

**DISCIPLINARY  
BOARD  
REPORTER**

Report of Lawyer Discipline Cases  
Decided by the Disciplinary Board  
and by the  
Oregon Supreme Court  
for 2014

**VOLUME 28**

*January 1, 2014, to December 31, 2014*

## 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 2014 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 28 DB Rptr \_\_\_\_ (2014).

In 2014, 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, spelling errors, obvious grammatical or word usage errors, and errors in citation formatting, 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, 2014, 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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**Cite as 354 Or 697 (2014)**

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In re:	)
	)
Complaint as to the Conduct of	)
	)
STEVEN M. McCARTHY,	)
	)
Accused.	)

(OSB 11-17; SC S060882)

En Banc

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

Argued and submitted November 8, 2013.

Conrad E. Yunker, Salem, argued the cause for the Accused.

Steven M. McCarthy, McCarthy Law Offices, Independence, filed the brief on his own behalf.

Susan Roedl Cournoyer, 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 a period of 90 days, commencing 60 days from the filing of this decision.

The Accused had represented the plaintiff in a civil action involving claims under the federal Truth in Lending Act and Real Estate Settlement Procedures Act. Following complaints tendered to the Oregon State Bar regarding the quality of the Accused’s representation in that matter, a trial panel of the Bar’s Disciplinary Board found that the Accused had violated Rules of Professional Conduct (RPC) 1.1 (failure to provide a client with competent representation; RPC 1.4(a) (failure to comply with a client’s reasonable requests for information and to keep the client reasonably informed concerning the status of the client’s legal matter); RPC 1.4(b) (failure to explain matters to a client to the extent reasonably necessary to allow the client to make informed decisions); and RPC 1.15-1(c) (2008) (failure to deposit fees paid in advance by a client into a lawyer trust account and

Cite as *In re McCarthy*, 28 DB Rptr 1 (2014)

withdraw them only as earned, or as expenses are incurred). The trial panel went on to impose a 90-day suspension as a sanction. *Held*: The accused knowingly violated RPC 1.1, RPC 1.4(a), RPC 1.4(b), and RPC 1.15-1(c) (2008). A 90-day suspension is an appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 13-44  
)  
TIMOTHY O'ROURKE, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Peter Jarvis  
Disciplinary Board: None  
Disposition: Violation of RPC 1.9(a). Stipulation for Discipline.  
Public Reprimand.  
Effective Date of Order: January 20, 2014

**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 1.9(a).

DATED this 20th day of January, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Timothy O'Rourke, the Accused attorney at law (hereinafter "O'Rourke"), 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.

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

3.

O'Rourke 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 May 20, 2013, a Formal Complaint was filed against O'Rourke pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of RPC 1.2(c) (counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent), RPC 1.9(a) (engaging in a former client conflict of interest), and RPC 3.1 (knowingly taking action on behalf of a client when there is no basis in law and fact for doing so). 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 1996, O'Rourke and another member of his firm represented two of the firm's long-time clients, Wife and Husband, in preparing and executing new wills and estate plans. In her executed will, Wife created the Wife's Trust, and named Husband as trustee and Granddaughter as successor trustee.

6.

In relevant part, the will provided that if Husband survived Wife, he would receive from her estate a marital share and the income from Wife's Trust assets. Husband could distribute Wife's Trust principal under certain limited circumstances, but upon Husband's

death, Granddaughter would distribute Wife's Trust assets to Wife's daughter and Wife's granddaughters.

7.

Wife died in 1998, after which Husband, as trustee, became vested in Wife's Trust assets, including fractional interests in seven tracts of property in which Husband personally owned the remaining interests.

8.

On or about June 14, 2007, O'Rourke assisted Husband in transferring, without consideration—when the Accused should have known such action was contrary to the terms of Wife's Trust—Wife's Trust's interest in the seven tracts of property to Husband individually, and in further transferring, without consideration—and when the Accused should have known such action was contrary to the terms of Wife's Trust—five of the tracts from Husband to his nephew. On or about June 26, 2007, O'Rourke represented Husband in creating Husband's Trust and in transferring, without consideration—when the Accused should have known such action was contrary to the terms of Wife's Trust—the remaining two tracts of property to Husband's Trust.

9.

Although the Oregon Supreme Court only decided in 2010 and as a matter of first impression that a lawyer could have a former client conflict of interest arising from the prior representation of a then-deceased client (*see In re Hostetter*, 348 Or 574, 238 P3d 13 (2010)), O'Rourke anticipated at the time of the transfers that subsequent to Husband's death, Wife's Trust could seek to overturn them.

### **Violations**

10.

O'Rourke admits that, by engaging in the conduct described above, he engaged in a former client conflict of interest, in violation of RPC 1.9(a).

Upon further factual inquiry, the parties agree that the charges of alleged violation of RPC 1.2(c) and RPC 3.1 should be and, upon the approval of this stipulation, are dismissed.

### **Sanction**

11.

O'Rourke 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.** O'Rourke violated his duties to his clients to refrain from conflicts of interest. *Standards*, § 4.3. The *Standards* assume that the most important ethical duties are those obligations that lawyers owe to clients. *Standards*, at 5, *Theoretical Framework*.
- b. **Mental State.** O'Rourke acted negligently; that is, he failed as 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, Definitions*. O'Rourke negligently did not consider the risk that his assistance in the transfers that Husband desired could or would impair rights of the Wife's Trust in a way that would give rise to a disciplinable conflict in light of his prior representation of Wife.
- c. **Injury.** Injury can be potential or actual. *Standards*, § 3.0. In this case, there was actual injury to Wife's Trust, which had to take legal action to have its share of the seven tracts of property returned. The lawsuit to set the wrongful transfers aside inconvenienced Granddaughter, consumed court resources, and ultimately resulted in a diminution in the value of Husband's estate from court-ordered attorney fees. It also caused potential injury to Wife's Trust and the beneficiaries of Wife's Trust.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. O'Rourke has substantial experience in the practice of law, having been admitted in 1987. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a selfish motive. *Standards*, § 9.32(b).
  3. Full and free disclosure and cooperation in the disciplinary proceedings. *Standards*, § 9.32(e).
  4. Remorse. *Standards*, § 9.32(l).

12.

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

13.

Oregon case law also supports in the imposition of a reprimand where a lawyer engages in similar conduct. *See, e.g., In re Gerttula*, 26 DB Rptr 31 (2012) (attorney reprimanded where two individual clients owned real property as joint tenants with right of survivorship and, on behalf of both, attorney prepared deeds by which the clients conveyed the property to themselves as tenants in common. Later, after one client died, attorney represented the deceased client's children in attempts to force the surviving client to partition the property, without informed consent from his present and former clients); *In re Dole*, 25 DB Rptr 56 (2011) (attorney reprimanded where he represented father and mother in estate planning and family business matters, and continued to represent father for a period after mother died. Attorney also began to represent the adult children regarding their concerns over the valuation, liquidation, and distribution of assets from mother's estate to father, father's spending habits, and control over the family business entities. Attorney stopped representing father, but failed to obtain informed consent from father or the children when he continued to represent the children in matters adverse to father. He also disclosed to the children information he had obtained about estate and entity matters when he represented father and mother).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that O'Rourke shall be publicly reprimanded for violation of RPC 1.9(a), the sanction to be effective upon approval by the Disciplinary Board.

15.

O'Rourke 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.

16.

O'Rourke 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.

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.

Cite as *In re O'Rourke*, 28 DB Rptr 3 (2014)

EXECUTED this 8th day of January, 2014.

/s/ Timothy O'Rourke

Timothy O'Rourke

OSB No. 873131

EXECUTED this 16th day of January, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-21
	)	
IVAN S. ZACKHEIM,	)	
	)	
Accused.	)	

Counsel for the Bar:	Mary A. Cooper
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.15-1(d) and RPC 1.16(d). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	January 23, 2014

**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 1.15-1(d) and RPC 1.16(d).

DATED this 23rd day of January, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Ivan S. Zackheim, 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 27, 1976, 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 February 14, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 1.15-1(d) and RPC 1.16(d) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

On February 28, 2013, a Formal Complaint was filed against the Accused pursuant to the authorization of the SPRB, alleging violation of RPC 1.15-1(d) and RPC 1.16(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

5.

On June 13, 2009, Irina Semenyuk (hereinafter “Wife”) and her minor son (hereinafter “SS”), suffered personal injuries when the car in which they were passengers was involved in an accident (hereinafter “June 13, 2009 collision”). The driver of the car was Sergey Semenyuk (hereinafter “Husband”). In October 2009, the Accused undertook to represent Wife and Minor Child to recover for personal injuries they sustained in the June 13, 2009 collision.

6.

On November 30, 2009, Wife and her adult daughter, Yelena Semenyuk (hereinafter “Daughter”) were injured in another car accident (hereinafter “November 30, 2009 collision”). On July 29, 2010, another of Wife’s minor sons (hereinafter “DS”), was struck by a car while riding his bicycle (hereinafter “July 29, 2010 collision”). The Accused undertook to represent Wife and Daughter regarding injuries they sustained in the November 30, 2009 collision and DS regarding injuries he sustained in the July 29, 2010 collision.

7.

On November 30, 2010, Wife’s action arising out of the June 13, 2009 collision was arbitrated. The arbitrator found that Husband was the at-fault driver and awarded Wife \$18,952.50 in damages.

8.

On January 3, 2011, after consulting with the Accused, Wife decided not to appeal the arbitration decision referenced in paragraph 7 herein. She instructed the Accused to accept an \$18,952.50 settlement offer made by the Semenyuks’ automobile insurance carrier, asked about the status of her and Daughter’s claims arising from the November 30, 2009 collision, and informed the Accused that she had retained new counsel to represent SS and DS.

9.

On January 11, 2011, the Accused sent a letter to Wife asserting that her decision to terminate his services without good cause violated their retention agreement. The Accused threatened to sue Wife for his fee and to assert attorney liens against all settlements to protect the fees he had already earned and might have earned in the future.

10.

On January 31, 2011, attorney Matthew Philbrook (hereinafter “Philbrook”) notified the Accused in writing that SS and DS had terminated the Accused’s services. Philbrook enclosed the clients’ authorization for the release of their files and asked the Accused to provide an itemized statement of his costs and to explain the basis of any lien or claim for attorney fees that the Accused intended to make.

11.

The Accused did not respond to Philbrook’s letter. He talked with Wife and Husband and obtained their agreement to allow him to continue representing DS; in exchange, the Accused agreed to appeal the arbitration decision referenced in paragraph 7.

12.

The Accused obtained an agreement from the Semenyuk's insurance carrier that it would pay Wife the amount of the arbitration award and would not seek reimbursement if the jury reversed the arbitrator's decision and found the other driver at fault. On March 16, 2011, the Accused distributed the net settlement proceeds to Wife; pursuant to an agreement with Wife, the Accused withheld \$2,000.00 of those proceeds to cover Wife's costs on appeal.

13.

Wife's claims arising from the June 13, 2009 collision were tried on April 27, 2011. The jury (like the arbitrator) found that Husband was the at-fault driver. On May 16, 2011, opposing counsel filed a general judgment for money award against Wife for attorney fees and costs of \$1,732.00. Thereafter, the Accused failed either to pay the judgment or deliver to Wife the \$2,000.00 he had withheld from her settlement proceeds to pay costs on appeal.

14.

On May 12, 2011, Wife again terminated the Accused's representation of DS. She instructed the Accused to forward the file to Philbrook. On that same day, SS, who had attained the age of majority, terminated the Accused's services and directed him to forward the file to his new lawyer. The Accused improperly asserted a right to retain the files and refused to forward them to new counsel.

### **Violations**

15.

The Accused admits that, by engaging in the conduct described in paragraphs 9 through 14, he violated RPC 1.15-1(d) and RPC 1.16(d) of the Oregon Rules of Professional Conduct.

### **Sanction**

16.

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

- a. **Duty Violated.** The Accused violated duties he owed to Wife to properly handle her funds and duties he owed to SS and DS to properly handle their files upon termination. *Standards*, § 4.1, § 7.0.

- b. **Mental State.** The Accused was frustrated to be terminated and failed to appreciate that he was obligated to comply with obligations he owed to his clients.
- c. **Injury.** Wife suffered actual injury in being deprived of access to funds the Accused held in trust to pay her costs on appeal or (alternatively) having those funds be used to satisfy the judgment for costs entered against her. (The Accused paid the withheld funds to Wife in July 2013.)
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Multiple offenses. *Standards*, § 9.22(d).
  - 2. Substantial experience in the practice of law. The Accused has been licensed in Oregon since 1976. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  - 2. Cooperative attitude toward the proceeding. *Standards*, § 9.32(e).
  - 3. Character or reputation. The Accused asserts that members of the legal community are willing to attest to his good character and reputation. *Standards*, § 9.32(g).

17.

Under the ABA *Standards*, a public reprimand is generally appropriate when a lawyer has negligently dealt with client property and causes injury or potential injury to a client (*Standards*, § 4.13) or when a lawyer negligently violates a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system (*Standards*, § 7.3).

18.

Oregon case law also suggests that a public reprimand is the appropriate sanction. See *In re Lounsbury*, 24 DB Rptr 53 (2010) (reprimand imposed for lawyer's failure to promptly return unearned funds to client upon termination); *In re Angel*, 22 DB Rptr 351 (2008) (reprimand imposed for lawyer's failure to promptly return unearned funds when he withdrew from representing the client).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violating RPC 1.15-1(d) and RPC 1.16(d).

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 being suspended.

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 15th day of January, 2014.

/s/ Ivan S. Zackheim

Ivan S. Zackheim, OSB No. 763880

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. 12-52, 12-53, and 13-06
	)	
MARY E. LANDERS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	Calon Nye Russell
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2). Stipulation for Discipline. 30-day suspension, all stayed, 2-year probation.
Effective Date of Order:	February 10, 2014

**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 shall be suspended for 30 days, for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2), the sanction to be effective the day this Order is approved. However, the 30-day suspension shall be stayed pending completion of a two-year probation as described in the Stipulation for Discipline.

DATED this 10th day of February, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Mary E. Landers, 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 May 29, 2001, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Josephine County, Oregon.

3.

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

4.

On January 19, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to keep a client reasonably informed or respond to requests for information), RPC 1.4(b) (failure to adequately explain a matter to a client), and RPC 8.1(a)(2) (failure to respond to a lawful demand for information from a disciplinary authority) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

On February 8, 2013, a Formal Complaint was filed against the Accused pursuant to the authorization of the SPRB, alleging violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2) in two separate client matters. 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**

**Wineland Matter: Case Nos. 12-52 and 12-53**

5.

On January 17, 2012, Josephine County Deputy District Attorney Carrie Wineland complained that the Accused, in five separate criminal cases, engaged in various improper acts.

6.

On that same day, Disciplinary Counsel's Office requested the Accused's response to Wineland's complaint, and to some specific questions, on or before February 7, 2012. The Accused knowingly failed to respond to this request and to a subsequent letter reminding her of her duty to respond.

7.

On March 7, 2012, Disciplinary Counsel's Office referred the matter to the Oregon State Bar Local Professional Responsibility Committee (hereinafter "LPRC") for Josephine County for investigation.

8.

**Black Matter: Case No. 13-06**

On September 29, 2011, Steve Black (hereinafter "Black") retained the Accused to represent him in a dissolution of marriage proceeding. Black paid the Accused a \$3,000 retainer. Thereafter, the Accused failed to respond to Black's attempts to contact her and did not otherwise communicate with Black until December 6, 2011. Between September 30, 2011, and December 6, 2011, the Accused took no substantive action on the case.

9.

A temporary spousal support hearing was set by the court for December 6, 2011. The Accused did not timely notify Black of this hearing.

10.

On December 6, 2011, the Accused assured Black that she was prepared for the temporary support hearing, but she had not prepared or submitted a Uniform Support Affidavit (hereinafter "USA") for Black or provided his current income information to the court and the opposing party. The Accused did not inform Black of the possible legal consequences of not providing this information to the court.

11.

As a result of the Accused's failure to prepare a USA or provide current income information on Black's behalf, the judge ordered Black to pay temporary spousal support based on the financial information supplied by opposing counsel.

### Violations

12.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 7, she violated RPC 8.1(a)(2).

The Accused admits that, by engaging in the conduct described in paragraphs 8 through 11, she violated RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

### 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 a duty she owed to Black to promptly and diligently pursue his legal matter and communicate with him. *Standards*, § 4.4. The Accused also violated a duty she owed to the profession to cooperate in the Bar's investigation into her conduct. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted knowingly with regard to RPC 1.3, RPC 1.4(a), and RPC 1.4(b). The Accused intentionally failed to respond to the Bar.
- c. **Injury.** Black sustained actual injury in that the Accused's failure to file his USA caused him to lose the opportunity to have the court consider his actual income to determine if spousal support should be awarded. Black also experienced frustration when the Accused failed to pursue his legal matter or respond to his inquiries. *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004). There was also the potential for injury to Black in that the court could have imposed sanctions for failure to file a USA. In the Wineland matter, the Bar sustained actual injury in that staff spent additional time and effort to obtain the information the Accused should have provided.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Multiple offenses. *Standards*, § 9.22(d).
  - 2. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 2001. *Standards*, § 9.32(g)
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of prior disciplinary record. *Standards*, § 9.32(b).
  - 2. Remorse. The Accused is remorseful for her misconduct. *Standards*, § 9.32(l).

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 a client. *Standards*, § 4.42. Suspension is also generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.0.

15.

Case law suggests that a period of suspension is the appropriate resolution of this case. *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (30-day suspension for failure to adequately communicate with a client where mitigating circumstances outweighed the aggravating circumstances); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (30-day suspension for, among other things, failure to inform a client that the client's appeal had been dismissed by the court); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension for neglect and failure to cooperate with the Oregon State Bar; 60-days of the suspension was attributed to the neglect charge alone).

