Ballantyne's rights, duties, obligations, or liabilities relating to the sex abuse case. *See* OSB Bylaws 20.1(B).

- (5) Regarding the dismissal of Ballantyne's malpractice lawsuit against Long, the Trial Panel finds the Bar proved by clear and convincing evidence that Boly prepared legal pleadings on behalf of Ballantyne seeking reinstatement of the Long malpractice lawsuit. *See* Exhibits #67 and #68. Further, Boly appeared in Multnomah County Circuit Court, before the Honorable Dale R. Koch, on October 14, 2003, to present the motion, order, and Boly's supporting affidavit for reinstatement of the Long malpractice lawsuit. The record is clear that no other attorneys were present at the October 14, 2003 appearance on behalf of Ballantyne and that Boly was appearing before Judge Koch on behalf of Ballantyne.

The Trial Panel finds the foregoing conduct by Boly constitutes the unlawful practice of law in violation of DR 3-101(B) by drafting legal pleadings on behalf of Ballantyne which involved Boly's application of legal principles to Ballantyne's rights, duties, obligations, or liabilities relating to the Long malpractice lawsuit, and further appearing in circuit court to present said pleadings on Ballantyne's behalf. *See* OSB Bylaws 20.1(B).

#### IV. DISPOSITION

In determining an appropriate sanction for a lawyer's ethical violations, the Oregon Supreme Court begins with the analytical framework set out in the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (Amended 1992) (hereinafter "*Standards*"). Using that framework, the court arrives at an initial presumptive sanction based on: the ethical duty violated; the lawyer's mental state; and the actual or potential injury caused. The court then adjusts that presumptive sanction based on a fourth factor, the presence of aggravating or mitigating circumstances under the *Standards*. Finally, the court considers whether that adjusted sanction is consistent with Oregon case law. *In re Jaffee*, 331 Or 398, 408-09, 15 P3d 533 (2000).

A. **Duty Violated.** The ABA *Standards* consider the unauthorized practice of law a violation of *Standards*, § 7.0 *Violations of Duties Owed as a Professional*. *Jaffe* at 410.

Absent aggravating or mitigating circumstances, the following dispositions apply to this violation:

7.1 **Disbarment:** when a lawyer knowingly engages in the misconduct with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury;

7.2 **Suspension:** when a lawyer knowingly engages in the misconduct and causes injury or potential injury;

7.3 **Reprimand:** when a lawyer negligently engages in misconduct and causes injury or potential injury;

7.4 **Admonition:** when a lawyer engages in an isolated instance of negligence and causes little or no actual or potential injury.

*Standards*, § 7.0 (Violations of Other Duties Owed As A Professional)

Based upon the foregoing findings and conclusions, the Trial Panel finds Boly violated his duties owed a professional (inactive lawyer) and thus violated ABA *Standards*, § 7.0.

B. **Mental State.** The ABA *Standards* recognize three mental states: intent, knowledge, and negligence. *Jaffe*, 332 Or at 409.

“‘Intent’ is the conscious objective or purpose to accomplish a particular result.

“‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

“‘Negligence’ is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.”

ABA *Standards*, Definitions.

Based upon the foregoing findings and conclusions, the Trial Panel finds Boly acted knowingly when advising Ballantyne at all relevant times relating to the Long malpractice lawsuit and the priest sex abuse case. Further, the Trial Panel finds Boly acted intentionally when appearing in court on behalf of Ballantyne to seeking affirmative relief when Boly was not an active attorney in the state of Oregon.

**C. Injury.**

“‘Injury’ is harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct. The level of injury can range from ‘serious’ injury to ‘little or no’ injury...”

“‘Potential injury’ is the harm . . . that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.”

*ABA Standards*, Definitions.

Based upon the foregoing findings and conclusions, the Trial Panel finds Boly’s conduct at relevant times as pled by the Bar resulted in potential injury to Ballantyne, the legal system, and the legal profession. The Trial Panel is convinced Boly’s conduct from 1999–2010 as it relates to his involvement with Ballantyne, resulted in actual injury to Ballantyne, the legal system, and the legal profession, but the Trial Panel is precluded from considering Boly’s conduct beyond November 2003 pursuant to the Bar’s Formal Complaint.

**D. Mitigating / Aggravating Factors.**

The *ABA Standards*, § 9.1 provides, “After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.” Based upon the foregoing findings and conclusions, the Trial Panel considers the following aggravating factors:

1. Dishonest or selfish motive. *Standards*, § 9.22(b). Boly’s assistance with two legal matters created a perception that Boly was an active attorney and Boly did not actively seek to correct such misperception.

2. Pattern of misconduct. *Standards*, § 9.22(c). Boly engaged in repeated instances of improperly acting as legal advisor in two different cases and in court-related proceedings.

3. Vulnerability of the victim. *Standards*, § 9.22(h). Ballantyne was an especially vulnerable person.

4. Substantial experience in the practice of law. *Standards*, § 9.22(i). Admitted in 1971, Boly had over twenty years of experience before he transferred to inactive status in 1999.

Pursuant to *ABA Standards*, § 9.32, the Trial Panel considers the following mitigating factors:

1. Absence of prior disciplinary record. *Standards*, § 9.32(a). No evidence was presented at trial relating to any previous disciplinary proceedings involving Boly.

2. Full disclosure and cooperation with proceedings. *Standards*, § 9.32(e). Evidence at trial established Boly was forthcoming with all discovery requests and was cooperative in all aspects of this proceeding.

3. Character or reputation. *Standards*, § 9.32(g). Evidence at trial established Boly was regarded as a very competent lawyer and had a positive reputation during his legal career.

**E. Oregon Case Law**

The Trial Panel is not aware of any Oregon case law involving an inactive attorney where the only allegation is a violation of DR 3-101(B), the unlawful practice of law. Additionally, the Trial Panel has reviewed the case law cited by the bar and counsel for Boly and the Trial Panel finds such case law is neither directly on point or persuasive.

**V. CONCLUSION**

Based upon the foregoing findings and conclusions, the Trial Panel having found by clear and convincing evidence Boly violated DR 3-101(B), considered the relevant ABA *Standards*, and evaluated the applicable Oregon case law, the Trial Panel makes the following disposition:

Boly is hereby suspended for one year.

Dated this 14th day of June, 2013.

/s/ Dylan M. Cernitz  
Dylan M. Cernitz, Chairperson

Dated this 14th day of June, 2013.

/s/ Theresa L. Wright  
Theresa L. Wright

Dated this 14th day of June, 2013.

/s/ Jonathan Levine  
Jonathan Levine, Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-63  
 )  
THOMAS IFVERSEN, )  
 )  
Accused. )

Counsel for the Bar: Stacy J. Hankin

Counsel for the Accused: None

Disciplinary Board: David W. Green, Chairperson  
F. Gordon Allen  
Jonathan Levine, Public Member

Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC  
8.1(a)(1), and RPC 8.4(a)(3). Trial Panel Opinion. 1-  
year suspension.

Effective Date of Opinion: August 14, 2013

**TRIAL PANEL OPINION**

This matter came regularly at a hearing (hereinafter “Hearing”) before a trial panel of the Disciplinary Board consisting of David W. Green, Chairperson, F. Gordon Allen, Esq., and Jonathan Levine, Public Member (hereinafter “Trial Panel”), on April 11, 2013, at offices situated at 900 SW Fifth Ave., Portland, Oregon. Stacy J. Hankin represented the Oregon State Bar (hereinafter “Bar”). The Accused, Thomas Ifversen, Esq., represented himself (hereinafter “Accused”).

The Trial Panel has considered the factual allegations in the Complaint, the prior Orders imposing sanctions related to the discovery of documents and a requested deposition, and the testimony and exhibits introduced in this case. Based on the findings and conclusions made below, we find that the Accused violated Oregon Rules of Professional Conduct, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.4(a)(3), and RPC 8.1(a)(1). We further determine that the Accused should be suspended from the practice of law for a period of one year (12 months).

## INTRODUCTION

**The Complaint:** A Formal Complaint (hereinafter “Complaint”) was filed on June 6, 2012 against the Accused claiming violations of the RPCs. In its first Cause of Complaint, the Bar claimed that the Accused violated RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (keeping a client reasonably informed and complying with reasonable requests for information), and RPC 1.4(b) (explaining matters to a client to the extent reasonably necessary for the client to make informed decisions) in his representation of Ms. Mandie Dever (formerly, Mandie Dougherty) (hereinafter “Dever”) and her children on injury claims related to an automobile accident in 2006. In its second Cause of Complaint, the Bar claimed that the Accused violated RPC 8.4(a)(3) (conduct involving misrepresentation that reflects adversely on the lawyer’s fitness to practice law) by making false representations to Dever about the status of her claims and actions taken on her behalf. In the third Cause of Complaint, the Bar alleged that the Accused violated RPC 8.1(a)(1) (knowingly making a false statement of material fact) in telling the Bar’s Client Assistance Office (hereinafter “CAO”) that the Accused had mis-filed a lawsuit on behalf of Dever and her children.

**The Answer:** An Answer was filed on August 23, 2012 by the Accused. The Accused admitted the facts and allegations in the Complaint, except that (i) the allegations in paragraphs 5, 14, and 15 were denied and (ii) the allegations in paragraphs 7 and 11 (which incorporated prior paragraphs) were denied in part.

**The Order to Produce Documents and Scheduling of Deposition:** The Bar requested production of documents in writing on September 12, 2012 (hereinafter “September Request for Production”) and followed up with a letter to the Accused on October 8, 2012 requesting production of documents and seeking a deposition of the Accused. A notice of deposition dated October 18, 2012 specified the time and place for the requested deposition. An Order by the Regional 5 Chairperson of the Oregon Disciplinary Board was issued to the Accused dated November 1, 2012 (hereinafter “November 1 Order”) requiring him to produce documents requested by the Bar in its September Request for Production. The Accused did not attend the deposition on November 12, 2012, and did not comply with the requests for documents or the November 1 Order.

**The January Order Imposing Sanctions:** The Bar made a motion on November 28, 2012 seeking sanctions for the failure of the Accused to cooperate with the discovery process and to attend the deposition. An oral hearing was held before the Trial Chairperson on January 14, 2013, attended by Ms. Hankin for the Bar and by the Accused. The Bar sought discovery sanctions pursuant to BR 4.5(e) for the Accused’s repeated failures to comply with the requests for discovery of documents and for the deposition. The Accused said that he knew about the November 1 Order, but that he been sick for part (but not all) of the period between October 2012 and January 13, 2013, and had been negligent in responding to the Bar’s requests. (Order Imposing Sanctions, dated January 16, 2013, p. 2.)

After consideration, the Trial Chairperson entered an Order Imposing Sanctions dated January 16, 2013, pursuant to BR 4.5(b)(1) (hereinafter “January Sanctions Order”). In the January Sanctions Order, the Trial Chairperson ordered that the matters in paragraphs 5, 7, 11, 14, and 15 of the Complaint shall be taken as established as true for purposes of the proceeding in accordance with the claim of the Bar in the Complaint. As a result of such ruling, the January Sanctions Order also provided that the matters alleged by the Bar in the Complaint as a whole were taken as established as true, and a default was entered against the Accused as to such matters.

**The April Order Compelling Discovery and Imposing Sanctions:** The Bar made a subsequent motion on March 25, 2013 to compel discovery and requesting an order imposing sanctions if the Accused failed to respond. The Trial Chairperson scheduled an oral argument to hear the motion. The oral argument was held on April 2, 2013 in front of the Trial Chairperson. Ms. Hankin was present for the Bar. Notification of the hearing for oral argument on this motion was sent to the Accused, but the Accused did not attend.

After the hearing and consideration of the motion, the Trial Chairperson issued a subsequent Order Compelling Discovery and Imposing Sanctions, dated April 2, 2013 (hereinafter “April Sanctions Order” and, with the November 1 Order and the January Sanctions Order, hereinafter the “Orders”). Pursuant to the April Sanctions Order, the Accused was ordered to produce documents and, if he failed to do so by 5:00 p.m. on April 8, 2013 (which was less than three full business days before the Hearing on sanctions in front of the full Trial Panel), the Accused would be prohibited from offering any evidence or testimony at the Hearing regarding the subjects of the Bar’s requests, in mitigation of any sanction that may be imposed on him as a result of his conduct.

**Witnesses, Exhibits, and Transcript:** This matter came before a Hearing in front of the full Trial Panel on April 11, 2013.

At the Hearing, the Bar called as witnesses Mandie Dever (the client referenced in the Complaint), the Accused, and Gina Mengheni, a claims representative for Ameriprise (the insurance company that was primarily involved on the claim by Dever). The Accused was called as a witness by the Bar and also testified on his own behalf.

The Bar introduced Exhibits 1 through 16, all of which were admitted as Exhibits (each is referred to in this opinion as a “Bar ex”).

Capri-Iverson Reporting (Adele P. Edwards) provided court reporting services. The transcript was received on or about April 29, 2013. A Motion to Correct and Settle Transcript dated May 10, 2013 was filed by the Bar. The Accused did not file a response to it. An Order to Correct and Settle Transcript was issued by the Trial Chairperson on May 20, 2013.

## **FINDINGS OF FACT**

The following are the findings of fact by the Trial Panel.

The Accused undertook the legal representation of Dever and her children in June 2006 on claims related to the automobile accident that occurred while her (then) husband was driving. Shortly thereafter, it was determined that Dever's husband was primarily at fault for the collision. As a result, the claims were against Dever's own insurance carrier, Ameriprise.

The injuries sustained by Dever and her daughter were serious enough that neither became medically stationary for approximately two years. During that time, Dever provided the Accused with information about medical treatment she and her daughter were receiving, and the representation by the Accused of Dever was handled in a generally satisfactory manner. However, starting in 2009, Dever began experiencing difficulty getting in touch with the Accused. He did not return many of her telephone calls, and he was rarely available when she tried to consult with him.

Sometime in mid-2009, the Accused informed Dever that Ameriprise had offered to settle the claims for \$20,000. The Accused explained that although Dever had a \$300,000 policy, the amount of outstanding medical expenses, primarily incurred by her daughter, meant that there was only \$20,000 left in available coverage under the insurance policy. Dever authorized the Accused to accept the offer. The Accused informed Dever that he would complete the settlement and provide her with paperwork to sign.

After the discussion with Dever, the Accused did not respond to many telephone messages left by her and cancelled numerous meetings with her. When Dever was able to reach the Accused, he told her that Ameriprise had reneged on the settlement. The Accused said he had filed a lawsuit in Washington County Circuit Court against Ameriprise to force it to settle the case, that he had taken a default against Ameriprise, that a hearing on the default was scheduled, and that he would be preparing an order to enforce the judgment. (Bar ex 9, pp. 1–6, 8.) At the time the Accused made those representations to Dever, he knew that they were false. No offer had been made by Ameriprise, no lawsuit had been filed, and the statute of limitations on Dever's claims had already expired (although the statute of limitations had not expired for claims by Dever's children).

Menghini, the Ameriprise claims representative, had a number of communications with the Accused in which the Accused said he was either going to file a lawsuit or make a demand. He did not file a suit or follow up with Menghini on any demand for the \$20,000 (or other amount) that his client had authorized him to accept. Eventually, Menghini closed the claims file.

Dever filed a written complaint with the Bar in December 2010. Most of her complaint focused on the Accused's failure to consummate the settlement and her recent discovery that no lawsuit had ever been filed on her or her children's behalf. The Bar's CAO sent Dever's complaint to the Accused and asked him to respond to her allegations.

In a February 3, 2011 response to the Bar, the Accused represented that he "mis-filed a complaint, causing it to be dismissed, but I am rectifying that mistake." (Bar ex 10.) On

that same day, the Accused informed Dever that he was “going full speed ahead on our lawsuit. I should have some court dates very soon.” (Bar ex 9, p. 7.) The Accused testified in the case Hearing that once he had told a lie, he felt he had no choice but to continue to repeat the lie. (Tr. 74–75.) The Accused testified that he was suffering from depression and that he could not tell Dever the truth. (Tr. 61–62.)

## 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 Bar’s factual allegations against the Accused in the Complaint were either already admitted by the Accused in the Answer or were deemed to be true, by virtue of January Sanctions Order, pursuant to BR 5.8(a). *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). However, the Trial Panel still needed to decide whether the facts deemed true by virtue of the default constitute the disciplinary rule violations alleged by the Bar and, if so, what sanctions may be appropriate. See *In re Koch*, 345 Or 444, 198 P3d 910 (2008); see also *In re Kluge*, *supra* (describing the two-step process). The Hearing was held in order to allow evidence and oral argument that would be relevant to these decisions.

We will discuss the three causes of complaint in groups based on the RPC that was the subject of the violation, as follows.

### **A. The Accused Violated RPC 1.3 by Neglecting Dever’s Legal Matter.**

RPC 1.3 prohibits a lawyer from neglecting a legal matter entrusted to the lawyer. A lawyer who ignores a case over an extended period or engages in a course of neglectful conduct violates the rule. *In re Jackson*, 347 Or 426, 223 P3d 387 (2009); *In re Koch*, *supra*.

The Accused failed to take actions necessary to pursue the children’s claims despite numerous requests from Dever and despite promises by the Accused to her that he was taking action. The Trial Panel concluded that the Accused violated RPC 1.3.

### **B. The Accused Violated RPC 1.4(a) by Failing to Keep the Client Reasonably Informed and by Failing to Respond to a Client’s Repeated Requests for Information.**

RPC 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. *In re Koch*, *supra*, at 452 (violation when lawyer failed to inform client for six months of an agreement with the opposing lawyer and failed to respond to the client’s repeated requests). In determining whether a lawyer acted reasonably, the court should consider, among other things, the length

of time a lawyer failed to communicate, whether the lawyer failed to respond promptly to reasonable requests for information from the client, and whether the lawyer knew or a reasonable lawyer would have foreseen that a delay in communication would prejudice the client. *In re Groom*, 350 Or 113, 124, 249 P3d 976 (2011).

Beginning in mid-2009, the Accused repeatedly did not respond to telephone calls and cancelled appointments he had made with Dever to discuss the status of her case. When he did respond, he did not provide truthful information. The Trial Panel concluded that the Accused violated RPC 1.4(a).

**C. The Accused Violated RPC 1.4(b) by Failing to Explain a Matter to the Extent Necessary to Permit the Client to Make an Informed Decision.**

RPC 1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. *In re Snyder*, 348 Or 307, 316, 232 P3d 952 (2010).

In representing Dever, the Accused failed to inform Dever that the statute of limitations would run on her claims, and, after they did, he failed to inform her that he had not filed a lawsuit or obtained a settlement. The Accused failed to explain the matters sufficient to allow Dever to make an informed decision about suing Ameriprise, accepting a settlement of claims, or hiring another lawyer to do what the Accused claimed he was doing for her, but not actually doing. The Trial Panel concluded that the Accused violated RPC 1.4(b).

**D. The Accused Violated RPC 8.4(a)(3) by Making False Representations and Failing to Disclose Material Information to the Client.**

RPC 8.4(a)(3) prohibits a lawyer from engaging in conduct involving misrepresentation that reflects adversely on the lawyer's fitness to practice law. A lawyer engages in conduct involving misrepresentation when the lawyer makes a representation, either directly or by omission, that the lawyer knows is false and material. *In re Hostetter*, 348 Or 574, 595, 238 P3d 13 (2010). To prove a violation of RPC 8.4(a)(3), it is not necessary for the Bar to prove that the misrepresentation was successful, but only that it could have influenced a decision-maker. *In re Summer*, 338 Or 29, 39, 105 P3d 848 (2005). The Bar need not establish that the lawyer intended to deceive, but only that the lawyer knew the misrepresentation was false and material. *In re Hostetter, supra; In re Claussen*, 322 Or 466, 481, 909 P2d 862 (1996). The term "knowingly" denotes actual knowledge of the fact in question, but a person's knowledge may be inferred from the circumstances. RPC 1.0(h).

When a lawyer knowingly fails to inform a client that the client's case has been dismissed, the lawyer engages in misrepresentation by omission. *In re Obert*, 336 Or 640, 649, 89 P3d 1173 (2004). In the *In re Obert* case, the lawyer inadvertently failed to timely file a notice of appeal and the court dismissed the appeal. Before becoming aware of the

dismissal, the lawyer informed the client that the appeal was pending and the briefing was ahead of schedule. Upon learning that the appeal had been dismissed, and because of shame and embarrassment, the lawyer failed to promptly inform the client of the dismissal. In finding that the lawyer engaged in misrepresentation by omission, the court noted that the lawyer-client relationship is a fiduciary one and a lawyer jettisons those responsibilities when the lawyer knowingly fails to tell the client the all-critical fact that the court has spoken and the client's case is over. *In re Obert*, *supra*.

The Accused failed to inform Dever that the statute of limitations for her claims was about to expire before they did, and afterwards he failed to inform her that the statute of limitations had expired. When he was silent, his conduct constituted misrepresentation by omission. When he spoke, he lied about the filing of a case and about the settlement. He repeated the pattern of avoiding telling Dever the truth, or lying about it, over a period of several months.

The Trial Panel concluded that the Accused made multiple false representations to Dever over an extended period in order to avoid her discovering what had happened. The Accused led Dever to believe that the insurance company (Ameriprise) had offered to settle the claims for \$20,000, that Ameriprise then reneged on its offer, and that the Accused was pursuing the settlement through litigation. The Accused knew that none of these events happened. The Trial Panel concluded that the Accused violated RPC 8.4(a)(3).

**E. The Accused Violated RPC 8.1(a)(1) by Falsely Telling the Bar That He Mis-Filed a Complaint in the Dever Matter.**

RPC 8.1(a)(1) provides that, in connection with a disciplinary matter, a lawyer shall not knowingly make a false statement of material fact.

After Dever filed a complaint with the Bar, the Accused told the Bar's CAO that the Accused had mis-filed a lawsuit on behalf of Dever and her children. In fact, no lawsuit had ever been filed by the Accused on behalf of Dever or her children. At the time the Accused made that representation to the Bar, he knew that no lawsuit had ever been filed and that he was giving the Bar's CAO false information. The Trial Panel concluded that the Accused violated RPC 8.1(a)(1).

### SANCTION

In fashioning a sanction, the ABA *Standards for Imposing Lawyer Sanctions* (amended 1992) (hereinafter "*Standards*") and Oregon case law are considered. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002); *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1993).

**A. ABA Standards Applied to This Case.**

The *Standards* require an analysis of four factors by the Trial Panel: (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; *In re Jackson*, 347 Or at 440; *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008). The Trial Panel should adjust the presumptive sanction under the *Standards* based upon the presence of aggravating or mitigating circumstances. *In re Jackson*, 347 Or at 441. Finally, the Trial Panel should evaluate whether the sanction is consistent with Oregon case law. *In re Jackson*, *supra*.

1. **Duties Violated.** The most important ethical duties are those obligations that a lawyer owes a client. *Standards*, § 5. The Accused violated a duty he owed to his client to be truthful and candid with her. *Standards*, § 4.6. The Accused violated his duty to pursue Dever's legal matter promptly and diligently and to communicate with her. *Standards*, § 4.4. He also violated a duty he owed to the profession to be truthful in the Bar's investigation into his conduct. *Standards*, § 7.0.

2. **Mental State.** The *Standards* recognize three mental states: intentional, knowing, and negligent. A lawyer acts intentionally by acting with the conscious objective or purpose of accomplishing a particular result. A lawyer acts knowingly by being consciously aware of the nature or circumstances but without having a conscious objective to accomplishing a particular result. A lawyer acts negligently by failing to heed a substantial risk that circumstances exist or a result will follow, in circumstances in which the failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 10.

The Trial Panel finds that the conduct of the Accused was done intentionally. The Accused misrepresented the truth and lied to his client in order to avoid the emotional and/or psychological consequences to the Accused of telling the truth.

3. **Actual or Potential Injury.** Under the *Standards*, the injuries caused by a lawyer's professional misconduct may be either actual or potential. *See In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992) (“[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction.”). The lawyer's misconduct may involve a violation of a duty owed to a client, the public, the legal system, or the profession. *Standards*, § 3.0. The protection of the public requires examination of the potential for injury caused by the lawyer's misconduct, whether or not actual injury occurred.

The Accused knew that his conduct could cause potential harm and did cause harm to the client. The Accused repeatedly lied to his client about the status of her affairs and claimed he was taking actions that he was not taking. He neglected the case and then lied about it. Further, his failure to respond truthfully to the Bar process was intentional as well as detrimental to the public confidence in the profession.

**B. Preliminary Sanction.**

Drawing together the factors of duty, mental state, and injury, the *Standards* provide the following:

“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.

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

*Standards*, § 7.2.

“Disbarment is generally appropriate when a lawyer \* \* \* has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.”

*Standards*, § 8.1(b).

**C. Aggravating and Mitigating Circumstances.**

“Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.” *Standards*, § 9.21. The Trial Panel considered the following factors under the *Standards*:

1. A Dishonest or Selfish Motive. Under *Standards*, § 9.22(b), a dishonest or selfish motive is an aggravating factor. The Bar argued that the Accused’s conduct was with the intent to avoid the personal consequences to himself of admitting he had failed to serve the client well. The Trial Panel found that there was a dishonest or selfish motive, within the meaning of the *Standards*, but not one based on any financial gain or any other rational advantage to the Accused.

2. A Pattern of Misconduct. Under *Standards*, § 9.22(c), a pattern of misconduct is an aggravating factor. The Bar argued that the Accused’s conduct extended over a long enough period to constitute a pattern of misconduct. The misconduct was both in regard to the misrepresentations to Dever and neglect of her case, and to the false statement to the Bar about mis-filing the complaint. The Trial Panel found that there was a pattern of misconduct.

3. Multiple Offenses. Under *Standards*, § 9.22(d), multiple offenses constitute an aggravating factor. The Bar argued that there were multiple offenses. The Trial Panel found that there were multiple offenses.

4. Bad-Faith Obstruction of Disciplinary Proceeding. Under *Standards*, § 9.22(e), bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency is an aggravating factor. The Bar argued that this aggravating factor applied because of the Accused's failure to comply with the requests for discovery and deposition by the Bar and with the Orders.

The essence of the testimony of the Accused is that after he started lying to Dever, he felt compelled to continue to deny the truth and he avoided thinking about the matters in this case, because of depression, death of a parent, family problems and/or other psychological reasons. The Trial Panel was not persuaded that the evidence or the Accused's explanation were legally sufficient to provide an excuse or to avoid the application of "bad-faith obstruction" to his refusal to comply with the Bar requests or follow the Orders. However, the consequences were the sanctions.

The Trial Panel found credible the Accused's explanation of his mental state. The Trial Panel concluded that the "obstruction" was, to the Accused, not *an intent* to obstruct the disciplinary process so much as it was the *consequence* of his desire to avoid facing the situation. The Trial Panel found credible the Accused's statements to the effect that he did not feel he had any options, once he started to lie to Dever. (Tr. at 74.) He could not face, think about, or deal with his failures in the Dever case. He could accept the legal consequences, including the sanctions, for his not facing the situation and dealing with it. The Trial Panel believed the Accused was sincere in being remorseful about the effect that his conduct had on Dever's case.

After much discussion within the Trial Panel, the Trial Panel concluded that it was unnecessary to find bad-faith obstruction in order for the Trial Panel to reach a decision on the appropriate sanction for the Accused's conduct, so it declined to find bad-faith obstruction by the Accused.

5. Mitigating Factors. Under *Standards*, § 9.32, there are factors that may be considered as mitigating factors in considering what sanction is appropriate. In its Trial Memorandum on Sanctions in this case, the Bar said that the absence of a prior disciplinary record was a mitigating factor in this case. In the case Hearing, the Bar's counsel did not discuss any mitigating factors, and instead argued that the assertion by the Accused that he had "fixed" his problem was not true as evidenced by a filed complaint that was apparently first made known to the Accused at this Hearing.

The Trial Panel looked at the mitigating factors in the *Standards*. The Trial Panel found that the absence of a prior disciplinary record was a mitigating factor for the Accused in this case. The Trial Panel found that there were no other mitigating factors in this case.

**D. Oregon Case Law.**

Considering the Accused's conduct, and the aggravating and mitigating factors, the Trial Panel concluded that some period of suspension is appropriate.

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). Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

Lawyers who have made misrepresentations to clients have been suspended or, in some cases, disbarred. *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension imposed on lawyer who, among other things, failed to disclose material information to clients); *In re Obert*, 336 Or 640, 89 P3d 1173 (30-day suspension of lawyer who, among other things, failed to inform his client that the client's appeal had been dismissed due to the lawyer's action where mitigating circumstances significantly outweighed aggravating circumstances); *In re Brown*, 326 Or 582, 956 P2d 188 (1998) (disbarment of lawyer who failed to make full disclosure to his clients about a business transaction between them); *In re Butler*, 324 Or 69, 921 P2d 401 (1996) (one-year suspension of lawyer who failed to inform his client that the client's lawsuit had been dismissed because of the lawyer's inaction); *In re Binns*, 322 Or 584, 910 P2d 382 (1996) (disbarment of lawyer who, among other things, made misrepresentations to his clients).

Lawyers who have made misrepresentations to the Bar have been suspended for lengthy periods. *In re Gallagher*, 332 Or 173, 26 P3d 131 (2001) (two-year suspension imposed on lawyer who engaged in dishonesty toward the opposing party, submitted fabricated evidence to the Bar, and made misrepresentations to the Bar); *In re Wyllie*, 327 Or 175, 957 P2d 1222 (1998) (two-year suspension imposed on lawyer who submitted false evidence to the Bar regarding his CLE activities, and then lied to the Bar about what he had done).

Generally, the Oregon Supreme Court has imposed suspensions ranging from 30 days to one year when a lawyer has either neglected a client's legal matter or failed to adequately communicate with the client. *In re Snyder*, 348 Or 307, 232 P3d 952 (30-day suspension); *In re Redden*, 342 Or 393, 397–402, 153 P3d 113 (2007) (court canvassed prior relevant cases and imposed a 60-day suspension on a lawyer who, for almost two years, failed to complete a client's legal matter).

After evaluating the ABA *Standards*, the factors in this case, and the Oregon case law, the Trial Panel concluded a suspension of one year (12 months) was the appropriate sanction.

**DISPOSITION**

The Accused shall be suspended from the practice of law for a period of one year (12 months).

DATED this 11th day of June, 2013.

/s/ David W. Green

David W. Green, OSB 76151  
Trial Panel Chairperson

/s/ F. Gordon Allen

F. Gordon Allen, OSB 770103  
Trial Panel Member

/s/ Jonathan Levine

Jonathan Levine  
Trial Panel Public Member

**Cite as 354 Or 47 (2013)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of )  
 )  
PETER CARINI, )  
 )  
Accused. )

(OSB 10125; SC S060708)

En Banc

On review from a decision of a Trial Panel of the Disciplinary Board.

Argued and Submitted April 30, 2013.

Lee S. Werdell, Bend, argued the cause and filed the briefs for the Accused.

Stacy J. Hankin, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The Accused is suspended from the practice of law for 30 days, commencing 60 days from the date of filing of this decision.

In this attorney discipline proceeding, the Bar charged the Accused with violating Rule of Professional Conduct (RPC) 8.4(a)(4), which prohibits engaging in conduct that is prejudicial to the administration of justice. The trial panel determined that the Accused had violated that rule, and it recommended his suspension from the practice of law for 30 days. On review, the Accused challenges the Trial Panel's determinations regarding the rule violation and sanction. On *de novo* review, we find that the Accused violated RPC 8.4(a)(4), and we further conclude that a 30-day suspension is the appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 12-106  
)  
ROSEMARY FOSTER, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: None  
Disciplinary Board: Mary Lois Wagner, Chairperson  
Chas Horner  
Carrie A. Bebout, Public Member  
Disposition: Violations of ORS 9.160, RPC 5.4(b), RPC 5.4(d),  
and RPC 5.5(a). Trial Panel Opinion. 30-day  
suspension.  
Effective Date of Opinion: August 17, 2013

**OPINION OF THE TRIAL PANEL**

This matter came before a Trial Panel of the Disciplinary Board of the Oregon State Bar on April 9, 2013, in Eugene, Oregon. The Trial Panel heard witnesses and considered evidence concerning the Accused’s conduct with respect to the Oregon State Bar’s complaints against her.

The Oregon State Bar charges the Accused:

1. with violations of ORS 9.160 and RPC 5.5(a) by practicing law in the State of Oregon and representing that she was qualified to practice law in this state at a time when she was not an active member of the Oregon State Bar; and,
2. with violations of RPC 5.4(b) and (d) by forming a partnership with a nonlawyer when the activities of the partnership included the practice of law and where the nonlawyer owned an interest in the partnership and was an officer or occupied a position of similar responsibility in any form of association other than a corporation.

### FINDINGS OF FACT

The Trial Panel finds the following facts that are generally applicable to all of the complaints against the Accused:

1. The Accused was at all relevant times an attorney at law and a member of the Oregon State Bar, admitted in September 2010 by the Supreme Court of the State of Oregon.
2. At all relevant times, the Accused was also an active member of the Bar of Washington, D.C. and a member of the Alaska State Bar.
3. Effective July 15, 2011, the Accused was administratively suspended from membership in the Oregon State Bar for her failure to pay her PLF assessment.
4. From January 2011 to the beginning of May 2011, the Accused worked as an independent contractor attorney, in Oregon, for attorneys Bernath and Wong. She represented clients of that firm in Social Security Insurance (SSI) and Social Security Disability (SSD) administrative hearings. During this period, the Accused became acquainted with JoEllen Shannon, a nonlawyer, who also worked as an independent contractor for the same firm. Both Ms. Shannon and the Accused were terminated from their work with Bernath and Wong at the beginning of May 2011.
5. The Accused made numerous inconsistent and contradictory statements in response to inquiries from disciplinary counsel and throughout her hearing before the Trial Panel. During the hearing, she was often evasive in her answers and interrupted other speakers frequently in order “to explain.” From this behavior, and evidence of her behavior during the period in which the Accused was suspended from bar membership, the Trial Panel finds that the Accused was not a credible witness on her own behalf.

### FIRST CAUSE OF COMPLAINT

In its Formal Complaint, the Oregon State Bar charges the Accused with violation of RPC 5.5(a) and ORS 9.160.

**RPC 5.5(a)** provides that 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.”

**ORS 9.160** provides that a “person may not practice law in this state, or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar.”

With respect to the First Cause of Complaint, the Trial Panel finds:

1. Beginning in September 2011, the Accused represented JoEllen Shannon in an administrative hearing before the Oregon Employment Department. When the ALJ learned the Accused was suspended from her membership in the Oregon State Bar, he allowed her to proceed, at the hearing level, as a non-attorney advocate. After Ms. Shannon lost her case at

the hearing level, the Accused continued her representation of Shannon at the appeal level, including the preparation and filing of a written memorandum to the Employment Appeals Board.