Lawyers have also been suspended for 60 days for failure to cooperate in a Bar investigation. *In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996).

The Accused's conduct is similar to that in *In re Snyder*. The conduct occurred over a short period of time (November 2011 through December 6, 2011) and did not involve misrepresentation or dishonesty.

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days, for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2), the sanction to be effective the day this Stipulation for Discipline is approved. However, the 30-day suspension shall be stayed pending completion of probation as described herein. The Accused will be subject to a two-year probation supervised by the Disciplinary Counsel's Office, which shall include the following terms and conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9;
- (b) The Accused shall bear any costs associated with this Stipulation for Discipline.
- (c) If during this two-year period of probation the Accused resumes the practice of law, she must participate in quarterly meetings with a designated practice mentor and prepare quarterly progress reports for submission to the Disciplinary Counsel's Office; the practice mentor will be required to review the Accused's calendar and files with her at each meeting, to ensure that:
  - 1. all matters are properly calendared and tickled;
  - 2. she has undergone a review of her office practices by the PLF office Practice Management Program; and
  - 3. she is properly communicating with her clients.

17.

In the event the Accused does not resume her legal practice during the period of her two-year probation, instead of a practice mentor, a member of the State Lawyers Assistance Committee or such other person approved by Disciplinary Counsel in writing shall supervise the Accused's probation.

18.

Whether or not the Accused resumes her legal practice within the next two years, during the period of her probation, she shall continue with her current medical and mental health treatment, including taking prescribed medications and undergoing therapy with her mental health and primary care physicians for her re-occurring migraines and depression.

19.

No later than December 31, 2014, the Accused shall attend and successfully complete the Ethics School requirement of BR 6.4. The Accused acknowledges that a failure to complete this and any other requirement timely may be grounds for the termination of this agreement by the SPRB. This requirement is in addition to any other provision of this agreement that requires the Accused to attend or obtain continuing legal education (CLE) credit hours.

20.

No later than November 1, 2015, the Accused shall also attend and successfully complete 8 hours of CLE related to the calendaring, docketing and file tickling systems, or

office management and building a successful practice through improved client communication.

21.

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 any term of suspension. In this regard, the Accused reports that she is not currently practicing law and does not have any clients or client files at this time.

22.

The Accused acknowledges that should she be suspended, 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.

23.

The Accused represents that she is only admitted to practice law in Oregon. If the Accused were admitted to practice in another jurisdiction the Bar would notify that jurisdiction of her current status and she acknowledges that the Bar would inform that jurisdiction of the final disposition of this proceeding.

24.

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

EXECUTED this 29th day of January, 2014.

/s/ Mary E. Landers

Mary E. Landers, OSB No. 011519

EXECUTED this 4th day of February, 2014.

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. 12-139  
)  
JOHN L. BALLARD, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Christopher R. Hardman  
Disciplinary Board: Ronald L. Roome, Chairperson  
Carl W. Hopp  
John G. McBee, DDS, Public Member  
Disposition: Trial Panel Opinion. Dismissed.  
Effective Date of Opinion: February 11, 2014

**TRIAL PANEL OPINION**

**Introduction:**

This matter was tried before a three-member Trial Panel in the City of Hermiston, Oregon, on October 31, and November 1, 2013. Both sides submitted trial briefs in advance of the trial. The Trial Panel consisted of attorney member Carl W. Hopp, Jr., public member John G. McBee, DDS, and attorney member and Trial Panel chairperson Ronald L. Roome. The Oregon State Bar was represented by Kellie F. Johnson, Assistant Disciplinary Counsel. John L. Ballard was present and was represented by Attorney Christopher R. Hardman.

Trial witnesses called by the Bar were Marylu Lopez, attorney Arron Guevara, attorney Barbara J. Aaby, and attorney John L. Ballard (called jointly by both parties). Witnesses called by the defense were attorney Paul Saucy, Hermiston Police Captain Daryl Johnson, attorney Sally Anderson-Hansell, attorney Michael Breiling, and attorney Thomas J. Creasing, Jr.

**General Nature and Scope of the Charges:**

Ballard represented husband (Richard Veliz) in a dissolution of marriage proceeding. Both parties to the dissolution action became subject to the terms of an automatic statutory

restraining order, found in ORS 107.093, when the wife (Marylu Lopez) was served with the Summons and Petition for Dissolution. The restraining order in ORS 107.093(2)(c) provides, in relevant part, that the parties in a dissolution proceeding may not conceal marital property without a court order or the other party's written consent.

Wife was using and had possession of a Ford F-150 pickup, which was marital property. On June 29, 2010, the Ford F-150 was "recovered" in the early morning by Ballard's staff member, while wife was asleep, from a location where wife was staying. The Ford pickup was taken at Ballard's direction, with a key Ballard obtained from his client for that purpose, and without benefit of a court order or wife's consent or knowledge. Ballard knew at the time that he and his client were subject to the ORS 107.093 statutory restraining order. Over the course of the next five to six weeks, and despite a number of requests to do so, Ballard refused to provide the location of the Ford F-150 pickup to wife or her attorney and refused to return possession of the vehicle to wife. On August 9, 2010, about 1 ½ months after the vehicle was taken from wife's possession, the court ordered that the F-150 pickup be returned to wife. Ballard complied with the court order by returning the vehicle.

The Oregon State Bar contended that Ballard violated ORS 107.093, the automatic statutory restraining order, by taking the Ford pickup and concealing its location from wife and her attorney, without court order and without wife's consent. As a result, the Bar requested that the Trial Panel suspend Ballard from the practice of law for thirty days.

Ballard denied that his actions violated ORS 107.093.

The relevant section of the statutory restraining order relied upon by the Oregon State Bar, ORS 107.093(2)(c), provides:

“(2) The restraining order issued under this section shall restrain the petitioner and respondent from:

\*\*\*

- (c) Transferring, encumbering, concealing or disposing of property in which the other party has an interest, in any manner, without written consent of the other party or an order of the court, . . .”

The question presented to the Trial Panel in this case was: Did Ballard improperly take possession of and conceal the Ford F-150 pickup, in violation of ORS 107.093(2)(c), because he did not have a court order or wife's permission and because he refused to disclose the location of the vehicle or return it to wife?

**TRIAL PANEL OPINION:**

This case turns on statutory construction of ORS 107.093, and in particular subsection (2)(c) of that statute. There was no dispute of material fact. By a split decision, the majority

of the Trial Panel finds that the Bar did not prove Ballard violated the statute at issue and, as a result, that Ballard is ACQUITTED of the charges.

However, it should be made clear that the Trial Panel unanimously disapproves of Ballard's conduct. Ballard's actions were overzealous. An attorney snatching and holding the opposing party's sole means of transportation reflects poorly on all lawyers. What if there had been a breach of the peace and someone was hurt? What if wife's attorney, following Ballard's example, took the vehicle back? Where do personal, self-help style, snatch and grab activities by attorneys end?

The claim by Ballard of "I owed no duty to the wife" rang hollow with the Trial Panel. As a direct result of Ballard's self-help actions, wife was left without a vehicle for an extended period of time. Ballard's actions caused actual harm to the wife, to the couple's daughter, and to the perception of lawyers held by the community at large. The Trial Panel found it offensive for Ballard, as an attorney and officer of the court, to be directly involved in surreptitiously taking and holding the vehicle used by wife, no matter the rationale offered.

For these reasons and others, the Public Member of the Trial Panel, whose opinion is typically representative of the conscience and norms of the community, finds that Ballard's actions were wrongful and that Ballard concealed the vehicle in direct violation of the statute. The Public Member finds further that, at a minimum, Ballard should be sanctioned with a Public Reprimand.

#### **Evidentiary Standards and Burden of Proof:**

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

With the material facts in this case are undisputed, the decision of the Trial Panel turns on the meaning and interpretation of a statute. It is not likely under these circumstances that the Bar is required to "prove" the statute's meaning by clear and convincing evidence. Instead, it is the province of a trial judge, or in this case the Trial Panel, to determine the law. In that respect, there can only be one legally correct construction of the law in question. Here, the majority of the Trial Panel did not accept the Bar's interpretation of the statute at issue, and as a result held on undisputed facts that the Bar did not prove a violation of ORS 107.093(2)(c).

#### **Pleadings—Bar's Complaint and Ballard's Answer:**

The Formal Complaint against Ballard was filed on October 22, 2012. Ballard's Answer was filed on December 4, 2012. The Bar's Amended Formal Complaint was filed on or about May 13, 2013. Ballard's Answer to Amended Formal Complaint was filed on May 28, 2013.

The Bar alleged two causes of action in its Amended Complaint. Both causes of action contend that Ballard violated ORS 107.093, the automatic statutory restraining order, when he directed a member of his staff to “recover” the Ford pickup that was in wife’s possession and then over a period of weeks concealed the location of the vehicle from the wife and her lawyer. (At trial, it became clear that the Bar more specifically contended that Ballard’s conduct violated section (2)(c) of ORS 107.093.) As a result of Ballard’s conduct, the Bar alleged that Ballard violated the following Rules of Professional Conduct:

RPC 1.2(c), counseling or assisting a client to engage in illegal conduct;

RPC 3.4(c), knowingly disobeying an obligation under the rules of a tribunal; and

RPC 8.4(a)(4), engaging in conduct prejudicial to the administration of justice.

Ballard’s Answer to the Amended Complaint denied that the pickup was “hidden” and claimed that Ballard did not violate ORS 107.093, or any other statute or court order.

#### **DISCUSSION—Findings of Fact and Conclusions of Law:**

The Trial Panel found all witnesses to be credible.

The Trial Panel found that the material facts in this case were not in dispute. Both parties agreed.

Both sides advised that the primary issue in dispute before the Trial Panel was the meaning and scope of ORS 107.093, the automatic statutory restraining order, and in particular the concealment provision of ORS 107.093(2)(c), as applied to the undisputed material facts in this case. Did Ballard violate the terms of the statutory automatic restraining order, and in particular did he violate the concealment prohibition, when his assistant retrieved the vehicle from wife, without permission and without a court order, and then refused to return or disclose the location of the Ford F-150 vehicle? The following sets out the material facts and conclusions of law accepted by the majority of the Trial Panel.

#### **MATERIAL FACTS:**

**April 13, 2010.** On behalf of husband (Richard Veliz), Ballard filed (1) a Petition for Dissolution of Marriage and (2) a Motion for Order to Show Cause Re Temporary Protective Order of Restraint and Ex Parte Order. The Show Cause Motion pertained only to parenting time and custody matters under ORS 107.097. As a result, the subsequent “status quo” Order signed by the court on April 15, 2010, did not address use or possession of marital estate property, and specifically did not deal with possession and use of the couple’s three vehicles.

(Note: The April 15, 2010 “status quo” Order in this case is distinct from the “automatic restraining order” required in marital dissolution proceedings by ORS 107.093. In practice, the ORS 107.093 automatic restraining order is implemented by service of a form found in the Uniform Trial Court Rules, section 8.080.)

As required by ORS 107.093(5), Ballard attached the standard UTCR 8.080 form to the Summons and Petition for Dissolution of Marriage. The UTCR 8.080 form is entitled “Notice of statutory restraining order preventing the dissipation of assets in domestic relations actions.” This form commands, in relevant part, that upon service of the Summons and Petition both parties are restrained from “[t]ransferring, encumbering, concealing, or disposing of property in which the other party has an interest, in any manner, without written consent of the other party or an order of the court.” The language found in the UTCR 8.080 form is taken directly from the statute at issue, ORS 107.093(2)(c).

**May 27, 2010.** The Summons and Petition for Dissolution of Marriage, along with the UTCR 8.080 form setting out the terms of the automatic restraining order, were served on wife (Marylu Lopez). Wife had possession and use of the couple’s Ford F-150 pickup at that time.

**June 23, 2010.** Wife filed a pro se Response to the Petition for Dissolution of Marriage. The Response suggested that wife had consulted with Legal Aid Services in preparing the form.

**June 29, 2010.** In the early morning hours, while wife was asleep, Ballard directed a member of his office staff to take possession of the Ford F-150 from a location where wife was staying temporarily. The Ford F-150 pickup was a marital asset. Ballard did not have a court order allowing him to take possession of the vehicle. Nor did he have wife’s permission to do so. Husband was listed as the sole registered owner, but wife had been contributing to the monthly payments on the vehicle. The F-150 pickup had been driven by wife as her primary vehicle for some time. Husband previously gave Ballard “blanket authority” to take the vehicle. At Ballard’s request, husband provided Ballard with a key to the F-150 pickup for that purpose. Ballard had been planning to “recover” the vehicle for his client for some time, and in fact considered taking the vehicle the night before while it (and presumably wife) was at Fiesta Foods. After the vehicle was taken from wife’s possession, Ballard directed that the Ford F-150 pickup be placed in a “secure location” at Ballard’s assistant’s home.

That same morning, on June 29, 2010, Ballard called the Hermiston Police Department and wife’s Legal Aid attorney, Arron Guevara, to report that he had taken possession of the Ford F-150 pickup. Guevara called wife that morning to inform her that the Ford F-150 was no longer at the location where she was staying. Wife was surprised to learn that the vehicle had been taken. Some items of wife’s personal property, including her purse, were in the Ford F-150 when it was “recovered” by Ballard. Arrangements were made through counsel for return of the personal property to wife. (Although wife did obtain her personal property from Ballard’s office, she claimed that \$100 was missing from her purse.) Attorney Guevara faxed three letters to Ballard on June 29, 2010 regarding return of wife’s personal property and the “apparent violation of the restraining order.”

**June 30, 2010.** Legal Aid attorney Arron Guevara filed a formal Notice of Appearance on behalf of wife. In a response to Guevara's letters from the day before, Ballard sent a letter to Guevara stating that, "My client had nothing to do with the asset protection activities by recovering the vehicle your client was possessing improperly."

**July 2, 2010.** Legal Aid attorney Arron Guevara filed Respondent's Motion for Show Cause Order Re: Temporary Orders. The Show Cause Motion concerned custody and parenting time for the couple's daughter, but also requested that wife be given exclusive use and possession of the couple's Honda Civic. Wife's supporting affidavit, signed by her on June 30, 2010, stated that she had been driving the Ford F-150 for over a year, that she drove the vehicle on June 28, 2010 to her sister's home, where she spent the night, and that that was when the Ford F-150 "was taken without my permission, apparently by attorney John Ballard." In the affidavit, wife asked to drive the couple's Honda Civic during the pendency of the dissolution proceeding.

**July 9, 2010.** Wife's attorney filed a second motion seeking an order giving her exclusive use and possession of the parties' Honda Civic.

**July 23, 2010.** Ballard filed Objections to wife's motions, seeking court authority to sell the Ford F-150 in order to pay off the lien owed on the pickup.

**July 30, 2010.** Wife's attorney filed an Ex Parte Motion for Order to Show Cause Re: Contempt of Court, seeking to find husband in contempt for taking and concealing the Ford F-150 in violation of ORS 107.093(2)(c). The motion on behalf of wife claimed that husband or his agent "took the marital vehicle which Respondent had been driving, while she lay sleeping, and concealed said vehicle." Wife's affidavit in support of the contempt motion stated that the last time she saw the Ford F-150 pickup it was parked in front of her sister's house, that Ballard had called her attorney Arron Guevara the morning of June 29, 2010 to inform him that husband had taken the vehicle, and that "Since the time I went to bed on the night of June 28/29, I have not known where this vehicle is, as it has been concealed from me."

**August 9, 2010.** The court, at a hearing involving the parties, orally ordered that the Ford F-150 pickup be returned to the wife's possession. In the next day or so, Ballard complied with the order of the court.

**September 14, 2010.** The court entered a written order giving wife temporary exclusive use of the Ford F-150. No order of contempt was issued by the court; the record is silent on disposition of that issue. No claim was made that the Ford pickup value was dissipated.

#### **CONCLUSIONS OF LAW:**

The majority of the Trial Panel found that the restraining order restrictions in ORS 107.093(2)(c) did not apply to Ballard's actions. In other words, that technically Ballard did

not conceal the pickup in violation of that statute. Both sides knew that Ballard and his client had taken possession of the Ford F-150 pickup. There is no dispute that the Ford vehicle was included in the marital estate and that it was not concealed from the court.

The purpose of ORS 107.093 is to prevent dissipation, transfer, or concealment of finances and other assets from the marital estate. The automatic restraining order imposed by ORS 107.093 requires that marital property be maintained so that the court can dispose of the parties' assets in an orderly fashion. This statute does not dictate the question of use or possession of property. Rather, ORS 107.095 provides the process for determination of temporary use and possession of property during a dissolution proceeding. If a party conceals property from the court, then a post-dissolution remedy is found in ORS 107.452.

Neither side offered Legislative History on ORS 107.093. Nor did they offer case law explicating the scope of the statute at issue. Both sides did offer testimony from seasoned, well-qualified domestic relations attorneys.

The majority of the Trial Panel found it significant that the Uniform Trial Court Rule 8.080 form, which implements the provisions of ORS 107.093, expressly states that the automatic restraining order is for "preventing the dissipation of assets" in domestic relations actions. Presumably, this UTCR form was created and established by court rule pursuant to ORS 107.094. There is no language in that form, or in ORS 107.093, creating or preventing a temporary or exclusive use or possession of property by the parties. That aspect of domestic relations proceedings is, in fact, accomplished via ORS 107.095. ORS 107.095 provides that the court may provide an order "for the temporary use, possession and control of the real or personal property of the parties." ORS 107.095(1)(f).

There was no ORS 107.095 use or possession order in place on June 29, 2010. Once served with process, wife could have requested a hearing under ORS 107.093(4) or under ORS 107.095 to maintain her possession of the Ford pickup. She did not do so. The UTCR 8.080 form served on wife gave her express notice that she had a right to apply to the court for further temporary orders or to modify the terms of the automatic restraining order.

The status quo order alleged in the Bar's Complaint involved child custody and parenting issues under ORS 107.097. It did not address possession or use of the Ford F-150 pickup.

The Bar asked the Trial Panel to imply, or write into the statute at issue, that ORS 107.093's automatic restraining provisions include a status quo order regarding possession and use of personal property. However, the majority of the Trial Panel concludes that the language of ORS 107.093 does not address the temporary possession of marital property issue raised in this case. The Trial Panel is directed, as a matter of statutory construction, to declare what is found in a statute and to not insert into a statute what has been omitted. ORS 174.010. The Trial Panel cannot insert into the ORS 107.093 what is not there. No matter how much the Trial Panel disapproves of Ballard's actions as rude, sharp, and in bad form,

the Bar has not proved that Ballard violated ORS 107.093. That statute prohibits dissipation of assets and concealment from the court and does not address the issue of temporary possession and use of the Ford F-150. No one claimed that the value of the Ford F-150 pickup was dissipated.

**CONCLUSION:**

Both sides agreed in closing argument that if Ballard did not violate the concealment provision of ORS 107.093(2)(c), then the Trial Panel should find that he did not violate the Rules of Professional Conduct. The majority of the Trial Panel concluded that Ballard's actions did not violate the statute. As a result, he must be acquitted and the complaint against him dismissed.

**ORDER OF THE TRIAL PANEL**

For the forgoing reasons, IT IS HEREBY ORDERED that John L. Ballard be ACQUITTED of the charges and that the claims against him be dismissed.

Dated: November 26, 2013

/s/ Ronald L. Roome

Ronald L. Roome, OSB #880976

Trial Panel Chairperson

/s/ Carl W Hopp, Jr.

Carl W. Hopp, Jr., OSB #751760

Trial Panel Member

/s/ John G. McBee, DDS

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. 13-134  
)  
GREGG A. McDONALD, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 3.4(c). Stipulation for Discipline.  
Public Reprimand.  
Effective Date of Order: February 19, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

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

DATED this 19th day of February, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Gregg A. McDonald, 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 26, 1991, 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, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

On December 16, 2011, the Accused stipulated to the entry of a permanent stalking order, prohibiting him from contacting the petitioner in a civil case. On December 20, 2011, the circuit court entered an order memorializing the stipulated agreement. The Accused was aware of the court’s order prohibiting contact with the petitioner.

6.

On May 2, 2012, the Accused knowingly contacted the petitioner, in violation of the circuit court’s stalking order, by sending and/or making written communications to the petitioner.

7.

On October 4, 2012, the Accused pled guilty to one count of violating the circuit court's stalking protective order, and was found in willful contempt of court for that violation.

### **Violation**

8.

The Accused admits that, by knowingly violating the restraining order as described above, he violated RPC 3.4(c).

### **Sanction**

9.

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

- a. **Duty Violated.** The Accused violated his duty to the legal process to avoid abuse of the process. *Standards*, § 6.2.
- b. **Mental State.** The Accused acted knowingly, in that he acted with a conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards, Definitions*.
- c. **Injury.** Injury can be potential or actual. *Standards*, § 3.0. The Accused caused potential and actual injury to the judicial process, as well as potential injury to the petitioner in the restraining order proceeding.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused's misconduct was undertaken for selfish reasons. *Standards*, § 9.22(b).
  2. The Accused has substantial experience in the practice of law, having been admitted in Oregon in 1991. *Standards*, § 9.22(i)
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. The Accused has no prior relevant history of discipline. *Standards*, § 9.32(a).

2. There was no dishonest motive. *Standards*, § 9.32(b).
3. The Accused was experiencing personal or emotional problems at the time he engaged in the misconduct at issue. *Standards*, § 9.32(c).
4. The Accused timely responded and fully cooperated with the Bar in its investigation of his conduct. *Standards*, § 9.32(e).
5. The Accused had other penalties and sanctions imposed upon him for the conduct at issues. Fines were levied against the Accused for his criminal conviction and he was placed on a period of supervised probation. *Standards*, § 9.32(k).
6. Remorse. *Standards*, § 9.32(l).

10.

Under the ABA *Standards*, a 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. However, when considering the Accused's substantial mitigation, a reprimand is the more appropriate outcome on these facts.

11.

Oregon case law supports the imposition of a public reprimand where, as in these circumstances, there is a single violation of a court order or ruling and mitigating factors outweigh those in aggravation. *See, e.g., In re Rubin*, 25 DB Rptr 13 (2011) (attorney reprimanded for violation of a protective order issued in one proceeding when he filed a motion in another proceeding describing information that the protective order deemed confidential); *In re Karlin*, 22 DB Rptr 346 (2008) (attorney found in willful contempt of court was reprimanded for failing to pay obligations and comply with other requirements arising out of a general judgment of dissolution of marriage); *In re Buchanan*, 17 DB Rptr 226 (2003) (reprimand for violation of court's restraining order in domestic relations proceeding); *In re Jones*, 13 DB Rptr 133 (1999) (reprimand for single violation of DUI probation).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 3.4(c), the sanction to be effective upon approval by the Disciplinary Board.

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.

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.

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 31st day of January, 2014.

/s/ Gregg A. McDonald

Gregg A. McDonald

OSB No. 910740

EXECUTED this 11th day of February, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 12-61
	)	
KATHERINE C. TANK,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Bradley F. Tellam
Disciplinary Board:	None
Disposition:	Violation of RPC 3.3(a), RPC 8.4(a)(3), and RPC 8.4(a)(4). Stipulation for Discipline. 90-day suspension.
Effective Date of Order:	April 1, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days, effective April 1, 2014, or 10 days following approval by the Disciplinary Board, for violation of RPC 3.3(a), RPC 8.4(a)(3), and RPC 8.4(a)(4).

DATED this 3rd day of March, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Katherine C. Tank, 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 23, 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 advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On September 24, 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 3.3(a) (false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made); RPC 3.4(b) (falsifying evidence); RPC 4.1 (making false statements to a third person or failing to disclose material facts necessary to avoid assisting an illegal or fraudulent act by a client); RPC 8.4(a)(2) (criminal conduct reflecting adversely on honesty, trustworthiness, or fitness as lawyer); 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 for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

In late December 2008, Northwest Utilities Services, Inc. (hereinafter “NUS”) hired the law firm of Schwabe Williamson & Wyatt, PC (hereinafter “Schwabe firm”) to assist it in responding to a subpoena duces tecum from Central Electric Cooperative (hereinafter “CEC”) in a federal action (hereinafter “*Gonzales v. CEC*”). The matter was assigned to the Accused.

6.

An issue in the *Gonzales v. CEC* litigation was the ownership and control of NUS.

7.

On or before January 6, 2009, the Accused asked a Schwabe firm business law partner to review and “clean up” the corporate records for NUS. This ultimately included the creation of bylaws, organizational minutes, stock subscription agreements, stock share certificates, a stock ledger, corporate maintenance minutes a/k/a consent of directors and shareholders (hereinafter collectively, “corporate records”). These corporate records, which were not drafted by the Accused, and which were created without the Accused’s personal involvement, had never previously existed; and purported to memorialize corporate events and actions since 1988.

8.

On January 6, 2009, the Accused produced to CEC both corporate documents that existed prior to the Accused’s representation of NUS and the corporate records, without differentiating between the prior existing records and the created corporate records.

9.

In July 2009, on behalf of NUS, the Accused filed a state lawsuit against CEC in Deschutes County Circuit Court (hereinafter “*NUS v. CEC*”). An issue in the *NUS v. CEC* litigation was the ownership and control of NUS.

10.

On October 1, 2010, the Accused and attorneys for CEC appeared for a state-court hearing in *NUS v. CEC* on CEC’s motion to compel the production of, among other things, the Schwabe firm’s billing records for NUS. Arguing that the Schwabe firm should not be required to produce NUS’s billing records, the Accused stated or implied to the court that the corporate records were prepared long before “this” litigation was filed. The Accused’s representations, standing on their own, did not accurately reflect the true events in the matter and the Accused did not provide sufficient information to the court to make her statements not misleading.

### **Violations**

11.

The Accused admits that, in light of the above, her representations to the court violated RPC 3.3(a), RPC 8.4(a)(3), and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct.

Upon further factual inquiry, the parties agree that the charges of alleged violation of RPC 3.4(b), RPC 4.1, and RPC 8.4(a)(2) 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 violated her duties to the court to ensure that accurate information was conveyed to the court and to comply with court rules.
- b. **Mental State.** The Accused acted negligently in prejudicing the administration of justice. Her inaccurate statements to the court were 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.
- c. **Injury.** Injury can be potential or actual. *Standards*, § 3.0. In this case, there was actual injury to the extent that the court and the parties did not have a complete understanding as to when the corporate records were created in reaching a decision on the motion to compel.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. The Accused has substantial experience in the practice of law, having been admitted in Oregon in 1988. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a selfish motive. *Standards*, § 9.32(b).
  3. Full and free disclosure and cooperation in the disciplinary proceedings. *Standards*, § 9.32(e).
  4. Remorse. *Standards*, § 9.32(l).

13.

Under the ABA *Standards*, a 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.

14.

Oregon case law also suggests that a suspension is appropriate for the Accused's conduct. *See, e.g., In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (attorney suspended for 120 days when, while representing a client in a dissolution of marriage proceeding, attorney falsely represented to the court that burglaries at his office were the reason he was unable to proceed with the case in a timely manner); *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004) (attorney suspended for 90 days where her firm represented a client charged with domestic violence and she gave legal advice to the victim and assisted in preparing an affidavit for the victim to use in seeking the dismissal of the charge against the firm's client. Thereafter, the attorney misrepresented to the judge whether she had given legal advice to the victim and concealed material information about the extent of her contact with the victim); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (attorney suspended for 120 days when he made misrepresentations to the court regarding why he had not moved his client's civil case forward or complied with the court's order that an arbitration of the matter be set by a date certain).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days for violation of RPC 3.3(a), RPC 8.4(a)(3), and RPC 8.4(a)(4), the sanction to be effective on March 1, 2014, or 10 days following approval by the Disciplinary Board, whichever is later.

16.

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. In this regard, the Accused has arranged for Myles A. Conway, 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 Myles A. Conway has agreed to accept this responsibility.

17.

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.

18.

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.

19.

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.

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 3rd day of February, 2014.

/s/ Katherine C. Tank

Katherine C. Tank

OSB No. 883199

EXECUTED this 11th day of February, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 12-168  
)  
MONTGOMERY W. COBB, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(2). Stipulation for Discipline.  
30-day suspension.  
Effective Date of Order: March 24, 2014

**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 March 24, 2014, for violation of RPC 8.4(a)(2).

DATED this 5th day of March, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Montgomery W. Cobb, 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 13, 1983, and has been a member of the Oregon State Bar continuously since that time, now having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On November 17, 2012, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 8.4(a)(2) and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

From 2002 until November 1, 2009, the Accused practiced law with attorney Eric M. Bosse as an LLP, Cobb & Bosse. The Accused was the designated “tax matters partner.” The firm’s clients included property developers, builders, and small businesses. In the year leading to its dissolution, the firm experienced financial problems caused by the economic recession and housing market collapse, which hit the firm’s clients hard. When the firm dissolved, Cobb and Bosse each established solo offices, each of which retained certain of the firm’s employees.

6.

The Oregon Department of Revenue (hereinafter “ODR”) reported that Cobb withheld money from employees’ wages but, beginning with the third quarter of 2008, failed to pay this money to the state.

7.

ODR reports the balances due by Cobb & Bosse, LLP, as of June 29, 2012, as follows:

1. 3rd Quarter 2008—\$6,043.15;
2. 4th Quarter 2008—\$1,834.83;
3. 1st Quarter 2009—\$2,729.26;
4. 2nd Quarter 2009—\$4,723.60;
5. 3rd Quarter 2009—\$8,681.82; and
6. 4th Quarter 2009—\$8,328.81.

8.

After Cobb & Bosse, LLP dissolved, Montgomery Cobb, LLC incurred the following employment tax debt:

1. 1st Quarter 2010—\$2,444.83;
2. 2nd Quarter 2010—\$1,814.23; and
3. 3rd Quarter 2010—\$2,642.15.

9.

Cobb & Bosse, LLP filed Oregon quarterly withholdings reports for the third and fourth quarters of 2008 and the first quarter of 2009, prepared by the firm’s bookkeeper, Patty Bosse. However, the firm did not pay the amounts it reported as withheld.

10.

After the firm dissolved and the Accused formed his own LLC in November 2009, the Accused failed to file any state quarterly reports. Similarly, the Accused failed to file Oregon Schedule B- State Withholding Tax or WR- Oregon Annual Withholding Tax Reconciliation Reports for any of the quarters mentioned above.

11.

In 2008, 2009, and 2010, both firms issued paystubs to employees showing the amounts withheld from every paycheck. The Accused never set aside the withheld funds to pay the taxes. Even if there was sufficient money in the firm’s business checking accounts to cover the withheld amounts for any given quarter, he used those funds to pay other creditors

or himself. Both the Accused and Bosse took draws during the period that the firm's withholding taxes went unpaid.

### Violations

12.

The Accused admits that when he failed to pay over funds withheld from employees' wages for federal and state taxes over three tax years, for ten separate quarters (as described in paragraphs 5 through 11 above) this constituted a crime under 26 USC § 7501(a) subject to penalties imposed under 26 USC § 7202 and 26 USC § 7203 in violation of RPC 8.4(a)(2).

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

### Sanction

13.

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

- a. **Duty Violated.** By failing to timely file and pay his withholding taxes, the Accused violated federal law that makes it a crime to willfully fail to pay withholding taxes or returns. This conduct was a breach of the Accused's duty to the public to maintain his personal integrity. *Standards*, § 5.1.
- b. **Mental State.** The Accused acted knowingly and willfully when he failed to timely file or pay his employer withholding taxes over the course of three tax years, for 10 separate quarters, because he chose to pay other creditors or himself.
- c. **Injury.** An injury need not be actual, but only potential to support the imposition of sanctions. The Accused's misconduct harmed the legal profession by reflecting poorly upon attorneys. There is significant injury to the taxing authorities and the federal government because they were deprived of the use of payroll taxes that were past due.
- d. **Aggravating Factors.** Aggravating factors include:
  1. The Accused acted with a selfish motive in that chose not to pay his employer withholding taxes and instead used those funds to pay other creditors or himself. *Standards*, § 9.22(b).

2. There was a pattern of misconduct. The Accused failed to timely file or pay the withholding taxes over an extended period of time. *Standards*, § 9.22(c).
  3. The Accused has substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1983. *Standards*, § 9.22(i).
- e. **Mitigating Factors.** Mitigating factors include:
1. The Accused does not have a prior disciplinary record. *Standards*, § 9.32(a).
  2. The Accused was experiencing personal problems in that his financial hardship resulting from the economic recession influenced the Accused's conduct. *Standards*, § 9.32(c)
  3. The Accused feels remorse and has subsequently filed tax returns for 2008, 2009, and 2010. *Standards*, § 9.32(l).

14.

The *Standards* provide that suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on this fitness to practice law. *Standards*, § 5.12.

15.

Although the Oregon Supreme Court has not yet ruled on the ethics of a lawyer willfully failing to pay withholding taxes, the court has found that willfully failing to timely file personal tax returns reflects adversely on a lawyer's fitness to practice law and warrants suspension. *See In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001); *In re Morris*, 215 Or 180, 332 P2d 885 (1958); *see also In re DesBrisay*, 288 Or 625, 606 P2d 1148 (1980).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of RPC 8.4(a)(2), once approved by the Disciplinary Board, and the sanction will be effective on March 24, 2014.

17.

In addition, on or before August 1, 2014, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$176.25, incurred for discovery. Should the Accused fail to pay \$176.25 in full by August 1, 2014, 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 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 being suspended.

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 Oregon Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 24th day of February, 2014.

/s/ Montgomery W. Cobb

Montgomery W. Cobb

OSB No. 831730

EXECUTED this 26th day of February, 2014.

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson

OSB No. 97-0688

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-45, 13-46, 13-47,  
) and 13-48  
SUSAN C. STEVES, )  
)  
Accused. )

Counsel for the Bar: Martha M. Hicks

Counsel for the Accused: Mary J. Grimes

Disciplinary Board: John E. Laherty, Chair  
Max S. Taggart II  
Steve P. Bjerke, Public Member

Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC  
1.16(c), RPC 3.3(a)(1), RPC 8.4(a)(3), and RPC  
8.4(a)(4). Trial Panel Opinion. Disbarment.

Effective Date of Opinion: April 8, 2014

**TRIAL PANEL SANCTION OPINION**

On September 19, 2013, Region 1 Disciplinary Board Chairperson Carl W. Hopp entered an Order of Default in the above-captioned cases (hereinafter collectively “the Cases”) deeming the allegations of the Bar’s Formal Complaint to be true. The Cases were then referred to a Trial Panel of the Disciplinary Board for determination of sanctions. The Trial Panel consisted of John E. Laherty, Chairperson; Max S. Taggart II, Attorney Member; and Steve Bjerke, Public Member.