In her correspondence to the Employment Department, and in the Memorandum filed with Employment Appeals Board, the Accused identified herself as an “Attorney at Law,” using an Oregon address and phone numbers, thereby implying that she was an attorney qualified to practice law in Oregon.

2. Following termination of their work relationship with Bernath and Wong, Mr. Bernath and Ms. Wong filed a civil action against the Accused and Ms. Shannon in Washington County Circuit Court and eventually took a money judgment against them by default. On January 24, 2012, the Accused filed, with Washington County, a “Motion to Set Aside Judgment and Reinstate Case” and two identical Affidavits in support of that motion, one signed by the Accused, the other by Ms. Shannon.

The Accused prepared the documents on her own behalf and that of Ms. Shannon, and filed them by facsimile with the court. The fax cover sheet accompanying the motion and affidavits, as well as the Accused’s cover letter, were both prepared by the Accused. They identify her as an “Attorney at Law” and the fax cover sheet shows only an Oregon address and telephone numbers. A reasonable person would conclude from these documents that the Accused was a lawyer licensed to practice law in Oregon.

3. The Accused repeatedly represented individuals in administrative hearings in Social Security Insurance and Social Security Disability hearings.

The Accused acknowledges that representing clients before the Social Security Administration constitutes the practice of law. Moreover, she was able to be paid through the Social Security Administration only because she was an attorney.

She justifies her representation of these clients on the fact that she is an active member of the Washington D.C. Bar. Social Security rules allow attorneys to appear in administrative hearings so long as they are active members of the bar in at least one jurisdiction. However, the statutes of the State of Oregon and the rules of the Oregon State Bar prohibit the practice of law in Oregon by a person who is not an active member of the Oregon State Bar.

4. The Accused generally held herself out in her business activities as qualified to practice law in this state at a time when she was not an active member of the Oregon State Bar. She identified herself in correspondence as an “attorney at law,” using an Oregon address and Oregon phone numbers, and, at the same time, failing to clarify that her memberships were in the Alaska or Washington D.C. Bar, not in Oregon. Until at least September 24, 2011, she failed to remove a website identifying herself as an attorney offering a wide variety of legal services in Oregon. Beginning sometime in 2012, she

authorized the posting of a second website advertising her legal services and specifically identifying Oregon as the issuing state for her license to practice law. This website remained online as of April 7, 2013, two days prior to her hearing in this matter.

### **Conclusions**

The Trial Panel finds that the Accused practiced law in the State of Oregon and represented that she was qualified to practice law in this state at a time when she was not an active member of the Oregon State Bar, in violations of ORS 9.160 and RPC 5.5(a).

### **SECOND CAUSE OF COMPLAINT**

In its Formal Complaint, the Oregon State Bar charges the Accused with violation of RPC 5.4(b) and RPC 5.4(d).

**RPC 5.4(b)** provides that “a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”

**RPC 5.4(d)** provides that a “lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein . . .; [or]
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law...”

With respect to the Second Cause of Complaint, the Trial Panel finds:

1. On September 1, 2011, the Accused and Ms. Shannon entered into a Limited Liability Partnership Agreement operating under the name FOSTER AND SHANNON, d/b/a DISABILITY ADVOCATES. The partnership agreement provides that the “capital stock of the partnership” shall be divided equally between the parties and authorized all decision making to be shared equally between them.

2. The partners opened a business checking account at Wells-Fargo Bank in Lane County and each partner was an authorized signer on that account.

3. The Accused prepared and filed the Articles of Organization with the Secretary of State. In that filing, the Accused represents that the LLC will provide a “Licensed Professional Service,” that service being “assistance to person with Social Security issues.” The Accused acknowledges that the “licensed professional service” to be provided was the practice of law in the representation of clients in SSI and SSD hearings.

4. The reason for forming the partnership was that Ms. Shannon, a nonlawyer, could not recover her fees through the Social Security Administration unless her work was

supervised by an attorney, who would sign the fee petition. The Accused, as the attorney, would sign on Ms. Shannon's fee petitions to the SSA.

5. Within a few months after entering into the partnership, but no longer than about six months after, the Accused became aware that the Oregon State Bar's rules might prohibit the partnership with Ms. Shannon. The Accused had been provided with a copy of the Oregon RPC at the time she had been admitted to active practice in 2010 and, by her testimony, was in contact with Helen Hirschbiel and Paul Neese at the Oregon State Bar to consult about matters of professional responsibility. Nonetheless, she claims that it took her about a year to find the RPC prohibiting business relationships with nonlawyers.

6. The Accused and Ms. Shannon dissolved DISABILITY ADVOCATES by written agreement on August 30, 2012. Each of them claimed, at different points in her testimony, that the reason for dissolving the LLP was their concern for the Accused's potential conflict with the RPC or, conversely, that Ms. Shannon had figured out how to get paid for her services without help from the Accused.

### **Conclusions**

The Accused entered into a partnership with a nonlawyer, JoEllen Shannon, forming an LLP where the principle business was the practice of law in SSA administrative hearings and where the nonlawyer held an equal interest in the ownership and direction of the business, all in violations of RPC 5.4(b) and RPC 5.4(d).

### **SANCTIONS**

In considering the appropriate sanction in this proceeding, the trial panel refers to the American Bar Association *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") and Oregon case law. The ABA *Standards* require the panel to consider four factors: (1) the duty violated; (2) the Accused's mental state; (3) the actual or potential injury caused by the Accused's conduct; and (4) the existence of aggravating and mitigating circumstances.

#### **Duties Violated.**

**Duties to the Profession.** Sanctions are appropriate in cases involving false or misleading communications about the lawyer or the lawyer's services and the unauthorized practice of law. *Standard*, § 7.0.

The Accused (1) allowed and authorized internet websites advertising her services as a lawyer authorized to practice law in the State of Oregon; and (2) continued to represent herself in her business correspondence as an "attorney at law" practicing in Oregon, all throughout the time when she was subject to an administrative suspension by the Oregon State Bar.

She also engaged in the unauthorized practice of law by (1) preparing and filing a pleading and supporting affidavit on behalf of Ms. Shannon in Washington County Circuit Court; (2) representing Ms. Shannon in an administrative appeal before the Employment Appeals Board for the State of Oregon; and (3) representing clients before the Social Security Administration, as a lawyer, in violations of RPC 5.5(a).

She further violated this duty by entering into an unauthorized partnership with Ms. Shannon, where the purpose of the partnership was the practice of law.

**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, Definitions.*

The Accused knew that she was suspended from the practice of law beginning July 15, 2011. She knew that a website or websites had been set up for her and, in one case, authorized a website, holding her out as an Oregon licensee. She thought that there “might” be a prohibition against her entering into the partnership with Ms. Shannon, but did not make a meaningful search to determine if that were the case.

There is not clear and convincing evidence that the Accused was knowledgeable of the RPC’s and intended to operate outside their boundaries. There is, however, clear and convincing evidence that she understood the representations being made to third parties and that she knew that what she was doing in the various circumstances described here constituted the practice of law.

**Injury.**

“Injury” includes harm to a client, the public, the legal system, or the profession that results from a lawyer’s misconduct. The level of injury can range from “serious” to “little or no” injury. *Standards, Definitions.* Injury can be either actual or potential. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

There is no evidence that any actual injury occurred as the result of the Accused’s actions. However, the potential for injury as she continued to practice law outside of the Oregon State Bar’s regulatory system, which is set up for the protection of clients, is clear.

**Aggravating Circumstances.**

The Trial Panel finds the following aggravating circumstances from those available under at *Standards*, § 9.2:

- c. A pattern of misconduct, that is, holding out as an “attorney at law” in her business communications; practicing law when not an active member of the Oregon State Bar; and continuing in her partnership with Ms. Shannon even when she suspected doing so might be against the rules;

- d. Multiple offenses;
- e. Substantial experience in the practice of law;

**Mitigating Circumstances.**

The Trial Panel finds the following mitigating circumstances at *Standards*, § 9.32.

- a. Absence of prior disciplinary record;
- b. Absence of a dishonest or selfish motive.

The aggravating circumstances outweigh the mitigating circumstances.

**CONCLUSION AND DISPOSITION**

Having found that the Accused violated the Oregon Code of Professional Responsibility and the Oregon Rules of Professional Conduct in the particulars discussed above, and taking into consideration the duties violated, the potential for injury to the public and the profession, the mental state of the Accused, and the aggravating and mitigating factors discussed above, the Trial Panel concludes that:

- 1. The Accused be suspended from the practice of law for a period of thirty (30) days;
- 2. That this suspension commence subsequent to the following events:
  - a. The Accused taking the Multistate Professional Responsibility Exam (MPRE) and earning a scaled score of no less than 85; and,
  - b. The termination of the Accused's administrative suspension under such terms as the Oregon State Bar may determine.

Dated this 17th day of June, 2013.

/s/ Mary Lois Wagner  
Mary Lois Wagner, Trial Panel Chairperson

/s/ Chas Horner  
Chas Horner, Trial Panel Member

/s/ Carrie A. Bebout  
Carrie A. Bebout, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case Nos. 12-81, 13-82, 13-93  
 )  
THEODORE C. CORAN, )  
 )  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(c)(3), RPC 1.15-1(a),  
RPC 1.15-1(c), and RPC 1.15-1(d). Stipulation for  
Discipline. 30-day suspension, all stayed, 24-month  
probation.  
Effective Date of Order: October 6, 2013

**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 thirty (30) days, with the suspension stayed pending twenty four (24) months of probation, effective thirty (30) days after the signing of this Order, for violations of RPC 1.5(c), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d).

DATED this 6th day of September, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ James Edmonds  
James Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Theodore C. Coran, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 24, 1982, 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 opportunity to seek advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On August 20, 2013, 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 1.5(c)(3), RPC 1.15-1(a), RPC 1-15-1(c), and RPC 1.15-1(d). 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

#### SOTO MATTER: OSB CASE NO. 12-81

5.

On or about March 3, 2008, the Accused was appointed to represent criminal defendant Raul Torres Soto (hereinafter “Soto”) in Yamhill County Circuit Court Case No. CR080118DV. Soto was convicted of felony assault and other charges after trial and, on or about August 15, 2008, was sentenced to a term of imprisonment.

6.

In June 2010, Soto filed a petition for post-conviction relief from his conviction arising from the criminal case described in paragraph 5 above and, on or about June 15, 2010, attorney Richard White (hereinafter “White”) was appointed to represent Soto on the

petition, Tillamook County Circuit Court Case No. 102065. On or about June 23, 2010, White contacted the Accused and requested a copy of Soto's file from the criminal case described in paragraph 5 above (hereinafter "Soto's file"). The Accused did not respond.

7.

Over the following several months, White repeatedly requested from the Accused, by telephone, fax, and letter, a copy of Soto's file. The Accused was aware of White's need for Soto's file, but did not respond to White's requests.

8.

On or about October 16, 2010, November 7, 2010, and November 27, 2010, Soto contacted the Accused by letter and directed the Accused to immediately deliver a copy of Soto's file to White. The Accused did not respond to Soto's requests.

9.

On or about January 4, 2011, a staff attorney for the Oregon State Bar Client Assistance Office contacted the Accused regarding his failure to deliver Soto's file to White. On or about February 1, 2011, the Accused mailed a file to White, but it was not the file White and Soto had requested.

10.

The Accused delivered Soto's file to White on or about March 18, 2011.

11.

The Accused admits that, by engaging in the conduct described in paragraphs 6 through 10, he violated RPC 1.15-1(d).

#### **JUAREZ MATTER: OSB CASE NO. 13-82**

12.

On or about January 10, 2011, the Accused represented Manuel May Juarez (hereinafter "Juarez") in a criminal case pending in Marion County, *State v. Juarez*, Case No. 10C49494. Pursuant to a written agreement, the Accused charged and collected a flat fee prior to completing the representation. Although the written agreement explained that the fee would not be deposited into a lawyer trust account, it did not explain that the client could discharge the Accused at any time and in that event might be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

13.

The Accused thereafter completed the representation of Juarez and no refund was required.

14.

The Accused admits that, by engaging in the conduct described in paragraphs 12, he violated RPC 1.5(c)(3).

**SELANDER MATTER: OSB CASE NO. 13-93**

15.

On or about November 13, 2011, the Accused represented Jayson Selander and Jayson's mother Jamie Victor (hereinafter "Victor") in various matters for a flat fee. The Accused charged and collected the entire fee from Victor on or about November 13, 2011, long before he had completed the matters for which the flat fee was paid.

16.

The Accused did not have a written fee agreement with respect to the representation and fee described in paragraph 15.

17.

On or about November 13, 2011, Victor advanced \$3,000 for expenses in the matters described in paragraph 15, above. The Accused did not deposit the \$3,000 into a lawyer trust account. The Accused thereafter used the \$3,000 to pay expenses in the matters described in paragraph 15, above.

18.

The Accused was discharged prior to completing the representation for which the fee described in paragraph 15 was paid. The Accused promptly and voluntarily refunded the majority of the fee and accounted for expenses.

19.

The Accused admits that, by engaging in the conduct described in paragraphs 15 through 18, he violated RPC 1.5(c)(3), RPC 1.15-1(a), and RPC 1.15-1(c).

**Sanction**

20.

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 properly deal with client property in the Soto and Selander matters, the Accused violated his duty to preserve client property. *Standards*, § 4.1. The Accused's failure to ensure that he had a proper written fee agreement in the Juarez and Selander matters violated a duty he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted negligently in not quickly delivering Soto's file to White. The Accused's failure to include mandatory language in the Juarez written fee agreement was negligent. (RPC 1.5(c)(3) became effective only a month prior to the agreement). In the Selander matter, the Accused knowingly collected a flat fee without a written fee agreement permitting him to do so.
- c. **Injury.** The Accused's failure to promptly deliver the Soto file caused frustration and a needless expenditure of resources by White and had the potential for delaying Soto's petition. The Accused's failure to include the proper language in his fee agreement in the Juarez matter could have injured Juarez in the event the Accused had not completed the representation. The Accused's failure to enter into a written fee agreement and to properly handle the fees and expenses advanced in the Selander matter jeopardized client funds and caused actual and potential confusion regarding the nature and extent of the agreement for which the fees and expenses were advanced.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. *Standards*, § 9.22(a)<sup>1</sup>.
    - i. In December 2010, the Accused was reprimanded for violation of RPC 1.5(c)(2) (contingent fee in a criminal case); and RPC 1.15-1(a) and RPC 1.15-1(c) (treating a fee as if it was earned on receipt in the absence of a written fee agreement so providing). *In re Coran*, 24 DB Rptr 269 (2010). The underlying misconduct occurred in 2007.
    - ii. In August 2002, the Accused was reprimanded for a personal-interest conflict of interest, in violation of DR 5-101(A), and neglect of a legal matter, in violation of DR 6-101(B). *In re Coran*, 16 DB Rptr 234 (2002). In August 2000, the Accused was reprimanded for engaging in

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<sup>1</sup> In determining the weight of each prior offense as an aggravating factor the court considers: (1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the present offense; (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 195, 200, 951 P2d 149 (1997).

conflicts of interest that arose from the Accused's joint representation of codefendants in a criminal matter, in violation of DR 5-105(C) and DR 5-105(E). *In re Coran*, 14 DB Rptr 136 (2000).

2. Multiple offenses. *Standards*, § 9.22(d).
3. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to the Oregon State Bar in 1982 and has maintained an active practice since that time.

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

1. The Accused's failures were not the result of a dishonest or selfish motive. *Standards*, § 9.32(b).
2. Timely good faith effort to rectify consequences of misconduct. *Standards*, § 9.32(d).
3. Full and free disclosure to disciplinary board and cooperative attitude toward proceedings. *Standards*, § 9.32(e).
4. Remoteness of prior offenses. *Standards*, § 9.32(m). The Accused's prior offenses in 2000 and 2002 are remote from the misconduct in the present matters. The misconduct underlying the Accused's 2010 reprimand occurred in 2007.

21.

Under the ABA *Standards*, 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. Where that failure was knowing, suspension is generally appropriate. *Standards*, § 4.12. Similarly, reprimand is generally appropriate when a lawyer negligently engages in conduct that violates a duty owed as a professional. *Standards*, § 7.3. Where the failure was knowing, suspension is generally appropriate. *Standards*, § 7.2.

22.

A 30-day suspension is in accord with Oregon law. The court has found that a single, isolated violation of charging an excessive or improper fee can result in a public reprimand. *In re Paulson*, 335 Or 436, 438, 71 P3d 60 (2003). Even where a lawyer has some prior disciplinary history, the Disciplinary Board has reprimanded lawyers who improperly charged and handled flat fees. *See, e.g., In re Grimes*, 25 DB Rptr 242 (2011) (reprimand for violations of RPC 1.5 and 1.15-1, notwithstanding lawyer's substantial prior experience, multiple offenses, and prior disciplinary record); *In re McElroy*, 25 DB Rptr 224 (2011) (reprimand for violations of RPC 1.15-1, notwithstanding lawyer's substantial experience, multiple offenses, and prior admonition for similar misconduct). When an excessive or improper fee is combined with other trust account rule violations, and more egregious

behavior, the court has imposed a 30-day suspension. *In re Fadeley*, 342 Or 403, 414, 153 P3d 682 (2007) (where lawyer not only treated a fee as earned on receipt without written agreement of his client, he also failed to render an accounting and refund upon discharge). A more serious violation of the fee rules, combined with conflict of interest violations and serious aggravating factors, has resulted in a 90-day suspension. *In re Balocca*, 342 Or 279, 298, 151 P3d 154 (2007) (lawyer not only improperly treated the fee as earned on receipt, he also performed no work and made no refund; the court found aggravating factors of substantial experience, multiple offenses, a prior admonition for similar misconduct, and false statements to the Bar during the investigation; and no mitigating factors). The Accused's misconduct is far less aggravated and there are substantial mitigating factors. Given all the circumstances, and taking the three cases together, a 30-day suspension is appropriate in this matter.

23.

Probation is a sanction that can be imposed when a lawyer's right to practice law needs to be monitored or limited. *Standards*, p. 23. However, the probationary conditions must make sense in light of the misconduct at issue. *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

24.

Consistent with the *Standards* and Oregon case law, the parties agree that for violation of RPC 1.5(c)(3), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d), the Accused shall be suspended for thirty (30) days, with the suspension stayed pending 24 months of probation, the sanction to be effective thirty (30) days after this stipulation is approved.

25.

During the period of suspension and probation, the Accused shall comply with the following 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. A finding of probable cause by the SPRB that the Accused violated the Oregon Rules of Professional Conduct or ORS Chapter 9, in a matter unrelated to the present matters, after the effective date of this stipulation, shall constitute sufficient proof to establish that the Accused did not comply with this condition;
- b. Within thirty (30) days of the effective date of this stipulation, the Accused shall arrange for the Professional Liability Fund (PLF) to review the Accused's fee agreements, trust account practices, and practices concerning the management and storage of client files, and shall provide to Disciplinary

Counsel's Office a list of changes recommended by the PLF and a plan as to how and when each change will be implemented;

- c. No later than sixty (60) days after the effective date of this stipulation, the Accused shall submit a report to Disciplinary Counsel's Office attesting how and when each recommendation made by the PLF was implemented. If a recommendation has not been implemented, the report shall explain why, and describe efforts the Accused has made to implement it;
- d. No later than thirty (30) days after the effective date of this stipulation, the Accused shall nominate a practice monitor who is willing and able to supervise his implementation of the terms of probation. The practice monitor must be approved by Disciplinary Counsel's Office. Disciplinary Counsel's Office shall not unreasonably withhold approval of a monitor nominated by the Accused;
- e. No later than sixty (60) days after the effective date of this stipulation, and every month thereafter (for the first six months of the probation) and every three months thereafter (for the remainder of the probation), the Accused shall file reports that he has reviewed his practice with the practice monitor and determined that he is implementing appropriate written fee agreements, utilizing proper procedures for storing and safeguarding client property, and responding promptly to file requests from his current or former clients (or their counsel). The Accused's reports shall identify the dates of the Accused's meetings with his practice monitor and shall be approved by the practice monitor prior to filing. In the event the Accused has not complied with any term of probation in this case, the report shall also describe the non-compliance and the reason for it, and when and what steps have been taken to correct the non-compliance;
- f. Within one year of the effective date of this stipulation, the Accused must attend and complete Ethics School as required by BR 6.4. The Accused acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that, in addition to constituting a violation of his probation, a failure to complete the Ethics School requirement timely under that rule may result in his suspension or the denial of his reinstatement;
- g. The Accused shall bear the financial responsibility for the cost of all services required under the terms of this Stipulation for Discipline;
- h. In the event the Accused fails to comply with the conditions of his probation, the Bar may initiate proceedings to revoke the Accused's probation pursuant to Rule of Procedure 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.

- i. If the Accused successfully completes his probation, he shall be reinstated unconditionally after the expiration of the probationary term, without further order of the Disciplinary Board or the Supreme Court.

26.

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

EXECUTED this 21st day of August, 2013.

/s/ Theodore C. Coran  
Theodore C. Coran, OSB No. 822260

EXECUTED this 22nd day of August, 2013.

OREGON STATE BAR

By: /s/ Linn D. Davis  
Linn D. Davis, OSB No. 032221  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-84
	)	
TERRANCE P. GOUGH,	)	
	)	
Accused.	)	

Counsel for the Bar:	Susan R. Cournoyer
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.7(a)(2) and RPC 1.8(j). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	September 10, 2013

**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 1.7(a)(2) and RPC 1.8(j).

DATED this 10th day of September, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Robert A. Miller  
 Robert A. Miller, Region 2  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

TERRANCE P. GOUGH, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 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 seek advice from counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 20, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.7(a)(2) and RPC 1.8(j) 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 February 2012, the Lane County Juvenile Court appointed the Accused to represent K.T., the mother in a juvenile proceeding. In July 2012, the juvenile court ruled that it had jurisdiction in the case.

(b) In January 2013, while the Accused represented K.T., he and K.T. commenced a sexual relationship.

(c) The Accused continued to represent K.T. until May 2013, when he withdrew from representation and the court appointed substitute counsel for her.

(d) The Accused represented K.T. when there was a significant risk that his representation would be materially limited by his personal interest, and engaged in sexual relations with a client when no consensual sexual relationship existed between them before their attorney-client relationship commenced.

### Violations

6.

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

### 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 a duty to his client to avoid a conflict of interest. *Standards*, § 4.3.
- b. **Mental State.** The Accused’s conduct demonstrates negligence in failing to ascertain that a sexual relationship with his client could affect his ability to represent her. The Accused perceived that there were no developments in the juvenile case that required him to render legal advice or to advocate on K.T.’s behalf at the time they became romantically involved. “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*, p. 7.
- c. **Injury.** By entering into a sexual or romantic relationship with a client who was the parent in a juvenile court proceeding involving the clients’ children, there was a potential that the Accused would act in his own interests to the detriment of the client.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused has substantial experience in the practice of law, having been admitted to practice in 1979. *Standards*, § 9.22(i).
  2. Prior discipline. The Accused was previously publically reprimanded for violations of former DR 1-102(A)(3) (dishonesty, fraud, deceit, or misrepresentation) and former DR 6-101(B) (neglect) arising from his handling of a marital dissolution. *In re Gough*, 13 DB Rptr 170 (1999). However, due to the age and dissimilarity of the prior discipline to this matter, this prior discipline should be given little if any weight as an aggravating factor. *In re Knappenberger*, 344 Or 559, 575, 186 P3d

272 (2008) (weighing prior discipline offenses according to several factors, including: (1) the relative seriousness of the prior offense and the resulting sanctions; (2) the similarity of the prior offense to the offense at issue; (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 at Bar).

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

1. None.

8.

Under the *ABA Standards*, public reprimand is generally appropriate when a lawyer is negligent in determining whether his representation may be affected by his personal interest and causes injury or potential injury to a client. *Standards*, § 4.33.

9.

Oregon case law is in accord. *See, e.g., In re Weisser*, 16 DB Rptr 269 (2002) (public reprimand for violation of former DR 5-101(A) (lawyer self-interest conflict) when attorney became personally involved with his female client in a marital dissolution and post-dissolution matter); *In re Escobar*, 14 DB Rptr 84 (2000) (public reprimand for violation of former DR 5-101(A)); *In re McCurdy*, 13 DB Rptr 107 (1999) (public reprimand for violation of former DR 1-102(A)(4) (conduct prejudicial to the administration of justice) and former DR 5-101(A)).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 1.7(a)(2) and RPC 1.8(j), the sanction to be effective upon approval of this stipulation.

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.

12.

The Accused represents that he was admitted to practice law in Idaho but that his membership was administratively suspended in 1979 and that he is not currently admitted to practice law in any other state.

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 15th day of August, 2013.

/s/ Terrance P. Gough

Terrance P. Gough

OSB No. 792431

EXECUTED this 19th day of August, 2013.

OREGON STATE BAR

By: /s/ Susan R. 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. 12-155 and 12-156  
 )  
VICKI R. VERNON, )  
 )  
Accused. )

Counsel for the Bar: Christopher R. Piekarski; Stacy J. Hankin  
Counsel for the Accused: Wayne Mackeson  
Disciplinary Board: Pamela E. Yee, Chairperson  
William G. Blair  
Loni J. Bramson, Public Member  
Disposition: Violations of RPC 1.3 and RPC 1.4(a). Trial Panel  
Opinion. 90-day suspension.  
Effective Date of Opinion: October 1, 2013

**TRIAL PANEL OPINION**

**NATURE AND BACKGROUND OF THE CASE**

The Accused, Vicki R. Vernon, OSB No. 891338, was first admitted to practice law in the State of Oregon on April 14, 1989. She is currently a sole practitioner in Hillsboro, Oregon. At all times material to the cases before us she was an associate attorney in an established Hillsboro law firm. Her firm was under contract, as part of a consortium of lawyers and firms, to handle court-appointed post-conviction relief (hereinafter “PCR”) cases for prisoners incarcerated in the Coffee Creek Correctional Facility (hereinafter “Coffee Creek”) in southeastern Washington County. Her practice areas within the firm included representation of all of the PCR cases on which her firm was appointed. These cases accounted for approximately 70% to 80% of her total caseload.

PCR cases are civil in nature. The inmate is the petitioner and the superintendent of the correctional facility is the named respondent. These cases are typically initiated with *pro se* petitions filed by inmates who are then given court-appointed counsel. Appointed counsel then review the case and file formal or amended petitions on behalf of their clients. Because the case has already been initiated by the time counsel is appointed for the petitioner, procedural timelines are already running.

When assigned a PCR case, the Accused typically reviews the often voluminous trial court file and discovery provided by the district attorney in the underlying criminal case, meets with the inmate-client at Coffee Creek to discuss the case and formulate a plan for its prosecution, and files a formal or amended petition. Grounds for post-conviction relief would generally fall into one or more of three categories: 1) incompetent defense counsel; 2) prosecutorial or judicial misconduct; or 3) newly discovered evidence. PCR cases have a very low success rate, and even a meritorious case requires considerable time and effort to produce a favorable result.

On December 19, 2012, the Oregon State Bar filed a Formal Complaint charging the Accused with violations of RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct. The charges against the Accused arise from her representation of two PCR petitioners: CN and JJ.

**Case No. 12-155 (arising out of complaint relating to CN)**

CN had been charged with the 2006 murder of her infant son. She was offered and accepted a plea bargain by which she would plead guilty to a reduced charge of manslaughter. On her change of plea she was sentenced to 20 years imprisonment.

CN filed a *pro se* petition for post-conviction relief on May 16, 2010, in the Washington County Circuit Court. The Accused was appointed to represent her.

The Accused is charged with violations of RPC 1.3 (neglect of an entrusted legal matter), RPC 1.4 (failure to keep a client properly informed as to the status of a legal matter and failure to respond reasonably to client requests for information), and RPC 8.4(a)(2) (engaging in conduct involving misrepresentation that reflects adversely on the lawyer's fitness to practice law).

**Case No. 12-156 (arising out of complaint lodged by JJ)**

JJ had been charged with manslaughter in the deaths of two individuals in a car crash, along with various misdemeanor charges. She was found guilty of several felonies and misdemeanors after a bench trial, and was sentenced to serve 187 months in the custody of the Oregon Corrections Division followed by a consecutive sentence of 19 months in the Linn County Jail on the misdemeanor charges. She filed a PCR petition *pro se* on February 9, 2010, in the Washington County Circuit Court, and the Accused was appointed to represent her.

The Accused is charged with violations of RPC 1.3 (neglect of an entrusted legal matter), and RPC 1.4 (failure to keep a client properly informed as to the status of a legal matter and failure to respond reasonably to client requests for information).

## FINDINGS OF FACT

### The CN Matter (No. 12-155)

#### Undisputed Facts

CN sought post-conviction relief from judgment and sentence on her plea of guilty to manslaughter in the 2006 death of her infant son. She has never denied that, in a fit of anger, she picked up her baby and shook him to death. She asserted that she was suffering from postpartum depression at the time. CN was indicted for murder, but the trial court conducted a mediation resulting in a plea bargain to a reduced charge of first degree manslaughter. She was then sentenced to 20 years imprisonment.

On May 14, 2010, she filed her *pro se* petition in the Washington County Circuit Court. Her *pro se* petition appears to be a goulash of practically every ground for post-conviction relief that could be asserted. Her testimony to this panel, however, was that through this petition she sought only to have her sentence reduced. She believes that proper consideration was not given to the severity of her postpartum depression.

On June 4, 2010, the Accused was appointed to represent CN. On June 7, 2010, Washington County Circuit Court Judge Price notified the Accused by letter that the court was making efforts to resolve PCR cases within a year of initial filing, and that the Accused would have until August 7, 2010, to file an amended petition. The Accused's time records indicate that she reviewed that letter on June 17, 2010.

Between June 9 and August 2, 2010 the Accused wrote to her client with a list of questions, received and reviewed her client's response, and reviewed a letter from the Asst. Attorney General handling the case. The AAG notified the Accused that he would not file an answer to the *pro se* petition, but would await the expected amended petition before appearing.

On August 2, 2010, with the court's filing deadline approaching, the Accused sent the AAG an e-mail notice that she would be filing a motion for an extension of time. The Accused neither filed such a motion nor filed an amended petition.

On September 13, 2010, the circuit court issued a notice of pending dismissal pursuant to UTCR 7.020(3) (a "Rule 7 notice"), stating that if an answer or judgment was not filed within 28 days, the case would be dismissed. That notice was received by the Accused's firm on September 20, 2010.

The Accused took no action with regard to that notice, and did not inform her client of the impending dismissal of her case. On November 2, 2010, the circuit court entered a judgment of dismissal, giving notice of entry of judgment to the Accused on November 3, 2010. That notice was received by the Accused's law firm on November 5, 2010.

The Accused arranged for a December 9, 2010, meeting with her client at Coffee Creek. On the day of that conference the Accused reviewed the file (presumably it contained

the Rule 7 notice and notice of entry of judgment received more than a month earlier, but the Accused denies having noticed them in her review of the file) and met with CN at Coffee Creek. The Accused had come to the preliminary conclusion, after review of the file, that CN had no legal or factual basis for post-conviction relief. That December 9 interview confirmed for the Accused her belief that there were no viable grounds for post-conviction relief. She so informed her client. After some further discussion, the Accused concluded the meeting, and in rising to leave the room, she told her client, in substance, that if she came up with any further information that she thought relevant to her case, CN should contact her.

At no time during the meeting or thereafter did the Accused advise CN that she should voluntarily withdraw her petition or advise her of any further steps she might take in connection with her petition. Neither did she solicit her client's consent to withdraw that petition or otherwise terminate the proceeding with the court. Most importantly, the Accused did not inform her client that the PCR petition had been dismissed more than a month earlier. Instead, CN was left with the belief that her case was still alive and could benefit from further information that she might provide. The Accused, on the other hand, believed that the case was over.

On January 11, 2011, CN wrote to the Accused in response to her invitation to provide further information that may help CN's case. She reported that at the time of the death of her son she was suffering from severe postpartum depression, but had been advised by her brother sometime prior to the child's death not to report the severity of her depression to her doctor because "they would take my baby away." She also reported in this letter that the trial judge "pressured me severely to take the 'deal' because I was looking at a life sentence." She ended by saying that she would think whether there was anything else she could help her case with, and thanked the Accused for her time.

The Accused did not respond to this letter, nor did she return subsequent phone calls from CN.

On February 28, 2012, CN learned, through the prison librarian's check of her PCR case through OJIN, that the case had been dismissed. She wrote to the Accused asking what had happened, and wrote to the Washington County Circuit Court asking to have her case reinstated. In May 2012, CN obtained the services of another lawyer who, on May 16, 2012, filed a motion for relief from judgment in the PCR case. That motion was denied on August 3, 2012.

Because there was no adjudication on the merits of CN's petition for post-conviction relief, what might otherwise have been at least a theoretically available remedy in the form of federal habeas corpus was lost.

The Accused has never offered an apology to CN.

### **Issues of Fact**

The factual disputes of significance are really disputes as to the inferences to be drawn from the undisputed facts.

The Accused testified that she did not know of the dismissal of CN's PCR petition when she met with her client on December 9, 2010. The Accused testified that she believed her advice to CN during that meeting was clearly that she did not have a factual or legal basis for pursuing post-conviction relief. She agrees that she probably said something to the effect of "let me know if you come up with any further information" as she was heading to the door as their meeting ended, and would characterize whatever she might have said as a polite but placatory and insignificant comment that she should not have made. CN, on the other hand, construed that statement as an encouragement to further pursue her case. The Accused has no explanation for why she did not respond to CN's January 11, 2011 letter, nor does she now even recall seeing it, although it was date-stamped in by the Accused's firm on January 19, 2011.

The Accused testified that, in her mind at the close of her December 9 interview with CN, "nothing could be done." When asked what she did with the file when she got back to her office, she testified, "I put it back on the shelf because, from my perspective, really, it was done. I put it back on the shelf, and that's what I did."

The Accused testified that she has no recollection of seeing either the circuit court's Rule 7 notice of impending dismissal or the court's notice that the case had been dismissed. She testified that she allows incoming mail to stack up in her inbox for as long as ten days to two weeks at a time, but that mail does not leave her inbox until she has reviewed it and moved it to an outbox for filing.

The Accused testified that a staff support person would calendar court appearance dates before the notices were placed in the attorneys' inboxes, but that calendaring of filing deadlines and appointments were the responsibility of each attorney.