After due notice to both the Office of Disciplinary Counsel and legal counsel for the Accused, and without objection, the Trial Panel Chairperson directed that the issue of sanctions be decided upon submission of written memoranda and without hearing, in accordance with BR 5.8(a). The Trial Panel provided written notice of the briefing schedule to both the Office of Disciplinary Counsel and the Accused. On December 13, 2013, the Office of Disciplinary Counsel, through Assistant Disciplinary Counsel Martha M. Hicks, submitted a memorandum entitled “Oregon State Bar’s Sanction Memo (hereinafter

“Sanction Memo”). The Accused did not submit a memorandum or any other written material.

### FINDINGS OF FACT

1. In light of the Accused’s default and entry of an Order of Default against her, and for the purpose of determining sanctions, the Trial Panel deems true all of the factual allegations of the Formal Complaint filed in the Cases and adopts those allegations as its Findings of Fact in this matter.
2. By reason of entry of the Order of Default, the Accused has been deemed to have violated the following Oregon Rules of Professional Conduct: RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), RPC 3.3(a)(1), RPC 8.4(a)(3), and RPC 8.4(a)(4).
3. At no time has the Accused, either personally or through her legal counsel, responded to correspondence sent to her legal counsel by the Trial Panel or otherwise communicated with the Trial Panel.

### CONCLUSIONS OF LAW

In Oregon, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) govern the determination of appropriate sanctions. The *Standards* require that the Accused’s conduct be analyzed by considering the following factors: (1) the ethical duties violated; (2) the attorney’s mental state; (3) the actual and potential injury; and (4) the existence of aggravating and mitigating circumstances. *Standards*, § 3.0. Applying those factors to the facts of this case, the Trial Panel concludes as follows:

#### 1. Duties Violated.

The Accused violated her duties of diligence and candor to her clients, and her duty to provide them with competent representation. *Standards*, § 4.4, § 4.5, § 4.6. The Accused violated her duties to the legal system and the public to be truthful to the court and to follow the court’s rules. *Standards*, § 6.0. The Accused also violated her duty as a professional to properly withdraw from representing her clients. *Standards*, § 7.0.

#### 2. Mental State.

In the Ross matter, the Accused acted intentionally in ignoring the court’s directive that she correct the judgment to accurately reflect the court-ordered child support award. The Accused acted knowingly with regard to all other violations, in that she acted with conscious awareness of the nature or attendant circumstances of the conduct.

#### 3. Extent of Actual or Potential Injury.

The extent of actual injury caused by the Accused’s conduct was extensive. Everyone—her clients, opposing parties and their counsel, the court—suffered actual injury. In the Ross matter, the Accused caused actual injury to the opposing party by unilaterally

raising his child support obligation for eight months and causing him to incur additional legal fees to prepare a judgment the court had ordered the Accused to draft. The Accused's delay in filing the proposed supplemental judgment and her misrepresentations to the court also caused actual injury to her own client, by delaying her entitlement to the court-ordered increase in child support, and to the court by compromising the integrity of the judicial process and delaying the resolution of the case.

In the Carone matter, the Accused caused actual injury to her client by failing to notify him that she would not appear for his trial, failing to appear for his trial, and subjecting him to a sanction of \$544. Thus, Mr. Carone appeared at trial and was without counsel, causing actual injury in anxiety and frustration. The court's time reserved for the Carone trial was wasted and the opposing party needlessly incurred \$544 in travel expenses.

In the Carone, Harris, Manning, and Martin matters, the Accused's failure to appear for trial also caused the unnecessary waste of the time the court had set aside for trial as well as the expenditure of additional time in attempting to locate the Accused to reset the trials, and burdened the opposing party with the need to prepare for trial and procure witnesses a second time. Her clients obviously experienced anxiety and frustration at finding themselves without a lawyer on the day of trial.

Nonperformance by neglect, needless and unexplained delay, and failure to communicate or respond to inquiries is as frustrating as prevarication, even when the neglect does not result in the ultimate loss of the client's objective. The Accused's failure to respond to attempts by clients Harris and Littlepage to reach her, and her failure to communicate with Cisneros, Littlepage, and Acord about her suspension thus caused actual injury to these clients.

Actual injury can include legal fees for time spent resolving a conflict, and complication and delay of the client's effort to change counsel at a critical time in his or her case. This is what happened to the Accused's client, Charles Manning. In addition to showing up twice for trial, only to find the Accused not present, Manning had to retain and pay new counsel to familiarize himself with a case that had been ready for trial.

#### 4. **Aggravating and Mitigating Circumstances.**

The following aggravating circumstances exist in the Cases:

- (1) The Accused has a prior disciplinary record. In 1998, she was suspended for 30 days for neglect of a legal matter (DR 6-101(B)), failure to deposit client funds into trust (DR 9-101(A)), and failure to deliver client funds or property to which the client is entitled (DR 9-101(C)(4)). *In re Steves*, 12 DB Rptr 185 (1998). In 2000, she was suspended for 60 days for neglect of a legal matter (DR 6-101(B)) and failure to render appropriate accounts of client funds (DR 9-101(C)(3)). *In re Steves II*, 14 DB Rptr 11 (2000). These prior offenses

should be given great weight because they involved similar conduct—neglect of legal matters—and there were multiple offenses, which had been adjudicated prior to the Accused’s conduct in this case. *Standards*, § 9.22(a).

- (2) The Accused was motivated by self-interest in her misrepresentations to the court and her abandonment of her clients after she had signed a stipulation for a one-year suspension for similar conduct. *Standards*, § 9.22(b).
- (3) The Accused has demonstrated a consistent pattern of misconduct. *Standards*, § 9.22(c).
- (4) The Accused committed multiple disciplinary offenses. *Standards*, § 9.22(d).
- (5) The clients who appeared for trial expecting representation were vulnerable victims. *Standards*, § 9.22(h).
- (6) The Accused has substantial experience in the practice of law. *Standards*, § 9.22(i).

There are no mitigating factors to be applied to the Cases.

### SANCTIONS

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 to properly discharge their professional duties to clients, the public and the legal system and the legal profession.” *Standards*, § 1.1. Disbarment is generally an appropriate sanction when (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client; or (d) a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously reflects on the lawyer’s fitness to practice. *Standards*, § 4.41, § 5.11(b).

In this case, the Accused’s repeated misconduct involved nearly all of the duties she owes as a lawyer and inflicted extensive actual harm to her clients, opposing parties, opposing counsel, and the court. For this reason, and after considering the applicable *Standards*, the Trial Panel unanimously concludes and directs that in order to protect the public, the Oregon State Bar, and the legal profession, the Accused shall be, and hereby is, disbarred from the practice of law in accordance with BR 6.3.

DATED this 30th day of January, 2014.

/s/ John E. Laherty

John E. Laherty, Trial Panel Chairperson

/s/ Max S. Taggart, II

Max S. Taggart, II, Trial Panel Member

/s/ Steve P. Bjerke,

Steve P. Bjerke, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 11-84 and 11-85  
) SC S061681  
MARC T. ANDERSEN, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Kelly M. Diephuis  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.16(a)(2),  
RPC 1.16(d), and RPC 8.1(a)(2). Stipulation for  
Discipline. 6-month plus 1-day suspension.  
Effective Date of Order: April 17, 2014

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE, AWARDING COSTS,  
VACATING BRIEFING SCHEDULE, AND DISMISSING REVIEW**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. Pursuant to the stipulation, the Accused is suspended from the practice of law in the State of Oregon for a period of six months and one day, effective as of the date of this order. The accused must pay discovery costs to the Bar in the amount of \$2,963.35.

The briefing schedule is vacated. The request for review is dismissed.

The appellate judgment shall issue forthwith.

/s/ Thomas A. Balmer  
THOMAS A. BALMER, 4/17/14, 8:09:22 a.m.  
CHIEF JUSTICE SUPREME COURT

### STIPULATION FOR DISCIPLINE

Marc Andersen, 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 21, 1995, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Deschutes County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely, 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 10, 2012, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to keep a client reasonably informed or respond to requests for information), RPC 1.15-2(m) (failure to submit annual IOLTA form), RPC 1.16(d) (failure to withdraw properly from representation), RPC 1.16(a)(2) (failure to withdraw when the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent a client), and RPC 8.1(a)(2) (failure to respond to a lawful demand for information from a disciplinary authority) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

On July 3, 2013, a Formal Complaint was filed against the Accused pursuant to the authorization of the SPRB, alleging violation of RPC 1.3, RPC 1.4(a), RPC 1.15-2(m), RPC 1.16(d), RPC 1.16(a)(2), and RPC 8.1(a)(2) in two client matters. 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 January 9, 2010, the Accused undertook to represent Gina Miller and Jeanette Thorpe under a contingent fee agreement in an arbitration of an employment contract dispute against their former employer. At the outset of the representation, the Accused performed some legal services, but failed to pay the filing fee and submit the request for arbitration with the American Arbitration Association (hereinafter “AAA”), until August 2010.

6.

Once the request for arbitration was filed, a telephone conference between the arbitrator and the parties to set a hearing date was scheduled for November 30, 2010. The Accused did not attend the telephone conference. AAA rescheduled the telephone conference for December 7, 2010, but the Accused did not attend and did not take any other substantive action on behalf of Miller and Thorpe thereafter.

7.

After November 30, 2010, both Miller and Thorpe attempted several times to reach the Accused at his office, by telephone, and by email several times about the status of their arbitration hearing and confirm the Accused’s attendance. The Accused failed to respond to Miller and Thorpe’s attempts to contact him or otherwise communicate with them. The Accused’s prolonged inaction and his failure to communicate with Miller and Thorpe constituted a termination by the Accused of their lawyer-client relationship.

8.

In or about November 2010, the Accused recognized he was suffering from an emotional problem that materially impaired his ability to represent Miller and Thorpe in their legal matters. The Accused failed to withdraw.

9.

On May 5, 2011, Disciplinary Counsel’s Office (hereinafter “DCO”) requested the Accused to explain by May 26, 2011, why he had not submitted his IOLTA Certification or complied with the reporting requirements. The Accused knowingly failed to respond and failed to submit the IOLTA Certification. Again on May 31, 2011, DCO requested the Accused to explain why he had not submitted his IOLTA Certification or complied with the reporting requirements. The Accused knowingly failed to timely submit his IOLTA Certification until June 2011.

## Violations

10.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 8, he violated RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 1.16(a)(2).

The Accused admits that, by engaging in the conduct described in paragraph 9, he violated RPC 8.1(a)(2).

Upon further factual inquiry, the parties agree that the charged alleged violation of RPC 1.15-2(m) should be and, upon the approval of this stipulation, is dismissed.

## Sanction

11.

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

- a. **Duty Violated.** The Accused violated his duty to his clients to pursue their case diligently and to adequately communicate with them. *Standards*, § 4.4. The *Standards* presume that the most important ethical duties are those which lawyers owe to their clients. *Standards*, p. 5, *Theoretical Framework*. The Accused also violated his duties as a professional to properly withdraw from representation and to respond to inquiries from the Bar. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted knowingly with regard to RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 1.16(a)(2). The Accused knowingly failed to respond to the Bar in violation of RPC 8.1(a)(2).
- c. **Injury.** The Accused’s neglect of Miller and Thorpe’s matters at a time when he was emotionally impaired caused both actual and potential injury. Their case was stalled, and resolution of their matter was delayed. *In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). The Accused’s failures to act, withdraw, and communicate with his clients caused further actual injury by causing Miller and Thorpe anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner II*, 325 Or 421, 426–27, 939 P2d 39 (1997). The Bar sustained actual injury in that staff spent additional time and effort to obtain the information the Accused should have provided sooner.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Multiple offenses. *Standards*, § 9.22(d).
  - 2. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1995. *Standards*, § 9.32(g)
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of prior disciplinary record. *Standards*, § 9.32(b).
  - 2. Remorse. The Accused is remorseful for his misconduct. *Standards*, § 9.32(l).

12.

Under the ABA *Standards*, *Standards*, § 4.42, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Under *Standards*, § 7.2, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

13.

Case law suggests that a period of suspension is the appropriate resolution of this case. Generally, the 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 Knappenberger II*, 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).

In *In re Castanza*, 350 Or 293, 253 P3d 1057 (2011), the court recently affirmed a trial panel opinion that suspended a lawyer for 60 days when he failed to properly withdraw in violation of RPC 1.16(d). In that case, the lawyer's inaction resulted in dismissal of the client's lawsuit and a judgment against her. *In re Devers*, 317 Or 261, 855 P2d 617 (1993) (six-month suspension imposed on lawyer who, among other things, neglected cases and failed to return files to clients when his representation of them was terminated).

In *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997), a lawyer with no prior disciplinary history was suspended from the practice of law for 120 days, 60 days of which resulted from knowingly neglecting one legal matter, and 60 days of which resulted from his failure to cooperate in the Bar's investigation into his conduct. See also *In re Bourcier II*, 325 Or 429, 939 P2d 604 (1997), in which the court imposed a 60-day suspension when the lawyer neglected a legal matter, among other violations.

The court considers a lawyer's failure to cooperate in a Bar investigation serious misconduct because public protection is undermined when a lawyer fails to participate in the

investigatory process. For that reason, the court has consistently imposed a 60-day suspension for single violation of RPC 8.1(a)(2). *In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996); *In re Schaffner I*, *supra*.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for six months and 1-day, for violation of RPC 1.3, RPC 1.4(a), RPC 1.16(d), RPC 1.16(a)(2), and RPC 8.1(a)(2), the sanction to be effective the day this Stipulation for Discipline is approved.

15.

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 any term of suspension. The Accused reports that he is not currently practicing law and does not have any clients or client files at this time.

16.

In addition, on or before October 31, 2014, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$2,963.35, incurred for discovery. Should the Accused fail to pay \$2,963.35 in full by October 31, 2014, 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.

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 represents that he is only admitted to practice law in Oregon. If the Accused were admitted to practice in another jurisdiction the Bar would notify that jurisdiction of his current status and he acknowledges that the Bar would inform this jurisdiction of the final disposition of this proceeding.

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 Andersen*, 28 DB Rptr 52 (2014)

EXECUTED this 28th day of February, 2014.

/s/ Marc Andersen

Marc Andersen, OSB No. 950516

EXECUTED this 4th day of March, 2014.

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. 13-114
	)	SC S062103
KEVIN J. KINNEY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Marc D. Blackman
Disciplinary Board:	None
Disposition:	Violation of RPC 8.4(a)(3) and RPC 8.4(a)(4). Stipulation for Discipline. 1-year suspension, all but 60 days stayed, 1-year probation.
Effective Date of Order:	June 1, 2014

**AMENDED ORDER GRANTING PETITION FOR RECONSIDERATION AND  
AMENDING ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

The court has considered the petition for reconsideration and orders that it be granted. The order, dated April 17, 2014, accepting the Stipulation for Discipline, is amended as follows:

The accused is suspended from the practice of law in Oregon for one year, effective June 1, 2014, for violating RPC 8.4(a)(3) and RPC 8.4(a)(4). However, all but 60 days of the one-year suspension shall be stayed pending completion of a one-year term of probation, on the terms and conditions recited in the parties' Stipulation for Discipline.

/s/ Thomas A. Balmer  
 THOMAS A. BALMER, 4/22/2014,  
 11:00:58 a.m.  
 CHIEF JUSTICE SUPREME COURT

### STIPULATION FOR DISCIPLINE

Kevin J. Kinney, 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 22, 1995, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Yamhill County, Oregon.

3.

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

4.

On September 21, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on fitness to practice law) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of these proceedings.

### Facts

5.

In 2006, the Accused’s wife received an interest in real property (hereinafter “Bell Road property”). His wife’s father contributed funds to the purchase of the Bell Road property as a gift to her and her brother. Her brother took out a loan to finance the balance of the purchase price. The Accused’s wife and her brother agreed that she would own a little more than a one-quarter interest in the property and would pay her brother \$350 per month as a contribution to the mortgage payments he was making. A bargain and sale deed for that transaction was recorded in March 2008.

6.

The Accused and his wife regularly paid a landscaper to maintain the Bell Road property.

7.

In 2007, the Accused and his wife refinanced their home and lent a portion of the loan proceeds to the Accused's law firm to buy out a retiring partner from his practice. Thereafter, the firm repaid a fraction of the borrowed loan proceeds to the Accused and his wife. The couple remitted those payments to a debt consolidation company with whom they had contracted in January 2010.

8.

In May 2011, the Accused and his wife submitted a financial statement to Willamette Valley Bank in an effort to procure a loan. In conjunction with their efforts to obtain the loan, the Accused and his wife obtained a market analysis on the Bell Road property.

9.

In October 2011, the Accused and his wife filed a joint Chapter 7 petition for bankruptcy protection. At the time, they had not made their mortgage payments on the Bell Road property for four months.

10.

In the Chapter 7 petition and other documents filed with the petition, as well as at the first meeting of creditors in November 2011, the Accused and his wife failed to disclose: (1) the Accused's loan to his firm as an asset in the bankruptcy; (2) the couple's payments to the debt consolidation company; (3) the existence of the financial statement given to Willamette Valley Bank; (4) any ownership interest in the Bell Road property; (5) that the Accused's brother-in-law was a creditor by virtue of the four missed payments; (6) that the couple's projected or monthly expenses included a regular payment to the Bell Road property landscaper; or (7) that they had made mortgage payments to the Accused's brother-in-law within the year prior to the filing. In addition, the value attributed to the Accused's and his wife's assets in the financial statement was substantially greater than what was disclosed in their Chapter 7 petition.

11.

In November 2011, the Accused appeared with his attorney for the first meeting of creditors and, under oath, testified that he did not want to make any changes to the bankruptcy schedules he had filed, that he had read all of the documents before he signed them, that the information contained therein was based upon his personal knowledge, and was true and correct.

12.

Shortly after the first meeting of creditors, the attorney for the Accused and his wife amended the bankruptcy documents to disclose her interest in the Bell Road property.

13.

Later, through counsel, the Accused disclosed to the bankruptcy court that he had neither thoroughly reviewed nor signed the documents before they were filed.

### **Violations**

14.

The Accused admits that his testimony to the bankruptcy trustee during the first meeting of creditors that he had read and signed the petition and other filings did not accurately represent the true facts, and accordingly violated RPC 8.4(a)(3).

The Accused further admits that, in addition to his inaccurate testimony, by not having thoroughly reviewed or signed the Chapter 7 petition and supporting documents (which failed to disclose certain required financial information), he caused harm to the procedural functioning of the bankruptcy court that was prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

### **Sanction**

15.

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 the legal system to ensure that the court had complete and accurate information, and to avoid abuse the legal process. *Standards*, § 6.1, § 6.2.
- b. **Mental State.** The Accused acted knowingly with respect to the conduct at issue. “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*. Although the Accused may have been negligent regarding the contents of his Chapter 7 petition and accompanying forms, he was aware of his need to provide complete and accurate information and that that he could not be sure this had been done with respect to his petition, yet testified differently.

- c. **Injury.** The Accused engaged in conduct causing some actual harm to the procedural functioning of the proceeding and to the substantive interests of the trustee and creditors. The trustee cannot properly pursue the goals and objectives of a bankruptcy if there is any doubt about the veracity of the debtor's testimony or the information provided by the debtor. Both the trustee and creditors are entitled to know about any assets the debtor may have even if those assets ultimately do not result in a benefit to the estate.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior discipline. The Accused was reprimanded in March 2012 for violation of RPC 1.5(a) (excessive fee), RPC 7.5(d) (state or imply a partnership when that is not a fact), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice) stemming from a 2009 complaint. *In re Kinney*, 26 DB Rptr 59 (2012). See *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997) (prior offenses under *Standards* refers to offenses that have been adjudicated prior to imposition of sanction in the current case). However, given the timing of the Accused's prior matter (which reportedly gave rise to some issues in the bankruptcy), it should only be given minimal weight as aggravation. See *In re Meyer*, 328 Or 220, 227–28, 970 P2d 647 (1999) (considerations regarding the significance of prior offense include: relative seriousness; similarity; number; relative recency; timing of current offense in relation to prior offense; and resulting sanction). *Standards*, § 9.22(a).
  2. Selfish motive. The Accused was seeking to obtain personal bankruptcy protection. *Standards*, § 9.22(b).
  3. Multiple offenses. *Standards*, § 9.22(d).
  4. Substantial experience in the practice of law. The Accused has been admitted in Oregon since 1995. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Personal and emotional problems. The Accused was reportedly experiencing personal and emotional problems at the time of the misconduct in these matters. *Standards*, § 9.32(c).
  2. Full and free disclosure; cooperative attitude toward proceedings. The Accused has cooperated fully in the Bar's investigation of his conduct and in these formal proceedings. *Standards*, § 9.32(e).
  3. Remorse. *Standards*, § 9.32(l).

16.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knows or should know 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, whereas a suspension is generally appropriate when a lawyer knows that he 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*, § 6.21, § 6.22.

17.

Like the *Standards*, Oregon cases suggest that a suspension is appropriate for the Accused's conduct. *See, e.g., In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (120-day suspension imposed on lawyer who, among other things, made misrepresentations to the court in order to cover up his own neglect in the underlying matter); *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006) (180-day suspension for lawyer's misrepresentations to the court and opposing counsel in connection with the 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 after the statement had already been signed and notarized by the personal representative). *See also, In re Fitzhenry*, 343 Or 86, 162 P3d 260 (2007) (120-day suspension for in-house counsel's false representations in connection of an SEC independent audit of the corporation's financial statements); *In re Levie*, 342 Or 462, 154 P3d 113 (2007) (one-year suspension for false representations to opposing counsel and arbitrator regarding sculptures that were the subject of litigation).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for one year for violation of RPC 8.4(a)(3) and RPC 8.4(a)(4), effective June 1, 2014, or as otherwise directed by the Oregon Supreme Court. However, all but 60 days of the suspension shall be stayed pending completion of a one-year term of probation supervised by the State Lawyers Assistance Committee (hereinafter "SLAC") which shall include the following terms and conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9.

- (b) The Accused shall abstain from using any controlled substances not prescribed by a physician. Any prescribed medications shall be taken only as prescribed.
- (c) A member of SLAC or such other person approved by DCO in writing shall supervise the Accused's probation (hereinafter "Supervising Attorney"). The Accused currently is working with the Oregon Attorney Assistance Program (hereinafter "OAAP") on treatment. The Accused shall immediately notify SLAC upon approval of this Stipulation for Discipline by the Oregon Supreme Court of: 1) the existence and contents of this Stipulation for Discipline, 2) the history and status of any OAAP treatment or programs in which the Accused has or is participating, and 3) discuss with SLAC whether and how to modify his current treatment plan to best accomplish the objectives of the Accused's probation.
- (d) The Accused shall meet at least monthly with his Supervising Attorney for the purpose of reviewing the Accused's compliance with the terms of the probation. The Accused shall cooperate and shall comply with all reasonable requests of SLAC that will allow the SLAC and DCO to evaluate the Accused's compliance with the terms of this Stipulation for Discipline.
- (e) The Accused shall enter into or continue substance abuse treatment as determined by SLAC to be appropriate, including any aftercare and relapse prevention education and therapy recommended by SLAC.
- (f) To the extent that SLAC or the Supervising Attorney recommends that the Accused attend OAAP, AA, NA, or equivalent meetings, the Accused agrees to obtain, upon SLAC's request, verification of attendance at such meetings.
- (g) The Accused agrees that, if SLAC is alerted to facts that raise concern that the Accused may be violating his requirements as described in paragraph 18(b) above, he will participate in a further evaluation at the request and direction of SLAC.
- (h) The Accused shall arrange for and meet with a health care professional acceptable to DCO and his Supervising Attorney to develop and implement a course of treatment that will address any identifiable concerns.
- (i) The Accused shall continue to attend regular counseling or treatment sessions with the approved health care professional for the entire term of his probation. The Accused shall continue to take, as prescribed, any health-related medications.
- (j) The Accused shall not terminate his counseling or treatment, or reduce the frequency of his counseling or treatment sessions, without first submitting to

DCO a written recommendation from the health care professional that the Accused's counseling or treatment sessions should be reduced in frequency or terminated and the Accused undergoes an independent evaluation by a second professional acceptable to DCO and the Supervising Attorney, which evaluation confirms the Accused's fitness.

- (k) The Accused shall report to his Supervising Attorney and to DCO within 14 days of occurrence any civil, criminal, or traffic action or proceeding initiated by complaint, citation, warrant, or arrest, or any incident not resulting in complaint, citation, warrant, or arrest, in which it is alleged that the Accused has possessed or consumed any controlled substances not prescribed by a physician in kind or amount, or which raises concerns about his fitness.
- (l) In the event the Accused fails to comply with any condition of this stipulation, the Accused shall immediately notify his Supervising Attorney, SLAC, and DCO in writing.
- (m) At least quarterly, and by such dates as established by DCO, 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 and the recommendations of his treatment providers, and each of them. The Accused's report shall also identify the dates and purpose of the Accused's meetings with his Supervising Attorney, and the dates of meetings and other consultations between the Accused and all health care professionals during the reporting period. In the event the Accused has not complied with any term of probation in this disciplinary case, the report shall also describe the non-compliance and the reason for it, and when and what steps have been taken to correct the non-compliance.
- (n) The Accused hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by OAAP, SLAC, his Supervising Attorney, or any other health care treatment providers of the Accused's compliance or non-compliance with this stipulation and their treatment recommendations to SLAC and DCO. The Accused agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (o) The Accused is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation.
- (p) 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 ten months of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

19.

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 Christopher W. Brown, 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 Christopher W. Brown has agreed to accept this responsibility.

20.

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.

21.

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.

22.

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.

23.

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 Oregon Supreme Court for consideration pursuant to the terms of BR 3.6.

Cite as *In re Kinney*, 28 DB Rptr 59 (2014)

EXECUTED this 6th day of March, 2014.

/s/ Kevin J. Kinney

Kevin J. Kinney

OSB No. 953237

EXECUTED this 11th day of March, 2014.

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. 11-133 and 11-134  
)  
FRANCISCO C. SEGARRA, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Richard G. Helzer  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3). Stipulation for Discipline. 90-day suspension, all but 30 days stayed, 2-year probation.  
Effective Date of Order: June 1, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days, with all but 30 days stayed pending the successful completion of probation, effective June 1, 2014, for violation of two counts RPC 1.3, two counts RPC 1.4(a), two counts RPC 1.4(b), RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3).

DATED this 17th day of April, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Francisco C. Segarra, 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 27, 2006, 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 December 16, 2011, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of the following: two counts of RPC 1.3 (neglect of a legal matter), two counts of RPC 1.4(a) (failure to keep a client reasonably informed or respond to requests for information), two counts of RPC 1.4(b) (failure to adequately explain a matter to a client), RPC 1.16(a)(2) (failure to withdraw when physical or mental condition materially impairs ability to represent client), RPC 1.16(d) (failure, upon termination of representation, to take reasonable steps to protect client’s interests), RPC 8.1(a)(2) (failure to respond to a lawful demand for information from a disciplinary authority), and RPC 8.4(a)(3) (misrepresentation reflecting adversely on fitness to practice law) 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

#### Dixon Matter: Case No. 11-133

5.

In mid-July 2009, Carol Dixon (hereinafter “Dixon”) retained the Accused to file and represent her in a dissolution of marriage proceeding. Dixon paid the Accused a total retainer of \$2,800. The Accused filed a petition for dissolution on Dixon’s behalf.

6.

On October 2, 2009, opposing counsel, Dustin Johnson (hereinafter “Johnson”), served a request for production on the Accused. The discovery deadline was December 12, 2009. On December 11, 2009, Johnson reminded the Accused of the discovery deadline. The Accused did not respond. On December 18, 2009, Johnson demanded Dixon’s discovery by December 22, 2009, and advised the Accused that he would move to compel discovery and petition for attorney fees. The Accused did not timely deliver the discovery. Instead, the Accused delivered the documents on December 23, 2009.

7.

The trial date for Dixon’s dissolution was March 2, 2010. The night before the trial, Dixon spoke to the Accused who assured her that he would see her at trial. On or about March 2, 2010, Dixon received a call from someone named “Jessica” who told Dixon that the Accused had a migraine headache and would not appear at trial. “Jessica” also told Dixon that the court had been notified and the trial had been taken off the docket. Dixon went to the courthouse and was informed that neither the court nor opposing counsel had been notified of the Accused’s illness. The Accused failed to appear. Subsequently, the Accused appeared before the judge and informed him of his struggle with migraine headaches.

8.

In January 2011, the court sanctioned Dixon for the Accused’s failure to comply with the discovery deadline and appear at trial and awarded the opposing party a judgment for attorney fees and costs in the amount of \$340.

9.

The Accused failed to take any other constructive action to advance Dixon’s matter.

10.

At all relevant times, and on March 3, 2010, the Accused was suffering from a serious physical or emotional condition that materially impaired his ability to represent, but failed to withdraw from the representation.

11.

On October 12, 2010, Dixon complained to the Bar about the Accused’s conduct. On December 29, 2010, in his response, the Accused represented to the Client Assistance Office that his delay in responding to opposing counsel’s discovery request was caused by Dixon’s delay in providing the requested documents to him. This representation was false, and the Accused knew it was false at the time he made it. Dixon’s complaint was referred to Disciplinary Counsel’s Office (hereinafter “DCO”), with notice to the Accused.

12.

On January 4, 2011, and January 24, 2011, DCO asked the Accused to respond to Dixon's complaint. The Accused asked DCO for additional time to respond, citing an unidentified health issue. The Accused did not respond by the extended deadline. On February 28, 2011, DCO again asked the Accused to respond to Dixon's complaint. The Accused sent DCO a copy of Dixon's file, but made no other substantive response.

**Marquardt Matter: Case No. 11-134**

13.

On or about April 5, 2010, Christina Marquardt (hereinafter "Marquardt") retained the Accused to respond to an Order to Show Cause to Enforce Parenting Time and to file a motion to modify the parenting time provisions of her judgment of dissolution of marriage. Marquardt paid the Accused a total retainer of \$1,500.

14.

The Accused appeared as Marquardt's counsel of record on April 7, 2010, and the court reset the show cause hearing, to July 1, 2010, at the Accused's request.

15.

The Accused drafted a motion to modify the parenting time provisions of Marquardt's judgment of dissolution and placed it in Marquardt's file. The Accused failed to file this motion with the court.

16.

From on or around May 2010, to June 2010, Marquardt repeatedly requested an opportunity to review the documents that she had provided the Accused. The Accused failed to promptly respond to Marquardt's reasonable requests for information until June 24, 2010, one week before the show cause hearing, when the Accused's assistant told Marquardt that the Accused had decided to withdraw from representing her. Between April 7, 2010, and June 24, 2010, the Accused had taken little or no substantive action on Marquardt's legal matter, failed to communicate with Marquardt, did not subpoena any witnesses for the show cause hearing, and did not file the motion to modify parenting time.

17.

Marquardt requested a copy of her client file and asked that her original documents be returned to her. On June 25, 2010, the Accused's legal secretary returned the original documents to Marquardt, but did not give her the case file. On June 28, 2010, the Accused filed a motion to withdraw from Marquardt's case. On June 30, 2010, the Accused notified Marquardt that his motion to withdraw had been granted. The Accused took no further steps to protect Marquardt's interests upon his withdrawal.

### Violations

18.

The Accused admits that, in light of the above, his conduct violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3).

### 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. **Duty Violated.** The Accused violated his duty to his clients to promptly and diligently pursue their legal matters and to communicate with them. *Standards*, § 4.4. The Accused violated his duty to the profession to cooperate in the Bar’s investigation into his conduct and not to engage in conduct involving dishonesty, deceit, or misrepresentation. *Standards*, § 7.0.
- b. **Mental State.** The Accused acted knowingly in all respects except that his failure to respond to the Bar was intentional.
- c. **Injury.** Dixon sustained actual injury in that the Accused’s failure to timely comply with opposing counsel’s discovery request resulted in the court imposing a sanction against her. Marquardt was actually injured by the Accused’s delay and improper withdrawal from her legal matter. Both Dixon and Marquardt experienced frustration when the Accused failed to pursue their legal matters and respond to their inquiries. *In re Knappenberger*, 337 Or 15, 31, 90 P3d 614 (2004). The Bar sustained actual injury in that staff spent additional time and effort to obtain information the Accused should have provided.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Multiple offenses. *Standards*, § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior disciplinary record. *Standards*, § 9.32(b).
  2. Emotional problems. *Standards*, § 9.32(c).

3. Remorse. The Accused is remorseful for his misconduct. *Standards*, § 9.32(1).

20.

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 a client. *Standards*, § 4.42. Suspension is also generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

21.

Oregon case law also suggests that a suspension is appropriate for the Accused's conduct. See *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006) (90-day suspension for neglect of two separate client matters, neglect of a client's appeal that resulted in the case being dismissed, and failure to inform the client when the motion to dismiss was granted); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (30-day suspension for, among other things, failure to inform a client that the client's appeal had been dismissed by the court); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension for neglect and failure to cooperate with the Bar; 60 days of the suspension was attributed to the neglect charge alone).

22.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days, with all but 30 days stayed pending the successful completion of probation, for violation of two counts RPC 1.3, two counts RPC 1.4(a), two counts RPC 1.4(b), RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3), the sanction to be effective June 1, 2014. The Accused will be subject to a two-year probation supervised by the Disciplinary Counsel's Office, which shall include the following terms and conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9;
- (b) The Accused shall bear any costs associated with this Stipulation for Discipline; and
- (c) The Accused must participate in meetings with a designated practice mentor every other month beginning with June 2014, and prepare quarterly progress reports for submission to the Disciplinary Counsel's Office. The practice mentor will be required to review the Accused's calendar and files with him at each meeting, to ensure that:
  1. All matters are properly calendared and tickled;

2. The Accused has undergone a review of his office practices by the PLF Office Practice Management Program;
3. The Accused is properly communicating with his clients; and
4. The Accused shall continue with his current medical and mental health treatment, including taking prescribed medications and undergoing therapy with his mental health and primary care physicians for his recurring migraine headaches and depression.

23.

No later than March 31, 2015, the Accused shall attend and successfully complete the Ethics School requirement of BR 6.4. The Accused acknowledges that a failure to complete this and any other requirement timely may be grounds for the termination of this agreement by the SPRB. This requirement is in addition to any other provision of this agreement that requires the Accused to attend or obtain continuing legal education (CLE) credit hours.

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 any term of suspension. In this regard, the Accused reports that he is currently practicing law and has 20(+) open criminal misdemeanor cases.

25.

The Accused acknowledges that should he be suspended, 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 represents that he is only admitted to practice law in Oregon. If the Accused were admitted to practice in another jurisdiction the Bar would notify that jurisdictions of his current status and he acknowledges that the Bar would inform this jurisdiction of the final disposition of this proceeding.

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.

Cite as *In re Segarra*, 28 DB Rptr 69 (2014)

EXECUTED this 4th day of April, 2014.

/s/ Francisco C. Segarra

Francisco C. Segarra

OSB No. 065047

EXECUTED this 7th day of April, 2014.

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. 13-30 and 13-62  
)  
JOHN P. ECKREM, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(a), RPC 1.5(c)(3), and RPC  
1.16(d). Stipulation for Discipline. 90-day suspension,  
all but 30 days stayed, 2-year probation.  
Effective Date of Order: July 1, 2014

**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, with all but thirty (30) days of the suspension stayed, pending the Accused's successful completion of a two-year period of probation, effective July 1, 2014, for violation of RPC 1.5(a), RPC 1.5(c)(3), and RPC 1.16(d). The 30-day suspension shall run concurrently with the two-year probationary period.