The Accused does not suggest, much less provide evidence, that the Rule 7 notice and the notice of dismissal were somehow misfiled and later placed into CN's file sometime after December 9, 2010. Giving credence to the testimony of the Accused, supported in certain particulars by the testimony of her then-firm's senior partner, that calendaring of deadlines was not automatically handled by support staff, and that she would review her inbox every ten days to two weeks, we must conclude that the Rule 7 notice and the notice of dismissal (received by the firm on September 20 and November 5, respectively) passed through her hands to be filed, and were in the file she reviewed prior to her December 9 meeting with CN.

The Accused has no credible explanation for why she would have seen and not promptly acted on a court notice that a case entrusted to her was about to be dismissed, or why she would have seen and not promptly notified her client of the later notice of dismissal.

Likewise, the Accused does not dispute that she did not return letters and phone calls from her client after their December 9, 2010 meeting. She explains this omission by the burden of her caseload and the hopelessness of CN's PCR case.

We must note that in these as well as other particulars representing at least neglect and, at worst, deliberate indifference to important events, the Accused's voice and demeanor in giving testimony strongly indicated that she was consciously or unconsciously avoiding painful candor, and that she was unable to acknowledge the nature and significance of her conduct. As she silently considered and formed her answers to probing questions, her gaze, usually direct and confident, would shift back and forth to the papers before her on the table, her right leg would begin to fidget, and she would knead her fingers nervously. We are not left with the impression that she was lying, but that she was carefully phrasing her testimony to avoid complete and inconvenient truths.

**The JJ Matter (No. 12-156)**  
**Undisputed Facts**

JJ was convicted of a variety of offenses arising out of a 2006 car crash. The crash left two occupants of the other vehicle dead, and JJ fled the scene. She and the other driver may have been speed racing. Both drivers were intoxicated.

JJ does not dispute that she was intoxicated at the time of the crash or that she fled the scene. She believes that because one of the deceased passengers in the other car was the son of a local police officer, and was found to have both alcohol and marijuana in his system, important facts were sealed away and venue should have been changed to another county. She was tried in a bench trial and convicted on two charges of second degree manslaughter, as well as charges of fourth degree assault, driving while intoxicated, reckless driving, and leaving the scene of an accident. On her felony convictions she was sentenced to serve a term of 187 months in the custody of the Oregon Department of Corrections, and on her convictions of various misdemeanors she was sentenced to a consecutive 19 months in the county jail. She filed a PCR petition in hopes of getting misdemeanor time to run concurrently with her 187 months of prison time. The court appointed the Accused to represent JJ on March 11, 2010. On May 24, 2010, the Oregon Department of Justice, representing the superintendent of Coffee Creek, filed an answer to the *pro se* petition.

The Accused obtained and reviewed the trial court and district attorney's files from the underlying criminal case, and sent a questionnaire to her client which JJ completed and returned.

The Accused met with her client at Coffee Creek on May 26, 2010, bringing with her the file of another inmate/client of the same surname. JJ thus had no opportunity at that meeting to review the answer filed by the respondent. The Accused later mailed a copy of the answer to JJ.

On July 26, 2011, the Accused filed a formal petition for PCR on behalf of JJ, and on August 15, 2011 the Department of Justice filed a motion to dismiss that petition for failure to comply with formal pleading requirements under ORS 138.580.

On August 18, 2011, the Accused filed a response to the State's motion to dismiss, arguing that the formal petition did satisfy applicable pleading requirements and, in the alternative, that she be allowed to file an amended petition addressing the deficiencies on which the state's motion was based. That same day, the circuit court mailed notice of an October 24, 2011 hearing on the State's motion to dismiss.

Other than getting a copy of the State's earlier answer, JJ heard nothing from the Accused following their May 26, 2010 meeting at Coffee Creek, despite JJ's attempts to contact her. On September 11, 2011, JJ filed a motion to have the Accused replaced as her appointed counsel. That motion was consolidated for hearing along with the State's motion on October 24, 2011.

On September 22, 2011, the Accused telephoned JJ to bring her up to date, assure her that her case had merit, and request that she withdraw her motion for new counsel. The Accused followed that up with a letter dated October 6, 2011, and a letter to the court dated October 14, 2011 (enclosing a letter to the court from JJ withdrawing her motion for new counsel.)

At the October 24, 2011 hearing (which JJ attended by phone), the court ultimately denied the State's motion to dismiss, and twice directed the Accused to file an amended petition within 28 days, addressing the deficiencies pointed out in the State's motion. The Accused did not file an amended petition, doing nothing further on the case. The court dismissed the case under OTC Rule 7 on December 19, 2011.

JJ asked the prison librarian to check the status of her case through OJIN, and thereby learned of the dismissal. Some two weeks after learning that her case had been dismissed, JJ was able to contact the Accused, who told her that she would file a motion to have the case reinstated. The Accused did file such a motion on March 9, 2012, and it was denied by the court on March 22. The Accused did not notify JJ of that disposition; JJ again had to ask the librarian to check the status of the case on-line and thus learned that the motion to reinstate had been denied.

Because of the dismissal, JJ lost her opportunity to petition for federal habeas corpus relief.

The Accused has never offered an apology to JJ.

## **Issues of Fact**

As with the case of CN, any factual issues in this case amount to the interpretations and conclusions to be drawn from undisputed facts. Counsel for the Accused, in both opening statement and closing argument, asserted that the Accused does not dispute her culpability in the matter of JJ's case. Instead, he ascribes her violations to simple neglect.

## **BURDEN OF PROOF AND RULES OF EVIDENCE**

The Bar has the burden of establishing misconduct warranting discipline by clear and convincing evidence. BR 5.2. The Accused's Answer admits the conduct in question as being violations of RPC 1.3 and RPC 1.4(a), but denies that the conduct in question is a violation of RPC 8.4(a)(3). We consider the evidence presented in light of BR 5.1, giving effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs.

## **FINDINGS AS TO GUILT**

### **Case No. 12-155 —The CN Matter**

From the undisputed facts we must conclude that the Accused did knowingly fail to inform her client, CN, of crucially important events in her case, and that she did knowingly neglect an entrusted legal matter. Because of her testimony that, beginning with her first review of the file and then confirmed by her meeting with her client, we find that she believed CN's case was without merit and undeserving of her further effort. Further considering her demeanor in giving testimony when these issues were brought out, we conclude that her conduct was also intentional. In short, she intended that, by ignoring court notices and by not communicating with her client, the case would simply go away unnoticed. We believe that both her neglect of the procedural posture of the case and her failure to respond to client requests for information were the product of a mental state of denial, but from the clear and convincing evidence, we cannot escape the conclusion that they were both knowing and intentional.

The Bar argues that the Accused misrepresented the status and merits of the case to CN by encouraging her to believe that her case might have merit if only she could come up with further information, then by keeping silent when CN communicated further information, and, finally, by failing to communicate to CN that her PCR petition had been dismissed. We need not discuss the finely honed legal arguments made by both parties on this point, because we simply do not believe that the Bar has proved by clear and convincing evidence that the Accused misrepresented any factual matter to the client. We therefore cannot find that she violated RPC 8.4.

### **Case No. 12-156 —The JJ Matter**

At the outset we note that the Accused is not charged with any dishonesty under RPC 8.4 in connection with this matter, so we do not consider whether the facts support any such violation.

The Accused admits that she neglected JJ's legal rights and interests as charged by the Bar. Likewise, she admits that she failed to properly inform her client as to matters significant to the status of her case. The burdens of a busy practice with what was clearly too heavy a caseload may explain her initial neglect of this matter, but after her insistence that she be permitted to continue as JJ's attorney, there can be no doubt that the Accused had a heightened awareness of the seriousness and importance of following through, both with filing an amended petition as ordered by the court in the October 24, 2011 hearing, and with timely and candid communication to her client as to the status of the case. That she did not follow through with the filings required by the court, and her failure to return messages cannot have been other than knowing.

Again considering her demeanor in giving testimony when dealing with probing questions as to what she knew and what she did, we find by clear and convincing evidence that the Accused intended that by ignoring JJ's case it would go away. Again, her motives may not have been born of any animosity toward JJ, but rather sprang from a conscious denial of the nature of her own limitations. That she did not inform her client of the dismissal, however, cannot have been other than both knowing and intentional.

By the weight of clear and convincing evidence we must find that the Accused did both knowingly and intentionally violate RPC 1.3 and RPC 1.4(a) as charged.

### **Other Facts Bearing on Sanctions**

In May 2006, the Accused and the Bar resolved similar charges against the Accused in an unrelated matter by stipulated diversion, including a period of practice monitoring and mentoring and the issuance of a letter of admonition. Admonition is not a public reprimand, and we do not consider that letter as prior discipline for reasons discussed below. Suffice to say that there is before this Trial Panel a record of prior similar behavior in the form of neglecting entrusted matters and failure to properly communicate with clients. The Accused agreed to and did follow a mentoring program to improve her practice management skills. That program was administered by senior lawyers in her firm. They were satisfied that she had learned the skills and put in place appropriate procedures to prevent future occurrences. That mentoring program concluded in August 2009. At that time, the Accused was shouldering what she and her mentors believed was a manageable caseload.

The caseload thereafter grew and the Accused neither brought that fact to the attention of her superiors nor did she redouble her efforts to follow the procedures she had been given to successfully manage her practice. Instead, she again fell into bad habits and

practices, not the least of which was neglect of her incoming mail, at least in matters she did not feel up to dealing with.

From the Accused's demeanor in giving testimony concerning her failure to manage her inbox, her failure to return phone calls from clients, her failure to effectively raise the issue of her increasingly heavy caseload, and her attempts to avoid dealing with uncomfortable issues concerning her clients' cases, we must conclude that the violations found in these two cases represent a clear pattern of misconduct. Despite attempts at intervention, that pattern remains unremitted.

### SANCTIONS

The Bar urges a suspension of 120 days; the Accused urges a public reprimand or, at most, a 30-day suspension from the practice of law. For the reasons discussed below, we find that this case warrants a 90-day suspension.

The methodology and standards for imposition of sanctions are well-established in Oregon. See *In re McDonough*, 336 Or 36, 43, 77 P3d 306 (2003); *In re Kimmell*, 332 Or 480, 487, 31 P3d 414 (2001). Referring to the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), we first assess the gravity of the particular offense in light of the duty violated, the mental state of the Accused, and the injury resulting from the misconduct. With that assessment we arrive at a baseline sanction and then consider whether there are aggravating and mitigating factors warranting adjustment of the baseline sanction.

#### **Nature of the Duty Violated.**

The violations we find are violations of duties owed to clients. As noted below, the duty owed by a lawyer to a client does not depend on the merits of the client's case, but upon the zealous and competent advocacy of the client's interests in an adversary system of justice. This duty includes duties of diligence, competence, and candor, all of which were, in some degree, violated by the conduct of the Accused in both cases.

#### **Mental State.**

The *Standards* define "intent" as "the conscious objective or purpose to accomplish a particular result." "Knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

As discussed above, we find that the Accused's mental state in both cases was both knowing and, in the end, intentional. We believe that, in both cases, she became resigned to the loss of her clients' remedies, and thereby most certainly did intend not to properly discharge her duties of loyalty and competence to those clients.

### **Injury.**

With respect to CN, it is apparent that nothing the Accused could have done on the facts she had to deal with could have resulted in a favorable outcome for her client. In fact, had CN managed to overturn her conviction she would have been at risk of re-prosecution and conviction of aggravated murder. The nature of the injury or harm to CN was not in the outcome of the post-conviction relief petition, but in the fact that the conduct of the Accused denied CN both the opportunity to exercise her lawful right to challenge her conviction through post-conviction relief and the opportunity to bring the somewhat broader challenge offered by federal habeas corpus. That she might not have prevailed in either forum does not mean that she was not injured by deprivation of her right to make the attempt.

With respect to JJ, the injury is both in the deprivation of process and the hope, engendered by the Accused herself, that JJ might be successful in her post-conviction relief. JJ is a woman who was, at the time of the fatal crash, 30 years of age with five children. She lived with the hope, buoyed by the Accused, that she might re-unite with them 19 months sooner. That hope was dashed by the conduct of the Accused.

In light of the facts before us, we are persuaded by clear and convincing evidence that both clients suffered injury. However, it is apparent that CN would have been put at risk of trial on far more serious charges than resulted from her plea bargain, and that JJ would probably not have been successful in her goal of getting her misdemeanor sentences to run concurrently with her felony sentence. Thus, we cannot find by clear and convincing evidence that the injury suffered by either client was serious or potentially serious.

### **Baseline Sanction.**

A baseline sanction is arrived at, under the *Standards*, by looking at both the state of mind of the Accused and the injury or potential injury to the client. The Bar does not request, and we do not find any basis for imposing the sanction of disbarment.

The Bar does not suggest and we do not find any evidence to support a finding that the Accused lacks competence in the areas of post-conviction relief and criminal law.

For violations of the duty of diligence to clients, *Standards*, §§4.41 to 4.43 provide:

4.41 Disbarment is generally appropriate when:

\* \* \*

- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

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 [that] causes injury or potential injury to a client.

4.43 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.

Diligence involves not only meeting deadlines, producing thoroughly researched and reviewed work product, and gathering all information and evidence reasonably available relating to the client's case, it involves effective and candid communication. This core component of communication is singled out as the subject of RPC 1.4(a):

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

The Accused acknowledges neglect in connection with the alleged violations of RPC 1.3 and RPC 1.4(a) in both cases.

We find that *Standards*, § 4.42 provides the appropriate baseline sanction is a period of suspension from the practice of law. We thus consider the appropriate length of such a suspension.

### **Aggravating and Mitigating Circumstances**

#### **Aggravation.**

“Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.” *Standards*, § 9.21.

*Standards*, § 9.22 identifies the following specific aggravating factors:

#### **Prior disciplinary offenses—*Standards*, § 9.22(a)**

The Bar argues that the letter of admonition issued to the Accused should be regarded as a prior disciplinary offense. As we have noted above, we do not regard the characterization of the admonition as “prior discipline” to be of significance to our determination, and therefore do not treat it as such. Were we to do so, the length of suspension in this case would be considerably longer.

#### **Selfish motive—*Standards*, § 9.22(b)**

There is, we find, a component of selfish motive involved in both cases. The Accused was, we believe, motivated to ignore both clients' cases at various times to avoid facing the realities of the work that would be required of her (particularly with regard to JJ's case) and the acknowledgment of personal failure. However benign the neglect may have been at first,

in both cases the subsequent conduct of the Accused when confronted with events that would cast her in a bad light can only be seen as selfish.

**Pattern of misconduct—*Standards*, § 9.22(c)**

Although we do not regard the prior admonition as discipline under *Standards*, § 9.22(a), we do consider it as evidence of a pattern of misconduct that was not remediated by a year of practice supervision (mentoring). We find the same pattern prevalent in both of the cases before us, and find that the Accused’s persistent refusal to deal squarely with procedural requirements and client communication are part and parcel of that same pattern of misconduct.

**Multiple offenses—*Standards*, § 9.22(d)**

These cases present multiple offenses of the same nature, both within each case and taken together. Clearly neither case is an isolated situation, and thus we do consider this as an aggravating factor.

**Vulnerability of victim—*Standards*, § 9.22(h)**

While it may seem strange to regard two persons serving prison terms for homicide of one sort or another as being “vulnerable,” that is certainly the case. Incarceration inherently involves severe limitations on one’s ability to act on an equal footing in society and commerce outside the prison walls. The access to legal counsel that is afforded is substantially dependent on the willingness of the lawyer to write to, telephone, or visit the inmate client. The prisoner is not afforded the opportunity to do any errands or make any personal investigation. The very fact of being a convicted and imprisoned felon creates a substantial barrier to meaningful contact with outsiders other than close friends and family, even through the limited means of communication allowed by the Department of Corrections. Prisoners are uniquely dependent upon their lawyers to see to their legal affairs. As such, they are uniquely vulnerable.

This vulnerability and special dependence of these clients on the Accused is certainly an aggravating factor that bears on our determination of appropriate sanctions in this case.

**Substantial experience in the practice of law—*Standards*, § 9.22(i)**

The Accused was admitted to the practice of law in 1989. For most of her 23-year legal career she has practiced criminal law, including that special subset of criminal and civil rights law known as post-conviction relief. She has represented literally hundreds of PCR clients, and is generally respected by bench and bar as an experienced practitioner in this field.

Simply put, the Accused knew better than to follow the course of conduct she did, and this must be considered as an aggravating factor here.

**Mitigation.**

Mitigating factors include absence of a prior disciplinary record, personal or emotional problems, full and free disclosure to the disciplinary board or cooperative attitude toward proceedings, interim rehabilitation, imposition of other penalties or sanctions, and remorse. *Standards*, § 9.32.

**Absence of prior discipline—*Standards*, § 9.32(a)**

As noted above, we do not regard the 2006 admonition as prior discipline, and thus must consider whether the absence of prior discipline is a mitigating factor in this case. After carefully weighing the evidence before us, we find neither aggravation nor mitigation in terms of prior discipline or its absence.

**Full and free disclosure and cooperative attitude—*Standards*, § 9.32(e)**

There is no evidence before us suggesting that the Accused has attempted to avoid disclosing any information requested by the Bar, nor that she has been uncooperative in the process. We do consider the fact that the Accused has attempted to provide full disclosure to and cooperate with the Bar in these matters, and find this factor to be mitigating in this case.

**Character or reputation—*Standards*, § 9.32(g)**

Two sitting circuit judges (both of them former prosecutors) and two practicing attorneys (one of them the managing partner of the firm with whom the Accused was associated at the time of the violations in these matters) testified quite favorably as to the character and reputation of the Accused. We are mindful of that testimony, and find that without it the appropriate sanction would be more stringent.

**Mental disability and interim rehabilitation—*Standards*, § 9.32(i) and (j)**

The Accused presents no evidence or argument of any mental, emotional, or substance abuse problem that would amount to mitigation.

**Remorse—*Standards*, § 9.32(l)**

We discuss this component only to recognize that counsel for the Accused, in both opening statement and closing argument, argued that the Accused feels and has expressed remorse for her actions. With respect for counsel's zeal in arguing his client's case, we cannot find that the Accused either feels or has expressed remorse in any meaningful sense. By "meaningful sense," we mean any sort of apology or expression of regret to the clients whose legal representation she admittedly neglected. Certainly the Accused does regret having done and failed to do things and wishes it were otherwise, but we see no sign that such wishes are in any way related to the clients she wronged.

We often hear about the "3 Rs"—responsibility, remorse, and repair—as a prerequisite to forgiveness. The Accused does accept responsibility for having done or not done things that put her in violation of the Rules of Professional Conduct, and regrets having

done so. As repair, she suggests that she be sanctioned by a public reprimand or a suspension of 30 days or less. We are convinced that her remorse is self-focused; that is to say, she regrets having done or not done something that has brought her in jeopardy of discipline rather than regret for the injury or potential injury to her clients.

Were it otherwise, her clients would long since have heard from her directly that she accepts responsibility for mishandling their cases, that she regrets and sincerely apologizes to them for the feelings of frustration, distress, and anger she has brought them, and that she wants to do whatever is in her power to make repair. Remorse is not a mitigating factor in this case.

### **Consideration of Similar Cases**

We are also mindful of the importance of prior lawyer discipline decisions by the Oregon Supreme Court. The proper balance in deciding an appropriate term of suspension has been most carefully explored by the Oregon Supreme Court in two cases, and we find their guidance most helpful.

In *In re Redden*, 342 Or 393, 153 P3d 113 (2007), the Oregon Supreme Court considered the court's history of imposing suspensions in cases involving neglect of entrusted matters. Finding that the most common sanction was a 60-day suspension, the court declined to uphold a 120-day suspension imposed by the Disciplinary Board. In that case the accused lawyer's violation affected only one client. The court noted that a pattern of similar conduct would have been an aggravating factor such as to enhance the term of suspension.

When considering the sanction issue, this court has found a pattern of misconduct in DR 6-101(B) cases when the accused lawyer engaged in similar misconduct in the past, the lawyer's conduct violated multiple disciplinary rules, or the lawyer neglected the legal matters of multiple clients.

*Redden*, 342 Or at 397.

In *In re Koch*, 345 Or 444, 198 P3d 910 (2008), the court again took up the length of suspension issue, this time in a case involving multiple offenses with the same client. We particularly note that pecuniary loss is not a precondition to either "injury" or "potential injury." The Court noted that:

The accused's violations of her duties to her clients did not result in any financial loss to either client, although Dolbeer suffered a delay in recovering the unearned balance of his retainer. However, the accused's repeated failure to respond to her clients' reasonable requests did result in injuries to her clients, "measured in terms of time, anxiety, and aggravation,

in attempting to coax cooperation from the accused.” (Citation omitted)

*Koch*, 345 Or at 456.

In *Koch* the court imposed a 120-day suspension, in part because of the aggravating factors of a pattern of misconduct and multiple offenses.

From the above discussion of aggravating and mitigating factors, we do not find them in equipoise. Mitigating factors are outweighed by aggravating factors. Were aggravation and mitigation to balance each other out, we would consider the appropriate sanction to be a 30-day suspension. The mitigating factors do, however, weigh against the 120-day or greater suspension meted out in *Koch* and requested by the Bar in this case. Particularly in light of the un-moderated pattern of neglect and bad judgment that clearly characterizes the Accused’s PCR practice, the particular vulnerability of her clients, and her lack of genuine remorse, we conclude that a 90-day suspension is necessary in this case.

#### **CONCLUSION AND ORDER**

Having found that the Accused has violated, on multiple occasions, RPC 1.3 and RPC 1.4(a), having considered the baseline sanction appropriate under the *Standards*, and having considered the aggravating and mitigating factors present here, the Trial Panel concludes that the Accused be suspended from the practice of law for a period of 90 days.

IT IS SO ORDERED.

Dated July 22, 2013.

/s/ Pamela Yee  
Pamela Yee, OSB No. 87372  
Trial Panel Chairperson

/s/ William G. Blair  
William G. Blair, OSB No. 69021  
Trial Panel Member

/s/ Loni J. Bramson  
Loni J. Bramson, Ph.D.  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-73  
 )  
REBECCA Z. MAY, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Megan I. Livermore  
Disciplinary Board: None  
Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a) & (b), and  
RPC 1.5(a). Stipulation for Discipline. Public  
Reprimand.  
Effective Date of Order: September 30, 2013

**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 1.1, RPC 1.3, RPC 1.4(a) & (b), and RPC 1.5(a).

DATED this 30th day of September, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Rebecca Z. May, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 her office and place of business in Lane 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 28, 2012, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.1 (failure to provide competent representation); RPC 1.3 (neglect of a legal matter); RCP 1.4(a) (failure to keep a client reasonably informed of the status of a case); RPC 1.4(b) (failure to communicate with client sufficient to allow client to make informed decisions regarding the representation); and RPC 1.5(a) (charge or collect an illegal or clearly excessive fee or expense) 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 May 2009, Christine Griffiths (hereinafter “Griffiths”) met with the Accused and hired her firm, Hudson|May, to obtain a divorce from Griffiths’ estranged husband, Ritch Danner (hereinafter “Danner”). At the time, the Hudson|May office was located in Salem. The Hudson|May firm was paid a \$1,200 retainer on Griffiths’ behalf. The Accused consulted and conferred with her law partner, Howard Hudson (hereinafter “Hudson”) regarding all aspects of Griffiths’ legal matter.

6.

During his marriage to Griffiths, Danner was criminally charged in connection with a number of financial scams. He and Griffiths separated in August 2005. Danner then fled the jurisdiction to escape prosecution.

7.

In July 2009, the Accused filed Griffiths' divorce petition in Linn County. Due to Griffiths' residency, the case should have been filed in Benton County. The Hudson|May firm billed Griffiths for this erroneous filing.

8.

Thereafter, the Accused and Hudson mailed the divorce petition to a number of addresses previously associated with Danner. To the extent that these mailings were not returned (or even in the instances where they were signed for), they did not qualify as personal service, substitute service, or office service under the requirements of ORCP 7. Neither Hudson nor the Accused attempted personal service of the petition on Danner because his whereabouts were unknown. The Linn County Court was never satisfied that Danner was properly served with the divorce petition and denied a motion for substitute service, and would not allow Hudson and the Accused to obtain a default against Danner. The Hudson|May firm billed Griffiths for these futile service efforts.

9.

The Hudson|May firm opened a second office in Eugene in September 2009, when the Accused took over the juvenile case load of a retiring lawyer. The Hudson|May firm maintained the lease at its Salem office through the summer of 2010. Hudson occasionally visited the Salem office to meet with clients and the office was only regularly staffed by a law clerk who spoke to clients, set appointments, and forwarded mail. Neither Hudson nor the Accused sent a letter to Griffiths or otherwise communicated directly to her that the office location had changed. Rather, they assumed from a communication with Griffiths' father that Griffiths was aware of the change.

10.

Due to the Accused's increased juvenile caseload, Hudson took over primary responsibility for Griffiths' case near the end of 2009.

11.

Between mid-December 2009 and March 2010, Griffiths experienced difficulties reaching the Accused regarding her case. When she could not get the Accused or her staff to return her calls, Griffiths stopped by the Hudson|May office address in Salem unannounced. The Accused and Hudson were not there. Thereafter, Griffiths and her parents made several calls to the law firm that went unreturned until Griffiths contacted the Bar's Client Assistance

Office (hereinafter “CAO”) for help. At the CAO’s suggestion, Griffiths sent a letter to the Hudson|May firm demanding clarification of who was handling her case. In response, Hudson sent Griffiths a letter confirming that he had taken over her case.

### **Violations**

12.

The Accused admits that, by filing the petition in Linn County, and failing to effect service on Danner, she failed to provide Griffiths’ with competent representation, in violation of RPC 1.1. The Accused further admits that, by failing to take substantive action on Griffiths’ divorce or respond to her requests for information, the Accused engaged in neglect and inadequate communication, in violation of RPC 1.3 and RPC 1.4(a). By failing to notify Griffiths’ of the relocation of the Hudson|May firm, the Accused violated RPC 1.4(b). Finally, for charging Griffiths for services that were of no benefit to her the Accused charged an excessive fee, in violation of RPC 1.5(a).

### **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 her duties to her client to act with diligence and competence, and her duty to the profession to refrain from charging excessive fees. *Standards*, §§ 4.4, 4.5, 7.0.
- b. **Mental State.** The Accused acted negligently, in that she failed to heed a substantial risk that circumstances existed or that a result would follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 7.
- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0. Griffiths was actually injured to the extent that she paid for services that did not benefit her, and to the extent that her matter was delayed by the Accused’s lack of competence and lack of communication. Griffiths subsequently obtained replacement counsel who completed her dissolution. The court has held that there is actual injury to the client where an attorney fails to actively pursue his or her case. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). In addition, the Accused’s failure to communicate caused 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 the attorney neglect can constitute actual injury under the *Standards*); *In re Schaffner II*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. There are multiple offenses. *Standards*, § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  - 2. Absence of a dishonest motive. *Standards*, § 9.32(b).
  - 3. The Accused was experiencing personal and emotional problems due to the death of her mother in fall 2009. *Standards*, § 9.32(c).
  - 4. The Accused was admitted in Oregon in 2007 and only had approximately two years of experience in the practice of law at the time of the events in this matter. *Standards*, § 9.32(f).

14.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, causing actual or potential injury to a client. *Standards*, § 4.53(b). A reprimand is also generally appropriate when a lawyer is negligent and does not act with reasonable diligence (including communication) in representing a client, causing actual or potential injury to the client. *Standards*, § 4.43. Finally, a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.3.

15.

Oregon cases have also held that a reprimand is appropriate under similar circumstances. *See, e.g., In re O'Rourke*, 24 DB Rptr 227 (2010) (attorney unfamiliar with the proper method of representing an incapacitated person in a personal injury case was reprimanded when, *inter alia*, he prepared documents for and allowed client's mother to sign as guardian *ad litem*, when she had not been appointed); *In re Later*, 22 DB Rptr 340 (2008) (attorney hired for employment litigation failed to follow up on information necessary to trigger obligation of employer to grant benefit his client had settled for, in part because he did not sufficiently understand workers' compensation and employment law; attorney then brought a second legal action asserting claims that the client had released in the first action and was reprimanded); *In re McDonough*, 21 DB Rptr 289 (2007) (attorney appointed to

represent client in two criminal matters over a two-year period was reprimanded for failing to pursue the defense of the matters, and making little or no efforts to investigate the matters); *In re Stevens*, 20 DB Rptr 53 (2006) (attorney reprimanded for repeatedly failing to submit timely accountings to the court in conservatorship and for filing documents which were deficient in substance and format required by statute and court rule); *In re Lyons*, 19 DB Rptr 271 (2005) (in a post-conviction relief matter, attorney filed the client's petition timely under state law, but was unaware that a separate statute of limitations applied for a related federal claim, resulting in the client's federal filing being untimely); *In re Breckon*, 18 DB Rptr 220 (2004) (attorney without previous experience in dissolutions involving significant real property issues was reprimanded when he failed to obtain an appraisal for trial or elicit evidence in support of client's position regarding property value). *See also In re Maloney*, 24 DB Rptr 194 (2010) (although attorney took some action on behalf of her criminal appellate client, she was reprimanded for failing to communicate with the client despite numerous inquiries asking about the status of his legal matter); *In re Dames*, 23 DB Rptr 105 (2009) (attorney reprimanded when, after concluding that his client's medical malpractice case lacked merit, he failed to respond to repeated inquiries from opposing counsel and ultimately conceded a defense motion for summary judgment and dismissal of the case without notice to his client).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 1.1, RPC 1.3, RPC 1.4(a) & (b), and RPC 1.5(a), the sanction to be effective upon approval by the Disciplinary Board.

17.

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.

18.

The Accused represents that, in addition to Oregon, she also is admitted to practice law in the jurisdictions listed in this paragraph, whether her current status is active, inactive, or suspended, and she acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: none.

19.

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 May*, 27 DB Rptr 200 (2013)

EXECUTED this 16th day of September, 2013.

/s/ Rebecca Z. May

Rebecca Z. May

OSB No. 074571

EXECUTED this 18th day of September, 2013.

OREGON STATE BAR

By: /s/ Amber-Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 980280

Assistant Disciplinary Counsel

**Cite as 354 Or 329 (2013)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)
	)
Complaint as to the Conduct of	)
	)
W. SCOTT PHINNEY,	)
	)
Accused.	)

(OSB 10–68; SC S060529)

En Banc

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

Argued and Submitted June 5, 2013.

W. Scott Phinney, Tualatin, argued the cause and submitted the brief pro se.

Stacy J. Hankin, Assistant Disciplinary Counsel, Oregon State Bar, Tigard, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM.

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

In this lawyer disciplinary proceeding, the Bar alleged that the Accused, who admitted taking substantial funds from the Yale Alumni Association of Oregon, violated RPC 8.4(a)(2), which prohibits criminal conduct that reflects adversely on a lawyer’s honesty and trustworthiness, and RPC 8.4(a)(3), which prohibits conduct involving dishonesty and misrepresentation that reflects adversely on a lawyer’s fitness to practice law. The trial panel found that the Accused had violated both rules and imposed the sanction of disbarment. The Accused appealed, arguing for a lesser sanction than disbarment. He contends that he did not commit theft because he intended to return the money. The Bar supports disbarment based on the Accused’s serious misconduct and breach of fiduciary duty. On *de novo* review, we find that the Accused violated both rules of professional conduct, and we conclude that disbarment is the appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-99  
 )  
ROBERT L. WOLF, )  
 )  
Accused. )

Counsel for the Bar: Bruce A. Rubin; Martha M. Hicks  
Counsel for the Accused: William Chad Stavely  
Disciplinary Board: None  
Disposition: Violation of RPC 3.4(b). Stipulation for Discipline.  
Public Reprimand.  
Effective Date of Order: October 7, 2013

**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(b).

DATED this 7th day of October, 2013.

/s/ Mary Kim Wood  
Mary Kim Wood  
State Disciplinary Board Chairperson

/s/ Nancy Cooper  
Nancy Cooper, Region 5  
Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Robert L. Wolf, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 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 June 4, 2013, 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 3.4(b). 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 2004, a former client sued the Accused for claims arising from the representation. The parties settled the lawsuit in 2009. The settlement agreement, drafted by the Accused and the lawyer for the Accused’s former client, conditioned the payment of money to the plaintiff in part upon her signing an affidavit, also drafted by the Accused, that negated an allegation of her complaint. The Accused thereafter used the affidavit in a different but related lawsuit.

### **Violations**

6.

The Accused admits that, by engaging in the conduct described in paragraph 5, herein he violated RPC 3.4(b).

## 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 the legal system to avoid improper communication with an individual in the legal system. *Standards*, § 6.0
- b. **Mental State.** The Accused acted negligently in determining whether the terms of the settlement agreement he negotiated and drafted violated the Code of Professional Responsibility. Negligence is defined by the *Standards* as “failure to be aware of a substantial risk that circumstances exist or that a result will follow.” *Standards*, p. 6.
- c. **Injury.** The Accused’s client suffered no actual harm from the Accused’s conduct. There was, however, the potential for harm to the legal system in that the offer of money in exchange for a sworn statement could have influenced what the former client was willing to sign.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses arising out of the representation that was the subject of the former client’s lawsuit against the Accused. *Standards*, § 9.22(a);
  2. The Accused was motivated by personal vindication. *Standards*, § 9.22(b);
  3. Refusal to acknowledge the wrongful nature of the conduct. *Standards*, 9.22(g); and
  4. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused sought advice from the Bar’s General Counsel about the terms of the settlement with his former client;
  2. Cooperative attitude towards these proceedings. *Standards*, § 9.32(e);
  3. Remoteness of prior disciplinary offenses. *Standards*, § 9.32(m).

4. Delay in the proceedings. *Standards*, § 9.32(j).
5. Members of the bar are willing to attest that the Accused has the reputation for honesty as a lawyer. *Standards*, § 9.32(g).

8.

Under the ABA *Standards*, a public 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 interference or potential interference with the outcome of the legal proceeding. *Standards*, § 9.33.

9.

Prior decisions by the Disciplinary Board are in accord. See *In re Lafky*, 11 DB Rptr 9 (1997), where a trial panel reprimanded a lawyer for offering to pay witnesses contingent upon their testifying in favor of a reduction in his client's sentence and to pay additional money if the client's sentence was reduced.

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 3.4(b), the sanction to be effective on the date this agreement is approved by the Disciplinary Board.

11.

In addition, on or before sixty (60) days after the execution of this Stipulation by both parties, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$1,118.25, incurred for court reporter's fees and deposition transcripts. Should the Accused fail to pay \$1,118.25 in full sixty (60) days after the execution of this Stipulation by both parties, the Bar may thereafter, without further notice to the Accused, obtain 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.

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.