DATED this 25th day of April, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Megan B. Annand

Megan B. Annand, Region 3  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

John P. Eckrem, 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 20, 1996, and has been a member of the Oregon State Bar continuously since that time. The Accused’s office and place of business is, and was at all relevant times herein, located in Jackson 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 August 27, 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 1.15-1(d), RPC 1.1, RPC 1.4(b), RPC 1.5(a), RPC 1.5(c)(3), and RPC 1.16(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

#### **Bonk Matter (Case No. 13-30)**

5.

On or about June 4, 2012, the Accused hired Joyce Bonk (hereinafter “Bonk”) to perform some investigative work on behalf of the Accused’s client Thomas Ellis (hereinafter “Ellis”).

6.

Bonk performed the requested services and sent an invoice to the Accused in mid-July 2012. On or about October 1, 2012, Ellis delivered to the Accused’s office the funds

necessary to pay Bonk. Bonk repeatedly demanded the funds thereafter. The Accused failed to forward the funds to Bonk until mid-February 2013.

7.

The Accused admits that by failing to promptly remit the funds to Bonk he violated RPC 1.15-1(d).

**Canoose Matter (Case No. 13-62)**

8.

On February 2, 2012, Marissa Canoose (hereinafter “Canoose”) hired the Accused to represent her in a proceeding to modify parenting time that she had earlier filed *pro se*. The Accused’s written fee agreement required Canoose to pay a non-refundable flat fee of \$2,500.00. The written agreement failed to explain that the funds paid to the Accused would not be deposited into his lawyer trust account, that Canoose could discharge the Accused at any time, and that if Canoose discharged the Accused, she may be entitled to a refund of all or part of the fee if the services for which the fee was paid were not completed.

9.

The Accused represented Canoose at a hearing on her motion to modify parenting time. The motion was denied. The court warned Canoose that custody of the child would be given to the child’s father (hereinafter “Father”) if Canoose failed to provide the court-ordered parenting time.

10.

Father filed a motion to modify custody based on allegations that Canoose continued to withhold parenting time in violation of the court’s orders. The Accused represented Canoose at hearing on Father’s motion. The court found Canoose was intentionally damaging her child’s relationship with Father and gave Father temporary custody, with parenting time to Canoose. The judge told Canoose that he hoped her condition was a temporary aberration and he directed her to get a psychological evaluation.

11.

Canoose obtained a favorable psychological evaluation. On August 28, 2012, Canoose retained the Accused to represent her on “a motion and hearing for additional parenting time under the pending custody action” for a non-refundable flat fee of \$1,000.00. The written fee agreement between Canoose and the Accused contained the language required by RPC 1.5(c)(3) regarding non-refundable and earned on receipt fees.

12.

The Accused filed a motion to modify to modify parenting time, supported by Canoose’s favorable psychological evaluation. However, on October 2, 2012, prior to a

hearing on the motion to modify parenting time, Canoose terminated the Accused's representation. The Accused failed to make a prompt refund of unearned fees from the \$1,000 flat fee. After Canoose complained to the Oregon State Bar, the Accused sent a \$250 refund check to Canoose.

13.

The Accused admits that he entered into an improper fee agreement in violation of RPC 1.5(c)(3) in February 2012 when he used a fee agreement that failed to fully explain how Canoose's fee payment would be handled and that she might be entitled to a refund if the service for which she paid was not completed. The Accused admits that by failing to promptly refund the fees paid by Canoose under the August 2012 agreement he charged an excessive fee, in violation of RPC 1.5(a), and failed to take upon termination of his employment reasonably practicable steps to protect his client, in violation of RPC 1.16(d).

14.

Upon further factual inquiry, the parties agree that the charges of alleged violation of RPC 1.1 and RPC 1.4(b) should be and, upon the approval of this stipulation, are 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 promptly deliver property in the Bonk matter violated his duties regarding client property. *Standards*, § 4.1). The Accused's failure to utilize a proper written fee agreement for the February 2012 representation of Canoose and promptly refund unearned fees from the August 2012 agreement with Canoose violated duties he owed as a professional. *Standards*, § 7.0).
- b. **Mental State.** The Accused negligently failed to ensure that Ellis's funds were promptly delivered to Bonk. The Accused acted negligently in failing to include all the required language in his February 2012 fee agreement with Canoose. The Accused knowingly failed to make prompt refund of the unearned fees paid by Canoose under the August 2012 fee agreement.
- c. **Injury.** The Accused's failure to promptly deliver the Ellis funds to Bonk caused Bonk to suffer anxiety and frustration. Since the Accused completed

the representation for which the flat fee was paid under the February 2012 agreement with Canoose, the Accused's failure to include all the necessary language in that agreement caused only potential injury. The Accused's failure to make a prompt refund of unearned fees paid under the August 2012 agreement with Canoose caused actual and potential injury to Canoose, who continued to pursue the legal matter without some of the funds to which she was entitled. Canoose also suffered anxiety and frustration as a result of the Accused's failure to make any refund of the funds paid in August 2012.

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

1. Prior disciplinary offenses. *Standards*, 9.22(a).<sup>1</sup>
  - i. In June 2009, pursuant to a stipulation approved by the Disciplinary Board, the Accused was suspended 60 days for violation of RPC 1.3, RPC 1.5(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 1.16(d), in two cases (the Simpson and Hilkey matters), and RPC 1.4(a) (in the Hilkey matter only). *In re Eckrem*, 23 DB Rptr 84 (2009). The misconduct in the matters took place chiefly in 2006–2007.
  - ii. In August 2009, the Accused was admonished for violation of RPC 1.16(d). In that matter, a client terminated his employment and he failed to promptly refund unearned fees or return the client's file. Letter of Admonition to John P. Eckrem, August 5, 2009.
  - iii. In April 2012, a trial panel of the disciplinary board suspended the Accused for 90 days, all stayed, pending a 180-day probation. The case involved the Accused's representation of a client in criminal matters in 2009 and occurred mostly prior to the August 2009 letter of admonition. In the first matter he had a written fee agreement that entitled him to immediately collect the initial retainer as "earned on receipt." When the second matter arose, he handled the second retainer the same way without the necessary written agreement. The terms of probation required the Accused to meet with and implement

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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 offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) the timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar." *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

changes recommended by the PLF and attend ethics school. The Accused successfully completed probation and was not suspended. *In re Eckrem II*, 26 DB Rptr 104 (2012).

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 1996 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. At the time of the violation in the Bonk matter the Accused was suffering significant medical problems arising from Cervical Spondylotic Myelopathy which caused substantial paralysis and fatigue. The Accused was undergoing the first of four surgeries to deal with the issue and was out of the office for a substantial amount of the time.
  3. Timely good faith effort to rectify consequences of misconduct. *Standards*, § 9.32(d). The Accused forwarded Bonk's funds soon after she contacted the Bar about her concerns.
  4. Full and free disclosure to disciplinary board and cooperative attitude toward proceedings. *Standards*, § 9.32(e).

16.

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. The Accused was negligent in not ensuring that the funds Ellis provided were promptly paid to Bonk. 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. Having been previously disciplined for the same conduct, Eckrem knew he was collecting an excessive fee when he failed to refund some portion of the flat fee Canoose paid under the second fee agreement. *Standards*, § 8.2.

17.

Oregon case law supports a suspension of 90 days. In *In re Balocca*, 342 Or 279, 151 P3d 154 (2007), the court suspended a lawyer 90 days for knowing misconduct in failing to deposit a client's fees in trust or to account for such fees, and failing to either earn, or refund, \$300 in fees received; and for representing a second client despite circumstances creating a

conflict of interest with the first. The lawyer's misconduct was aggravated by his substantial experience, multiple offenses, false statements to the Bar during the investigation, and a prior admonition for similar misconduct. There were no mitigating factors. In *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004), the court suspended a lawyer 90 days when the lawyer had received a prior admonition and reprimand for same or similar misconduct.

18.

"Probation is a sanction that can be imposed when a lawyer's right to practice law needs to be monitored or limited." *Standards*, §2.7, *Commentary*. However, the probationary conditions must appropriately address the misconduct at issue. *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that for his violation of RPC 1.5(a), RPC 1.5(c)(3), and RPC 1.16(d), the Accused shall be suspended 90 days, with all but thirty days of the suspension stayed, pending the Accused's successful completion of a two-year period of probation, the sanction to be effective July 1, 2014. The 30-day suspension shall run concurrently with the two-year probationary period.

20.

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.

21.

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.

22.

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.

23.

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.

24.

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 30 days of the effective date of this stipulation, the Accused shall arrange for the Professional Liability Fund (hereinafter “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 (hereinafter “DCO”) 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 effective date of this stipulation, the Accused shall submit a report to DCO 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. Prior to 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 DCO. DCO may not unreasonably withhold approval of a monitor nominated by the Accused;
- e. No later than 30 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 requests from his current or former clients (or their counsel) concerning files, unearned funds or other client property. The Accused’s reports shall identify the dates of the Accused’s meetings with his practice monitor and shall be approved in substance by the practice monitor prior to filing. The review of practice must include a random audit of six to ten files at each review to determine whether the Accused is utilizing fee

agreements that comply with the Rules of Professional Conduct and is appropriately handling client property. The review of practice must include a review of the Accused's discharge of responsibilities to his clients at the conclusion of his representation of them. 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. The Accused authorizes his practice monitor to communicate with DCO 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.
- g. The Accused agrees to and pay the costs for Oregon State Bar Fee Arbitration with Canoose to determine the appropriate amount to be refunded under the August 2012 agreement. The Accused shall initiate such arbitration before June 1, 2014. The Accused shall make a refund in the amount determined at arbitration within sixty days after the determination.
- h. 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;
- i. The Accused shall bear the financial responsibility for the cost of all services required under the terms of this Stipulation for Discipline;
- j. 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. 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 Oregon Supreme Court.

25.

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

Cite as *In re Eckrem*, 28 DB Rptr 77 (2014)

EXECUTED this 3rd day of April, 2014.

/s/ John P. Eckrem

John P. Eckrem

OSB No. 962708

EXECUTED this 7th day of April, 2014.

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. 11-31  
) SC S062140  
THEODORE M. ROE, )  
)  
Accused. )

Counsel for the Bar: Elaine D. Smith-Koop; Amber Bevacqua-Lynott  
Counsel for the Accused: Kurt F. Hansen  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(a), RPC 3.1, RPC 3.3(a), RPC 3.3(d), 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: June 7, 2014

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The Accused is suspended from the practice of law in Oregon for two years, effective 30 days from the date of this order. However, all but six months of the two-year suspension shall be stayed pending completion of a two-year term of probation, on the terms and conditions recited in the parties' Stipulation for Discipline.

/s/ Thomas A. Balmer  
THOMAS A. BALMER, 5/8/2014, 9:01:18 a.m.  
CHIEF JUSTICE SUPREME COURT

**STIPULATION FOR DISCIPLINE**

Theodore M. Roe, 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 21, 1999, 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 May 31, 2011, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.5(a) (excessive fee), RPC 3.1 (unmeritorious claim or defense), RPC 3.3(a) (candor toward a tribunal), RPC 3.3(d) (failure to disclose necessary information in an *ex parte* proceeding), RPC 8.4(a)(3) (conduct involving misrepresentation), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice) of the Oregon Rules of Professional Conduct. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### **Facts**

5.

In October 2005, Heath Shamburg (hereinafter “Heath”) hired the Accused to assist in avoiding the foreclosure of the home in Yamhill County that Heath and his wife, Janna Shamburg (hereinafter “Janna”; collectively “the Shamburgs”), were purchasing on contract from Brian Tate (hereinafter “Tate”). At the time Heath hired the Accused, Tate was in default on his mortgage payments, and the bank had initiated foreclosure proceedings on the Shamburgs’ home.

6.

The Accused sent the Shamburgs a written fee agreement to execute, but neither of the Shamburgs ever did so.

7.

The Accused was able to convince Tate's bank to delay the foreclosure in order to allow the Shamburgs an opportunity to try to purchase the property themselves and pay off Tate's mortgage.

8.

In early 2006, after a disagreement between Heath and the Accused, the Accused terminated his representation. At the time the Accused terminated his representation, Heath owed the Accused attorney fees for services through that date.

9.

In June 2006, the Shamburgs and their adult daughter, Elizabeth Abbott (hereinafter "Abbott") were able to jointly purchase the Shamburgs' home and avoid the foreclosure of Tate's interest in it. This joint purchase came at the suggestion of the Shamburgs' mortgage broker, unbeknownst to the Accused. Abbott's credit was necessary for the Shamburgs to qualify for the purchase money loan.

10.

On August 7, 2006, the Accused filed a lawsuit against the Shamburgs in Multnomah County Circuit Court for breach of contract (hereinafter "Multnomah Action") arising from their failure to pay his fees.

11.

On December 28, 2006, the Multnomah Action went to arbitration before arbitrator Craig Colby (hereinafter "Arbitrator Colby"). Arbitrator Colby found *inter alia* that:

"I find in favor of Mrs. Shamburg. I disallow Roe's claims for attorney fees, late fees and interest in excess of the judgment rate. I find for Roe against Mr. Shamburg for \$200/hour for all the hours claimed except the .2 hour on 10/27/05."

The Accused knew from these findings and his own knowledge of the underlying facts that:

- Janna was not a party to any agreement with the Accused, and accordingly, was not liable to pay the Accused's fees.
- No written fee agreement existed between the Accused and Heath, and accordingly, the Accused could not enforce the provisions of the proposed written fee agreement described in paragraph 4 above (which included interest on the unpaid balance and attorney fees for collection efforts).
- An oral fee agreement existed between Heath and the Accused, which entitled the Accused to recover for his services at the rate of \$200/hour.

12.

On March 28, 2007, a judgment in the amount of \$6,544.17 was entered against Heath in the Multnomah Action. The Accused then transcribed the judgment to Yamhill County.

13.

On August 22, 2007, the Accused initiated a lawsuit against Heath, Janna, and Abbott in Yamhill County Circuit Court (hereinafter “Yamhill Action”), alleging that the Shamburgs had fraudulently conveyed their home to Abbott to prevent the Shamburgs’ creditors, including the Accused, from executing on the judgment in the Multnomah Action. Although the Accused was unaware at the time that Abbott was an adult or that her credit was required to qualify for the Shamburgs’ purchase loan, there was no basis in law or fact that was not frivolous upon which the Accused could bring the Yamhill Action. The Accused was aware that there was no basis to do so, having just participated in the Multnomah Action and having relied on Arbitrator Colby’s findings in entering a judgment against Heath.

14.

In the complaint filed in the Yamhill Action, the Accused alleged that both Shamburgs were in default on their contract obligations to the Accused and that the Accused had obtained a judgment (in the Multnomah Action) based on that breach. This assertion was not accurate with respect to Janna, and the Accused either knew so when he made it or took no immediate steps to correct it once he acknowledges he became aware of its inaccuracy.

15.

In the complaint filed in the Yamhill Action, the Accused alleged that the Shamburgs had made a fraudulent transfer intended to hinder, delay, and defraud the creditors of Heath Shamburg, including the Accused. Because the Multnomah Action had determined that Janna owed the Accused nothing, this allegation was also not accurate with respect to Janna, and the Accused either knew so when he made it or took no immediate steps to correct it once he acknowledges he became aware of its inaccuracy.

16.

In the complaint filed in the Yamhill Action, the Accused asserted that he was entitled to recover from both the Shamburgs and Abbott his attorney fees incurred in the Yamhill Action pursuant to the terms of the Multnomah Action judgment or the written fee agreement between himself and the Shamburgs. Because Arbitrator Colby had necessarily found that there was no written agreement between the Accused and Heath and because the judgment in the Multnomah Action did not entitle the Accused to attorney fees, the Accused’s assertion that he was entitled to attorney fees from any or all of the defendants in the Yamhill Action was inaccurate, and the Accused either knew so when he made it or took no immediate steps to correct it once he acknowledges he became aware of its inaccuracy.

17.

The Shamburgs and Abbott did not respond to the complaint in the Yamhill Action, and on October 31, 2007, the Accused obtained a general default judgment. The judgment declared that the Accused's lien was superior to the interest held by either the Shamburgs or Abbott and that the property should be sold to satisfy the Accused's lien. The judgment also awarded the Accused his reasonable attorney fees to be determined by an ORCP 68 motion.

18.

At all times relevant herein, ORCP 68 C(4) required a party seeking attorney fees or costs and disbursements to file a signed and detailed statement of the amount of attorney fees or costs and disbursements not later than 14 days after entry of judgment.

19.

On May 1, 2008, more than 14 days after entry of judgment in the Yamhill Action, the Accused filed an *ex parte* ORCP 68 Statement for Costs and Prevailing Party Fees (hereinafter "Rule 68 Motion") and a Motion for Enhanced Prevailing Party Fee and supporting affidavit (collectively "Enhanced Fee Motion"), seeking fees and costs in the Yamhill Action in the amount of \$13,686.97 and an enhanced prevailing party fee in the amount of \$5,000.

20.

The Rule 68 Motion incorporated by reference the substance of the Enhanced Fee Motion and declared, under penalty of perjury, that the statements contained therein were true.

21.

The Accused did not attach a copy of the Yamhill Action judgment to his Rule 68 Motion or otherwise notify the court that his Rule 68 Motion was not timely. The timeliness of the Rule 68 Motion was a material fact necessary for the tribunal to make an informed decision whether to allow it.

22.

With respect to the Multnomah Action, the Accused's Rule 68 Motion and Enhanced Fee Motion contained the following representations:

- That "defendant's [sic] [including Janna and Abbott] lack[ed] an objectively reasonable basis for their defense of plaintiff's breach of contract claim . . ."
- That "the original judgment was entered against defendants [including Janna and Abbott] . . ."

- That “defendants [including Janna] had fraudulently transferred their property into the name of their minor daughter in an effort to defraud creditors, namely, plaintiff [the Accused].”
- That “defendants [including Janna and Abbott] wrongfully withheld payment of the judgment . . .”
- “Defendant [sic] [including Janna and Abbott] knew that there was no objectively reasonable basis for their defenses and made the fraudulent transfer with the knowledge and intent of defrauding a creditor.”

These representations were false and material, and the Accused either knew so when he made them or took no immediate steps to correct them once he acknowledged he became aware of their inaccuracy.

23.

With respect to the Yamhill Action, the Accused’s Rule 68 Motion and Enhanced Fee Motion contained the following representations

- That “this case was tried previously in court mandated arbitration with the exact same result, i.e., a judgment in favor of plaintiff on plaintiff’s claim and against defendant [sic] on defendant’s [sic] claims.”
- That “defendant’s [sic] lack[ed] an objectively reasonable basis for their *defense* of plaintiff’s . . . fraudulent transfer claim.” (emphasis added).
- “Defendant’s [sic] *defense* lacked any objectively reasonable basis, further supporting a larger prevailing party fee.” (emphasis added).
- “Defendant [sic] *position* throughout the present litigation has lacked objective reasonableness . . .” (emphasis added).
- That “defendants were not objectively reasonable *in their defense* of the subject claims, or otherwise lack any objectively reasonable basis, and *were brought* for no other reason but to abuse the legal process and harass plaintiff to incur additional delay and legal fees and costs.” (emphasis added).
- “The court should not permit the *defendants to misuse the legal system* as their own personal vehicle to bend others to their will and misappropriate funds of another.” (emphasis added).
- That “defendants’ *defenses* lacked any merit.” (emphasis added).
- “Defendants lacked any objective reasonableness and diligence during the proceedings.”
- “Defendants on multiple occasions sought postponements.”

- “Defendants’ efforts to continually *delay judgment of this matter* have been in bad faith and lacked an objectively reasonable basis.” (emphasis added).
- That “defendants [had] improper motivation in *seeking to delay judgment* and increase the fees and costs of plaintiff.” (emphasis added).
- That “the court should consider . . . *defendant’s [sic] handling* of this case.” (emphasis added).
- “In an effort to increase plaintiff’s fees and costs defendants has [sic] at every stage of this litigation attempted to make it as expensive as possible.”
- “In fact, defendants have at every stage *attempted to increase the costs related to the present litigation*, in an effort to improperly deter plaintiff from pursuing its lawful claim.” (emphasis added).

These representations were false and material, and the Accused either knew so when he made them or took no immediate steps to correct them once he acknowledges he became aware of their inaccuracy.

24.

The Accused’s Rule 68 Motion and Enhanced Fee Motion also contained the following affirmative representations that were contrary to facts as alleged in the Accused’s prior pleadings or information available to the Accused:

- “In response to and in an effort to intimidate plaintiff and increase plaintiff’s legal fees and costs, defendants filed defenses to plaintiff [sic] original claims and when it appeared that they would not prevail, they fraudulently transferred the subject real property into the name of their minor daughter.”
- That the Accused had incurred an arbitrator’s fee in the amount of \$250 in the Yamhill Action.
- That the Accused was entitled to a \$550 prevailing party fee in the Yamhill Action.

25.

On May 26, 2008, acting on the misrepresentations contained in the Accused’s Rule 68 Motion and Enhanced Fee Motion, the court entered a supplemental judgment against the Shamburgs and Abbott that awarded attorney fees to the Accused.

26.

The Shamburgs filed a motion to set aside the judgment in the Yamhill Action. Shortly thereafter, the Accused voluntarily dismissed the Yamhill County Complaint and withdrew the judgment and supplemental judgment. On June 5, 2009, following a hearing,

the court found that the Accused lacked any objectively reasonable basis to bring the Yamhill Action and awarded the Shamburgs their attorney fees, which the Accused paid.

### Violations

27.

The Accused admits that, by engaging in the above-described conduct, he violated RPC 1.5(a), RPC 3.1, RPC 3.3(a), RPC 3.3(d), RPC 8.4(a)(3), and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct.

### Sanction

28.

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 the legal system to avoid misrepresentations to the court, avoid abuse of the legal process, and refrain from conduct prejudicial to the administration of justice. *Standards*, § 6.1, § 6.2. He also violated his duties to the profession not to charge excessive fees. *Standards*, § 7.0.
- b. **Mental State.** Although the Accused may have initially filed pleadings negligently or recklessly, the Accused’s conduct became knowing when he had time to investigate the facts and alert the court to any inaccuracies. “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, Definitions*. “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*.
- c. **Injury.** The actual and potential injury to the Shamburgs and Abbott was huge—in addition to angst and frustration, they had substantial judgments entered against them and were required to incur fees to another attorney to attempt to rectify the Accused’s actions. (However, the Accused later paid at least a portion of these fees when he agreed to pay \$7,000 in costs to the Shamburgs.) Similarly, the judicial system was actually injured by the

Accused's initiation and pursuit of the Yamhill Action. Court time and resources were spent unwinding the Accused's conduct.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. The Accused acted with a selfish motive. *Standards*, § 9.22(b).
  2. There is a pattern of misconduct. *Standards*, § 9.22(c).
  3. Multiple offenses. *Standards*, § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior discipline. *Standards*, § 9.32(a).
  2. Cooperation with these disciplinary proceedings. *Standards*, § 9.32(e).
  3. The Accused provided letters to support that he has a good reputation in the legal community and the community as a whole. *Standards*, § 9.32(g).
  4. The Accused had other penalties imposed against him, as he paid \$7,000 in costs to the Shamburgs. *Standards*, § 9.32(k).
  5. Remorse. *Standards*, § 9.32(l). The Accused has expressed remorse that he allowed himself to get carried away in pursuing this matter against the Shamburgs.

29.

Under the ABA *Standards*, 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. Similarly, 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. Finally, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

30.

Like the *Standards*, Oregon cases suggest that a suspension is appropriate for the Accused's cumulative conduct.

The Accused's conduct is somewhat factually similar to that in *In re Stauffer*, 327 Or 44, 956 P2d 967 (1998). Stauffer's continued misuse of both the probate and bankruptcy courts to pursue his unpaid fees resulted in delays and years of aggravation and uncertainty to

former clients and led the court to impose a two-year suspension against him. The conduct in *Stauffer* was longer and more deliberate than the Accused's here. *Stauffer* also included conflicts charges that are not present in this case. However, it is useful as a starting point. See also *In re Kluge II*, 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; and also violated the rule by intentionally not giving notice of the motion to opposing counsel or the judge he sought to disqualify).

Moreover, the other misconduct by the Accused makes *Stauffer* and *Kluge* reasonable overall comparisons. See, e.g., *In re Campbell*, 345 Or 670, 202 P3d 871 (2009) (60-day suspension for excessive fees); *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (30-day suspension for excessive fees); *In re Smith*, 348 Or 535, 236 P3d 137 (2010) (90-day suspension for conduct including a frivolous claim); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (120-day suspension for conduct including misrepresentations to the court and third parties); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (same); *In re Fitzhenry*, 343 Or 86, 162 P3d 260 (2007) (same); *In re Levie*, 342 Or 462, 154 P3d 113 (2007) (one-year suspension for conduct including prejudice to the administration of justice); *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (same); *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006) (six-month suspension for conduct which prejudiced the administration of justice); *In re Paulson*, 341 Or 13, 136 P3d 1087 (2006), *cert den*, 549 US 1116 (2007) (same).

Under the foregoing cases, the Accused's collective misconduct warrants a lengthy suspension.

31.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for two years for violation of RPC 1.5(a), RPC 3.1, RPC 3.3(a), RPC 3.3(d), RPC 8.4(a)(3), and RPC 8.4(a)(4), effective 30 days following the date of approval by the court, or as otherwise directed 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 comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9.
- (b) Attorney Kurt Hansen or such other person approved by Disciplinary Counsel's Office (hereinafter "DCO") in writing shall supervise the Accused's probation (hereinafter "Supervising Attorney").
- (c) Within 60 days of the effective date of this agreement, 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.

- (d) Within 60 days of the effective date of this stipulation, the Accused will enroll himself in the Bar's attorney mentoring program, and thereafter, actively participate in and complete the Bar's attorney mentoring program prior to the end of the Accused's probationary term.
- (e) 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.
- (f) 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.
- (g) At least quarterly, and by such dates as established by DCO, 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. The Accused's report shall also identify: the dates and purpose of the Accused's meetings with his Supervising Attorney. 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.
- (h) The Accused authorizes his Supervising Attorney to communicate with DCO 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.
- (i) The Accused is responsible for the cost of any professional services required under the terms of this stipulation and the terms of probation.
- (j) 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.

- (k) 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.

32.

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 Kurt Hansen, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Mr. Hansen has agreed to accept this responsibility.

33.

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.

34.

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.

35.

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.

36.

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 Oregon Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 21st day of March, 2014.

/s/ Theodore M. Roe

Theodore M. Roe

OSB No. 991004

EXECUTED this 24th day of March, 2014.

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. 13-88 and 13-89  
)  
PETER M. SCHANNAUER, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: Paul B. Heatherman, Chairperson  
Ronald L. Roome  
John G. McBee, Public Member  
Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC  
1.4(b), RPC 1.15-1(d), and RPC 8.1(a)(2). Trial Panel  
Opinion. Disbarment.  
Effective Date of Opinion: May 13, 2014

**TRIAL PANEL OPINION**

This matter came before a Trial Panel of the Disciplinary Board consisting of Paul B. Heatherman, Chairperson; Ronald L. Roome, Member; and John G. McBee, Public Member, on February 12, 2014. The Oregon State Bar is represented by Amber Bevacqua-Lynott, Assistant Disciplinary Counsel. The Accused is not represented and did not respond to the Formal Complaint. An Order of Default was entered against the Accused on October 28, 2013. The trial panel considered the pleadings and memoranda filed by the parties. Based on the findings and conclusions made below, we find that the Accused has violated RPC 1.15-1(d), RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.1(a)(2).

**INTRODUCTION**

The Oregon State Bar (hereinafter “Bar”) filed its Formal Complaint against the Peter M. Schannauer (hereinafter “Accused”) on or about August 4, 2013, charging nine violations of the Oregon Rules of Professional Conduct from two episodes. The Accused was served with the Formal Complaint on September 10, 2013, but failed to appear within the time

provided by the Bar Rules of Procedure. The Bar filed a motion for order of default, and an Order of Default was granted on October 28, 2013, by Carl W. Hopp Jr., the Region 1 Disciplinary Board Chairperson. Pursuant to BR 5.8(a), the allegations of the Bar's Formal Complaint are deemed true, and the sole issue before the Trial Panel is the issue of sanctions for the misconduct.

## FACTS

The Accused was admitted to the Oregon State Bar on June 3, 1996. He was admitted to the Pennsylvania Bar in 1982.

In August 2012, the Bar initiated a formal proceeding against the Accused in three matters unrelated to the two matters now at issue. The Accused failed to appear in that proceeding and an order of default was entered against him. The Trial Panel issued sanctions that included, *inter alia*, a one-year suspension. That sanction was imposed in large part after reviewing the Accused's letter dated January 21, 2013, which stated, in part: "In addition, I will do what is required to make the complainants in these cases whole. \* \* \* I will also take other steps suggested by the Bar and PLF to make sure that these problems do not reoccur." The Bar appealed the decision of the Trial Panel before the Oregon Supreme Court.

## FIRST CASE

### (Stratton & Gowan Matter—No. 13-88)

In or around February 2012, Valerie Gowan and Troy Stratton hired the Accused to file a modification of Gowan's divorce and seek custody of Gowan's son. Gowan and Stratton provided to the Accused original documents, which were to be copied and returned, and a payment of \$940. There was no written fee agreement.

In July 2012, after the Accused failed to file any modification petition and respond to numerous inquiries, Gowan and Stratton demanded return of their original documents. A couple of weeks later, they terminated the Accused's representation and again demanded their documents and requested an accounting of the \$940 previously paid. The Accused did not return the documents or provide an accounting. The Accused's inaction and avoidance violated RPC 1.3 and RPC 1.4(a).

Between November 2012, and April 2013, the Accused failed to respond to at least three inquiries from Disciplinary Counsel's Office (hereinafter "DCO"). During this same time period, the Accused failed to respond to numerous inquiries from Gowan and Stratton.

## SECOND CASE

### (Neel Matter—No. 13-89)

In or around October 2012, Rian Neel retained the Accused to defend a modification of custody proceeding initiated by her former husband. The hearing was scheduled for

November 2012 and Neel paid the Accused an \$800 retainer for fees and costs. There was no written fee agreement.

After accepting Neel's retainer, the Accused did nothing to prepare for the hearing and as a result, Neel lost custody of her daughter. Neel asked that a change be made to the proposed judgment, but the Accused failed to request this change and notified opposing counsel that the proposed judgment was satisfactory. The Accused's failure to prepare for Neel's hearing is a violation of RPC 1.1. His neglect of the matter is a violation of RPC 1.3 and his failure to provide any explanation to Neel for his elected inaction violated RPC 1.4(b).

Throughout the representation, Neel made periodic requests for an accounting of her \$800 retainer. The Accused did not respond or provide an accounting.

Between January and April 2013, the Accused failed to respond to at least three inquiries from DCO.

### COMMON ALLEGATIONS

Without a clear written agreement that fees paid in advance constitute a non-refundable retainer earned upon receipt, any such funds must be deposited into the lawyer's trust account and withdrawn only as they are earned. The Accused did not have a written fee agreement in either the Gowan & Stratton matter or the Neel matter. The Accused also failed to account for the funds in either matter, or return any unused funds. This constitutes a violation of RPC 1.15(d).

A lawyer is required to cooperate and respond fully and truthfully to inquiries and reasonable requests from the Bar. In both matters the Accused failed to respond to at least three inquiries by DCO. This is a violation of RPC 8.1(a)(2).

### SANCTIONS

In determining the appropriate sanction, we may consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") and Oregon case law. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994). The *Standards* include the following factors to review: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating or mitigating circumstances. *Standards*, § 3.0. Applying those factors in this case it is clear that:

1. **Duty Violated.** The most important ethical duties are those obligations that a lawyer owes to clients. In this case, the Accused violated his duty to preserve and return client property, to act with reasonable diligence and promptness, and to adequately communicate with clients. The Accused also violated his duty to cooperate with disciplinary investigations.

2. **Mental State.** The Accused acted knowingly and intentionally in failing to communicate with clients and DCO and in failing to return property and funds to clients. This is a deviation from the standard of care a reasonable lawyer would exercise in the situation.
3. **Injury.** The Accused's failure to act and communicate with clients and return property to clients caused actual injury in terms of anxiety and frustration and the use of money owed to them. The Accused's failure to cooperate with the Bar's investigation caused actual injury to both the legal profession and the public. The Accused's failure to respond to the Bar's inquiries resulted in the Bar seeking more time-consuming ways to investigate, and public respect for the Bar was diminished because the Bar could not provide timely and informed responses to complaints.
4. **Aggravating Circumstances.** In this case there are several aggravating factors. The Accused has a prior record of discipline. He has demonstrated a pattern of misconduct and there have been multiple offenses. In his letter of January 21, 2013, to the trial panel in the former disciplinary action, the Accused appeared sincere and remorseful. However, at or near this same time he was engaging in the same pattern of misconduct with the victims in this present case. The Accused is not inexperienced. He has made no effort to return or account for any money paid by either of the clients in this case.

Severe sanctions for failing to cooperate are particularly applicable where the attorney has prior similar discipline. *See, e.g., In re Paulson III*, 346 Or 676, 216 P3d 859 (2009), *adh'd to on recons*, 347 Or 529, 225 P3d 41 (2010); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons*, 345 Or 652, 202 P3d 165 (2009); *In re Kluge II*, 335 Or 326, 66 P3d 492 (2003). Generally, a greater sanction is imposed when a lawyer has a prior disciplinary record, particularly when the prior misconduct was similar to the misconduct at issue. We are mindful that the Accused's misconduct here is substantially similar to that in the Accused's recent past. This fact compels a serious sanction. *In re Jones II*, 326 Or 195, 200, 951 P2d 149 (1997).

At some point the pattern and duration of misconduct by an accused lawyer is such that disbarment is the only sanction that will ensure protection of the public, particularly when the misconduct is as pervasive as is the Accused's. Considered as a whole, the pattern and extent of the Accused's misconduct establishes that he is unable to conform his conduct to the basic rules demanded of all lawyers.

### **CONCLUSION / SANCTIONS 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 to properly

Cite as *In re Schannauer*, 28 DB Rptr 100 (2014)

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). The Trial Panel unanimously concluded that in order to protect the public and the Oregon State Bar, the Accused should be disbarred.

In addition, the Accused must provide full restitution to Rian Neel, and to Valerie Gowan and Troy Stratton, including interest at the rate of 9 percent. Alternately, the Accused must reimburse the Client Security Fund (hereinafter “CSF”) if the CSF has already paid said individuals.

DATED this 10th day of March, 2014.