The sanction provided for herein has been approved by the SPRB. This Stipulation for Discipline is also subject to review by Disciplinary Counsel of the Oregon State Bar. 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 Wolf*, 27 DB Rptr 208 (2013)

EXECUTED this 30th day of September, 2013.

/s/ Robert L. Wolf

Robert L. Wolf  
OSB No. 773931

EXECUTED this 1st day of October, 2013.

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. 12-71
	)	
JERRY G. KLEEN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.16(d). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	October 29, 2013

**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, RPC 1.4(a), RPC 1.4(b), and RPC 1.16(d).

DATED this 29th day of October, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ James C. Edmonds  
 James C. Edmonds, Region 6  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Jerry G. Kleen, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 in 1963, 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 17, 2013, 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 1.4(b) RPC 1.16(d), and RPC 8.4(a)(3). 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 April 16, 2009, Joan Ott (hereinafter “Ott”) retained the Accused to pursue a medical malpractice claim regarding treatment Ott received in June 2008 and to assist Ott in dealing with medical bills related to that claim. The Accused told Ott that she should not pay outstanding medical bills, and she should direct the medical providers to contact the Accused regarding them.

6.

On or about September 3, 2009, the Accused informed Ott that he required her to advance \$500 for the cost of retaining an expert to evaluate and testify regarding Ott’s claims. Ott paid \$500 to the Accused. The Accused did not obtain Ott’s full medical records pertaining to her medical malpractice claim.

7.

On or about September 21, 2009, the Accused informed Ott's medical creditors that they should communicate with him regarding Ott's outstanding medical bills.

8.

In the following months, the Accused did not retain an expert to review Ott's case and render a formal opinion regarding Ott's medical malpractice claim. The Accused made informal inquiries of a potential medical expert and a lawyer whom the Accused viewed as possessing expertise in bringing and defending medical malpractice claims. Based upon those informal inquiries, the Accused's review of some records Ott had provided, and the Accused experience regarding the difficulty in proving "failure to diagnose" cases that he believed were similar to Ott's, the Accused decided against retaining an expert to render an opinion regarding Ott's medical malpractice claims. The Accused did not promptly communicate that decision to Ott. The Accused took no further substantive action to investigate Ott's claims

9.

Beginning early in January 2010 and continuing over the following months, Ott called and emailed the Accused asking for information regarding the status of her medical malpractice case. The Accused failed to promptly respond to Ott's reasonable inquiries until on or about March 17, 2010, when he was notified that Ott had contacted the Oregon State Bar Client Assistance Office regarding his failure to respond. The Accused soon thereafter informed Ott that he was concerned about the financial viability of her medical malpractice claim. The Accused did not inform Ott about his decision to forgo obtaining an expert opinion regarding the claim.

10.

On or about May 14, 2010, the Accused had a lengthy telephone conversation with Ott, and advised her that he did not believe that she had a viable case, and he was not proceeding further with Ott's case. Ott requested that the Accused provide her with a copy of the current court filing fees, which he did in a letter to Ott in June 2010, when the statute of limitations was imminent. The Accused expressed his regret once again that he did not believe that Ott's claim was viable. The Accused regarded his representation as ended but failed to promptly refund the \$500 that Ott had advanced to retain a medical expert.

11.

On or about June 14, 2010, the Accused received from a lawyer representing one of Ott's medical creditors a written demand for payment of Ott's medical bills. The Accused did not inform the creditor that he no longer represented Ott and he negligently failed to ensure that Ott was informed of the demand.

12.

On or about September 14, 2010, the Accused was served with a summons and complaint for a lawsuit a medical creditor had filed against Ott for unpaid medical bills. The Accused did not inform the creditor that he no longer represented Ott and he negligently failed to ensure that Ott was informed of the demand.

13.

The Accused refunded Ott's \$500 in February 2011, after he was contacted by a subsequent attorney retained by Ott.

### **Violations**

14.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 13, he violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.16(d). 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**

15.

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 failure to act with reasonable diligence and promptness in representing and communicating with Ott violated his duty of diligence. *Standards*, § 4.4. The Accused's failure to take reasonable steps to protect Ott upon the termination of representation, such as refunding costs advanced and assuring that the client and her creditor knew he no longer represented her, violated a duty he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted negligently, i.e., he failed to heed a substantial risk that circumstances existed or a result would follow, which failure is a deviation from the standard of care a reasonable lawyer would exercise in the situation. *Standards*, p. 7.
- c. **Injury.** The Accused's misconduct resulted in actual and potential injury. The Accused's failure to diligently represent and communicate with Ott caused Ott to suffer anxiety and frustration and may have affected her ability to obtain

other counsel to pursue her tort claims and defend her debt. The Accused's failure to satisfy his duties at the conclusion of the representation may have contributed to the ability of Ott's creditor to obtain a default judgment, including attorney fees and interest that accumulated while Ott was ignorant that a judgment existed. The Accused, through his insurer, offered to repay the attorney fees and interest that accumulated.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused has practiced law in Oregon since 1963.
- 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 disciplinary proceedings. *Standards*, § 9.32(e).

16.

Under the ABA *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. The *Standards* also recommend that reprimand is generally appropriate where a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system *Standards*, § 7.3.

17.

Oregon case law is in accord. See *In re Witte*, 24 DB Rptr 10 (2010) (reprimand for negligent violations of neglect of a legal matter, failure to communicate, failure to withdraw when mandatory, and failure to comply with obligations upon termination of employment; client's unemployment case dismissed); *In re Rose*, 20 DB Rptr 237 (2006) (reprimand for negligent violations of neglect of a legal matter, failure to communicate, excessive fee, failure to deposit funds in trust, and failure to comply with obligations upon termination of employment; client's post-conviction appeal dismissed and delayed).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.16(d), the sanction to be effective upon approval of this stipulation.

19.

In addition, on or before December 31, 2013, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$580.15, incurred in deposing the Accused. Should the Accused fail to pay \$580.15 in full by December 31, 2013, the Bar may thereafter, without further notice to the Accused, obtain 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.

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 20th day of August, 2013.

/s/ Jerry G. Kleen

Jerry G. Kleen  
OSB No. 630440

EXECUTED this 23rd day of October, 2013.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis  
OSB No. 032221  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 13-12 and 13-13
	)	
TIMOTHY R. STRADER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 5.3(a). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	November 8, 2013

**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, effective November 8, 2013 for violations of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 5.3(a).

DATED this 4th day of November, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Nancy Cooper  
 Nancy Cooper, Region 5  
 Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Timothy R. Strader, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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, 1981, 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 February 12, 2013, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.15-1(a) (failure to safeguard and account for client property); RPC 1.15-1(c) (failure to deposit and maintain client funds in trust); and RPC 5.3(a) (failure to adequately supervise nonlawyer employees). 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.

At all times relevant herein, the Accused was the managing shareholder of the law firm known as Hanna Strader, PC, later known as HS Law Firm, PC (hereinafter “law firm” or “firm”). As managing shareholder, the Accused oversaw law firm operations, was responsible for the manner in which the firm handled firm and client money, and had direct supervisory authority over the nonlawyer staff employed by the firm.

6.

At all times relevant herein, Julie A. McCarter (hereinafter “McCarter”) was employed by the law firm as the office manager. The Accused had direct supervisory authority over McCarter.

7.

Prior to September 2008, the Accused represented a member or members of the Porcelli family, who owned a business called Beverage Ice Company, LLC (hereinafter “Beverage Ice”). Upon the Accused’s recommendation in September 2008, the Porcelli family deposited with the Accused and the law firm nearly \$1,500,000. The funds were to be used to pay annual premiums on insurance policies insuring the life of a member or members of the Porcelli family. The Accused arranged for these funds to be deposited in a trust account established by the firm at Sterling Savings Bank for Beverage Ice (hereinafter “Beverage Ice Trust Account”).

8.

The Accused failed to maintain complete records of the Beverage Ice Trust Account funds between January 1, 2009, and April 21, 2011. During this time, McCarter withdrew and misappropriated for her own use approximately \$489,000 from the Beverage Ice Trust Account.

9.

McCarter’s misappropriation of Beverage Ice funds occurred because the Accused failed to make reasonable efforts to ensure that McCarter’s conduct was compatible with the Accused’s professional obligations.

10.

The funds misappropriated by McCarter were client funds, had not been earned by the Accused or the law firm, and should not have been withdrawn from the Beverage Ice Trust Account.

### **Violations**

11.

The Accused admits that he failed to properly or adequately supervise McCarter, which allowed for the theft of client funds and thereby violated RPC 5.3(a). The Accused further admits that his failure to create and maintain adequate records violated RPC 1.15-1(a), and his failure to ensure that client funds were maintained in trust and properly accounted for violated RPC 1.15-1(a) and (c).

## 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 his client to preserve client property. *Standards*, § 4.1. The *Standards* assume that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, p. 5. Those violations also violate the Accused’s duty to the public to avoid conduct that reflects adversely on his fitness to practice law under *Standards*, § 5.14. See *In re Peterson*, 348 Or 325, 342, 232 P3d 940, (2010) (so stating). The Accused also violated his duty to the profession to ensure that his employees refrained from professional misconduct. *Standards*, § 7.0.
- b. **Mental State.** The Accused’s conduct was negligent, insofar as he was unaware of McCarter’s thefts and she took steps to actively conceal them from him. “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. 9. However, from his lengthy experience in the practice of law, the Accused should have known that he was dealing improperly with client funds to the extent that he did not have adequate records or systems in place to prevent against the type of theft that occurred.
- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0. In this case, the size of the loss to the Porcelli family was substantial (\$500,000) and the family was required to hire new counsel, at its expense, and engage in a lengthy negotiation and mediation before recovering the missing funds. However, the Accused took substantial, successful remedial measures to ensure that full restitution was made to the Porcelli family.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Multiple offenses. *Standards*, § 9.22(d).
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. No prior record of discipline. *Standards*, § 9.32(a).

2. Absence of dishonest or selfish motive. *Standards*, § 9.32(b).
3. Good faith effort to make restitution or rectify the consequences of his misconduct. *Standards*, § 9.32(d).
4. Full and free disclosure and cooperation in the disciplinary investigation and formal proceeding. *Standards*, § 9.32(e)
5. The Accused has submitted evidence of good character and reputation. *Standards*, § 9.32(g).
6. The imposition of other penalties or sanctions. *Standards*, § 9.32(k). The Accused stepped up and contributed \$200,000 toward the restitution of the Porcelli family.
7. Remorse. *Standards*, § 9.32(l).

13.

Under the ABA *Standards*, a 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. A reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client. *Standards*, § 4.12; *Standards*, § 7.3.

A suspension is appropriate. However, in light of the Accused's considerable mitigation, only a short-term suspension is warranted.

14.

Oregon case law reaches a similar result where mitigation outweighs any aggravation. *See, e.g., In re Ireland*, 26 DB Rptr 47 (2012) (30-day suspension by trial panel where attorney failed to deposit client funds in trust upon receipt); *In re Feest*, 18 DB Rptr 87 (2004) (30-day suspension for attorney's failure to properly handle client funds); *In re Doyle*, 18 DB Rptr 69 (2004) (30-day suspension for conduct including failing to deposit retainers into trust). *But c.f., In re Peterson*, 348 Or 325, 232 P3d 940 (2010); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (where court imposed 60-day suspensions on experience lawyers whose mitigating factors did not outweigh their aggravating factors).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of RPC 1.15-1(a) and (c), and RPC 5.3(a), the sanction to be effective November 8, 2013, or three days after approval by the Disciplinary Board, whichever is later.

16.

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 Brian Dirks, 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 Brian Dirks has agreed to accept this responsibility.

17.

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.

18.

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.

19.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: State of Washington.

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 24th day of October, 2013.

/s/ Timothy R. Strader

Timothy R. Strader

OSB No. 814651

EXECUTED this 28th day of October, 2013.

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. 12-72 and 12-171  
 ) SC S061652  
HOWARD HUDSON, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott

Counsel for the Accused: Megan I. Livermore

Disciplinary Board: None.

Disposition: Violation of RPC 1.1, RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(d), RPC 1.16(c), RPC 1.16(d), RPC 3.3(a), RPC 3.4(b), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4). Stipulation for Discipline. 2-year suspension, all but 6 months stayed, 2-year probation.

Effective Date of Order: November 24, 2013

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline, based upon the court's understanding that the stipulation requires the Accused to seek reinstatement under BR 8.1(b). The Accused is suspended from the practice of law in the State of Oregon for a period of two years, with all but six months of the two-year suspension stayed pending the completion of a two-year term of probation, effective ten (10) days from the date of this order.

November 14, 2013.

/s/ Thomas A. Balmer  
Chief Justice, Supreme Court

### STIPULATION FOR DISCIPLINE

Howard Hudson, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 Lane 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 24, 2013, an Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.1 (failure to provide competent representation), RPC 1.2(a) (failure to abide by the objectives of the client), RPC 1.3 (neglect of a legal matter), RCP 1.4(a) (failure to keep a client reasonably informed of the status of a case), RPC 1.4(b) (failure to communicate with client sufficient to allow client to make informed decisions regarding the representation), RPC 1.5(a) (charge or collect an illegal or clearly excessive fee or expense), RPC 1.15-1(d) (failure to provide an accounting of client property, upon request), RPC 1.16(c) (failure to obtain court permission to withdraw), RPC 1.16(d) (failure to take reasonable steps, upon withdraw, to protect client interests), RPC 3.3(a) (lack of candor with a tribunal), RPC 3.4(b) (creation of false evidence), RPC 8.1(a)(1) (knowingly make a false statement to a disciplinary authority), RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice) .

The parties intend that this stipulation set forth all relevant facts, which the Accused does not contest, all relevant violations and the agreed-upon sanction as a final disposition of this proceeding.

**Griffiths Matter**  
**(Case No. 12-72)**

**Facts**

5.

In May 2009, Christine Griffiths (hereinafter “Griffiths”) met with the Accused’s law partner, Rebecca May (hereinafter “May”) and hired their firm, Hudson|May, to obtain a divorce from Griffiths’ estranged husband, Ritch Danner (hereinafter “Danner”). At the time, the Hudson|May office was located in Salem. The Hudson|May firm was paid a \$1,200 retainer on Griffiths’ behalf. May and the Accused consulted one another regarding all aspects of Griffiths’ legal matter.

6.

Before Griffiths and Danner separated in August 2005, Danner was criminally charged in connection with a number of financial scams. After the separation, Danner fled the jurisdiction to escape prosecution.

7.

In July 2009, May filed Griffiths’ divorce petition in Linn County. Due to Griffiths’ residency, the case should have been filed in Benton County. The Hudson|May firm billed Griffiths for this erroneous filing.

8.

Thereafter, the Accused and May mailed the divorce petition to a number of addresses previously associated with Danner. To the extent that these mailings were not returned (or even in the instances where they were signed for), they did not qualify as personal service, substitute service, or office service under the requirements of ORCP 7. Neither May nor the Accused attempted personal service of the petition on Danner because his whereabouts were unknown. The Linn County Court was never satisfied that Danner was properly served with the divorce petition and denied a motion for substitute service, and would not allow May and the Accused to obtain a default against Danner. The Hudson|May firm billed Griffiths for these futile service efforts.

9.

The Hudson|May firm opened a second office in Eugene in September 2009. The Hudson|May firm maintained the lease at its Salem office through the summer of 2010. The Accused occasionally visited the Salem office to meet with clients and the office was only regularly staffed by a law clerk who spoke to clients, set appointments, and forwarded mail. Neither May nor the Accused directly notified Griffiths that the office location had changed. Rather, they assumed from a communication with Griffiths’ father that Griffiths was aware of the change.

10.

The Accused took over primary responsibility for Griffiths' case near the end of 2009.

11.

Between mid-December 2009 and March 2010, Griffiths tried repeatedly but was unable to contact May regarding her case. Griffiths contacted the Bar's Client Assistance Office (hereinafter "CAO") for help, and at its suggestion, Griffiths sent a letter to the Hudson|May firm demanding clarification of who was handling her case. In response, the Accused sent Griffiths a letter confirming that he had taken over her case.

12.

Thereafter, Griffiths continued to have difficulty communicating with the Hudson|May firm. Once again, she contacted the CAO for assistance, and it contacted the Accused in March 2010. Although unspecified legal services were discounted from Griffiths' invoice, the Hudson|May firm billed her for the Accused's time spent speaking with the CAO about Griffiths' concerns about their lack of communication.

13.

Between April 1, 2010, and June 9, 2010, neither the Accused nor May communicated with Griffiths or took any action on her matter. On or about June 9, 2010, the Linn County Court dismissed Griffiths' divorce petition. Staff at the Hudson|May firm notified Griffiths of this event by telephone, but neither the order of dismissal nor court notice was ever provided to Griffiths.

14.

The case could now be re-filed in the proper jurisdiction (Benton County). Thereafter, the Accused prepared documents for Griffiths to file *pro se* in Benton County.

### **Violations**

15.

The Accused admits that, by assisting May to file the petition in Linn County, and failing to effect service on Danner, he failed to provide Griffiths' with competent representation, in violation of RPC 1.1. The Accused further admits that, by failing to take substantive action on Griffiths' divorce or respond to her requests for information, he engaged in neglect and inadequate communication, in violation of RPC 1.3 and RPC 1.4(a). By failing to notify Griffiths' of the relocation of the Hudson|May firm, the Accused violated RPC 1.4(b). Finally, for charging Griffiths for services that were of no benefit to her the Accused charged an excessive fee, in violation of RPC 1.5(a).

**Keene Matter**  
**(Case No. 12-171)**

**Facts**

16.

In September 2009, Matthias Keene (hereinafter “Keene”) met with May, and retained the Hudson|May firm to represent him in a custody dispute with his former girlfriend, Melissa Collar (hereinafter “Collar”). She lived in Washington State and was represented by attorney Eleanor Beatty (hereinafter “Beatty”). Keene and Collar sought to formalize their parenting arrangement after Collar moved to Washington with the child. Keene, a Modest Means client, paid the Hudson|May firm a \$2,400 retainer against an hourly fee. During the representation, no bills or statements were ever sent or provided to Keene.

17.

Toward the end of 2009, the Accused assumed responsibility for Keene’s custody matter. Although Keene’s primary objective was to protect his son’s safety and stability, child support was also an important issue.

18.

On June 4, 2010, at a settlement conference before Judge Luukinen, the parties agreed to a new custody arrangement effective after Collar’s move. Judge Luukinen instructed the Accused to draft: a stipulated judgment that included two parenting plans—one that would apply immediately and another that would apply after Collar moved to Oregon (reflecting 50/50 parenting time). Judge Luukinen indicated that the child support calculation in the judgment was to be based on a 50/50 parenting time arrangement.

19.

This last instruction was ambiguous. The Accused and Keene left the conference thinking there would be two child support calculations: one reflecting the then-existing 75/25 custody arrangement, and the second reflecting the 50/50 arrangement after Collar moved to Oregon. However, Beatty left the conference thinking that the child support calculation would be based on 50/50 custody regardless of whether and when Collar moved.

20.

The Accused drafted documents that reflected his and Keene’s understanding: a proposed judgment, a parenting plan, and two child support calculations. The first set of calculations, based on 75/25 custody, required Collar to pay Keene \$105/month. The second set of calculations, based on 50/50 custody, required Keene to pay Collar \$168/month.

21.

The Accused forwarded these proposed documents to Beatty on July 7, 2010. Reviewing them, she realized their disagreement about child support. She drafted her own proposed judgment and parenting plans and sent them to the Accused attached to two emails. The first email attached her proposed judgment, which calculated child support based on 50/50 custody and awarded Collar a child support judgment against Keene. Beatty's second email attached two parenting plans, effective pre- and post-move.

22.

The Accused received Beatty's first email, attaching the proposed judgment. However, he did not acknowledge it, review it, or forward it to Keene. When the Accused received the second email, attaching the proposed parenting plans, he forwarded it to Keene without reviewing it himself.

23.

Between July 20, 2010, and September 23, 2010, the Accused failed to respond to numerous emails and telephone calls from Keene.

24.

On August 25, 2010, Keene emailed the Accused to complain that the settlement arrangement was not working out, in part because Collar was not paying him child support.

25.

From June 4, 2010 through September 15, 2010, Beatty sent numerous emails and left telephone messages for the Accused in an attempt to finalize the form of judgment and parenting plans. The Accused did not respond.

26.

A status conference regarding the form of judgment and parenting plans in the custody matter was scheduled for September 21, 2010. The Accused did not notify Keene, nor did the Accused appear for the conference. Noting his absence, the court telephoned the Accused. The Accused—who still had not reviewed Beatty's form of judgment—withdrew any objection to it. He did not realize that it calculated child support using the 50/50 custody arrangement and required Keene to pay Collar child support.

27.

The Accused did not tell Keene that the status conference had taken place or that the Accused had stipulated to Beatty's form of judgment.

28.

On September 23, 2010, Keene learned about the status conference from Collar, who also told him that the judgment approved by the court required that him to pay her child support. Seeking clarification, Keene tried unsuccessfully to contact the Accused by telephone. Later that day, the Accused emailed Keene saying that the final judgment should require that Collar pay Keene support. The Accused promised to call Keene within 24 hours to discuss the matter further and to mail him a copy of the final judgment as soon as the Accused received it from Beatty, but the Accused did neither.

29.

On September 24, 2010, Beatty emailed the Accused copies of the final documents.

30.

On September 28, 2010, after reviewing the final judgment, the Accused emailed Beatty to object—for the first time—about support being based upon her 50/50 custody calculations prior to Collar’s move to Oregon. The Accused requested that Beatty voluntarily amend the documents to reflect Keene’s present role as primary parent. Beatty immediately responded that the Accused had had her calculations since July and had withdrawn any objection to them at the September 21, 2010 status conference.

31.

Hours after the September 28, 2010 email exchange between the Accused and Beatty, Keene demanded that the Accused explain the form of judgment. The Accused did not respond or take any further action on Keene’s matter. In particular, the Accused failed to notify Keene about: the Accused’s role in allowing a judgment setting child support based on 50/50 custody; his futile attempt to persuade Beatty to amend the judgment; his decision thereafter to do absolutely nothing to salvage the situation; or the advisability of Keene consulting with new counsel about his options, including the possibility of a malpractice claim against the Accused.

32.

At all times relevant herein, UTCR 3.140(1) required in relevant part that a notice of withdrawal, termination, or substitution of attorney be promptly filed when an attorney was terminated or resigned from representing a client in a court proceeding. UTCR 3.140(3) provided that an attorney remained attorney-of-record until that attorney otherwise notified the court.

33.

After Keene’s repeated attempts to obtain a response from the Accused about the form of judgment, Keene hired new counsel. On October 11, 2010, Keene sent a letter to the Accused, formally terminating the representation and demanding his client file and an

accounting of his retainer. The Accused did not respond, forward Keene's file, or provide the requested accounting. Moreover, the Accused failed to file and serve a Notice of Termination in Keene's matter until December 15, 2010.

34.

In late December 2010, Keene complained to the Bar's Client Assistance Office (hereinafter "CAO") about the Accused's conduct.

35.

In response to CAO's inquiry, on February 25, 2011, the Accused provided a narrative and supporting documentation, which included a letter the Accused purportedly sent to Keene dated September 21, 2010 (hereinafter "September 21 letter"), and a purported Notice of Termination of Attorney-Client Relationship, also dated September 21, 2010 (hereinafter "Notice of Termination"). The Accused asserted to CAO that:

Any issues Keene had with respect to the Accused's representation arose "after the termination of the attorney-client relationship."

The Accused had prepared and filed a Notice of Termination in Keene's matter on September 21, 2010—prior to any complaints from Keene about the form of the judgment.

The Accused had drafted and sent a letter to Keene on September 21, 2010, transmitting a conformed copy of the final judgment in Keene's custody matter.

The Accused had been aware on (or prior to) September 21, 2010, that the court had entered a judgment that included child support calculations based upon 50/50 parenting time.

On (or prior to) September 21, 2010, the Accused had already discussed with Beatty the "error" of child support calculations based upon 50/50 parenting time.

The Accused knew that these assertions materially misrepresented the true facts. He knew that he had not drafted either the September 21 letter or the Notice of Termination on or before September 21, 2010, but intended that CAO rely on these documents as proof that the Accused had terminated the attorney-client relationship on that date.

36.

On February 10, 2011, Keene filed a small claims action against the Accused in Polk County. On March 16, 2011, the Accused filed a declaration in the small claims action, in support of a motion to dismiss stating that:

"I prepared a Notice of Termination of Attorney-Client Relationship after the judgment was signed. My file copy is

dated September 21, 2010, and the cover letter is dated September 23, 2010 [sic]. After I learned that Polk County did not have the Notice in the Court File, and after I heard a Bar complaint had been filed, I submitted a new Notice of Termination [on December 15, 2010]...”

These assertions suggested that the referenced events occurred on or around September 21, 2010. That was not the case.

37.

On April 1, 2011, at a hearing before the small claims court, the Accused offered the September 21 letter and the Notice of Termination into evidence, thereby misrepresenting that he created and sent these documents on or before the dates indicated, when he knew this was not the case.

38.

On April 18, 2011, the Accused signed and returned to the Bar an agreement to participate in the Bar’s Fee Arbitration Program regarding the Keene matter. On May 27, 2011, the Accused submitted to the arbitrator documentation that included both the September 21 letter and the Notice of Termination. He thereby misrepresented that he had created and sent these documents on or before September 21, 2010 when he knew this was untrue.

39.

On May 26, 2011, Keene’s complaint to CAO was referred to Disciplinary Counsel’s Office (hereinafter “DCO”) for investigation. In response to an inquiry from DCO, the Accused produced documentation that included both the September 21 letter and the Notice of Termination, intending that DCO rely on those documents in its evaluation of Keene’s Bar complaint. The Accused thereby misrepresented to DCO that he created and sent these documents on or before September 21, 2010, when he knew this was untrue.

### **Violations**

40.

The Accused admits that, by engaging in the above-described conduct, he violated RPC 1.1, RPC 1.2(a), RPC 1.3, RPC 1.4(a) & (b), RPC 1.15-1(d), RPC 1.16(c), RPC 1.16(d), RPC 3.3(a), RPC 3.4(b), RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct

## Sanction

41.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Oregon 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 his duties to his clients: to act with reasonable diligence and promptness in representing them (including communicating with them); to provide competent representation; and to properly handle and account for client funds and property. *Standards*, §§ 4.1, 4.4, 4.5. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards*, p.5. The Accused also violated his duty to the profession to refrain from charging excessive fees. Finally, the Accused violated his duty to the profession to be candid in disciplinary matters, and his duties to the legal system to avoid false statements, fraud, and misrepresentation, as well as abuse of the legal process. *Standards*, §§ 6.1, 6.2, 7.0.
- b. **Mental State.** The *Standards* recognize three types of 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. “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.

The Accused’s conduct in the Griffiths matter began as negligent but became knowing after the Bar first brought Griffiths’ concerns to his attention. The Accused’s mishandling of the Keene matter was also initially negligent, and it too became knowing when he became aware of the form of judgment entered and then did nothing to address this mistake. His subsequent misrepresentations and submission of inaccurate documents were knowing.

- c. **Injury.** Griffiths was actually injured to the extent that she paid for services that did not benefit her and to the extent that her matter was delayed a year by lack of competence and communication. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). In addition, the Accused’s lack of communication caused Griffiths actual injury in the form of anxiety and frustration. *See In re*

*Knappenberger*, 337 Or 15, 23, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004); *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 II*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).

Keene was actually injured because he paid for services that did not benefit him and then had to pay for new counsel to “undo” what the Accused allowed to happen. Keene also suffered frustration due to the Accused’s failure to communicate with him. Keene also suffered actual or potential injury in that the small claims court, the arbitration, and/or the Bar could have relied on the Accused’s misrepresentative documents, to Keene’s disadvantage.

Finally, the judicial system and the Bar were actually injured by the Accused’s submission of inaccurate evidence and information in those proceedings, as was the public. The supreme court has held that both the legal profession and the public are actually injured where attorney conduct delays or disrupts the orderly operation of the disciplinary process. *See In re Skagen*, 342 Or 183, 218, 149 P3d 1171 (2006); *In re Kluge*, 335 Or 326, 350, 66 P3d 492 (2003); *In re Glass*, 308 Or 297, 305, 779 P2d 612 (1989) (disciplinary process serves to protect public); *see also In re Schaffner II, supra; In re Miles, supra; In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990); *In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (court concluded that the Bar was prejudiced because the Bar had to investigate in a more time-consuming way, and the public respect for the Bar was diminished because the Bar could not provide a timely and informed response to complaints).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. The Accused acted with a dishonest or selfish motive. *Standards*, § 9.22(b).
  2. There is a pattern of misconduct. *Standards*, § 9.22(c).
  3. Multiple offenses. *Standards*, § 9.22(d).
  4. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. *Standards*, § 9.22(f).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. The Accused was admitted in Oregon in 2007 and thus had only two years of legal experience when he represented Griffiths. *Standards*, § 9.32(f).

42.

Under the ABA *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. Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client. *Standards*, § 4.52

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. *Standards*, § 6.11. Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. *Standards*, § 6.12

Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding. *Standards*, § 6.21. 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.

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. 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

43.

Like the *Standards*, Oregon cases suggest that a lengthy suspension is appropriate for the Accused's cumulative conduct.

The Accused's creation of evidence and attempts to mislead the Bar are themselves sufficient to warrant a suspension of at least two years. See *In re Brown*, 298 Or 285, 692 P2d 107 (1984) (lawyer who prepared and had his client sign an affidavit that he knew was

false to persuade the Bar to drop an investigation against the lawyer was suspended for two years); *In re Wyllie*, 327 Or 175, 957 P2d 1222 (1998) (two-year suspension where attorney misrepresented his CLE activities to the MCLE Board and then lied to the Bar in its investigation of the conduct).

Similarly, misrepresentations to the court and others for the lawyer's benefit have yielded long-term suspensions. *See, e.g., In re Hostetter*, 348 Or 574, 238 P3d 13 (2010) (while representing a client in connection with a real estate foreclosure, attorney obtained from the buyer an executed deed in lieu of foreclosure. Thereafter, attorney removed the notarized signature page from the deed, affixed it to a deed with a different property description that the buyer had not signed, and had the second deed recorded. Court suspended attorney for 150 days); *In re Levie*, 342 Or 462, 154 P3d 113 (2007) (in a dispute concerning his client's compliance with the terms of a settlement agreement, attorney was suspended for one year when he falsely represented to an arbitrator that opposing counsel knew of and consented to the three sculptures being displayed in attorney's law firm); *In re Strickland*, 339 Or 595, 124 P3d 1225 (2005) (court suspended attorney for one year when attorney, upset about a construction project in his neighborhood, falsely reported to police that he had been threatened and assaulted by construction workers); *In re Leisure*, 338 Or 508, 113 P3d 412 (2005) (18-month suspension for attorney who repeatedly issued checks on her business account knowing that the account held insufficient funds, and made false representations to the payees of the checks regarding the availability of funds in her account); *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (attorney suspended for 36 months where he failed to disclose to his clients that insurance agents who would be coming to their homes to review their living trusts would use the information they gained thereby to attempt to sell them insurance products and that the attorney had a financial interest in such sales); *In re Kluge*, 335 Or 326, 66 P3d 492 (2003) (attorney suspended for two years when he presented to one judge a motion to disqualify another judge without informing the motions judge that the judge to be disqualified had already made a substantive ruling in the case. Attorney also violated the rule by intentionally not giving notice of the motion to opposing counsel or the judge he sought to disqualify); *In re Gallagher*, 332 Or 173, 26 P3d 131 (2001) (attorney acted dishonestly, and was suspended for two years, when he refused to return to opposing counsel settlement funds that were paid in error, disbursed the proceeds to himself and his client without seeking clarification about the overpayment, and justified his actions by fabricating a different account of the settlement terms).

Under the foregoing cases, the Accused's collective misconduct warrants a lengthy suspension.

44.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for two years for violation of RPC 1.1, RPC 1.3, RCP 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(d), RPC 1.16(c), RPC 1.16(d), RPC 3.3(a), RPC 3.4(b),

RPC 8.1(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4), effective December 1, 2013, or upon approval by the court. However, all but six months of the two-year suspension shall be stayed pending completion of a two-year term of probation, which shall include the following terms and conditions:

- (a) The Accused shall be suspended from the active practice of law for six months, beginning December 1, 2013. This six-month suspension shall run concurrently with the two-year probationary period.
- (b) 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.
- (c) On or before January 1, 2014, the Accused will select an active Oregon attorney to supervise the Accused's probation (hereinafter "Supervising Attorney"), and obtain written approval from Disciplinary Counsel's Office (hereinafter "DCO") for this person to act as the Supervising Attorney. The Accused agrees to cooperate and comply with all reasonable requests made by his Supervising Attorney that the Supervising Attorney, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of the Accused's clients, the profession, the legal system, and the public. For example, the Supervising Attorney may determine that the Accused would benefit from:
  - (1) Consultation with practice management advisors from the Professional Liability Fund (hereinafter "PLF"), and the implementation of any PLF recommendations regarding his office practices or management.
  - (2) Enrollment and completion of the Oregon Attorney Assistance Program's (hereinafter "OAAP") program, "Getting it Done," or individual counseling sessions with one of the professional attorney counselors with the OAAP that cover the same subject matter as the "Getting it Done" program.
- (d) Sixty (60) days prior to the conclusion of the suspension in this matter, the Accused shall meet with his Supervising Attorney in person at least once for the purpose of reviewing the status of the Accused's law practice and his performance of legal services on the behalf of clients, and at least once on or before the 15th day of each third month thereafter.
- (e) During the meetings between the Accused and his Supervising Attorney, in addition to providing an opportunity to discuss any general or specific practice management concerns, the Accused and his Supervising Attorney shall audit a random sampling (8-10%) of the Accused's active files to verify:

- (1) The Accused is timely attending to the clients' matters and that he is adequately communicating with clients, the court, and opposing counsel, as appropriate.
  - (2) The Accused has written fee agreements in the files for all private clients and/or all clients for whom the Accused intends to charge non-refundable retainers that are earned on receipt.
  - (3) The Accused has familiarity with the subject matter of all matters in which he is representing clients.
  - (4) The Accused has reviewed his client files and reconciled them with his calendaring system, such that all necessary appearances and deadlines are noted and memorialized.
- (f) During the term of his probation, the Accused shall attend not less than 6 MCLE accredited programs, for a total of 30 hours, which shall emphasize client management, including proper fee agreements, conflicts of interest, adequate communication, and how to get along with difficult people. These credit hours shall be in addition to those MCLE credit hours required of the Accused for his normal MCLE reporting period.
- (g) Upon completion of the MCLE programs described in paragraph (f), and no later than November 30, 2015, the Accused shall submit an Affidavit of Compliance to Disciplinary Counsel's Office regarding this condition.
- (h) In the event the Accused fails to comply with any condition of this stipulation, the Accused shall immediately notify his Supervising Attorney and DCO in writing.
- (i) At least quarterly, on or before the last business day of the month, the Accused shall submit a written report to DCO, approved in substance by his Supervising Attorney, advising whether he is in compliance or non-compliance with the terms of this stipulation, including:
- (1) The dates and purpose of the Accused's meetings with his Supervising Attorney.
  - (2) The number of the Accused's active cases and percentage reviewed in the audit with the Accused's Supervising Attorney per paragraph (e) and the results thereof.
  - (4) Whether the Accused has completed the other provisions recommended by his Supervising Attorney, if applicable.
  - (5) In the event the Accused has not complied with any term of probation in this disciplinary case, the report shall also describe the non-

compliance and the reason for it, and when and what steps have been taken to correct the non-compliance.

- (j) The Accused authorizes his Supervising Attorney to communicate with Disciplinary Counsel's Office regarding the Accused's compliance or non-compliance with the terms of this agreement and to release to DCO any information DCO deems necessary to permit it to assess the Accused's compliance.
- (k) The Accused is responsible for the cost of any professional services required under the terms of this stipulation and the terms of probation.
- (l) Any failure by the Accused to comply with any condition of his probation, any failure by the Accused to comply with any reasonable request of his Supervising Attorney, or any subsequent finding by the SPRB that there is probable cause that the Accused violated a provision of the Oregon Rules of Professional Conduct or ORS Chapter 9 in a matter unrelated to the subject of stipulation, is a basis for the extension or termination of his probation by the SPRB.
- (m) In the event the Accused fails to comply with any condition of his probation, DCO 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.

45.

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 Rebecca May, 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 Rebecca May has agreed to accept this responsibility.

46.

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.

47.

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 prior to the end of the six-month period of actual suspension may result in the denial of his reinstatement.

48.

The Accused represents that, in addition to Oregon, he also is admitted to practice law in the jurisdictions listed in this paragraph, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing these jurisdictions of the final disposition of this proceeding. Other jurisdictions in which the Accused is admitted: none.

49.

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 16th day of September, 2013.

/s/ Howard Hudson

Howard Hudson  
OSB No. 074098

EXECUTED this 18th day of September, 2013.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott  
OSB No. 980280  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-167  
 )  
CARLA A. ANDERSON, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None.  
Disciplinary Board: David W. Green, Chairperson  
David W. Hercher  
Joann Jackson, Public Member  
Disposition: Violation of RPC 3.1, RPC 4.4(a), and RPC 8.1(a)(2).  
Trial Panel Opinion. 90-day suspension.  
Effective Date of Opinion: November 19, 2013

**TRIAL PANEL OPINION**

The matter came regularly before a trial panel of the Disciplinary Board consisting of David W. Green, Chairperson, David W. Hercher, Esq., and Joann Jackson, Public Member (hereinafter “Trial Panel”). Amber Bevacqua-Lynott represented the Oregon State Bar (hereinafter “Bar”). The Accused, Carla A. Anderson, Esq., represented herself (hereinafter “Accused”).

The Trial Panel has considered the factual allegations in the Complaint, the Default Order entered on the Complaint, and the exhibits submitted by the Bar in this Case. Based on the findings and conclusions made below, we find that the Accused violated RPC 3.1, RPC 4.4(a), and RPC 8.1(a)(2). We further determine that the Accused should be suspended from the practice of law for a period of ninety (90) days.

**INTRODUCTION**

**The Complaint:** A Formal Complaint (hereinafter “Complaint”) was filed on December 19, 2012, against the Accused claiming violations of the Oregon Rules of Professional Conduct. In its first Cause of Complaint, the Bar claimed that the Accused violated RPC 3.1 (pursuit of a frivolous claim) and RPC 4.4(a) (use of means with no

substantial purpose other than to embarrass, delay, harass, or burden a third person) in her representation of Michael Watson in civil complaints filed by the Accused in 2010 against Megan Watson and her sister, Gretchen Stangier. In its second Cause of Complaint, the Bar claimed that the Accused violated RPC 8.1(a)(2) (knowing failure to respond to a lawful demand for information from a disciplinary authority) by failing to respond in 2011 to the requests for information by the Disciplinary Counsel's Office.

**The Answer:** No answer was filed by the Accused to the Complaint.

**The Order of Default:** An Order of Default, dated April 3, 2013 (hereinafter "Default Order"), was entered by Nancy Cooper, Region 5 Chairperson, for a default on the Complaint based on the failure of the Accused to appear (to answer the Complaint) within the time period provided by the RPCs. As a result of the Default Order, the factual allegations in the Complaint were taken as established as true.

**No Hearing; Written Submission of Exhibits:** On April 22, 2013, the Trial Panel Chairperson requested that (i) the Accused confirm whether she had any objection to the place of the hearing in this case being in Region 5 (Multnomah County), and (ii) the parties provide dates on which they would be available for a hearing on sanctions, if the Trial Panel Chairperson requested oral argument by the parties. This case had been assigned to Region 5 because the Accused had an address of record with the Bar at a Post Office box in Gresham, which is in Multnomah County. The Post Office box was closed, although an alternate address and emails were used to communicate with the Accused. The Accused did not respond to the April 22, 2013 request. The Bar had previously stated that it did not require a hearing to submit evidence relative to sanctions or to make any oral argument in this case. The Trial Panel Chairperson decided (and notified the parties) on June 22, 2013, that a hearing would not be required and that the parties had until July 18, 2013, to make written submissions to the Trial Panel.

The matter came before the full Trial Panel on August 9, 2013. The matter was considered without a hearing, but after notice and opportunity were granted to both parties to submit a sanctions memorandum or written materials that they deemed appropriate for the Trial Panel to consider in this case, pursuant to the Bar Rules of Procedure (hereinafter "BR"). The Bar submitted a Memorandum re: Sanction dated July 18, 2013 (hereinafter "Bar Sanctions Memorandum"). The Accused did not submit a memorandum or written materials.

Any reference in this Opinion to an exhibit refers to the respective exhibits that are attached to the Bar Sanctions Memorandum (each, referred to in this Opinion as an "Ex"). The exhibits referred to in this Opinion were reviewed and accepted by the Trial Panel as exhibits in this case.

#### **FINDINGS OF FACT**

The following are the findings of fact by the Trial Panel.

Michael Watson (hereinafter “Michael”) and Megan Watson (hereinafter “Megan”) were divorced in 2008. In the Stipulated Judgment of Dissolution (hereinafter “Dissolution Judgment”), Michael and Megan were given separate ownership of some adjacent parcels in Clackamas County. The parties were required in the Dissolution Judgment to grant ingress and access easements to each other on the Clackamas parcels, as necessary. Megan subsequently refused to allow access to, or grant an easement to, Michael. As a result, Michael filed a *pro se* contempt motion in July 2009 seeking damages and other remedies. The court awarded \$4,125 in contempt sanctions. Further problems ensued between Michael and Megan. In January 2010, the Accused filed a civil action on behalf of Michael against Megan (hereinafter “Watson Complaint”), alleging damages for breach of contract, intentional interference with contractual relations, and fraud, and seeking \$898,000 in damages.

Soon after filing the Watson Complaint, the Accused filed for a second contempt order against Megan pursuant to the Dissolution Judgment for failure to grant easements. On May 14, 2010, the court found no contempt order was required. (Ex 2, Entry 152.) The Accused filed a third contempt motion in October 2010 against Megan, again based on her failure to grant the easements. The third contempt motion was dismissed after Megan subsequently granted the easements.

Prior to, during, and after the dissolution proceedings, Megan’s sister, Gretchen Stangier (hereinafter “Stangier”), provided financial support to Megan and communicated with Michael on Megan’s behalf. (Ex 5, pp 4–5.) In June 2010, the Accused filed a legal action against Stangier (hereinafter “Stangier Complaint”). (Ex 4.) The Stangier Complaint asserted claims against Stangier that are similar to those alleged in the Watson Complaint, but added a defamation claim. The Stangier Complaint claimed over \$2 million in damages against Stangier. (Ex 4, p 1; Ex 6, p 7.)

On behalf of both Megan and Stangier, attorney Daniel Steinberg (hereinafter “Steinberg”) and his co-counsel filed motions under the Oregon Rules of Civil Procedure against the Watson Complaint and the Stangier Complaint (collectively, “Complaints”). In response to the first motion, the court ordered the Accused to make the Complaints more definite and certain. After the Accused filed an amended complaint, Steinberg filed a second motion to dismiss the Complaints under ORCP 21. In January and February 2011, the court dismissed all claims on both Complaints with prejudice. (Ex 3, Entry 103; Ex 4, Entry 33.)

Steinberg then filed motions for enhanced prevailing party fees, attorney fees, and costs for both Megan and Stangier. (*See* Ex 5.) Steinberg informed the court that in the 10 months of litigation, the Accused had ignored his and co-counsel’s phone calls and requests to confer on the merits of the Complaints. (Ex 5, pp 2–3.)

In two opinion letters dated April 18, 2011 (hereinafter “April Opinions”), Clackamas County Circuit Court Judge Herndon awarded all relief sought. (Ex 6.) Judge Herndon found

that there was no good-faith basis for the filing of either Complaint and that Michael and the Accused had acted in bad faith. Judge Herndon's findings on the April Opinions included:

1. Michael's claims in the Watson Complaint were nearly identical to those alleged in the first contempt motion against Megan, but he had increased his damage claim from approximately \$30,000 to \$898,221. (Ex 6, p 7, #4.)
2. Michael's claims in the Watson Complaint were nearly identical to those he alleged against Megan in the contempt motions (Ex 6, p 4, #2), but Stangier had no title to the property and could not be liable to Michael for failing to grant an easement (Ex 6, p 3, #8; Ex 5, p 5, (f)).
3. The Accused had repeatedly refused Steinberg's attempts to confer on the merit of the claims, requiring Steinberg to file at least three Rule 21 motions against the Complaints, the last of which resulted in dismissal. (Ex 6, p 7, #10.)
4. None of Michael's claims were objectively reasonable. (Ex 6, pp 3–5, 8–9.)
5. The totality of the Accused's and Michael's conduct showed that filing the Watson Complaint, the three contempt petitions, and the "companion action" against Stangier were motivated by animosity against Megan arising from the dissolution of marriage proceeding. (Ex 6, p 8, #1.) Those actions were reckless, willful, malicious, and in bad faith and motivated solely for the purpose of harassing and terrorizing his former wife. (Ex 6, p 8, #2.)

#### **DISCUSSION AND CONCLUSIONS OF LAW**

The Bar has the burden of establishing the Accused's misconduct in the 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 Bar's factual allegations against the Accused in the Complaint were deemed to be true, by virtue of the Default Order, pursuant to BR 5.8(a). *In re Magar*, 337 Or 548, 551–53, 100, P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). However, the Trial Panel still needed to decide whether the facts deemed true by virtue of the Default Order constitute the disciplinary rule violations alleged by the Bar and, if so, what sanctions may be appropriate. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008); *see also In re Kluge*, 332 Or 251 (describing the two-step process). The parties were permitted to submit written materials in order to allow evidence that would be relevant to these decisions.

**A. The Accused Violated RPC 3.1 by Knowingly Bringing Proceedings on Behalf of a Client without a Basis That Is Not Frivolous.**

RPC 3.1 prohibits a lawyer from bringing an action, or asserting a position therein, or taking other action on behalf of a client unless there is a basis in law and fact for doing so that is not frivolous. A lawyer who ignores a case over an extended period or engages in a course of neglectful conduct violates the rule. *In re Jackson*, 347 Or 426, 223 P3d 387 (2009); *In re Koch*, 345 Or 444.

The Oregon Supreme Court has declined to find that an attorney knowingly asserted a frivolous position when that position was based upon a plausible interpretation of the law. *In re Marandas*, 351 Or 521, 538–40, 270 P3d 231 (2012) (the court need not determine whether the attorney’s interpretation was ultimately correct; it is sufficient to conclude that the interpretation of the law was plausible, and not frivolous or unwarranted).

Judge Herndon’s findings of bad faith were specific: the civil sanctions sought in the Complaints were “not objectively reasonable,” were “entirely void of any factual or legal basis,” were “motivated by and the result of [Michael’s] animosity against [Megan] arising from the dissolution proceeding,” and were “reckless, willful, malicious and in bad faith.” (Ex 6.) Judge Herndon found that the pursuit and filing of the Complaints was “motivated solely for the purpose of harassing and terrorizing his former wife” and that “these meritless claims have forced [Megan and Stangier] to hire attorneys to defend themselves.” Judge Herndon found that the litigation was “part of the common scheme of plaintiff and his counsel to harass his former spouse and her sister.” (Ex 6.)

The Trial Panel reviewed the facts and concluded that the Accused violated RPC 3.1 by bringing proceedings on behalf of a client without a basis that is not frivolous.

**B. The Accused Violated RPC 4.4(a) by Using Means with No Substantial Purpose Other Than to Embarrass, Delay, Harass, or Burden a Third Person.**

In the April Opinions, Judge Herndon noted several of the claims asserted in the Complaints were not objectively reasonable: (i) Stangier could not be held liable for damages Michael suffered due to Megan’s failure to grant easements when Stangier did not own the property and had no ability to effect such a transaction, and (2) claiming that Stangier was liable for over \$2 million in damages to Michael as a result of these acts (when Michael sought only \$898,000 in damages from Megan for the same conduct). Judge Herndon concluded that the Accused filed the action in order to harass Megan and her sister, Stangier.

There is little factual information in this case on the Accused’s motivation, other than the intent to harass or burden a party. In seeking attorneys’ fees and costs, attorney Steinberg claimed that the Accused was living with Michael during the litigation. (Ex 5, p 6, (1).) The Accused’s residential address on record with the Oregon DMV was 18151 SE Troge Road, which is the same as Michael’s residential and business address.( Ex 5, p 6, (1).) In awarding

attorney fees, Judge Herndon incorporated portions of Steinberg's motion, including the assertions that the Accused and Michael had a personal relationship and that presumed Michael had no legal fees to deter him from litigation to harass Megan and her sister. (Ex 6, p 3, #8; Ex 5, p 6, (1).)

RPC 4.4(a) prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, harass, or burden a third person. In filing and pursuing the Complaints, the Trial Panel found that the Accused violated RPC 4.4(a).

**C. The Accused Violated RPC 8.1(a)(2) by Knowingly Failing to Respond to a Lawful Demand for Information from a Disciplinary Authority.**

RPC 8.1(a)(2) prohibits a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority. This RPC requires a lawyer to respond fully and truthfully to reasonable requests for information by the Bar's disciplinary authority, subject only to the exercise of any applicable right or privilege. The Oregon Supreme Court has said that "[t]he failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation." *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000); *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996). Under this RPC, the lawfulness of the Bar's demand for information does not depend on the Bar being correct that a violation occurred. The Bar has authority to investigate when it is presented with factual allegations that raise an arguable complaint of misconduct. *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons*, 345 Or 652 (2009); *see also In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *modified on recons*, 347 Or 529 (2010); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (both disciplined for failing to respond during Bar investigation, notwithstanding ultimate dismissal of some or all of the investigated charges).

In July 2011, the Disciplinary Counsel's Office (hereinafter "DCO") asked the Accused to address Judge Herndon's findings in light of several RPCs. The DCO also requested that the Accused provide copies of various pleadings from the civil actions and contempt proceedings. (Ex 7.) After some delay, the Accused provided the requested pleadings. However, the Accused did not respond substantively to the other inquiries by the DCO. In a September 19, 2012 letter to the DCO, the Accused stated that she believed the DCO did not understand the issues and that the Professional Liability Fund (hereinafter "PLF") had taken both matters in an effort to "repair" errors made by the court. (Ex 7-B.)

Attorneys have been found to be in violation of RPC 8.1(a)(2) when they have responded insubstantially (*In re Paulson*, 346 Or 676), when they have refused to submit to a follow-up interview with Bar investigators (*In re Kluge*, 335 Or 326, 66 P3d 492 (2003)), or, after responding initially, when they failed to respond to subsequent inquiries by disciplinary counsel (*In re Scharfstein*, 19 DB Rptr 97 (2005)). An attorney's assertion that the underlying complaint is without merit, and even if that complaint is ultimately dismissed

after investigation, does not provide a defense to a charge of failing to respond to the Bar during that investigation. *In re Paulson*, 346 Or 676.

The Trial Panel reviewed the facts and case law and concluded that the Accused violated RPC 8.1(a)(2) by failing to respond substantively to the DCO's requests for information.

## SANCTION

In fashioning a sanction, the ABA *Standards for Imposing Lawyer Sanctions* (amended 1992) (hereinafter "*Standards*") and Oregon case law are considered. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002); *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994).

### A. ABA *Standards* Applied to This Case.

The *Standards* require an analysis of four factors by the Trial Panel: (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; *In re Jackson*, 347 Or at 440; *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008). The Trial Panel should adjust the presumptive sanction under the *Standards* based upon the presence of aggravating or mitigating circumstances. *In re Jackson*, 347 Or at 441. Finally, the Trial Panel should evaluate whether the sanction is consistent with Oregon case law. *In re Jackson*, *supra*.

1. **Duty Violated.** In pursuing the Complaints, the Accused violated a duty she owed to the legal system to refrain from filing frivolous suits. *Standards*, § 6.0. Furthermore, in reviewing the evidence and conclusions by Judge Herndon in the April Orders, the Trial Panel found that the Accused also knowingly engaged in conduct that is in violation of a duty owed to the profession with the intent to obtain a benefit for another, and that caused serious injury to the legal profession. *Standards*, § 7.0.
2. **Mental State.** The *Standards* recognize three mental states: intentional, knowing, and negligent. A lawyer acts intentionally by acting with the conscious objective or purpose of accomplishing a particular result. A lawyer acts knowingly by being consciously aware of the nature or circumstances but without having a conscious objective to accomplishing a particular result. A lawyer acts negligently by failing to heed a substantial risk that circumstances exist or a result will follow, in circumstances in which the failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 7.

The Trial Panel finds that the conduct of the Accused was done intentionally. The Accused filed the Complaints with the intention of accomplishing a result of harassing or burdening Megan and Stangier.

3. **Actual or Potential Injury.** Under the *Standards*, the injuries caused by a lawyer's professional misconduct may be either actual or potential. See *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992) (“[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction.”). The lawyer's misconduct may involve a violation of a duty owed to a client, the public, the legal system, or the profession. *Standards*, § 1.1. The protection of the public requires examination of the potential for injury caused by the lawyer's misconduct, whether or not actual injury occurred.

The Accused knowingly pursued a course of conduct in filing the Complaints that she knew could cause potential injury to Megan and her sister, in causing them expense to defend themselves, and in the harassing effect that the Complaints had. The record in this case supports the Trial Panel's conclusion that actual harm was caused by the Accused. Further, her failure to respond substantively to the Bar in the disciplinary process was intentional as well as detrimental to the legal profession.

#### **B. Preliminary Sanction.**

Drawing together the factors of duty, mental state, and injury, the *Standards* provide the following:

“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.

“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.

“Disbarment is generally appropriate when a lawyer \* \* \* has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.”

*Standards*, § 8.1(b).

#### **C. Aggravating and Mitigating Circumstances.**

“Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.” *Standards*, § 9.21. The Trial

Panel considered the potential aggravating and mitigating factors under the *Standards*, and found the following to be relevant to its decision in this case:

1. **A Dishonest or Selfish Motive.** Under *Standards*, § 9.22(b), a dishonest or selfish motive is an aggravating factor. The Bar argued that the Accused's conduct was with the intent to harass or burden Megan and for personal reasons (a personal relationship with Michael). The Trial Panel found that the motive was not an honest pursuit of a client's interest for non-frivolous reasons, and that this aggravating factor applied in this case.
2. **A Pattern of Misconduct.** Under *Standards*, § 9.22(c), a pattern of misconduct is an aggravating factor. The Bar argued that the Accused's conduct in filing the Complaints and contempt motions extended over a long enough period of time to constitute a pattern of misconduct. The Trial Panel found that there was a pattern of misconduct.
3. **Multiple Offenses.** Under *Standards*, § 9.22(d), multiple offenses constitute an aggravating factor. The Bar argued that there were multiple offenses. The Trial Panel found that there were multiple offenses.
4. **Refusal to Acknowledge the Wrongful Nature of Conduct.** Under *Standards*, § 9.22(g), the refusal to acknowledge the wrongful nature of conduct is an aggravating factor. The Accused responded on September 19, 2012, to the Bar to the DCO's requests for information in connection with various matters. Her response was that she could not afford legal counsel to assist her in responding to the Bar, the DCO did not understand the issues, the judge had made a finding that was not supported by the allegations, the PLF was involved in order to correct the errors made by the court, and the opposing counsel had repeatedly advised his client to ignore court orders and was not being investigated (by the Bar). (Ex 7-B.)

After discussion within the Trial Panel, the Trial Panel concluded that the aggravating factor was present in this case.

5. **Substantial Experience in the Practice of Law.** Under *Standards*, § 9.22(i), substantial experience in the practice of law is an aggravating factor. The Trial Panel concluded that the aggravating factor was present in this case.

The Trial Panel discussed the weight to be applied to the aggravating factors in this case. The Trial Panel concluded that it did not place significant weight in this case on the following factors: (i) there being a dishonest or selfish motive (*Standards*, § 9.22(b)), since the evidence of motive was weak in this case; and (ii) the refusal to acknowledge the wrongful nature of conduct (*Standards*, § 9.22(g)), since the Accused chose to say very little in response

and there was no Answer or hearing in which the Accused responded to the charges.

6. **Mitigating Factors.** Under *Standards*, § 9.32, there are factors that may be considered as mitigating factors in considering what sanction is appropriate. In the Bar Sanctions Memorandum, the Bar said that the absence of a prior disciplinary record was a mitigating factor in this case. The Trial Panel found that the absence of a prior disciplinary record was a mitigating factor for the Accused in this case. The Trial Panel found that there were no other mitigating factors in this case.

The Trial Panel discussed the weight to give to the aggravating and mitigating factors in this case. The Trial Panel did not place significant weight on (i) there being a dishonest or selfish motive (*Standards*, § 9.22(b)), or (ii) the Accused's refusal to acknowledge the wrongful nature of conduct (*Standards*, § 9.22(g)). The evidence of the Accused's motive was present, but weak, in this case. On the second factor, the Accused chose to say very little in response to the Bar, and there was no Answer or hearing in which the Accused responded to the charges. The Trial Panel found that there was sufficient evidence of both aggravating factors in the Accused's conduct and responses, but also concluded that less weight should be given to them than the other factors in considering the sanctions to be imposed in this case.

#### **D. Oregon Case Law.**

Considering the Accused's conduct, and the aggravating and mitigating factors, the Trial Panel concluded that some period of suspension is appropriate.

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). Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

Generally, the Oregon Supreme Court has imposed suspensions ranging from 60 days to two years when a lawyer has pursued unwarranted claims or actions. On the "high" end on sanctions is the decision in *In re Stauffer*, 327 Or 44, in which the attorney was suspended for two years for filing duplicate claims in a bankruptcy proceeding to make his former client's unsecured debt look as large as possible. The attorney's motive was to disqualify the former client from pursuing a bankruptcy that included the attorneys' own unpaid legal fees; the conduct resulted in nearly a decade of aggravation and uncertainty for his former client. Stauffer's conduct was more egregious than the Accused's conduct in this case, and involved personal and multiple-client conflicts of interest and excessive fee charges that are not present in this case. However, Stauffer engaged in a pattern of misconduct, had multiple

violations, and substantial experience in the practice of law, and did not have a significant record of discipline.

In considering the sanctions in other Oregon Supreme Court cases, the Trial Panel also considered the following cases:

- *In re Hopp*, 291 Or 697, 634 P2d 238 (1981) (60-day suspension). The attorney was suspended for 60 days after he, out of animosity for a company’s counsel, caused his secretary to register for the company’s expired assumed business name and refused to relinquish the name until paid \$100. *Hopp* involved only a single incident, the attorney acted out of “inexperience and overzealousness,” and he acknowledged that he used bad judgment.
- *In re Paulson*, 341 Or 13, 136 P3d 1087 (2006) (six-month suspension). The attorney filed a pleading in a bankruptcy proceeding purportedly on behalf of the debtors when he was not attorney of record and knew that the debtors, who were his clients in a related state court matter, objected to the filing. In addition, the attorney’s cumulative actions in ignoring and violating procedural rules resulted in the litigation becoming more complicated, protracted, and expensive, which served to prejudice the administration of justice. While the lawyer in *Paulson* had prior discipline, he was specifically found not to have acted with a dishonest or selfish motive. *Paulson*, 341 Or at 32–33.
- *In re Glass*, 308 Or 297, 779 P2d 612 (1989) (91-day suspension). The attorney, who was in litigation with an unregistered contractor to whom he owed a debt, registered himself under the contractor’s assumed name in order to prevent the contractor’s collection of the debt. Similar to *Hopp*, the attorney in *Glass* engaged in a single incident of maliciously pursuing a claim, but his sanction was increased because he also failed to cooperate with the Bar.

After evaluating the *ABA Standards*, the factors in this case, and the Oregon case law, the Trial Panel concluded that a suspension of ninety (90) days is the appropriate sanction.

#### **DISPOSITION**

The Accused shall be suspended from the practice of law for a period of ninety (90) days.

DATED the 12th day of September, 2013.

/s/ David W. Green

DAVID W. GREEN, OSB No. 76151

Trial Panel Chairperson

/s/ David W. Hercher

DAVID W. HERCHER, OSB No. 812639

Trial Panel Member

/s/ JoAnn Jackson

JOANN JACKSON

Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-140  
 )  
TIMOTHY J. VANAGAS, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Charles J. Paternoster, Chairperson  
Duane A. Bosworth  
Mary Beth Yosses, Public Member  
Disposition: Violation of RPC 1.5(a). Trial Panel Opinion. Public Reprimand.  
Effective Date of Opinion: November 19, 2013

**DISCIPLINARY OPINION**

The Accused, Timothy J. Vanagas, is alleged to have violated RPC 1.5, prohibiting an attorney from taking an illegal fee. Specifically, the Bar contends that on December 6, 2010, the Accused received payment for legal work without seeking the necessary approval of the court, thereby violating RPC 1.5. The Accused, while conceding the distribution of funds occurred and was without court approval, contends his conduct did not violate any disciplinary rule.

After considering the facts, evidence, and argument offered by the parties in this matter, the Trial Panel concludes the Accused's conduct violated RPC 1.5. The Trial Panel further concludes the appropriate sanction for the Accused's conduct is a written reprimand.

**FACTS**

The parties reached an agreement with respect to the facts in this matter in advance of the hearing.

The parties stipulated to the following facts:

1. The Accused, Timothy J. Vanagas, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon.
2. On or about August 26, 2010, Ursula Padrutt (hereinafter “Padrutt”), a Switzerland court-appointed guardian and conservator, hired the Accused to establish a conservatorship and act as a conservator for Dr. Cary Kornfeld (hereinafter “Dr. Kornfeld”). Dr. Kornfeld had been teaching in Switzerland when he became incapacitated and his family had him relocate to Oregon.
3. The Accused requested and Padrutt paid the Accused a \$3,500 retainer from Dr. Kornfeld’s estate funds to establish a conservatorship in Oregon and once established, act as Dr. Kornfeld’s Oregon conservator. On August 26, 2010, the Accused deposited the retainer into his lawyer trust account.
4. The Accused prepared a conservatorship petition for Padrutt’s signature. The petition included Padrutt’s estimate that Dr. Kornfeld had approximately \$1.5 million in assets requiring management and her nominating of the Accused to serve as conservator. The Accused filed the petition and paid the \$622 filing fee from trust in early October 2010. On November 30, 2010, the Accused filed a Notice of Filing of Petition for Appointment of Conservator.
5. On December 2, 2010, a Multnomah County Circuit Court declared Dr. Kornfeld a protected person and appointed the Accused as the conservator of the estate of Dr. Kornfeld. The limited judgment appointing the Accused as Dr. Kornfeld’s conservator was entered in the court registry on December 6, 2010.
6. The Accused knew that ORS 125.095(3) required prior court approval before payment from conservatorship funds to a fiduciary or an attorney for a fiduciary.<sup>1</sup>
7. Prior to December 2, 2010, the Accused had rendered all of the legal services necessary to have himself appointed Dr. Kornfeld’s conservator. On December 6, 2010, without court approval, the Accused knowingly paid

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<sup>1</sup> The Panel notes that the Accused’s understanding of the stipulation in Paragraph 6 may diverge from the language of the paragraph itself. At the hearing, the Accused was asked what he understood with respect to this paragraph. The Accused stated, “[w]hat I intended to be stipulating to there was merely a recital of what the statute says. It’s 125.095. Nothing more or nothing less than that... Whether I clearly articulated that, I don’t know; but I’m not -- I was not intending to suggest that I knew that in this instance.” Hearing Transcript at 37:16-23.

himself \$2,778 from Kornfeld's conservatorship estate funds that he held in his lawyer trust account.

## ANALYSIS

### I. Violation of RPC 1.5(a)

The complaint brought by the Bar against the Accused rests on the intersection of two responsibilities: the requirement that a lawyer not collect an illegal fee found in RPC 1.5(a)<sup>2</sup> and the obligation of a conservator to seek prior court approval before taking payment of compensation under ORS 125.095(3).<sup>3</sup>

The Bar contends the Accused violated RPC 1.5(a) when he took payment for legal work without the prior approval of the court required under ORS 125.095(3).<sup>4</sup> It is the Bar's burden to establish a violation by clear and convincing evidence. BR 5.2; *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

Here, the Trial Panel finds that the undisputed facts establish by clear and convincing evidence the Accused took payment of compensation without prior court approval in violation of ORS 125.095(3). Because this constitutes the taking of an illegal fee, the Trial Panel finds the Accused's conduct violated RPC 1.5(a).

The Stipulated Facts conclusively establish that on December 2, 2010, the Circuit Court, Multnomah County, State of Oregon appointed the Accused as conservator of the estate of Dr. Cary Kornfield, declaring Dr. Kornfield a protected person under the applicable statute.

By virtue of the court declaring Dr. Kornfield a protected person and establishing a conservatorship, the Accused was charged with a number of responsibilities, including the obligation pursuant to ORS 125.095(3) to seek prior court approval before taking payment of compensation.

The Stipulated Facts further establish that on December 6, 2010, four days after he was appointed conservator by the court, and the day the limited judgment appointing him

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<sup>2</sup> RPC 1.5(a) provides as follows: "Fees. (a) A lawyer shall not enter into an agreement for," charge or collect an illegal or clearly excessive fee or a clearly excessive amount of expenses.

<sup>3</sup> ORS 125.095(3) provides, "[p]rior court approval is required before payment of compensation to a fiduciary or to the attorneys for a fiduciary . . ." The remaining clause of ORS 125.095(3) is not applicable in this case.

<sup>4</sup> It is worth noting that the Bar does not contend that amount of fee charged by the Accused for work performed was excessive under RPC 1.5(a). Instead, the Bar argues that merely taking the fee on December 6, 2010 (four days after the court appointed the Accused as conservator), violated ORS 125.095(3) and was therefore an illegal fee under RPC 1.5(a).

was entered in the court registry, the Accused collected a fee in the amount of \$2,778. It is also undisputed the Accused did not seek the prior approval of the court before taking this compensation.

The Trial Panel is aware of no authority, including *Derkatsch v Thorp, et al.*, 248 Or App 185, 273 P3d 204 (2012), cited by the Accused, which obviates the responsibility of a conservator or fiduciary to seek court approval before collecting a legal fee once appointed as conservator.

In *Derkatsch*, the Oregon Court of Appeals discussed the circumstances under which, after the appointment of a fiduciary, a court could order payment for services rendered by the attorney or fiduciary on behalf of the protected person. *Derkatsch*, 248 Or App at 195–98. While the court of appeals held that, upon request, the court had broad authority to order the payment of services on a behalf of a protected person, the Trial Panel does not read *Derkatsch* to vitiate the responsibility of an attorney or fiduciary to seek prior court approval before taking payment for legal work, irrespective of whether the fee was earned prior to the appointment of the conservator, nor does the Trial Panel believe *Derkatsch* overrules, modifies, or dilutes any of the obligations of a fiduciary or conservator under ORS 125.095(3).

After he was appointed conservator on December 2, 2010, ORS 125.095(3) required the Accused to seek the approval of the court before taking compensation to pay his legal fees. When the Accused took payment in the amount of \$2,778 on December 6, 2010, without court approval he violated ORS 125.095(3) and his conduct constituted a technical violation of RPC 1.5, collecting an illegal fee.

Finding that the Accused’s conduct constituted a technical violation of RPC 1.5(a), we now turn to the appropriate sanction for this violation.

## **II. Appropriate Sanction**

When considering the appropriate sanction for a violation of RPC 1.5, the Trial Panel begins its analysis by reviewing the *ABA Standards for Imposing Lawyer Sanctions*.<sup>5</sup> Generally, these *Standards* contemplate the duty violated by the Accused, the mental state of the Accused, and the injury resulting from the violation.

Here, the Bar contends the Accused breached the general duty to preserve his client’s property and recommends a suspension of the Accused as the appropriate sanction. In support of this recommendation, the Bar references the prior disciplinary history of the Accused, which includes three prior disciplinary matters.

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<sup>5</sup> The applicable section of the *ABA Standards for Imposing Lawyer Sanctions* (Section 7.2) provides as follows: “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.”

In this instance, the Trial Panel does not believe a suspension is the appropriate sanction for the violation. The Trial Panel notes that while the Accused stipulated he understood his obligations under ORS 125.095(3), the Accused also provided credible testimony of his reasonable (albeit incorrect) belief it was appropriate for him to collect the fee on December 6, 2010, because the fee was earned prior to his appointment as conservator. There is no evidence the Accused operated with any ill-intent, with the purpose of harming his client, or in any effort to place himself before any other creditors or third parties.

To the contrary, the Accused provided testimony he in fact waited to take the fee he had earned until after he received notice the court had signed the order appointing him conservator to ensure he had accomplished the task for which he had been retained. The Bar concedes that had the Accused not waited until the order appointing him conservator was signed and had he simply taken the fee prior to December 2, 2010, his conduct would not have violated RPC 1.5(a). Accordingly, the Trial Panel does not believe that the sanction of suspension is warranted for this violation.

This conclusion is further supported by the fact that the actual harm to the client in this case was minimal. There is no evidence the fee charged by the Accused was inappropriate or excessive. Instead, the evidence reveals the Accused had already earned the fee prior to his appointment, and it is merely the timing of taking this fee that resulted in a technical violation of the statute and disciplinary rule.

We do not dismiss lightly the prior disciplinary history of the Accused in reaching this decision. The Accused has three separate disciplinary matters from 1994, 2000, and 2009. That said, the Trial Panel finds that the mental state of the Accused, combined with the harm to the client, do not warrant the sanction of suspension in this instance. The Trial Panel further notes the Accused's cooperation as an additional mitigating factor. *See ABA Standards for Imposing Lawyer Sanctions*, § 9.32(e).

For the reasons set forth above, the Trial Panel concludes that the appropriate sanction for the Accused's violation of RPC 1.5(a) is a written reprimand.

DATED this 11th day of September, 2013.

/s/ Charles J. Paternoster  
Charles, J. Paternoster, Trial Panel Chairperson

/s/ Duane A. Bosworth  
Duane A. Bosworth, Trial Panel Member

/s/ Mary Beth Yosses  
Mary Beth Yosses, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-25
	)	
ELLEN J. KRIDER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.7(a)(2) and RPC 4.3. Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	November 25, 2013

**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 1.7(a)(2) and RPC 4.3.

DATED this 25th day of November, 2013.

/s/ Mary Kim Wood  
 Mary Kim Wood  
 State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
 Carl W. Hopp, Jr., Region 1  
 Disciplinary Board Chairperson

**STIPULATION FOR DISCIPLINE**

Ellen J. Krider, attorney at law (hereinafter “Accused”), and the Oregon State Bar (hereinafter “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 25, 2001, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Crook 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 11, 2013, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.7(a)(2) and RPC 4.3. 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.

From on or about September 14, 2009, through on or about August 13, 2010, the Accused represented Verl Hereford (hereinafter “Verl”) in the dissolution of his marriage, *Hereford and Hereford*, Crook County Case No. 09DS0135. Verl was over ninety-years old at the time of the dissolution proceedings and in especially poor health by about July 2010.

6.

On or about July 27, 2010, the Accused met Verl’s children, Donald Hereford (hereinafter “Donald”) and Donna Clayton (hereinafter “Donna”). The Accused recommended to Donald and Donna that Verl’s estate be submitted for probate. The Accused informed Donald that she had assisted Verl to update his estate plans and that his will nominated a local friend Don Carter (hereinafter “Carter”) to serve as personal representative. Donald informed the Accused that he was distressed to learn of Carter’s nomination as personal representative. The Accused learned in the following days before Verl died that Carter might permit Donald to serve as personal representative, instead. Over the following weeks, the Accused and her office prepared petitions to substitute Donald as

personal representative for Verl's estate. However, Carter ultimately refused to consent to the substitution.

7.

On or about July 28, 2010, the Accused prepared a warranty deed for Verl transferring to Donald and Donna, as tenants in common, all Verl's rights, title, and interest in a specific real property located in Prineville (hereinafter "the Prineville home"). On or about July 30, 2010, the warranty deed was recorded and returned to the Accused.

8.

On or about August 11, 2010, a general judgment was entered in the *Hereford and Hereford* dissolution matter. The general judgment awarded the Prineville home to Verl as his sole and exclusive property.

9.

Verl died on or about August 13, 2010. At the time of his death, Verl owed the Accused approximately \$5,000 for her legal fees in the *Hereford and Hereford* dissolution matter. After Verl's death, the Accused recommended to Carter, and to Donald and Donna, that Verl's estate be submitted for probate in order to address and terminate any claims by Verl's ex-wife.

10.

On or about August 13, 2010, the Accused sent a letter to Donald and Donna that stated:

"[B]ecause of the status of the Judgment of Dissolution and the nature of how the divorce was accomplished, I think we need to move forward expediently to get the probate established. I talked with Don Carter as he is the appointed Personal Representative. It is my understanding based on conversations with you two, and with Don, that you two desire that I be the probate attorney. On that basis, I am making preparations to get the necessary documents drafted and signed so that we can get an estate account established...I will be working with Don Carter in the next few weeks to get everything going, however, if you have any questions please feel free to call and I will answer any questions or concerns you might have."

11.

Donald and Donna mistakenly concluded from the Accused's communications that the Accused was representing the two of them in addition to Carter, who they expected would soon relinquish his position as personal representative to Donald.

12.

Beginning on or about August 13, 2010, the Accused represented Carter as personal representative of Verl's estate. At the time she undertook to represent Carter and at all subsequent times, the Accused was aware that Verl's estate lacked ready cash.

13.

On or about August 20, 2010, the Accused informed Donald that she would not proceed with the probate of Verl's estate until the attorney fee balance from Verl's dissolution was paid in full, and that additional sums would be needed to satisfy other creditors of the estate. Donald loaned \$15,000 to Verl's estate. The Accused promised to document the loan for Donald. The Accused intended that a portion of the loaned funds be used to satisfy her outstanding claim for legal fees from Verl's dissolution. Donald was aware that the money he lent would be used to pay claims from the dissolution, including the Accused's fees, and he approved.

14.

On or about August 23, 2010, the Accused filed as attorney for personal representative Carter a petition in Crook County Circuit Court for the probate of Verl's estate and the appointment of Carter as personal representative, *In re Verl Hereford*, Crook County Circuit Court Case No. 10PB0019. The Accused remained at all subsequent times herein the attorney for the personal representative for Verl's estate.

15.

As attorney for the personal representative, the Accused's duties included advising the personal representative whether to allow claims on the estate and when and in what order to pay them.

16.

At all relevant times herein ORS 115.115 provided in relevant part that no claims on the estate should be paid prior to the day on which all known claims are barred under ORS 115.005(2).

17.

At all relevant times herein ORS 115.125(1)(a)–(m) specified the order of payment of timely expenses and claims when the assets of an estate are insufficient to pay all expenses and claims. Payment of the expenses of a funeral and disposition of the decedent's remains is required before the payment of debts owed to employees of the decedent for labor performed within 90 days immediately preceding the decedent's death or other general claims against the estate.

18.

On or about August 25, 2010, the Accused asked Donald to loan funds to Verl's estate to be used to pay estate creditors, including the funeral expenses, and Donald loaned an additional \$8,000 to Verl's estate. The Accused promised to document the loan for Donald.

19.

On or about August 27, 2010, Verl's estate was admitted to probate and Carter appointed personal representative.

20.

On or about September 1, 2010, the Accused advised Carter to establish and maintain a bank account for Verl's estate and Carter did so. Carter deposited the funds Donald had loaned to the estate into the bank account he had established for the estate. The only funds ever in the account were those Donald had loaned to the estate.

21.

On or about September 7, 2010, per the agreement between the Accused and Donald, the Accused advised Carter to pay the Accused's outstanding legal fees from Verl's dissolution using the funds in the bank account established for Verl's estate.

22.

The Accused advised Carter to pay her outstanding legal fees from Verl's dissolution prior to the time prescribed in ORS 115.115.

23.

The Accused advised Carter to give her outstanding legal fees from Verl's dissolution priority over payment of the expenses of a funeral and disposition of the decedent's remains.

24.

In September 2010 through early October 2010, the Accused spoke with Donald and Carter regarding Donald's desire to become personal representative instead of Carter. Based upon her understanding that Carter was willing to relinquish his duties as personal representative, the Accused and her associate prepared draft pleadings for a petition to the court to substitute Donald as the personal representative for Verl's estate.

25.

In September 2010, Carter executed a United States Postal Service change of address form so that bills sent to Verl would be forwarded to Donald. The Accused told Donald that he could pay those bills to be later reimbursed by Verl's estate.

26.

The Accused instructed Donald and Donna in September and early October 2010 regarding whether and how they could use the Prineville home.

27.

There was a significant risk that the Accused's personal interest in the fees Verl owed for his dissolution would materially limit her representation of Carter as personal representative of Verl's estate.

28.

The Accused knew or should have known that with respect to Verl's estate, Donald and Donna's interests were in conflict with, or had a reasonable possibility of being in conflict with, the interests of the Accused.

29.

The Accused knew or should have known that with respect to Verl's estate, Donald and Donna's interests were in conflict with, or had a reasonable possibility of being in conflict with, the interests of Carter.

30.

On or about October 19, 2010, after it became apparent to the Accused that Donald and Donna erroneously believed she was representing them in the Verl Hereford probate matter, the Accused made certain that Donald and Donna understood that she was representing only Carter, the personal representative for Verl's estate. Donald and Donna hired an attorney to represent their interests regarding Verl's estate soon thereafter.

31.

In addition to paying the Accused's fees from the *Hereford and Hereford* dissolution, the funds Donald loaned to the estate were used to pay other debts related to the dissolution matter. Pursuant to a Final Accounting and General Judgment of Final Distribution approved by the probate court, the remainder was used to pay an enhanced personal representative's fee and the attorney fees of the Accused, incurred by the personal representative. Donald was not reimbursed and the funeral expenses were not paid by the estate.

### **Violations**

32.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 31, she violated RPC 1.7(a)(2) (current client conflict of interest) and RPC 4.3 (dealing with unrepresented persons).

## Sanction

33.

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 avoid conflicts of interest, *Standards*, § 4.3, and improper communications with individuals in the legal system, *Standards*, § 6.3.
- b. **Mental State.** For the purpose of applying the *Standards*, negligence is defined as “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. The Accused negligently offered legal advice to Donald concerning the estate proceeding when Donald’s interests were not aligned with those of herself or her client. The Accused negligently failed to recognize she was entering into a current client conflict of interest that required the informed consent of her client when she undertook to represent the personal representative administering an estate and she was a creditor of that estate.
- c. **Injury.** Relying upon what the Accused said, Donald advanced funds to the estate and he was not repaid. Donald’s confusion regarding whether he was represented by the Accused caused Donald to suffer anxiety and frustration. The personal representative, Carter, was exposed to the potential of a surcharge for improperly paying the Accused’s fees from the *Hereford and Hereford* dissolution early and in full.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. *Standards*, § 9.22(b).
  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. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Full and free disclosure and a cooperative attitude toward proceedings. *Standards*, § 9.32(e).

34.

The *ABA Standards* recommend that 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 interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.33. The *Standards* recommend that 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 and causes injury or potential injury to a client.

35.

The court and the disciplinary board have agreed that public reprimand is appropriate in some cases where lawyers violated conflict of interest rules. *In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004) (lawyer represented clients in an unsuccessful attempt to avoid foreclosure; sanctions were imposed against the lawyer and clients in that proceeding; lawyer then represented clients in taking position that payment of sanctions should be given priority in the foreclosure); *In re Wright*, 17 DB Rptr 132 (2003) (reprimand where estate attorney permitted, without consent after full disclosure, investment of estate funds into corporation in which he held a 50% interest); *In re Scott*, 294 Or 606, 660 P2d 157 (1983) (reprimand where lawyer advised domestic relations client in lending funds to lawyer's home construction business without necessary disclosure and consent).

36.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violation of RPC 1.7(a)(2) and RPC 4.3, the sanction to be effective upon the approval of this stipulation.

37.

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.

38.

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 Krider*, 27 DB Rptr 260 (2013)

EXECUTED this 18th day of November, 2013.

/s/ Ellen J. Krider

Ellen J. Krider, OSB No. 011296

EXECUTED this 18th day of November, 2013.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis, OSB No. 032221

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 13-31  
 )  
THOMAS IFVERSEN, )  
 )  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: None  
Disciplinary Board: Courtney C. Dippel, Chairperson  
John L. Langslet  
Mary Beth Yosses, Public Member  
Disposition: Violations of RPC 1.3, RPC 8.1(a)(2), and RPC  
8.4(a)(3). Trial Panel Opinion. 1-year suspension.  
Effective Date of Opinion: August 14, 2014

**TRIAL PANEL OPINION**

This matter came regularly before a trial panel of the Disciplinary Board consisting of Courtney C. Dippel, Chairperson, John Langslet, Esq., and Mary Beth Yosses, Public Member (hereinafter “Trial Panel”) on August 27, 2013, at offices situated at 805 SW Broadway, Portland, Oregon. Stacy J. Hankin represented the Oregon State Bar (hereinafter “Bar”). The Accused, Thomas Ifversen, Esq., has made no appearance in this matter.

The Trial Panel has considered the factual allegations in the Complaint, the Bar’s Sanctions Memorandum and supporting exhibits, the Affidavit of Keith Wagner, and the Accused’s prior disciplinary history. Based on the findings and conclusions below, we find that the Accused violated RPC 1.3, RPC 8.4(a)(3), and RPC 8.1(a)(2). We further determine that the Accused should be suspended from the practice of law for a period of one year (12 months). The Accused shall serve his suspension consecutive to his current suspension imposed in *In Re Thomas Ifversen*, Case No. 12-63. The Accused’s suspension in this matter shall commence on August 14, 2014, and shall run for a period of one year.

## INTRODUCTION

**The Complaint:** A Formal Complaint (hereinafter “Complaint”) was filed on April 10, 2013, against the Accused claiming violations of the RPCs. In its first Cause of Complaint, the Bar claimed that the Accused violated RPC 1.3 (neglect of a legal matter) in his representation of Mr. Keith Wagner (hereinafter “Wagner”) relating to expunging three criminal convictions of Wagner in 2012. In its second Cause of Complaint, the Bar claimed that the Accused violated RPC 8.4(a)(3) (conduct involving misrepresentation that reflects adversely on the lawyer’s fitness to practice law) by making false representations to Wagner about the status of his motions for expungement and actions taken on his behalf. In the third Cause of Complaint, the Bar alleged that the Accused violated RPC 8.1(a)(2) (knowingly failing to respond to a lawful demand for information ) in not responding to the Bar’s requests for the Accused’s response to Wagner’s complaint and to some specific questions.

**The Bar’s Motion and Order for Default:** The Accused accepted service of the Bar’s Complaint and Notice to Answer on April 11, 2013. The Bar served the Accused with a notice of intent to take default if he failed to file an answer to the Bar’s Complaint by May 28, 2013. After notice, the Accused failed to file an Answer.

On June 17, 2013, the Region 5 Disciplinary Board Chairperson entered an Order of Default finding the Accused in default for failure to file an answer or other appearance and deeming true the allegations of the Complaint.

**Sanctions Briefing:** Based upon the Order of default, on July 9, 2013, the Trial Panel requested that the parties submit any arguments regarding appropriate sanctions to be made in writing by August 8, 2013, pursuant to BR 5.8(a) and 2.4(h).

The Bar submitted its Sanctions Memorandum on August 8, 2013 along with supporting exhibits and testimony of Wagner. The Accused submitted nothing.

## FINDINGS OF FACT

The following are the findings of fact by the Trial Panel.

The Accused undertook the legal representation of Wagner in June 2012 to assist Wagner in expunging three criminal convictions in Tillamook and Multnomah Counties. At the time, Wagner had recently received a job offer from an employer who conducted background checks. Wagner knew that he would not be hired unless his convictions were expunged.

On June 22, 2012, Wagner signed affidavits prepared by the Accused for the two Multnomah County cases and gave the Accused cashier’s checks for costs in the amounts of \$80.00 made payable to the Oregon State Police and another for \$250.00 payable to the State of Oregon. Wagner also gave the Accused a personal check for \$1,200.00 made payable to

Ifversen Law Group for attorney's fees. The Accused told Wagner that it would take two to three months for the courts to process the information.

At the end of July 2012, the Accused told Wagner that he had not yet filed the motions for expungement in the Multnomah County cases, but would do so that week. At the end of August 2012, the Accused sent Wagner an affidavit for the Tillamook County case. Wagner signed and returned the affidavit to the Accused on August 30, 2012.

That same day, the Accused emailed Wagner and told him that the Accused had just spoken with the District Attorney in Multnomah County and that they were doing a background check on Wagner, but would not submit the order to expunge until the Accused directed it since they had to do both counties simultaneously.

On September 12, 2012, the Accused emailed Wagner and informed him that the Accused had submitted everything and was waiting to hear from the Tillamook District Attorney, and that the Multnomah County matters should be completed soon. On September 27, 2012, the Accused emailed Wagner and promised him that he would check with Tillamook County that same day and inform Wagner of the status of the motion for expungement.

On October 9, 2012, the Accused emailed Wagner that he had recently spoken with the clerks in Multnomah County and they were going to send the Accused a progress report the next day. The Accused told Wagner that his expungements were delayed because of court staff cuts.

Almost a month later, on November 9, 2012, Wagner contacted Tillamook and Multnomah County courts to inquire as to the status of the expungements. Court staff informed Wagner that nothing had been filed in either court on his behalf. Wagner also spoke to the expungement clerk at the Multnomah County District Attorney's Office who informed Wagner that the clerk had no paperwork related to Wagner. Wagner contacted the Accused and asked for an explanation.

On November 12, 2012, the Accused told Wagner that he had filed the paperwork with the District Attorney, but had a student file it with the court. The Accused said he'd been too busy to follow up, but had had a conversation with the District Attorney and that the process was almost complete.

On November 30, 2012, the Accused returned his file materials to Wagner and refunded the money Wagner had paid him.

Due to the Accused's actions, Wagner was unable to accept the job offered to him in June 2012.

## DISCUSSIONS 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 Bar's factual allegations against the Accused in the Complaint were deemed to be true by virtue of the Order of Default pursuant to BR 5.8(a). *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001). However, the Trial Panel still needed to decide whether the facts deemed true by virtue of the default constitute violations of the disciplinary rules, and if so, what sanctions may be appropriate. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008); *see also In re Kluge, supra* (describing the two-step process).

We will discuss the three causes of complaint in groups based on the RPC that was the subject of the violation as follows.

### **A. The Accused Violated RPC 1.3 by Neglecting Wagner's Legal Matter.**

RPC 1.3 prohibits a lawyer from neglecting a legal matter entrusted to the lawyer. A lawyer who ignores a case over an extended period or engages in a course of neglectful conduct violates the rule. *In re Jackson*, 347 Or 426, 223 P3d 387 (2009).

The Accused failed to take actions necessary to pursue Wagner's motions for expungement of his three criminal convictions despite numerous requests from Wagner and despite promises by the Accused to him that he was taking action. The Trial Panel concluded that the Accused violated RPC 1.3.

### **B. The Accused Violated RPC 8.4(a)(3) by Making False Representations to the Client.**

RPC 8.4(a)(3) prohibits a lawyer from engaging in conduct involving misrepresentation that reflects adversely on the lawyer's fitness to practice law. A lawyer engages in conduct involving misrepresentation when the lawyer makes a representation, either directly or by omission, that the lawyer knows is false and material. *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010). To prove a violation of RPC 8.4(a)(3), it is not necessary for the Bar to prove that the misrepresentation was successful, but only that it could have influenced a decision-maker. *In re Summer*, 338 Or 29, 39, 105 P3d 848 (2005). The Bar need not establish that the lawyer intended to deceive, but only that the lawyer knew that the misrepresentation was false and material. *In re Hostetter, supra*; *In re Claussen*, 322 Or 466, 481, 909 P2d 862 (1996). The term "knowingly" denotes actual knowledge of the fact in question, but a person's knowledge may be inferred from the circumstances. RPC 1.0(h).

Beginning in late August 2012, the Accused represented to Wagner that the motions for expungement had been filed with the courts and that he was working with the District

Attorneys to pursue judgments. The Accused had to have known that his representations were false.

After Wagner confronted the Accused about the lack of court filings, the Accused blamed a student. However, e-mails sent by the Accused at the time of the underlying events from late August until early October are inconsistent with anyone other than the Accused handling Wagner's expungements. Further, the Accused knew that he was not having ongoing discussions with the courts and/or the District Attorney's offices in Tillamook and Multnomah Counties. In a November 12, 2012 e-mail, the Accused admitted that at the time he told Wagner that he was following up, he was not.

The Accused's multiple misrepresentations to Wagner about the status of his legal matter constitute a violation of RPC 8.4(a)(3).

**C. The Accused Violated RPC 8.1(a)(2) by Not Responding to the Bar's Requests for Information.**

RPC 8.1(a)(2) provides that, in connection with a disciplinary matter, a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority. Twice Disciplinary Counsel's Office sent inquiries to the Accused requesting his response—first on January 14, 2013, and then again on February 14, 2013, after the Accused failed to respond to the initial inquiry. The Bar's inquiries were sent to the address on file with the Bar.

At the time the Bar sent its letters to the Accused, the Accused was also involved in another pending prosecution by the Bar. In that other matter, letters to the same address had been sent to the Accused by both Disciplinary Counsel's Office and the trial panel chairperson. None of those letters were returned and the Accused responded to some of those communications.

The Accused's knowing failure to respond to the Bar constitutes a violation of RPC 8.1(a)(2).

**SANCTION**

In fashioning a sanction, the ABA *Standards for Imposing Lawyer Sanctions* (amended 1992) (hereinafter "*Standards*") and Oregon case law are considered. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002); *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1993).

**A. ABA Standards Applied to This Case.**

The *Standards* require an analysis of four factors by the Trial Panel: (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; *In re Jackson*, 347 Or at 440; *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008). The Trial Panel should adjust the presumptive sanction under the *Standards* based upon the presence of

aggravating or mitigating circumstances. *In re Jackson*, 347 Or at 441. Finally, the Trial Panel should evaluate whether the sanction is consistent with Oregon case law. *In re Jackson*, *supra*.

1. **Duties Violated.** The most important ethical duties are those obligations that a lawyer owes a client. *Standards*, § 5. The Accused violated a duty he owed to his client to be truthful and candid with him. *Standards*, §§ 4.4, 4.6. The Accused violated his duty to pursue Wagner’s legal matter promptly and diligently. *Standards*, § 4.4. The Accused also violated a duty he owed to the profession to be responsive to and cooperative with the Bar’s investigation into his conduct. *Standards*, § 7.0.
2. **Mental State.** The *Standards* recognize three mental states: intentional, knowing, and negligent. A lawyer acts intentionally by acting with the conscious objective or purpose of accomplishing a particular result. A lawyer acts knowingly by being consciously aware of the nature or circumstances but without having a conscious objective to accomplishing a particular result. A lawyer acts negligently by failing to heed a substantial risk that circumstances exist or a result will follow, in circumstances in which the failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p.10.

The Trial Panel finds that the Accused’s conduct was at first negligent, then knowing, and finally intentional. Initially, the Accused acted negligently when he failed to pursue Wagner’s legal matter. However, his actions became knowing when Wagner contacted the Accused at the end of July 2012. Thereafter, the Accused knew that he was not pursuing Wagner’s legal matter and intentionally misled Wagner as to the Accused’s actions and the status of the expungements.

The Accused misrepresented the truth and lied to his client on multiple occasions.

3. **Actual or Potential Injury.** Under the *Standards*, the injuries caused by a lawyer’s professional misconduct may be either actual or potential. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992) (“[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction.”) The lawyer’s misconduct may involve a violation of a duty owed to a client, the public, the legal system, or the profession. *Standards*, § 3.0. The protection of the public requires examination of the potential for injury caused by the lawyer’s misconduct, whether or not actual injury occurred.

The Accused knew that his conduct could cause potential harm and did cause harm to the client. Wagner sustained actual and potential injury. He was

unable to accept the job offered to him in June 2012 as a result of the Accused's neglect of Wagner's legal matter and ongoing misrepresentations. As evidenced by the e-mails, the client was also frustrated by the Accused's failure to act. *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004). The Accused repeatedly lied to the client about the status of his affairs and claimed he was taking actions he was not taking.

Further, the Accused's failure to respond to the Bar process was intentional as well as detrimental to the public confidence in the profession.

4. **Aggravating or Mitigating Circumstances.**

a. Aggravating Circumstances

The Accused has prior disciplinary offenses. Effective August 14, 2013, the Accused was suspended from the practice of law for violating RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.4(a)(3), and RPC 8.1(a)(1). *In re Ifversen*, 27 DB Rptr 150 (2013); *Standards*, § 9.22(a).

Generally, a greater sanction may be ordered than is ordinarily warranted by the facts of a particular matter when a lawyer has a prior disciplinary record, particularly when that prior record includes misconduct similar to the misconduct at issue in the present proceeding. *In re Cohen*, 330 Or 489, 506, 8 P3d 953 (2000).

The Trial Panel reviews all offenses that have already been adjudicated. *In re Knappenberger, supra*. The Trial Panel examined the timing of the current offenses in relation to the prior offenses, the relative seriousness of the prior offenses and sanction, the similarity of the prior offenses to the case at bar, the number of prior offenses, and the relative recency of the prior offenses. *In re Jones*, 326 Or 195, 200, 951 P2d (1997).

In this matter, the Accused's prior offenses are practically identical to the violations at issue in this proceeding. However, the prior discipline was imposed after the conduct at issue in this proceeding. *In re Knappenberger*, 344 Or at 575–76.

There are no mitigating circumstances.

b. Selfish Motive

The Accused intentionally lied to Wagner and intentionally failed to respond to the Bar in order to avoid the personal consequences of his failure to pursue Wagner's legal matter. *Standards*, § 9.22(b).

c. Pattern of Misconduct

Over a period of time, the Accused made multiple misrepresentations to Wagner. *Standards*, § 9.22(c).

d. Multiple Offenses

The Accused violated three rules. *Standards*, § 9.22(d).

e. Substantial Experience in the Practice of Law

The Accused has been an Oregon lawyer since 2000. *Standards*, § 9.22(i).

**B. Preliminary Sanction.**

Drawing together the factors of duty, mental state, and injury, the *Standards* provide the following:

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.

Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

*Standards*, § 4.62.

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

*Standards*, § 7.2.

The presumptive sanction is suspension.

**C. Oregon Case Law.**

Considering the Accused's conduct and the aggravating factors, the Trial Panel concluded that some period of suspension is appropriate.

Sanctions are intended to protect the public and uphold the dignity, respect, and integrity of the profession, and are not designed to penalize the accused lawyer. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998); *In re Kimmel*, 332 Or 480, 488, 31 P3d 414 (2001). Appropriate discipline also deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

Lawyers who have made misrepresentations to clients have been suspended, or in some cases, disbarred. *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension imposed on lawyer who, among other things, failed to disclose material information to clients); *In re Obert*, 335 Or 640, 649, 89 P3d 1173 (2004) (30-day suspension of lawyer who, among other things, failed to inform his client that the client's appeal had been dismissed due to the lawyer's action where mitigating circumstances significantly

outweighed aggravating circumstances); *In re Brown*, 326 Or 582, 956 P2d 188 (1998) (disbarment of lawyer who failed to make full disclosure to his clients about a business transaction between them); *In re Butler*, 324 Or 69, 921 P2d 401 (1996) (one-year suspension of lawyer who failed to inform his client that the client's lawsuit had been dismissed because of the lawyer's inaction); *In re Binns*, 322 Or 584, 910 P2d 382 (1996) (disbarment of lawyer who, among other things, made misrepresentations to his clients).

The Oregon Supreme Court considers a lawyer's failure to cooperate in a Bar investigation serious misconduct because the public protection provided by that obligation is undermined when a lawyer fails to participate in the investigatory process. *In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996). As such, the court has consistently imposed a 60-day suspension for a single violation of DR 1-103(C). *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Miles, supra*, (120-day suspension for two instances of failure to cooperate).

Generally, the Oregon Supreme Court has imposed suspensions ranging from 30 days to one year when a lawyer has either neglected a client's legal matter or failed to adequately communicate with the client. *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (30-day suspension); *In re Redden*, 342 Or 393, 397–402, 153 P3d 113 (2007) (court canvassed prior relevant cases and imposed a 60-day suspension on a lawyer who, for almost two years, failed to complete a client's legal matter); *In re Knappenberger*, 340 Or 573, 135 P3d 297 (2006) (court will generally impose a 60-day suspension when a lawyer knowingly neglects a client's legal matter).

After evaluating the ABA *Standards*, the factors in this case, and Oregon case law, the Trial Panel concluded a suspension of one year (12 months) was the appropriate sanction.

#### **DISPOSITION**

The Accused shall be suspended from the practice of law for a period of one year (12 months) to commence consecutive to his current suspension imposed in *In Re Thomas Ifversen*, Case No. 12-63. The Accused's suspension in this matter shall commence on August 14, 2014, and shall run for a period of one year.

DATED this 18th day of September 2013.

/s/ Courtney C. Dippel

Courtney C. Dippel, OSB No. 022916  
Trial Panel Chairperson

/s/ John L. Langslet

John L. Langslet, OSB No. 721469  
Trial Panel Member

/s/ Mary Beth Yosses

Mary Beth Yosses  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 12-145  
)  
SUSAN FORD BURNS, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: Craig A. Crispin, Chairperson  
Ulanda L. Watkins  
Charles H. Martin, Public Member  
Disposition: Violation of RPC 1.3, RPC 1.16(d), and RPC 8.1(a)(2).  
Trial Panel Opinion. 210-day suspension.  
Effective Date of Opinion: December 3, 2013

**DECISION OF THE TRIAL PANEL**

This matter came for consideration before a Trial Panel of Craig A. Crispin, Chairperson, Ulanda L. Watkins, Lawyer Member, and Charles H. Martin, Public Member. The Oregon State Bar is represented by Linn D. Davis, Assistant Disciplinary Counsel. The Accused made no appearance before the Bar or the Trial Panel and was not represented by counsel.

**FINDINGS AND CONCLUSIONS**

The Accused was admitted to the Oregon State Bar in 1991. On January 16, 2013, the Bar filed its Formal Complaint against the Accused. The Accused was personally served on February 26, 2013.

Thereafter, the Accused failed to file an Answer or otherwise appear in this proceeding. After giving the Accused a ten-day notice of its intent to seek an order of default, the Bar filed and served a Motion for Order of Default on May 14, 2013. On May 16, 2013, the Disciplinary Board Regional Chairperson granted the Bar's motion with an order finding the Accused in default and ordering that the allegations in the Bar's Formal Complaint be deemed true. With the Default Order, the Bar's factual allegations against the Accused have

been proven. *See* BR 5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251, 27 P3d 102 (2001).

Specifically, based on the Default Order, the Trial Panel finds as follows with regard to the alleged violations of RPC 1.3 and RPC 1.16(d):

On about August 22, 2008, pursuant to an oral agreement, Ima Saunders (hereinafter “Saunders”), a resident of Ohio, retained the Accused for a flat fee of \$400, to assist with the transfer of real property located in Oregon. Saunders paid and the Accused received \$400 to accomplish the representation.

The Accused drafted and mailed back to Saunders an affidavit of claiming successor of a small estate (hereinafter “the affidavit”), with instructions to obtain the notarized signatures of the other heirs and return the affidavit for filing by the Accused.

In or about October 2008, Saunders returned the affidavit to the Accused, fully executed by Saunders and the other heirs. The Accused received the affidavit. Though the affidavit was fully executed and ready to be filed, the Accused never thereafter filed it.

In about December 2009, Saunders filed a bankruptcy petition and she asked the Accused to refrain from filing the affidavit until after the bankruptcy was completed. In about April 2010, Saunders received a discharge from the bankruptcy court and she instructed the Accused to file the affidavit.

On about December 7, 2010, the Accused was suspended from the practice of law in Oregon for one year and closed her practice. The Accused failed to notify Saunders of her suspension from the practice of law and the closure of her practice. The Accused did not file the affidavit or, in the alternative, return the affidavit to Saunders with a refund of the unearned portion of her fee.

From about fall 2010 through about May 2, 2011, the Accused failed to respond to repeated inquiries regarding the status of the matter from Saunders and others on her behalf, via email, telephone, and regular mail. In June 2011, after Saunders filed a claim on the Oregon State Bar Client Security Fund, the Accused arranged to return the affidavit to Saunders with a refund of the unearned portion of her fees.

Based on the Default Order, the Trial Panel also finds as follows with regard to the alleged violations of RPC 8.1(a)(2):

On about October 12, 2011, via regular mail, assistant disciplinary counsel for the Oregon State Bar asked the Accused to respond to lawful inquiries for information concerning Saunders’ complaint to the Client Security Fund.

Although the Accused received and was aware of those inquiries, she knowingly failed to respond to them.

On or about February 13, 2012, via regular and certified mail, the Accused was again asked to respond to those disciplinary inquiries. Although the Accused again received and was aware of those inquiries, she knowingly failed to respond to them.

### OPINION

Despite the Default Order entered in this case deeming the factual allegations to be true, the Trial Panel must determine whether the facts alleged by the Bar constitute the disciplinary rule violations alleged, and, if so, what sanction is appropriate. *In re Koch*, 345 Or 444, 198 P3d 910 (2008); *In re Kluge*, 332 Or 251, 253, 27 P3d 102 (2001).

The Bar alleges, for its First Cause, that the Accused violated RPC 1.3, which reads:

A lawyer shall not neglect a legal matter entrusted to the lawyer.

The Bar also alleges as part of its First Cause that the Accused violated RPC 1.16(d), which reads:

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.

Taking the factual allegations in the Formal Complaint as true, *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004), the Trial Panel finds that the Bar has established by clear and convincing evidence that the Accused undertook a legal matter entrusted to the Accused by Saunders; that the Accused's undertaking was to file affidavit of claiming successor of a small estate; that Saunders performed all actions necessary for filing of the Affidavit; and that from October 2008 to December 2009, the Accused failed to file the Affidavit. Furthermore, the Trial Panel finds that after Saunders requested the Accused to hold the Affidavit without filing in December 2009, Saunders again directed the Accused to file the Affidavit in April 2010. The Accused failed to file the Affidavit, and was suspended from the practice of law in December 2010.

The Accused did not provide any explanation for the delays in filing the Affidavit from October 2008 to December 2009, and from April 2010 to December 2010. For purposes

of RPC 1.3, a lawyer's conduct must be viewed across the course of the entire representation. The Rule is violated only when the Accused engages in a course of neglectful conduct. That course of conduct is established here. The Accused's delay in failing over two extended periods of time to complete the legal matter entrusted to her constitute an unethical neglect of a legal matter. See *In re Koch*, 345 Or 444, 198 P3d 910 (2008), where the accused there failed to ensure a final element of a dissolution matter was completed, resulting in a finding of an RPC 1.3 violation.

The panel also finds, taking the factual allegations in the Formal Complaint as true, that the Bar has established by clear and convincing evidence that the Accused failed to notify Saunders that she had been suspended from the practice of law and closed her office in December 2010, nor did she file the affidavit or return the affidavit to Saunders, or refund the unearned portion of the fee paid by Saunders.

These facts establish by clear and convincing evidence that the Accused failed to take any steps reasonably designed to protect Saunders' interests, failed to give Saunders reasonable notice of the suspension and closure of her practice, failed to return the affidavit, and failed to refund unearned fees. These facts establish the violation of RPC 1.16(d).

For the Bar's Second Cause, it alleges that the Accused violated RPC 8.1(a)(2), which reads:

(a) 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:

(1) \* \* \* \*; or

(2) 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.

Taking the factual allegations in the Formal Complaint as true, *In re Magar, supra*, the Trial Panel finds that the Bar has established by clear and convincing evidence that in October 2012, the Accused received a request from assistant disciplinary counsel for the Oregon State Bar asking her to respond to lawful inquiries for information concerning Saunders' complaint to the Client Security Fund. The Accused failed to respond to such request. The Trial Panel finds that the Bar has established by clear and convincing evidence that the Accused received a second request to respond to the inquiries concerning Saunders'

complaint in February 2012. The Accused received these inquiries by regular and certified mail, but failed to respond to either.

On or about February 13, 2012, via regular and certified mail, the Accused was again asked to respond to those disciplinary inquiries. Although the Accused again received and was aware of those inquiries, she knowingly failed to respond to them.

An RPC 8.1(a)(2) violation requires that the Accused “knowingly” fail to respond to the Bar’s information demand. The lawyer must have actual knowledge of the facts. Knowledge can be inferred from circumstances. RPC 1.0(h). The facts alleged in the complaint may be used establish the mental state of an accused lawyer. *In re Kluge I*, 332 Or 251, 262, 27 P3d 102 (2001).

The Formal Complaint alleges that the Accused “received and was aware” of both the October 2011 and February 2012 inquiries. We take that allegation as proved, and from those facts reach the conclusion that the Accused had knowledge of the Bar’s and its designees’ requests for information, but knowingly failed to respond and cooperate with the Bar’s investigation of the complaint submitted against her, which constitutes a violation of RPC 8.1(a)(2). See *In re Haws*, 310 Or 741, 750, 801 P2d 818 (1990) (“Obviously, in the case where the accused failed to respond at all, he violated DR 1–103(C)”).

### SANCTION

The Bar urges the Trial Panel to impose a suspension of six months.

In fashioning a sanction, the trial panel considers the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) and Oregon case law. *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1983). The *Standards* require an analysis of three factors: (1) the ethical duty violated; (2) the attorney’s mental state; and (3) the actual or potential injury. *Standards*, § 3.0. Once a sanction is determined based on those factors, the existence of aggravating and mitigating circumstances is considered. *Standards*, § 3.0.

1. **Duties Violated.** The Accused violated her duty owed to the profession when she knowingly failed to cooperate with the Bar’s investigation into her conduct. *Standards*, §§ 5.0–6.0.
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*, Definitions. “A failure to act can be characterized as intentional, rather than attributed to mere neglect or procrastination, if the lawyer fails to act over a significant period of time,

despite the urging of the client and the lawyer's knowledge of the professional duty to act." *In re Sousa*, 323 Or 137, 144, 915 P2d 408 (1996).

The panel concludes that the Accused acted with knowledge in failing to complete the filing of the Affidavit and in failing to respond to repeated requests for information from the Bar. The Bar has failed to prove that the Accused acted with either intent or knowledge in her failing to notify Saunders of her suspension from the practice of law or the closure of her office, and in failing to refund unearned fees. The panel concludes that the Accused acted intentionally in failing to respond to legal inquiries from the Bar.

3. **Injury.** An inquiry into the actual injury and potential injury is appropriate. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). An "injury" is harm to the client, public, or legal system. *Standards*, Definitions. "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*, Definitions.

The Accused's failure to file the Affidavit resulted in delay in the processing of the small estate for which the Affidavit was intended. It resulted in potential delay in the distribution of estate assets to heirs. The Bar admits that the Accused's cooperation with the Client Security Fund in returning Saunders' property and making some response to Sanders' complaints mitigated the actual or potential injury.

The failure of the Accused to cooperate with the Bar's investigation into her conduct caused actual harm to both the legal profession and to the public. The Accused's failure to cooperate delayed the Bar's investigation and, consequently, the resolution of the complaint against her. *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996). *See also In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (the court concluded that, when a lawyer persisted in his failure to respond to the Bar's inquiries, the Bar was prejudiced because it had to investigate in a more time consuming way, and the public respect for the Bar was diminished because the Bar could not provide a timely and informed response to complaints).

4. **Suspension Is Appropriate.** "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.

5. **Aggravating Factors.** The following aggravating factors apply:
  - (a) Prior disciplinary offenses. *Standards*, § 9.22(a). The Accused was sanctioned in December 2010 for numerous violations including RPC 1.16(d) and RPC 8.1(a)(2). *In re Burns*, 24 DB Rptr 266 (2010). She previously was sanctioned for neglecting a client and failure to take appropriate steps upon termination of representation.
  - (b) A pattern of misconduct. *Standards*, § 9.22(c).
  - (c) Multiple offenses. *Standards*, § 9.22(d).
  - (d) Intentionally failing to comply with rules or orders of the disciplinary agency. *Standards*, § 9.22(e).
  - (e) Substantial experience in the practice of law. *Standards*, § 9.22(i)
6. **Mitigating Factors.** The Bar admits the follow mitigating circumstances may be considered:
  - (a) Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  - (b) Timely good faith effort to make restitution or to rectify consequences of misconduct. *Standards*, § 9.32(d).

The knowing neglect of a single client matter warrants a 60-day suspension. *In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004). The Accused’s failure to file the Affidavit, a simple matter, for a period of years in disregard of repeated contacts from Saunders warrants similar treatment. When aggravating factors are considered, including prior disciplinary actions and previous failure to respond to disciplinary authorities, it becomes clear that a substantial suspension is required. A lawyer who neglects her duties to her clients and fails to cooperate with the disciplinary authorities threatens the profession and the public. *In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Butler*, 324 Or 69, 921 P2d 401 (1996) (the court imposed a one-year suspension where the accused stipulated that he failed to act diligently and that he violated his duty to be truthful, finding aggravating factors of substantial experience in the practice of law and that the misconduct occurred when the accused knew he was under investigation for an unrelated matter alleging the same violations.)

The Bar points out that the failure to fully and truthfully respond to disciplinary inquiries, when committed along with many other violations, commonly results in suspensions of a year or more. *See, e.g., In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (one year suspension where lawyer engaged in violations of rules governing accounting for a client’s funds, mishandled those funds, failed to make a refund, and failed to fully and truthfully cooperate in disciplinary investigation).” Without considering the mitigating

factors, the Trial Panel concludes the Accused should be suspended from the practice of law for a period of 120 days on the Bar's First Cause.

The court has emphasized a no-tolerance approach to non-cooperation with the Bar. In *In re Miles*, 324 Or at 222–23, the court found that a lawyer's failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation that warrants a suspension. When a lawyer fails to cooperate with the Bar, the correspondence that the Bar must generate increases, as does the workload of volunteer lawyers and members of the public serving on the State Professional Responsibility Board (SPRB) and the Local Professional Responsibility Committees (LPRCs). *In re Haws*, 310 Or 741, 751, 801 P2d 818 (1990).

A lawyer's failure to cooperate is not merely a technical violation of the Oregon Rules of Professional Conduct. The Oregon Supreme Court has clearly and repeatedly stated that the duty of honesty and cooperation in a disciplinary investigation is no less important than a lawyer's other responsibilities under the disciplinary rules. *See, e.g., In re Whipple*, 320 Or 476, 489, 886 P2d 7 (1994); *In re Haws*, 310 Or 741, 756, 801 P2d 818 (1990) (Gillette, J., concurring) ("the members of the Bar [should be] on notice that their obligations under [former] 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 Arbuckle*, 308 Or 135, 141, 775 P2d 832 (1989) ("the stonewalling of the Bar in its pursuit of potential disciplinary violations, will not be taken lightly").

The ABA *Standards* state that a suspension generally is appropriate when the lawyer "knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system." *Standards*, § 7.2. In *Miles, supra*, the court imposed a 120-day suspension when a lawyer failed to cooperate with the Bar and where no substantive charges were brought. In *In re Hereford*, 305 Or 69, 756 P2d 30 (1988), a lawyer was suspended for 126 days for non-cooperation, even though he was found not guilty of all other charges. *See also In re Parker*, 330 Or 541, 551, 21 P3d 107 (2000); *In re Schaffner*, 323 Or 472, 481, 918 P2d 803 (1996).

The Trial Panel finds that the intentional, knowing, and repeated refusal by the Accused to respond to the Bar's inquiries and demands for information constitutes a serious violation of the conduct expected of a member of the Oregon State Bar and resulted in material injury to the legal system and the public. The Trial Panel concludes that the sanction imposed be significant and that the Accused should be suspended for a period of 150 days on the Bar's Second Cause of Complaint.

Considering the mitigating factors, especially noting the timely good faith effort to make restitution or to rectify consequences of misconduct when in June 2011, after Saunders filed a claim on the Oregon State Bar Client Security Fund, the Accused arranged to return

the affidavit to Saunders with a refund of the unearned portion of her fees, the panel reduces the sanction to a suspension of 210 days.

**DISPOSITION**

It is the decision of the Trial Panel that the Accused be suspended for a period of 210 days.

IT IS SO ORDERED.

Dated this day of September, 2013.

/s/ Craig A. Crispin  
Craig A. Crispin, Trial Panel Chairperson

/s/ Ulanda L. Watkins  
Ulanda L. Watkins, Trial Panel Member

/s/ Charles H. Martin  
Charles H. Martin, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 12-42  
 )  
CHRISTOPHER CAUBLE, )  
 )  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: Arden J. Olson  
Disciplinary Board: Joan-Marie Michelsen, Chairperson  
Penny Lee Austin  
Thomas W. Pyle, Public Member  
Disposition: Violation of RPC 1.7(a)(2), RPC 1.15-1(a), and  
RPC 1.15-1(c). Trial Panel Opinion. 45-day suspension.  
Effective Date of Opinion: December 11, 2013

**TRIAL PANEL OPINION**

Two charges were pled by the Oregon State Bar in its March 7, 2012 Complaint:

1. Count One alleges that Christopher Cauble (hereinafter “Accused”) violated RPC 1.7(a)(2). The Oregon State Bar (hereinafter “Bar”) alleges that the Accused simultaneously represented both William Hiljus (hereinafter “Hiljus”) and a group of other clients (hereinafter “the Group”), which included the complainants Jimmie and Juanita Pettet (hereinafter “Pettets”). The Bar alleges that this representation caused a significant risk that the Accused’s representation of one or more clients would be materially limited by the Accused’s responsibilities to another client, or by the Accused’s personal interest.

2. Count Two alleges that the Accused violated RPC 1.15-1(a) and RPC 1.15-1(c). The Bar alleges that members of the Group paid the Accused to represent them in suing Ticor as a Group, and that some of these client funds were diverted to pay the individual legal fees of Hiljus. The Bar alleges that RPC 1.15-1(a) requires a lawyer to properly identify and safeguard the Group’s funds, and that the Accused failed to do this. The Bar further alleges that RPC 1.15-1(c) requires that legal fees be withdrawn from a lawyer’s trust account only as fees are earned and expenses incurred, and that the Accused withdrew funds in violation of this rule.

On July 17, 2013, the undersigned Trial Panel convened to hear the charges against the Accused. A two-day hearing was conducted. The Accused appeared in person and with his attorney, Arden Olson. The Bar was represented by Linn Davis.

The Bar called the Accused and three other witnesses to testify and submitted a number of exhibits. The Accused called two character witnesses and submitted several exhibits.

There were no relevant or disputed pre-hearing rulings. All parties agreed to have the hearing in Grants Pass, at the office of the Accused. The trial panel appreciates his courtesy in allowing us to meet at his office.

### **SUMMARY**

The Accused's firm represented Hiljus in over a dozen cases through the course of at least a decade before the Accused took him on as an estate planning client for a potentially taxable estate. For a number of years before hiring the Accused, Hiljus facilitated members of his Bible group and friends in making investments in numerous local real-estate related loans. The characterization of his role is disputed and for these purposes not critical. It is clear that at a minimum he brought the parties together, wrote up escrow instructions, tracked payments and disbursements, was paid fees for his efforts, and generally facilitated the loans. He had no license to work as an investment counselor or mortgage broker. When the real estate market crashed most, if not all, of the local builders involved in the Hiljus loans were unable to service their debts, lost their properties, and went bankrupt. This negatively impacted the investments that people had made with the aid of Hiljus. The Pettets lost their life savings and were significantly harmed. Some of the investors sued Hiljus (hereinafter "Gilbertson lawsuit") claiming negligence, breach of fiduciary duty, fraud, unlawful trade practices, and that he was liable for all ascertainable losses because he didn't have a mortgage broker's license.

The Accused agreed to represent Hiljus in the Gilbertson lawsuit. Hiljus denied all responsibility and instead blamed Ticor Title Company (hereinafter "Ticor") for the investors' losses. (Ex. 22 49:16–53:4) The Accused assisted Hiljus in filing two suits against Ticor, one for negligence and one for indemnity. Subsequently, Hiljus brought a number of affected investors to the Accused as potential clients. The Accused did not discuss the investors' potential claims against Hiljus at these meetings, analyze Hiljus's potential liability, or discuss his ability to satisfy a judgment. After a couple of meetings with these investors the Group was formed and hired the Accused to also sue Ticor. The Group put up over \$33,000 for fees and costs in support of their suit against Ticor.

### **CREDIBILITY OF ACCUSED**

The Accused is an experienced litigator with years of experience in handling complex litigation. He testified credibly to his abilities and the Trial Panel takes him at his word on the

issues of his experience and skill. The Trial Panel finds that he would have performed the estate planning for Hiljus in a normal and competent way. The Trial Panel finds that he would have therefore been intimately familiar with Hiljus's assets and holdings before December 2008. The Trial Panel finds that the Accused prepared pleadings for Hiljus and undertook the defense of *Gilbertson v. Hiljus* in a normal and competent way, which would include reviewing the substantive issues and available documentation with his client. The Trial Panel finds that the Accused would have done the same regarding both of the *Hiljus v. Ticor* suits.

The Accused testified at length. Despite his litigation experience, he often claimed not to understand questions, stammered, and repeated himself. The Accused was evasive and at times dodged the Bar's questions, for example, in discussing when he first became aware of relevant documents and information, such as the escrow instructions. He was evasive when discussing the allocation of fees by the Group. He was also particularly evasive when discussing Hiljus's net worth. Based on his demeanor, and the way he answered questions about these issues, the Trial Panel finds that he was not forthcoming or completely credible on contested issues.

The Accused did not always listen to the questions being asked of him. At times his answers were either unresponsive or long rambling monologues. At other times, instead of listening to the Bar's questions he fiddled with or shuffled the exhibits around. In several instances he was so inattentive that he did not have the correct exhibit or page being discussed before him. For example, when the Bar was questioning the Accused about Exhibit 10 he was not tracking the pages, was shuffling around, and instead of answering the questions directly, was argumentative. On the other hand, he listened to his own lawyer and his answers to those questions were more on point

When the Accused was generally discussing what work he did for Hiljus, he was assertive, used a strong voice, did not stammer, and sat up in his chair. When he was rationalizing his choices, or arguing that the fact Hiljus did not have a mortgage broker's license was relatively unimportant and that this fact did not really impact the investors' potential claims or recovery, the Accused was gesturing quite a bit and speaking with a very strong voice.

At times, such as when the Accused was explaining why he thought that it was reasonable to attempt to limit the scope of his representation in this matter or when describing the Group meeting, he was more withdrawn, looking down, and rocking back and forth in his chair. These differences in his demeanor influenced our overall credibility determination of the Accused and lead us to find that he was not always credible.

In the Accused's letter to the potential clients that Hiljus had brought in, he stated that "I do not believe that any conflicts exist at this time. All of the parties are interested in the same outcome and none of your legal interests conflict . . ." (Ex. 16 at 1.) This statement is

neither true nor plausible. The Trial Panel finds that the Accused knew that there was a conflict between the interests of the Group (in getting recovery of the losses) and Hiljus (in avoiding paying judgments for the losses). We base that finding on the demeanor of the Accused, the way the Accused either avoided or answered questions about these issues, and on the simple objective plausibility, or lack thereof, of his position.

A cursory examination of the allegations against Hiljus and the information that was available to the Accused in September 2009 shows that the interests of the Group were absolutely adverse to the interests of Hiljus. Hiljus had at least, according to the Accused, a 50 percent chance of being found liable for the losses of the investors that he had facilitated loans for. The Accused acknowledged that he could not advise the members of the Group about the possible liability of Hiljus, that it would be a conflict. The Trial Panel finds that the Accused realized that a conflict existed, and tried to avoid this conflict by attempting to limit the scope of representation to only the claims against Ticor. The Trial Panel finds that the over \$33,000 retainer put up by the Group influenced the Accused's judgment.

The Trial Panel finds that the Accused was repeatedly evasive in discussing the core issues of this matter. Specifically, the Trial Panel finds that the Accused was evasive and not credible regarding when he first learned that Hiljus did not have a mortgage broker's license, when he learned that Hiljus had written numerous escrow instructions, and when he realized that a conflict existed between Hiljus and the Group.

The Trial Panel does not find that the Accused was maliciously dishonest. We do find that he deliberately chose what facts to focus on or to ignore. We find that the Accused consistently chose to ignore or minimize facts and information that he should have paid attention to. We find that he chose to ignore inconvenient facts, and minimize information that did not support his selected viewpoint. Throughout his testimony his viewpoint was the one that would validate and support Hiljus's story of what happened and Hiljus's trial theories. The Accused stuck to this viewpoint to the exclusion of the interests of the Group.

## **CREDIBILITY OF OTHER WITNESSES**

### **Jimmie Pettet.**

The Bar's first witness was Jimmie Pettet. Professionally he was in construction. He is a complainant and was one of the people who invested his funds with the aid of Hiljus. He and his wife lost a lot of money and had to take out a mortgage on their home to cover the losses. Their home had been paid off. He clearly had some anger around this but it did not seem excessive nor did he appear to be vindictive or vituperous. He seemed to be fairly unsophisticated and not particularly familiar with the legal process, especially for someone who has now been involved with several lawsuits. Throughout his testimony Mr. Pettet's demeanor was consistent. He answered questions promptly and succinctly. He appeared to be concentrating and remained focused. He did not become confused when quickly changing

between exhibits and seemed to track what was going on. He was slightly defensive on cross-examination. He was not fidgety nor did he avoid eye contact. The Trial Panel finds him to be credible.

**Joseph Charter.**

The Bar's second witness was Joseph Charter (hereinafter "Charter"). Charter is a lawyer who has been in practice for at least 30 years. He represented several investors against Hiljus in the Gilbertson suit. They won and had obtained judgment against Hiljus. The Pettets hired him after leaving the Accused. The Pettets came to Charter much later than the Gilbertsons did due at least in part to having been part of the Group and hiring the Accused to sue Ticor. Charter was not able to get judgment for the Pettets due to the automatic stay that went into effect when Hiljus filed bankruptcy. At one point he became a bit sarcastic, identified that fact, and apologized for becoming a bit of an advocate. He testified over the phone so the Trial Panel was not able to observe his body-language or demeanor. He was able to recall details of the litigation involving Hiljus. Charter was direct, seemed prepared, and was forthcoming. The Trial Panel finds him credible.

**Juanita Pettet.**

The Bar's third witness was the wife of Jimmie Pettet. Professionally she was an office manager for the local school district. She did not seem as familiar with what had happened and gave shorter answers than Mr. Pettet. She seemed somewhat passive and not at all assertive. She did not seem to recall the facts of the case as well. She also appeared fairly unsophisticated and inexperienced in legal or financial matters. The Trial Panel found her credible, but not particularly useful as a witness.

**Stephen Roe and Dennis Becklin.**

The Trial Panel finds that neither Mr. Roe nor Mr. Becklin offered more than their personal, non-legal, views that they like the Accused and think he is a good and honorable man. Mr. Becklin said he was more familiar with the Accused's father.

**FINDINGS OF FACT**

The Accused is an attorney, admitted by the Supreme Court of the State of Oregon. The Accused was admitted to the Bar on September 20, 1996. He resides in Josephine County, Oregon, and is active in the Oregon State Bar. He has participated in many OSB committees including some involving ethics issues. The Accused has more than fifteen (15) years of legal experience in various aspects of civil litigation. He is, and has been for some time, a named partner in his firm. As the two charges are closely related factually we have one set of facts, common to both charges.

Based on the facts that were not at issue or for which no rebuttal was offered, and our findings of credibility, the Trial Panel makes the following findings based on clear and convincing evidence:

1. The Trial Panel finds that between September 22, 2005, and June 27, 2007, Hiljus arranged numerous mortgage loans between various local builders and individual investors, including the Gilbertsons. (e.g., Ex 1–10). He told them that the loans were safe and would be disbursed via a construction disbursement company. He wrote escrow instructions for these loans and performed many other tasks in facilitating or arranging these loans. Hiljus was paid substantial commissions/fees for his efforts. During this time Hiljus did not have a mortgage broker's license. (Ex 22 37:21–38:5). The Trial Panel finds that the Accused knew these facts prior to December 2008.
2. The Trial Panel finds that Hiljus was sued in *Gilbertson et al v. Hiljus* (Gilbertson suit) by some of his investors. (Ex 12). This suit was filed by Charter on June 7, 2008. It alleged negligence, breach of fiduciary duty, fraud, unlawful trade practices, and that Hiljus was liable for all of Plaintiff investor's ascertainable losses under ORS 59.925, because he didn't have a mortgage broker's license at the time the loans were made. The Accused took over the representation of Hiljus in December 2008. The Fullers, who were two of the original Plaintiffs in the Gilbertson suit, withdrew from that suit (Tr 89:13) and later became members of the Group represented by the Accused.
3. The Trial Panel finds that Accused did tax estate planning for Hiljus just prior to taking over as defense counsel in the Gilbertson suit. He was therefore quite familiar with the Hiljus family assets and goals. It was clear that Hiljus had substantial assets, or he would not have had a potentially taxable estate. The Accused did not know the extent of the liabilities on Hiljus's property but did know that he owned a \$1.2 million house, a motorhome that Hiljus valued at \$800,000, and other properties. (Tr 229:1–230:1). The Accused apparently thought that based on Hiljus's representations he had enough assets that would require tax estate planning since that is what he did for him. The Accused estimated that Hiljus had less than \$5 million in assets but declined to estimate what Hiljus's net worth was at the time he was doing the tax estate planning. The Trial Panel finds that any reasonable person looking at the Hiljus assets from the outside would conclude, as Charter did, that Hiljus had sufficient assets to satisfy substantial judgments (should litigation against him be successful).
4. The Trial Panel finds that the Accused knew that Hiljus had drafted or written escrow instructions on a number of the loan transactions. Because the Accused was evasive, and the file transferred, it is not possible to determine exactly which specific instructions the Accused saw or when he saw a particular instruction. However, a cursory review of the instructions shows that the Gilbertsons were parties to several loans that members of the Group were also involved in. The Trial Panel believes that he would have seen Exhibits 5, 6, 7, 9, and 10 in his representation of Hiljus. Further, a quick review of the instructions involving the Gilbertsons shows that Hiljus did not instruct Ticor to put the funds in a construction

disbursement account and instead required that the funds go directly to the builders in many cases<sup>1</sup>. These instructions, at least, would have been available to the Accused after he took over representation of Hiljus in the Gilbertson suit. Apparently, none of the discovery was Bates numbered or dated so it is hard to track. The facts that Hiljus wrote the instructions and that they didn't require construction disbursement are directly relevant to the Accused's theory of liability in the Ticor litigation, and point at Hiljus rather than Ticor having potential liability.

5. The Trial Panel finds that there was substantial evidence that Hiljus may have made numerous misrepresentations to people making the loans. This evidence should have been obvious by the time depositions in the Gilbertson suit were taken. After the arbitration hearing the Accused knew or should have known that Hiljus might not have been honest with the investors. The Accused testified that Hiljus may not have even been accurate with him regarding his assets in the estate planning context. (Ex 48 79:2–10).

6. By the beginning of 2008, it was clear that the loans were not in the positions expected, that the funds were gone, that the builders were defaulting, and that the properties were underwater.

7. The Trial Panel finds that the Accused, as an experienced litigator, would have been well informed about the facts surrounding the Hiljus facilitated loans, the possible defenses, claims, and counterclaims. He would have had detailed information regarding the transactions prior to June 2009, which was when he filed *Hiljus v. Ticor* and was six (6) months after he started representing Hiljus in the Gilbertson suit.

8. The Trial Panel finds that the Hiljus arranged loans involved significant sums of money, which in some cases represented the savings of the individuals making the investments. The total losses of the Group were estimated by the Accused to be just over \$4 million. Some of the members of the Group were older members of the same closely knit church, had known Hiljus for a number of years, and considered him a friend. He was an authority figure and lead Bible study classes. The Accused raised the fact that only the Pettets complained about him to the Bar and no one else asked for their money back several times as though it somehow excuses or mitigates his actions. The Trial Panel finds it completely irrelevant; it is like arguing that if you speed and don't get caught you were not breaking the law.

9. The Trial Panel finds that in September 2009, the Accused met with a number of individuals brought to him by Hiljus. These individuals at the meeting were for the most part members of the same church that Hiljus attended, members of his Bible study, and friends of his. They were mostly people for whom he had facilitated real estate loans. They had lost

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<sup>1</sup> There were a number of problems with the transactions, but the details of the transactions are not important to this case because of the fact that Hiljus didn't have a license to do this sort of transaction as required at that time by ORS 58.845.

money when these Hiljus-arranged loans became uncollectable and/or the builders defaulted. The topic of the meetings was the possible recovery of some of the losses that they had. The Accused felt that the potential clients supported Hiljus and didn't want to sue him. (Ex 48, 74:11–75:24). The Accused thought that was a good thing because these were people who could potentially sue Hiljus. (Ex 48, 74:11–75:24). The Accused said that “they don't want to sue your client, they want to sue somebody else, then you've got to solve the problem by getting them to sue that person who is the somebody else which is the deep pocket, Ticor. That's what was in my mind.” (Ex 48, 75:15–19). Therefore, he only discussed the possibility and mechanics of filing a group suit against Ticor. The litigation theory against Ticor was essentially the same for the Group and the 2009 *Hiljus v. Ticor* suit.

10. The Accused admitted that the Hiljus investors had a potentially viable claim against him, but he “knew subjectively” that Hiljus could not satisfy all the claims against him. (Tr 240:5–9; 240:22–241:7).

11. The Trial Panel finds that the Accused discussed possible group representation of the investors that Hiljus had organized to speak with him. The Accused did not discuss the substance of the claims in *Gilbertson v. Hiljus*; the fact that by writing the instructions and arranging the loans Hiljus could be found to be a mortgage broker and therefore liable for all ascertainable losses; the possibility that Hiljus was at fault and potentially liable on other theories; the pros or cons of suing Hiljus; the possibility that while they might not get full recovery Hiljus did have substantial assets; the relative merits of litigation against Ticor and Hiljus; the possibility that Ticor could counterclaim or otherwise raise Hiljus's past actions as a defense; or the fact that the litigation against Ticor was speculative at best<sup>2</sup>.

12. The Trial Panel finds that, as the Accused stated, the substance of the meetings was memorialized by the Accused in his letters to the Group members. (Ex 16; Tr 237:14–23). The letters were all substantially identical except for the addresses. As noted above, the Accused stated that he saw no conflicts. He also captioned the letters “RE: Ticor Lawsuit.” The Trial Panel notes that this subject is in the singular. The letter states that the firm is pleased to be retained in “connection with the Ticor litigation matter,” also in the singular. The parties put on conflicting testimony about the specific issue of whether the Group authorized the payment of Hiljus's personal legal fees. The Trial Panel finds that the Pettets were more credible in their testimony that they would not have authorized that action. The letter contains a paragraph covering fees but does not say that the retainer may be used to pay other people's fees, that Hiljus has authority to direct the expenditures of Group funds, or anything about paying off Hiljus's past due bills.

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<sup>2</sup> The Accused claimed repeatedly that the fact that the litigation survived an ORCP Rule 21 motion indicated that the court found merit to his theories regarding Ticor. The Trial Panel does not read that decision as broadly. The fact that the Bankruptcy Trustee authorized settlement of *Hiljus v. Ticor* for approximately \$2,500 speaks more loudly to the merits of the case than surviving a Rule 21 motion.

13. The Trial Panel finds that the Accused claimed that he knew Hiljus would not be able to answer to the total losses of the Group. The only way he could have come to that conclusion is by applying information learned in the course of representing Hiljus.

14. The Accused admitted that he could not have advised the Group about the above-listed issues involving Hiljus, as to do so would have been a conflict. The Trial Panel finds that the Accused used his knowledge of Hiljus's assets, gained through the tax estate planning he did for Hiljus, to decide that Hiljus would not be able to fully answer the Group's full claims.

15. The Accused said that this letter and the meetings he had were sufficient to eliminate his responsibilities under Oregon RPC 1.15-1(a)(2) and to act as a limitation on the scope of his representation pursuant to RPC 1.2(b).

16. The Trial Panel finds that the Accused did not attempt to obtain informed consent from either Hiljus or the Group under RPC 1.7(b)(4).

17. The Trial Panel finds that in September 2009, a number of people retained the Accused to act for them as a group in suing Tigor. (e.g., Ex 16). While the Group included Hiljus's son, Hiljus himself was not a named Plaintiff in that suit. (Ex 25). Hiljus did sign one of the Group's retainer letters on September 2, 2009. Hiljus did not contribute any funds to the Group trust account for his own case. The records show that the Hiljus Revocable Trust paid \$6,000 on behalf of Chip Hiljus (his son), J Carlson, and Z Geeseman. (Ex 38, Invoice 74290 at 3). That same bill shows that the Pettets contributed \$2,000.

18. The Trial Panel finds that that in November 2009, the Accused received \$32,300 from members of the Group for legal fees. An additional \$900 was received in February and March 2010. (Ex 30). The Accused seemed to claim that because \$6,000 of this was deposited through a check from the Hiljus Revocable Trust that Hiljus was a paid member of the Group. However, a check of the trust records shows this not to have been the case; the funds were not deposited for the benefit of Hiljus, but rather for the benefit of three other investors.

19. The Trial Panel finds that Hiljus agreed to be the primary contact person for the Group. The Accused did not discuss the pros or cons of the Group using Hiljus as the primary contact person. He not only used him as the point of contact but also took case specific directions from Hiljus regarding both the Hiljus litigation and the Group's suit. The Accused did not take any action to verify that the directions given him by Hiljus were, in fact, reflective of the directions of the Group members. The Trial Panel does not believe that the uninformed request of the Group members to have him work primarily with Hiljus is the same as the Group formally giving Hiljus power of attorney or some other form of officially delegated authority. After his original letter the Accused did not send regular updates, have additional meetings, send copies of letters or pleadings, or even forward copies of the billings to the various members of the Group. Whatever communications may have been made to the

Group were done by Hiljus, not by the Accused.<sup>3</sup> Hiljus still had his own litigation pending at this time as well. The Accused says that Hiljus told him to pay his fees for work in *Hiljus v. Ticor* from the Group's trust account. The Trial Panel accepts that as true.

20. The Trial Panel finds that on September 22, 2009, the Accused filed a suit against Ticor on behalf of the Group alleging that it was Ticor that was responsible for the Group's investment losses. (Ex 18). This suit is correctly denominated as *Fuidge et al v. Ticor* but is referred to herein for clarity as *Group v. Ticor*.

21. The Trial Panel finds that the Accused spent a considerable amount of time working both on the *Hiljus v. Ticor* and the *Group v. Ticor* matters. He kept separate bills for both lawsuits and they were filed separately. He spent substantial amounts of time on the *Hiljus v. Ticor* suit before the formation of the Group, including drafting the suit, getting it served, and working on default pleadings. It is difficult to ascertain exactly how much time he spent on which activities or exactly what the Accused was doing due to the summary nature of the billing records.

22. The Trial Panel finds that the Accused, without any of Ticor's lawyers present, deposed Theresa Gilbertson in connection with the Gilbertson suit. He also participated in the deposition of Hiljus in *Gilbertson v. Hiljus* on September 25–26, 2009, which was continued to October 13, 2009. The exhibits to this deposition contain numerous escrow instructions written by Hiljus, as discussed above. (Ex 22). The Trial Panel finds that at least some of the costs for these depositions were paid by the Group when they paid for time spent on September 23, 2009, on deposition prep. (Ex 27, Invoice 73413).

23. The Trial Panel finds that in his depositions Hiljus admitted to the underlying facts sufficient to constitute a claim in the Gilbertson suit.

24. The Trial Panel finds that Exhibit 28, Invoice 72947, shows work starting in the matter of *Hiljus v. Ticor* for indemnity and contribution. The Accused alleges that this is somehow related to the Group's claims. Invoice 73874 shows time billed for the Henner deposition. Half of the time for the Henner deposition was billed to the Group at the request of Hiljus. The Henner deposition shows that the Accused and the Ticor lawyer agreed that although it was being taken in the Gilbertson suit it could also be used in Hiljus's indemnity claim against Ticor. There is no agreement on the record that it could be used in the Group's claims against Ticor. (Ex 23 7:9–8:18).

25. The Trial Panel finds that the Accused reviewed all bills and invoices, and sent and approved all of the charges and payments involved in this case. During the period of

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<sup>3</sup> Although this conduct could form the basis for charges for violating RPC 1.4 the Bar did not plead that as a charge and the Panel is not concluding that any violation of that, or additional rules, occurred. The Panel only considered this information in the context of whether or not the Accused reasonably safeguarded the Group's property as set out below.

September 2009 to December 2009 the Accused did not communicate directly with the members of the Group about the progress of their case. He did not send copies of the bills to the individual clients nor did he obtain any documented consent from the members of the Group, other than Hiljus, to pay the past due bills Hiljus had accrued in *Hiljus v. Ticor*.

26. The Trial Panel finds that the arbitration in the Gilbertson suit was conducted on November 30, and December 1, 2009. Testimony at that arbitration, again, showed that all of the members of the Group had a strong case against Hiljus.

27. The Trial Panel finds that on December 3, 2010, the Accused paid himself \$7,622.11 from the Group trust account to pay off the bill of Hiljus in *Hiljus v. Ticor*. (Ex 28, Invoice #74290 at 3) (the notation is that it was “to pay previous Ticor file”). The October 15, 2009, bill in *Hiljus v. Ticor* shows a balance due of \$7,603.16 for work commencing on June 15, 2009. (Ex 27). The Trial Panel is not clear as to where the difference between the October bill and the amount paid came from. All but \$1,192.49 of the Hiljus October bill was past due. The payment from the Group trust account represented the full amount owing in *Hiljus v. Ticor*. The bills for *Hiljus v. Ticor* show charges for the Summons, Service, communication with clients regarding service, fees for the process server, work on a Motion and Order for Default, communications with the Hiljus regarding default, work on subpoenas, and the Hiljus deposition. Some of these charges were at least 90 days past due.

28. On December 3 and 15, 2009, the Accused paid from the Group account a total of \$16,117.45. (Ex 28). This payment included charges for the Henner deposition. This payment also included charges for “Research for drafting Complaint of *Hiljus v. Ticor* / CD for indemnity and contribution claims from Gilbertson matter.” (Ex 28, Invoice 72947).

29. The Trial Panel finds that the Accused failed to forward or inform the Group about the arbitrator’s preliminary award issued on December 29, 2009. In that award the arbitrator in *Gilbertson v. Hiljus* found Hiljus to be liable to the Plaintiffs in the Gilbertson suit based on Hiljus’s conduct in facilitating loans for them. The Accused did not forward copies of this award to members of the Group, did not tell them what it meant, did not explain that it could change the analysis of their viable options for the recovery of their losses, or otherwise discuss it in any way with the Group.

30. The Trial Panel finds that the Accused filed an indemnity action, *Hiljus v. Ticor II*, on behalf of Hiljus on October 5, 2009. (Ex 20).

31. The Trial Panel finds that the Pettets became disenchanted with Hiljus and obtained the services of Charter in April 2010. In June 2010, they sued Hiljus alleging negligence, accounting problems, breach of fiduciary duty, fraud, and unlawful trade practices. (Ex 34).

32. The Trial Panel finds that the Group changed lawyers in July 2010. This was due, at least in part, to the fact that the Group had expressed interest in suing another title company that was also a firm client. The Accused thought that would be a conflict. By this point in

time the Group trust funds of \$33,200 were exhausted. (Ex 31). However, not all of the notices of substitution of counsel were promptly filed. The Accused failed to file any notices of withdrawal and therefore continued to receive court notices for some of the Group until April 2011. (Ex 18).

33. The Trial Panel finds that Hiljus filed for bankruptcy protection on October 22, 2010. *Pettet v. Hiljus* was not yet concluded and was stayed by the bankruptcy court.

34. Although it was not considered by the Trial Panel in its decision, because it was neither pled nor proven by the Bar which has the burden of proof, a check of the public record in the US Bankruptcy Court, District of Oregon, Eugene Divisional Office shows that Hiljus listed nine (9) parcels of real property and other assets worth in his estimation \$2,837,007.69. He listed creditor claims of 1,737,038.04. This is consistent with the facts that were in the record and Charter's statement that it was probably going to be a positive asset case.

### **DISCUSSION AND CONCLUSIONS OF LAW**

The Bar has the burden of proving the Accused'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).

#### **First Charge –**

#### **THE RULES ON CONFLICT OF INTEREST**

Count One alleges that the Accused violated RPC 1.7(a)(2) by simultaneously representing both Hiljus and the Group, which included the complainants. The Bar alleges that this representation caused a significant risk that the Accused's representation of one or more clients would be materially limited by the Accused's responsibilities to another client, or by the Accused's personal interest. Oregon's Supreme Court has repeatedly cautioned that a lawyer who is asked to represent multiple clients who have potentially differing interests must weigh carefully the possibility of impaired judgment or divided loyalty and that employment should be refused if there is the slightest doubt about whether the employment will involve a conflict of interest. *See In re O'Neal*, 297 Or 258, 264, 683 P2d 1352 (1984).

Oregon RPC 1.7 governs the conduct of a lawyer regarding current client conflicts of interest. Specifically it provides that:

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

client, a former client or a third person or by a personal interest of the lawyer; . .

- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to 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.

Oregon RPC 1.2 allows a lawyer to limit the scope of their representation and provides that: “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

Oregon RPC 1.0(g) says that:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

The Trial Panel will consider all facts known to the Accused or which in the exercise of reasonable care should have been known. RPC 1.7(a)(1) provides that a current client conflict exists if the representation of one client is directly adverse to the representation of another client. *In re Johnson*, 300 Or 52, 61, 707 P2d 573 (1985) (discussing the former Oregon Disciplinary Rules). The Trial Panel is permitted to impute knowledge of relevant facts “if, by the exercise of reasonable care, such [relevant] facts should have been known by the lawyer.” *In re Johnson*, 300 Or at 61. Once the relevant facts are determined, the Trial Panel is responsible for determining whether there was a current client conflict regardless of the Accused’s recognition, or lack of recognition, of the conflict. *In re Johnson*, 300 Or at 61. It is sufficient to constitute a conflict if clients with differing interests request advice from the Accused even if actual litigation between the clients is not contemplated. *In re Wylie*, 331 Or 606, 616, 19 P3d 338 (2001).

## ANALYSIS

When Hiljus brought the potential clients who became the Group to the Accused he was already working on closely related matters on behalf of Hiljus. The Accused either knew or should have known with a minimum of care that many of those potential clients had the same legitimate causes of action against Hiljus that the Gilbertsons did. This is obvious since many, including the Pettets, were involved with the same deals that Hiljus facilitated and which formed the basis of the Gilbertson suit. By the time the Group first came to see the Accused, he was well familiar with the allegations and facts underlying the Gilbertson suit. Those members of the Group who were not involved in deals with the Gilbertsons were involved in the same series of Hiljus facilitated transactions, which were all basically related and of a type.

The potential clients who became the Group were recruited by Hiljus, which should have raised a concern immediately for the Accused. The potential clients that became the Group never had a chance to evaluate their options for recovering their funds. They did not get the unbiased analysis of the Accused about their options, and the best way to go forward because the Accused was focused on the problems of Hiljus. The Group members were not informed by the Accused of the pros and cons of suing Hiljus or the high probability that Hiljus would be found liable. The fact that Hiljus, or even the potential clients, told the Accused that they didn't want to sue Hiljus is irrelevant. Even if they told him they didn't want to hear it, the Accused still had a duty to the members of the Group to spell out the information that they needed to make an informed decision. The fact that a client doesn't want to hear about something does not eliminate or waive the lawyer's potential liability for conflicts of interest. *In re Germundson*, 301 Or 656, 661–62, 724 P2d 793 (1986)

By saying that they didn't have any conflicts in his letter, the Accused effectively ratified Hiljus's past conduct to the Group, which is the very same conduct that formed the basis for the judgment against Hiljus in the Gilbertson suit.

A reasonable lawyer without a prior duty and loyalty to Hiljus would have advised the potential group members about their litigation options. A reasonable lawyer without inside knowledge of Hiljus's estate would have reasonably concluded that he would be able to pay at least some if not all of a very large judgment. The Pettets and other members of the Group suffered real harm here. They did not file suits promptly against Hiljus and therefore did not have judgments against him before he entered bankruptcy. There is no way to know what they would have done had the Accused not validated the conduct of Hiljus. However, since Hiljus's bankruptcy appears, according to Charter, to be an excess asset case, and there will therefore be a liquidation of assets for the benefit of creditors, it is probable that at least some of the Group's losses would have been covered by Hiljus.

The Accused owed Hiljus a duty of loyalty when the investors who became the Group were brought to meet him. The Accused also had duties of competent representation and

loyalty to the members of the Group. The Accused could not discharge his duties to the Group clients without violating his duty to Hiljus. This held true throughout his representation of the Group. For example, the Accused could not inform them of the range of their choices, explain the relative risks of their options, evaluate the strength of their claims relative to the other parties, discuss all the probable defenses Ticor might raise, or discuss the probability of at least partial recovery without discussing the probability that they had a strong cause of action against Hiljus. As the case went on the Accused could not, and did not, explain the importance of the arbitration ruling and how that might, or might not, impact the *Group v. Ticor* litigation and claims. The Accused could not, and did not, advise the members of the Group about the pros and cons of testifying or appearing on behalf of Hiljus in the Arbitration. He did not disclose or discuss with them the dangers of designating Hiljus as the representative of the Group or take any action to protect the Group's interest from Hiljus.

The Trial Panel finds that the Accused had an actual conflict of interest, both due to his self-interest in getting Hiljus's past due fees paid and due to his loyalty to Hiljus at the time he was retained by the Group in September 2009. The Trial Panel finds that this conflict should have been identified by the Accused at that point. The Trial Panel finds that this conflict continued for the life of the case. The Accused had several opportunities to identify that he had a conflict and withdraw, but he chose not to. For example, when he received the Arbitrator's ruling in *Gilbertson v. Hiljus*, a reasonable lawyer would have reanalyzed the positions of the clients.

#### **WAIVER OF CONFLICTS<sup>4</sup>**

RPC 1.7(b), as quoted above, allows the knowing waiver of some conflicts of interest. It does not apply in this matter. The potential clients who became the Group did not give informed consent that was confirmed in writing and which informed them that they should seek independent legal advice to determine if consent should be given.

The Accused raised as a defense that he had validly limited the scope of his representation of the Group under RPC 1.2(b) and that this somehow excused him from complying with RPC 1.7. The Trial Panel does not need to construe the exact parameters RPC 1.2(b) might have in terms of limiting liability for conflicts in this matter, because we find that the Accused did not comply with the substantive requirements of the rule.

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<sup>4</sup> Although we did not agree with his conclusions, the Trial Panel notes that Mr. Olson did a nice job setting forth the standards and providing the requested information to the Trial Panel.

RPC 1.2(b) has two elements. First, the limitation must be reasonable under the circumstances. Second, the client must give informed consent.<sup>5</sup> We will examine reasonableness briefly. To be reasonable the representation must be competent and adequate. It would not be adequate to represent co-defendants with “irreconcilable or unreconciled interests” or where there exists a conflict of interest between class members that cannot be resolved by informed consent. *Restatement (Third) of the Law Governing Lawyers* sec. 19 (2000). Comment [6] of ABA Model Rule 1.2 provides that:

A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

The Trial Panel concludes that it was not reasonable for the same lawyer to represent both Hiljus and the Group in this matter as they had too many conflicts in their interests.

We do not, however, base our decision in this matter on the somewhat subjective issue of reasonableness and whether or not the Accused’s representation of Hiljus and the other members of the Group was, or could have been, reasonable, because the second prong of the rule requires that the clients give informed consent. We conclude that informed consent was not obtained in this case.

Informed consent does not mean simply that the clients understand that the lawyer is representing more than one person. A lawyer is required to explain the nature of any conflicts between the clients with sufficient detail and information that they can understand why independent counsel may be appropriate. *In re Brandt*, 331 Or 113, 134, 10 P3d 906 (2000)

RPC 1.0(g) has four requirements. First, the client must agree. That element was clearly met. The remaining three elements all impact the informed part of consent. Second, the lawyer must communicate adequate information about the material risks of the proposed course of conduct. Third, the lawyer must provide an explanation about the material risks of the proposed course of conduct. Finally, the lawyer must communicate adequate information about the reasonably available alternatives to the proposed course of conduct.

The Accused stated that his letter to the Group reflected the information conveyed and materials discussed at the preliminary meetings where all disclosures and information was given to the investors who became the Group. He acknowledged that he did not discuss the potential liability of Hiljus, and could not. He did go over a number of important

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<sup>5</sup> Informed consent in this rule is not required to be confirmed in writing and therefore does not require that the client seek independent legal advice.

elements, such as stating some of the things he could not do, but he did not go far enough to meet the rules.

The rule depends on a lawyer providing adequate information to the client(s). What information that is going to be considered adequate is going to vary from case to case. While the Comments to the ABA Model Rules are not part of the Oregon RPCs, counsel has provided them, and they do provide some perspective on the rules. It is necessary that a lawyer provide sufficient information for a client or potential client to understand the “material advantages and disadvantages or the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. . . a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.” (ABA Model Rule 1.0, Comment [6])

The Trial Panel concludes that the Accused failed to obtain the informed consent of the members of the Group before undertaking to represent them. The Accused failed to provide adequate information about the material risks of suing Ticor. He failed to explain a number of risks, including the possibility that Ticor would probably counter that Hiljus was liable. If that had happened, then the Group, presumably, would have been told to get a new lawyer, a definite risk. The Accused not only failed to provide adequate information but he failed to explain the material risks. For example, he didn’t explain the impact of Ticor raising Hiljus’s actions as a defense. Nor did he discuss the risks of testifying on behalf of Hiljus with members of the Group. Most importantly, however, the Accused failed to provide adequate, or even any, information about the reasonably available alternatives to the proposed course of action, suing Ticor.<sup>6</sup> A lawyer who did not have a duty to Hiljus would have identified him as a possibly liable party. A lawyer who did not know the exact extent of the Hiljus family assets from doing their estate plan would have looked at the outside view and found that he seemed to have a lot of assets. Charter testified that he had a single property that was believed to be worth about \$1.2 million. The Accused did meet his duty to Hiljus, but he failed to protect his other clients in favor of Hiljus. The Accused correctly points out that he was prohibited by his duties to Hiljus from disclosing much of this information to the Group. That is correct. Therefore, from the start the Accused had a conflict between his duties to the Group and his duties to Hiljus.

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<sup>6</sup> The Accused said that it was clear that the Group did not want to sue Hiljus, that they were upset with the people who did and thought it was not right. The Trial Panel believes this. However, the uninformed preconceived ideas of the client are exactly the sort of reason for requiring informed consent. Here, the Accused relied on the idea that Hiljus had explained the basis of the Gilbertson matter to the clients, and his conduct, and they still didn’t want to pursue him. It may be that the clients would have made the same decision after learning the details of Hiljus’s conduct, Gilbertson’s allegations, and Hiljus’s assets, but they also might not have.

The Trial Panel concludes that the Accused did proceed with the Group litigation in violation of RPC 1.7(a)(2). There was a significant risk that the Accused's representation of the Group was materially limited by his responsibilities to Hiljus. There was a significant risk that his representation of the Group would be materially limited by his own self-interest and the interests in the firm in obtaining the fees from multiparty litigation and by having Hiljus's past due bills paid.<sup>7</sup>

The questions presented by *In re Marandas*, 351 Or 521, 270 P3d 231 (2012) are quite different from those present here and that ruling does not change our analysis.

## **Second Charge –**

### **THE RULES REGARDING CLIENT PROPERTY**

Count Two alleges violation of RPC 1.15-1(a) that requires a lawyer to safeguard client funds and RPC1.15-1(c) that requires funds to be withdrawn only when fees are earned and expenses incurred. The Bar alleges that both of those rules were violated when the Accused paid the bills for Hiljus with the Group's trust funds.

Oregon RPC 1.15-1 provides that:

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
- (b) \* \* \* .
- (c) 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, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

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<sup>7</sup> The Accused suggested that no risk to his representation existed due to the billing issues because Hiljus had always paid his bills and that he was not worried about that. Hiljus, it was pointed out, did pay bills larger than the one at issue here. However, that risk was still present, particularly in that some of the bills were over 90 days past due, and costs as well as time had been advanced.

The Bar bears the burden of proof to show that the lawyer charged fees that were not authorized by the terms of the agreement. *In re Campbell*, 345 Or 670, 685, 202 P3d 871 (2009).

### ANALYSIS

There are two issues raised with respect to the payment of fees from the Group account by the Accused. First, the payment of fees in *Hiljus v. Ticor*, Hiljus's individual case against Ticor. Second, the sharing of expenses for work that the Accused contends benefitted both cases.

The Accused had a duty to the members of the Group to safeguard their funds. Neither party provided much guidance about what the RPC requires a lawyer to actually do when safeguarding client property. However, the Trial Panel concludes from the plain language of the text that a lawyer has a duty to protect client funds in a reasonable way, to essentially act as a guard or protector for those funds. Safeguarding funds means more than just putting them in a bank; it means protecting them in whatever way or from whatever threats as may exist in a given case.

Hiljus had no incentive to safeguard the Group funds; in fact, he had the opposite incentive. The Accused knew this. The Accused knew or should have known that the Group had not authorized him to pay himself for work done in another case. The retainer agreement discussed the litigation in the singular and made no mention of paying Hiljus's past due fees or even that he would be able to make binding decisions for the Group. The Accused did not have the ability to ignore his duty to protect the Group funds and was not legitimately authorized to pay himself for work done before the existence of the Group. He was not allowed to pay himself for work that clearly had no legitimate relationship to the Group's litigation. By failing to inform the Group clients that he would take directions regarding the use of their funds from Hiljus, by failing to tell them that they might be charged for a second, albeit related, case, and by actually withdrawing those funds to pay for another client's litigation, the Accused failed to safeguard the client's funds. It would have been relatively easy to get the required authority to make the payments of Hiljus's past due bills. All that the Accused had to do was contact the Group members and verify that they were in agreement with those payments, assuming that the conflict of interest rules were complied with.

Putting this case in another context makes it clearer. Tenants sometimes have problems with their landlords, and often those problems are similar between similarly situated tenants. If a lawyer had three clients, all of whom had problems with the same landlord, for example, with security deposits, one of those clients would not be allowed to direct the lawyer to pay his or her bill with funds from another tenant. This would be true even if the first tenant had recruited the other two. This would still be true if all three had signed the same boilerplate retainer agreement. Here, Hiljus did sign the same retainer as the members of the Group, but his case was actually separate.

The second question relating to the Group's trust funds is the sharing of costs. The Trial Panel believes that this may be authorized in some situations. However, it must be reasonably authorized and with the lawyer being vigilant about the safeguarding of client funds. Cost sharing was not legitimately authorized in this case. However, the Bar has failed to meet its burden of proof to show exactly how much the Accused was compensated for work done on both files or shared the costs of preparation. The Trial Panel finds that the Bar did not meet its burden of proof to show the client's actual harm with respect to the payments made in the Henner deposition or in the Group's billings because the Trial Panel does not know how much time was spent on the tasks.

The Trial Panel finds that the Accused should not have used Group funds to pay Hiljus's current and past due bills. We find that the Group was harmed to the extent that those funds were diverted from their matter to another one.

### SANCTION

Finding that the Accused did violate the Rules of Professional Conduct, we must impose a sanction, and look first to the *ABA Standards for Imposing Lawyer Sanctions*, 2005 (hereinafter "*Standards*"). Under *Standards*, § 3.0, the following factors are considered:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

From consideration of the first three we may arrive at a baseline sanction that may be affected by aggravating or mitigating factors. We address each of the four factors in order.

#### **a. Duty Violated.**

The Trial Panel looks to the *ABA Standards* for guidance in the appropriate resolution to ethics violations. With respect to the two duties violated the ABA says that:

#### 4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

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.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

#### 4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

4.32 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.

4.33 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.

4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence 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 little or no actual or potential injury to a client.

The Trial Panel concludes that the Accused violated his duties to some clients to protect and further the interests of another client. He violated his duty to safeguard and

protect the property of many clients when he disbursed funds in favor of one client. The Accused also violated his duty to avoid conflicts of interest both with his own self-interests and between clients.

**b. Mental State.**

*Standards, Definitions*, defines the relevant mental states as follows:

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

“Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.

The Trial Panel concludes based on our credibility assessment of the Accused and other witnesses that the Accused acted with intent regarding his handling of the conflicts of interest. He clearly intended to proceed with representing the Group regardless of the clear conflicts inherent therein. We do not find the Accused acted maliciously or with the specific intent to damage or harm the members of the Group.

The Trial Panel concludes based on our credibility assessment of the Accused and other witnesses that the Accused acted with a negligent disregard of his duty to protect the Group’s funds and his duty to only bill them for work he did on their case.

**c. Injury.**

The injuries in this matter are difficult to quantify. The Trial Panel is convinced that if the Pettets and other members of Group had sued Hiljus earlier they might have received at least a partial recovery. There is actual injury to the legal community in the loss of faith that all members of the Group could justifiably have. Also, the conduct of the Accused in telling the members of the Group that they did not have a conflict with Hiljus effectively validated the stories that they were hearing from Hiljus. The Trial Panel recognizes that the members of the Group were unusually loyal to Hiljus. But, it is impossible to know how they would have reacted if they were told by a lawyer that actually Hiljus had done some things that were actionable, that actually he could be liable, and that actually it looked like he did have sufficient assets to pay back at least some of the investor’s losses. This information, coming

from an authority figure such as a lawyer, might have influenced them. It is impossible to know what the Group members might have done without the Accused's choices and it is even more difficult to quantify the harm that the delay caused. Clearly, the Pettets were unsuccessful in their litigation, at least in large part due to the delay in filing. Finally, almost all of the Group members each invested another \$2,000 to pursue the claims against Ticor, without being able to evaluate accurately if that was an appropriate use of their diminished funds.

The harm done from fees that the Accused paid himself for work relating to Hiljus's litigation is somewhat easier to quantify. The Trial Panel finds that the Group funds paid by the Accused at the direction of Hiljus for the benefit of Hiljus were not earned.

**d. Aggravating or Mitigating Circumstances.**

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose. Aggravating circumstances consist of any considerations or factors that may justify an increase in the degree of discipline to be imposed.

Aggravating factors include:

- (a) Prior disciplinary offenses. This factor is not applicable in these cases.
- (b) Dishonest or selfish motive. This factor is applicable in this matter. The Trial Panel does not find the Accused to have had a dishonest motive, but he was selfish to at least some degree. Hiljus was an established client. He could be expected to continue to pay substantial fees to the firm. The Group provided a substantial retainer, which was exhausted.
- (c) A pattern of misconduct. This factor is somewhat applicable in this case in that the Accused had so many opportunities to tell the Group about this conflict issues.
- (d) Multiple offenses. This factor is applicable in this case only due to the large number of people who were impacted by the Accused's choices, regardless of the fact that most of them didn't complain.
- (e) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. We are unable to conclude that his actions in the disciplinary process were in bad faith.
- (f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. We are unable to conclude that his actions in the disciplinary process involved the submission of actually false evidence or statements, although we do find that he was evasive and at times not forthcoming.

- (g) Refusal to acknowledge wrongful nature of conduct. The Accused's conduct showed a pattern of disregard for inconvenient facts and an utter unwillingness to consider either the possibility that he had erred or that his choices could have harmed his clients in the Group. Throughout the proceedings the Accused minimized his conduct and rationalized his behavior, often noting that other members of the Group had not filed complaints, as though that somehow absolved him of responsibility for his actions and choices.
- (h) Vulnerability of victim. This factor is applicable in this case. Many, if not all, members of the Group seem to have been older and appear to the Trial Panel to be somewhat unsophisticated. The Pettets certainly fit into this profile. The Pettets were at least potentially harmed from the delay that they experienced in suing Hiljus. The fact that many of the Group members have not complained is absolutely not a defense in any way. From their perspective the members of the Group had a good and trusted friend, Hiljus. He took them to see a lawyer. The lawyer, the Accused, was experienced and has an impressive office. He not only didn't tell them that there was a good chance Hiljus was actually liable for their losses, but affirmatively told them that there was no conflict in their interests. We will never know what might have happened if the members of the Group had been advised by an authority figure, such as an impartial attorney, that Hiljus was probably liable for, and could pay for, at least some of their losses. They didn't get that unbiased advice until it was too late, by which point they had invested even more funds at the direction, and to the benefit, of Hiljus.
- (i) Substantial experience in the practice of law. This factor is applicable this case.
- (j) Indifference to making restitution. This factor is applicable in this case. As explained above in the Accused's failure to acknowledge even a possibility that his choices damaged the potential recovery of the Group.
- (k) Illegal conduct, including that involving the use of controlled substances. This factor is not applicable in this case.

There are also a number of factors that should be taken into account in mitigation of an accused's conduct. Mitigation or mitigating circumstances consist of any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

Mitigating factors include:

- (a) Absence of a prior disciplinary record. This factor is applicable in these cases as the Accused has no other disciplinary record.

- (b) Absence of a dishonest or selfish motive. This factor is not particularly applicable in this case.
- (c) Personal or emotional problems. This factor is not applicable in this case.
- (d) Timely good faith effort to make restitution or to rectify consequences of misconduct. This factor is not applicable in this case.
- (e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. This factor is not particularly applicable in this case. As noted above, while the Accused was not actively hampering the process he certainly was evasive and could have been more cooperative.
- (f) Inexperience in the practice of law. This factor is not applicable in this case.
- (g) Character or reputation. There was no evidence presented relating to this factor as it relates to the practice of law. The Accused did offer two witnesses who testified that he had a good reputation as an ethical and honest person.
- (h) Physical disability. This factor is not applicable in this case.
- (i) Mental disability or chemical dependency including alcoholism or drug. This factor is not applicable in this case.
- (j) Delay in disciplinary proceedings. The underlying claims against Hiljus arose in 2005 and 2006, the representation at issue occurred in 2009 and 2010. The complaint was filed shortly thereafter. This factor is therefore not applicable in this case.
- (k) Imposition of other penalties or sanctions. This factor is not applicable in this case.
- (l) Remorse. This factor is not applicable in this case.

### **DISPOSITION**

The Bar has requested a 60-day suspension. While it is clear that a suspension is the required sanction under the *ABA Standards*, the Trial Panel believes that 60 days is disproportionate in this matter. Therefore, based on the above, it is the decision of the trial panel that the Accused be suspended for a period of 45 days.

The Trial Panel authorizes five (5) days of the 45 day suspension sanction to be satisfied if the Accused:

- (1) actively work, in person, in the Cauble and Cauble offices, with a PLF practice management advisor to thoroughly review all office systems, office technology, office management, financial management (including the way the

bookkeeper codes and processes bills and deposits), and client relations for the firm; and

- (2) implements in his practice the recommendation of the practice management advisor with direct out of pocket costs of \$1,500 or less.

It will be sufficient to show that this provision has been met if the Accused files an affidavit of compliance over his sworn and notarized signature. The Affidavit, if the Accused chooses to cooperate with the PLF, shall be filed with Mr. Davis and will specifically indicate that the Accused has completed the above tasks. The Accused is not required in any way to waive the confidentiality that he has working with the PLF, other than to file the Affidavit. He is not required to list what recommendations were implemented or what advice was given. The PLF is not required to file any sort of document with the Bar.

Based on the above, the Accused is ordered to pay pro rata restitution of the fees paid in this matter from the Group account for the benefit of Hiljus in the sum of \$7,622.11. This sum is to be paid back, pro rata, to the Group clients as listed in Exhibit 30 with the funds paid by the Hiljus Revocable Trust for the benefit of C. Hiljus, J. Carlson, and Z. Gleeseman going to them and no funds being remitted to the Hiljus Revocable Trust.

IT IS SO ORDERED.

Dated October 10, 2013

/s/ Joan-Marie Michelsen  
Joan-Marie Michelsen, Trial Panel Chairperson

/s/ Penny Lee Austin  
Penny Lee Austin, Trial Panel Member

/s/ Thomas W. Pyle  
Thomas W. Pyle, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 11-128  
 )  
ALAN G. SELIGSON, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: John Fisher  
Disciplinary Board: Jet Harris, Chairperson  
Chas Horner  
Carrie A. Bebout, Public Member  
Disposition: Violations of RPC 1.7(a)(2), RPC 1.8(a), and RPC  
1.16(a)(3). Trial Panel Opinion. Public Reprimand.  
Effective Date of Opinion: December 17, 2013

**OPINION OF THE TRIAL PANEL**

**NATURE OF THE CASE**

The Accused attorney, admitted to the practice of law in Oregon since 1988, is charged with conflicts of interest in violation of RPC 1.7(a)(2) and RPC 1.8(a), and failing to timely withdraw upon termination in violation of RPC 1.16(a)(3).

The Accused is a sole practitioner, handling primarily bankruptcy matters. The Bar’s allegations arise out of the Accused’s representation of a bankruptcy client who sought advice as to whether and when she should file her own bankruptcy. The client was going through a divorce and her soon-to-be-ex-husband had filed a bankruptcy action that involved the client’s ranch property owned jointly with her ex-husband (hereinafter “Ranch Property”). The Accused did not believe it was in the client’s best interest to file immediate bankruptcy and the representation evolved into efforts to protect her interest in her ex-husband’s bankruptcy.

The Accused does not deny the factual allegations of the Bar’s Formal Complaint, but denies the interpretations of those facts as violations of the RPC.

The Bar seeks a 30-day suspension.

## **EVIDENCE AND BURDEN OF PROOF**

The Bar has the burden of establishing misconduct warranting discipline by clear and convincing evidence. BR 5.2. The Oregon Evidence Code does not apply to Bar disciplinary proceedings, rather the standard for admissibility of evidence is found in BR 5.1(a):

Trial panels may admit and give effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Incompetent, irrelevant, immaterial, and unduly repetitious evidence should be excluded at any hearing conducted pursuant to these rules.

The allegations put in issue by the Accused's Answer are essentially issues of law and not based on a dispute as to the objective facts on which they depend.

## **ISSUES OF FACT AND FINDINGS OF GUILT**

The Accused initially entered into an attorney-client relationship with the client to establish her own bankruptcy. In the course of events, the client and the Accused learned that the second mortgage on the Ranch Property was not properly secured. The Ranch Property was estimated to be worth approximately \$950,000, with approximately \$920,000 in first and second mortgages against the property. The potentially avoidable second mortgage created the possibility of the client having significant equity in the Ranch Property.

### **The Trust Deed**

Shortly after learning that the second mortgage was not properly secured, the client's family law attorney prepared a trust deed for the client's signature in favor of his law firm and the Accused to secure their attorney fees (hereinafter "Trust Deed"). The Accused participated minimally in creation and execution of the Trust Deed, but had knowledge of the fact that the Trust Deed had been prepared and executed by his client and the Accused consented to it. The Accused did not obtain informed consent in writing from his client with regard to the Trust Deed.

The Bar alleges that the foregoing conduct created a conflict of interest in that the Accused acquired a security interest adverse to that of his client without complying with the requirements of RPC 1.8(a):

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

RPC 1.8(a).

The Accused does not deny the factual allegations but disputes that the conduct alleged is a violation of RPC 1.8(a).

The Trial Panel finds that the Accused's conduct violated RPC 1.8(a).

### **Representation in the Adversary Proceeding**

At approximately the same time that the Accused learned of the avoidable security interest in the Ranch Property, the trustee also learned this information and subsequently filed an adversary proceeding to avoid the second mortgage and the Accused's interest in the Ranch Property, among others, and naming the Accused's client as an adverse party to that proceeding.

The Accused represented both his interest and his client's interest in the adversary proceeding filed by the trustee. The Accused did not obtain written, informed consent from his client in connection with this representation.

The Bar alleges that the Accused violated 1.7(a)(2) when he represented both his own interest and his client's interest in the bankruptcy adversary proceeding without obtaining informed, written consent from his client.

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
  1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to 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 opposed on behalf of another client; and
4. each affected client gives informed consent, confirmed in writing.

RPC 1.7(a)(2) and (b).

The Trial Panel finds that the Accused's representation of his and his client's interest in the adversary proceeding violated RPC 1.7(a)(3) and that he failed to obtain written, informed consent as required.

### **Withdrawal after Discharge**

In April 2009, the bankruptcy court issued an order requiring the property to be sold. Following this order, the Accused's client terminated the attorney-client relationship with the Accused via email April 15, 2009. (Ex 16J). The Accused did not immediately seek withdrawal and did not seek the bankruptcy court's permission to withdraw until February 2010, a time period of ten months.

The Bar alleges the Accused's failure to withdraw for a ten-month period is a violation of RPC 1.16(a)(3), which provides:

Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged.

RPC 1.16(a)(3) requires withdrawal upon discharge by the client; however, no specific time frame is provided. Case law provides only limited guidance in this regard. Arguably, the Accused was in a no-win situation. There is potential liability in withdrawing and leaving his client's interest unprotected.

The Trial Panel finds that the Accused was discharged by his client on April 15, 2009, and his failure to withdraw for ten months is a violation of RPC 1.16(a)(3).

### **SANCTIONS**

The methodology and standards for imposition of sanctions are well-established in Oregon. See *In re McDonough*, 336 Or 36, 43, 77 P3d 306 (2003); *In re Kimmell*, 332 Or 480, 487, 31 P3d 414 (2001). Referring to the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), we first assess the gravity of the particular offense in light of the duty violated, the mental state of the Accused, and the injury resulting from the misconduct. With that assessment we arrive at a baseline sanction, and then consider whether there are aggravating and mitigating factors warranting adjustment of the baseline sanction.

**Nature of the Duty Violated.**

The breaches of a lawyer’s duty of which the Accused is guilty fall into the category of violations of duties owed to clients. *Standards*, § 4.0.

**Mental State.**

The Trial Panel finds that the Accused was negligent in determining whether his conduct created a conflict of interest that required written, informed consent and in failing to timely withdraw.

**Injury.**

The Accused’s conduct caused no actual harm, but created the potential for injury to a client.

**Baseline Sanction.**

*Standards*, § 4.33 advises that “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 interest, or whether the representation will adversely affect another client, and cause injury or potential injury to a client.” There is no specific baseline sanction for failure to timely withdraw. We are satisfied that a reprimand is an appropriate baseline sanction and proceed to aggravating and mitigating factors.

**Aggravation.**

“Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.” *Standards*, § 9.21.

Under *Standards*, § 9.22, aggravating factors include prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, obstruction of the disciplinary proceeding, submission of false evidence, refusal to acknowledge wrongful nature of conduct, substantial experience in the practice of law, indifference to making restitution, and illegal conduct.

The Bar asserts that the factor regarding refusal to acknowledge the wrongful nature of conduct should apply as an aggravating factor in this case. The Trial Panel disagrees. Although the Trial Panel disagrees with the Accused’s interpretation, we find that the Accused’s position regarding the nature of his conduct is a good faith argument regarding the application of the relevant rules and do not find this amounts to a refusal to acknowledge the wrongful nature of his conduct as an aggravating factor.

The Bar argues that the Accused engaged in the alleged conduct out of self-interest. The Trial Panel agrees that self-interest was at least a significant motivating force in the Accused’s conduct.

**Mitigation.**

Factors that may justify a reduction in the degree of discipline imposed include absence of prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board, inexperience in the practice of law, character or reputation, physical disability, mental disability or chemical dependency, delay in proceedings, imposition of other penalties or sanctions, remorse, and remoteness of prior offenses.

The Trial Panel notes that the Accused has no prior disciplinary record and demonstrated that he provided full and free disclosure to the Bar and a cooperative attitude toward these proceedings.

On balance, the Trial Panel finds that aggravating factors weigh equal to mitigating factors and no deviation from the presumed sanction is appropriate.

**CONCLUSION AND ORDER**

Considering the baseline sanction appropriate under the *Standards*, as well as the aggravating and mitigating factors present here, the Trial Panel concludes that the Accused be publicly reprimanded.

IT IS SO ORDERED.

/s/ Jet Harris  
Jet Harris, OSB No. 071280  
Trial Panel Chairperson

/s/ Chas Horner  
Chas Horner, OSB No. 080848  
Trial Panel Member

/s/ Carrie A. Bebout  
Carrie A. Bebout, Trial Panel Public Member



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*<[www.osbar.org/\\_docs/rulesregs/cpr.pdf](http://www.osbar.org/_docs/rulesregs/cpr.pdf)>.)*

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