/s/ Paul B. Heatherman

Paul B. Heatherman, Trial Panel Chair

/s/ Ronald L. Roome

Ronald L. Roome, Trial Panel Member

/s/ John G. McBee

John G. McBee, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 12-143 and 12-144  
)  
JUSTIN E. THRONE, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: Megan B. Annand, Chairperson  
John E. Davis  
Thomas W. Pyle, Public Member  
Disposition: Violation of RPC 8.1(a)(2), RPC 8.4(a)(2), and RPC  
8.4(a)(3). Trial Panel Opinion. 1-year suspension, all  
stayed, 2-year probation.  
Effective Date of Opinion: May 28, 2014

**TRIAL PANEL OPINION**

This matter came before a Trial Panel of the Disciplinary Board on January 21, 2014. The Trial Panel consisted of Megan Annand, trial chairperson, Tom Pyle, public member, and Jack Davis, attorney member. The Bar was represented by Amber Bevacqua-Lynott, who appeared by telephone due to inclement weather. The Accused, Justin E. Throne, was present and appeared *pro se*. This disciplinary proceeding concerns four alleged violations of the Oregon Rules of Professional Conduct, including knowing misrepresentation and failure to file and pay taxes.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Justin E. Throne (hereinafter “Accused”) was admitted to the Oregon State Bar (hereinafter “Bar”) on January 4, 2002. On June 11, 2013, the Bar filed its Formal Complaint against the Accused. He was personally served on July 24, 2013 with the Complaint and the Notice to Answer. On September 14, 2013, an Order of Default was entered as to the Formal Complaint against the Accused after he failed to respond to a ten-day notice to seek default.

The factual allegations are deemed true (BR 5.8(a)) because of the default. The Accused conceded at the hearing that the allegations of the complaint are true. (TR 12:15-21).

### **Federal and State Employee Withholding**

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. RPC 8.4(a)(3).

The Accused did not pay withholding taxes on his employees' wages for eight quarters between mid-2009 and mid-2011. According to a note from his then attorney, the Accused filed all quarterly returns with the Internal Revenue Service and the State of Oregon but did not pay the amounts due. (Bar Brief, Ex. 2, p. 2). The Accused's full-time employee<sup>1</sup> helped him prepare the returns and was aware that payments were not made. (Bar Brief, Ex. 3, p. 2). At the time of the March 2013 interview, all amounts owed to the IRS for employee withholding had been paid. (Bar Brief, Ex. 3, p. 2). He still owed approximately \$2000 to the State of Oregon as of January 2014, for which he was making \$500 monthly payments per an agreement with the state. (TR 26:13-25).

The Accused conceded that he failed to pay the taxes owed on behalf of his two employees when due. There is uncontroverted evidence that the Accused's assistant knew that he did not pay the taxes when due because he did not have the money.

We do not find that this was a fraud, dishonesty, or deceit on the part of the Accused because he did not claim *not* to owe the trust fund taxes, nor did he claim that the employees were independent contractors, both of which might have shown an intention to mislead the employees. The misrepresentation is that the employees received pay checks which stated money had been withheld. Presumably, the employees' W-2 to the IRS also stated that money was withheld. This would give the impression that money had been withheld and was paid to the taxing authorities, which it was not on a timely basis.

While we find that this was a material misrepresentation, we do not find fraud or deceit were involved. Based upon a material misrepresentation, we find a violation of RPC 8.4(a)(3).

### **Federal Tax Returns**

It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. RPC 8.4(a)(2).

The Accused failed to file and pay his federal income tax for a number of years. He filed extensions for 2009 and 2010, but had not filed an extension for 2011 as of March 2013. (Bar Brief, Ex. 3, p. 3). In determining whether a lawyer's conduct violates RPC 8.4(a)(2),

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<sup>1</sup> The Accused had two employees, one was a part-time employee.

the inquiry is whether there was a criminal act, not the criminal conviction. It is not necessary for a lawyer to have been charged or convicted of a crime to establish a violation of the rule. *In re Kirkman*, 313 Or 181, 184, 830 P2d 206 (1992).

Pursuant to 26 USC § 7203, willful failure to file a personal income tax return is a crime. In this context, willful conduct is established by evidence of a knowing, voluntary, and deliberate intent to disobey a filing requirement.

As the Bar points out, “[t]here must be some rational connection other than the criminality of the act between the conduct and the actor’s fitness to practice law.” *In re White*, 311 Or 573, 589, 815 P2d 1257 (1991). In *In re White*, the court found that an attorney’s failure to file timely tax returns reflected disrespect for the law. The failure was not victimless as the federal government was affected. *In re Lawrence*, 332 Or 502, 510, 31 P3d 1078 (2001).

As of the time of the January 2014 hearing, the Accused stated that though he had still not filed tax returns, he had filed extensions and, based upon his understanding of his business and other income, did not owe federal taxes. (TR 16:19–25). The Accused stated that though the federal tax lien indicated he owed substantial amounts, those estimates were based upon his IRS 1099s as opposed to his actual tax liability. (TR 17). The Accused admitted that he had not filed federal tax returns for the year 2004 through 2008 until 2012. (TR 18–19). The Accused testified that because of a disallowance on an earlier tax return, tax returns for the years 2010 through 2012 were held up. (TR 19). The Accused is not yet caught up with filing his federal tax returns.

His failure to file returns constitutes conduct that could be a criminal act and that reflects adversely on his fitness to practice law, in violation of RPC 8.4(a)(2).

### **Oregon Dept. of Revenue Matter & Monette Matters**

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

This rule requires a lawyer to cooperate and to respond fully and truthfully to inquiries from the Bar and to comply with the reasonable requests of the Bar. Because of the Accused’s failure to respond, both matters were referred to the Klamath County Local Professional Responsibility Committee (hereinafter “LPRC”) for additional investigation. The LPRC subpoenaed the Accused for an interview and the production of records, and the Accused complied.

The facts establish that the Accused committed the disciplinary rule violations as alleged in the Formal Complaint. This is a violation of RPC 8.1(a)(2).

## SANCTION

In fashioning a sanction in this case, the Trial Panel considers the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) and Oregon case law. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993). The *Standards* establish the framework to analyze the Accused’s conduct, including (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.

### A. Duty Violated.

The Accused violated his duty to the public to maintain his personal integrity because of his failure to file timely tax returns and to make timely payments. *Standards*, § 5.1. The Accused also violated his duty to the profession to cooperate with disciplinary investigations. *Standards*, § 7.0.

### B. 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, Definitions*.

The Trial Panel finds the Accused knowingly failed to pay withholding taxes on his employees’ wages and that one of the employees did not know the taxes had not been paid. The Trial Panel also finds that the Accused acted knowingly in failing to file his federal tax returns. *See In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1988) (lawyer’s mental state can be inferred from the facts).

The Trial Panel finds that the Accused acted at least knowingly in failing to respond to Bar inquiries. He acknowledged receipt of the letters to Bar staff (Ex. 4) and the LPRC (Ex. 3).

### C. Injury.

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

It is unknown whether the Accused’s failure to pay the assessed withholding taxes and corresponding misrepresentation to the employee who was unaware that the taxes were not forwarded to the taxing authorities caused any actual injury. According to the Accused, he is in the process of paying the employee trust fund amounts to the State of Oregon in an amount of approximately \$500 per month and payment in full should be completed within

two months of this opinion. (TR 26-27). As discussed earlier, failure to file and pay federal taxes is not a victimless crime.

The Accused's failure to respond to inquiries from the Bar's investigation caused additional work for the Bar.

**D. Presumptive Sanction.**

Drawing together the factors of duty, mental state, and injury (and absent aggravating or mitigating circumstances), the Bar points to the following *Standards* which it believes applies:

§ 5.11 Disbarment is generally appropriate when:

- (b) a lawyer engages in . . . intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

§ 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct . . . that seriously adversely reflects on the lawyer's fitness to practice.

§ 7.2 Suspension is generally appropriate where a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

**E. Aggravating Circumstances.**

The following factors recognized as aggravating exist in this case:

A prior record of discipline. *Standards*, § 9.22(a). The Accused's prior relevant disciplinary history includes a 30-day suspension in 2011 for violation of RPC 1.4(a) (failure to adequately communicate with a client or respond to reasonable requests for information) and RPC 1.15-1(d) (failure to account for and return client funds) in connection with his representation of a seller seeking forfeiture of a real estate sales contract. *In re Throne*, 25 DB Rptr 255 (2011). (Ex. 5). The Trial Panel notes that this discipline was stipulated to by the Accused. In reviewing the conduct detailed in the Order and Stipulation for Discipline, the Trial Panel believes that if this conduct had been brought before a Trial Panel, as a first offense, the Accused would probably have received a public reprimand.

A pattern of misconduct. *Standards*, § 9.22(c). The Bar argues that the Accused repeatedly misrepresented the amount of his employee(s) wages, repeatedly failed to file his federal taxes, and repeatedly failed to respond to the Bar. *See In re Bourcier II*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner II*, 325 Or 421, 427, 939 P2d 39 (1997).

Multiple offenses. *Standards*, § 9.22(d). This Accused faces discipline for a second time.

Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to the Oregon State Bar in 2002.

#### **F. Mitigating Circumstances.**

At the hearing and following the hearing at the request of the Trial Panel, the Accused presented evidence that he suffers from depression and Attention Deficit Disorder which may stem from a brain injury suffered as a result of being beaten in 2005. The Accused testified that at the time of his 30-day suspension, his parents noticed that “he had been slipping around a lot of things at the office. . . .” (TR 9) and that he “was not the person that they traditionally recognized.” (TR 9). They pointed him to the Amen Clinic in northern California, which is well-known clinic specializing in brain trauma. The Accused traveled to and submitted to an examination at the Amen Clinic on February 27 and 28, 2012. After consultation and brain scans, the Accused was diagnosed with Attention Deficit Disorder (ADD), depressive disorder, and an abnormal brain scan. (Amen Records, p. 14). It was recommended that he consult with his primary physician, have blood work, obtain a sleep study, take antidepressants, and initiate a medication regime for ADD. (Amen Records, pp. 14–16). These recommendations were signed by Todd Elwyn, a physician board certified in psychiatry and neurology. (Amen Records, p. 17). The Accused followed the Amen Clinic consultation with a visit to his primary care physician. The Accused was placed on antidepressants and sent for a sleep study. He was diagnosed with sleep apnea and now uses a CPAP. (Dassoff Records, dated 6/19/12).

After reviewing the medical conditions diagnosed at the Amen Clinic and treated by his primary physician, the Trial Panel feels that the conduct for which this sanction will be imposed may well have been caused by his medical conditions.

#### **Oregon Case Law**

Sanctions in disciplinary matters are not intended to penalize the accused lawyer, but instead are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). “[A]ppropriate discipline deters unethical conduct.” *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

#### **Misrepresentation**

The Bar requests a two-year suspension. The Bar cites *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010) (lawyer representing a client in a real estate foreclosure was suspended for 150 days when he removed the notarized signature page from a deed, affixed it to a different deed, and had the second deed recorded); *In re Fitzhenry*, 343 Or 86, 162 P3d 260 (2007) (in-house counsel for a corporation regulated by the SEC was suspended for 120 days when he signed and knowingly filed a false management representation letter); *In re Morris*, 326 Or 493, 953 P2d 387 (1998) (120-day suspension of lawyer who altered and filed an account that had already been signed and notarized); and *In re Hiller*, 298 Or 526, 694 P2d

540 (1985) (120-day suspension of lawyers who submitted a knowingly false affidavit when the lawyers knew there was no consideration for the sale and the buyer was employed by the lawyers).

In the opinion of the Trial Panel the Accused's conduct, while misguided, fits more into the category of negligence than of fraud. Each of the instances cited by the Bar's cases describes lawyers whose behavior was criminal, fraudulent, and grimly harmful to the court, to their clients, and the public in general. We disagree that the Accused's conduct is equivalent to the conduct of the lawyers in the above cases.

Next, the Bar cites the case of *In re Levie*, 342 Or 462, 154 P3d 113 (2007) (attorney suspended for one year for multiple misrepresentations including false representations to opposing counsel and false representations to an arbitrator<sup>2</sup>) and *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006) (six-month suspension when attorney made false representations to the court and opposing counsel orally and in submitted affidavits). For the same reasons cited above, the Trial Panel finds these cases inapposite. We note the comparative brevity of the suspensions for false representations involving deceit and fraud.

Finally, the Bar compares the Accused's conduct to that of Sally Leisure. Ms. Leisure wrote 98 bad checks and incurred overdraft or returned item charges on another 200 checks. With these NSF checks she took possession of others' property, such as a \$3000 saddle for her daughter. She wrote \$12,500 in worthless checks for wages to her associate. These are only some examples of Leisure's callous misconduct. The Trial Panel does not find the conduct of the Accused to be in any way comparable to Leisure, who received an 18-month suspension. *In re Leisure*, 338 Or 508, 113 P3d 412 (2005).

The Trial Panel is deeply concerned that the medical conditions from which the Accused suffers imperil his ability to effectively manage a law practice. Rather than impose a sanction that will do nothing to address the Accused's problems and, in the long run, protect the public, the Trial Panel believes a sanction that requires the Accused to follow a well-defined path would most benefit him and the public.

## CONCLUSION

The Trial Panel has determined that the proper and fair sanction for the Accused is as follows:

1. The Accused shall be suspended for 1 year;
2. The suspension is stayed in whole on the condition that the following probationary terms are met by the Accused:

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<sup>2</sup> The author notes that the OSB does not display Levie's name and that he was suspended in California.

3. The Accused shall submit copies of his signed, filed IRS and State of Oregon tax returns for tax years 2010, 2011, and 2012, within 60 days of this Order becoming final;
4. The Accused shall submit a copy of his completed and filed IRS and State of Oregon tax return for Tax Year 2013 by July 15, 2014;
5. If the Accused has any employees, he shall submit proof of filing timely returns and timely payment of all monies owed on behalf of employees within 10 days of submission of the returns and money;
6. The Accused shall provide documentary proof of his continuing medical care for depression, attention deficit disorder, and sleep apnea, including proof of his following the medication regime prescribed by his physician(s) or he shall provide his physician or physicians' declarations stating that the Accused no longer requires medical care for each condition;
7. The Accused shall submit to a comprehensive review of his office systems through the Professional Liability Fund within 120 days of this Order becoming final;
8. The Accused and the Bar shall agree upon a suitable person to supervise the Accused's probation within 10 days of this Order becoming final. If no agreement is reached, pursuant to BR 6.2(a), a person shall be appointed by the chairperson of the Disciplinary Board or the Oregon Supreme Court to supervise the Accused's probation;
9. Pursuant to this Order and the State Bar Rules of Procedure the Accused is required to cooperate fully with whoever is appointed to supervise his probation.

It is so ordered.

March 21, 2014

/s/ Megan B. Annand

Megan B. Annand, Trial Panel Chairperson

/s/ John E. Davis

John E. Davis, 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. 13-107  
)  
PAIGE ALINA DE MUNIZ, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Roy Pulvers  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(3). Stipulation for Discipline.  
30-day suspension.  
Effective Date of Order: June 7, 2014

**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 June 7, 2014, for violation of RPC 8.4(a)(3).

DATED this 28th day of May, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Paige Alina De Muniz, 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 25, 2008, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

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

4.

On September 21, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 8.4(a)(2) and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

#### **Facts**

5.

In April 2013, the Accused paid for two hours of parking at a private parking garage managed by Northwest Parking Control (hereinafter “NPC”) and placed the time-stamped receipt on the dash of her vehicle. The Accused was issued a parking fee notice by the lot attendant when she did not move her vehicle before the expiration of the time stamped on her receipt.

6.

Due to the contents of the fee notice, including the questionable contact information and website for NPC, the Accused was skeptical about its authenticity. In addition, the Accused was doubtful that NPC had the authority to issue her a parking fee notice. However,

rather than investigate the matter fully, the Accused made obvious alterations to the times on the time-stamped receipt and sent it to NPC with a note arguing that the time had not expired on her parking time and that the parking fee notice was invalidly issued. The Accused put her name and phone number on the note she sent to NPC. She did not pay the parking fee notice at that time.

7.

In May 2013, NPC denied the Accused's appeal of the parking fee notice and sent her a copy of the lot attendant's dash photo of the parking receipt (i.e., prior to alteration). Approximately a week after NPC mailed the letter, the Accused paid the parking fee notice voluntarily and roughly a month before Bar involvement.

### **Violations**

8.

The Accused admits that, by altering the parking receipt and representing to NPC that time had not expired when she was issued the notice, she engaged in a misrepresentation in violation of RPC 8.4(a)(3).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.4(a)(2) should be and, upon the approval of this stipulation, is dismissed.

### **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 her duty to the public to maintain her personal integrity. *Standards*, § 5.1.
- b. **Mental State.** The Accused acted knowingly, to wit, with the conscious awareness of the nature of the conduct but without the conscious objective or purpose to accomplish a particular result. The Accused acted negligently and impetuously in not adequately investigating the legitimacy of the parking fee notice before attempting to illicit a reply to her skepticism of the notice by obviously altering the face of the parking receipt. *Standards, Definitions*.
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury can be considered. *Standards, Definitions; In*

*re Williams*, 314 Or 530, 840 P2d 1280 (1992). NPC was potentially injured to the extent that they may not have been able to recover for their parking fee notice.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. The Accused engaged in a misrepresentation. *Standards*, § 9.22(b).
  2. The Accused has substantial experience in the practice of law, having been admitted in Oregon in 2008. *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 cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e).
  3. Good faith effort to make restitution or to rectify the consequences of her misconduct. The Accused paid the parking notice when notified that her appeal had been denied and roughly a month before the Bar became involved. *Standards*, § 9.32(d);
  4. Good character and reputation. *Standards*, § 9.32(g).
  5. The Accused has expressed remorse for her actions. *Standards*, § 9.32(l).

10.

Under the ABA *Standards*, a suspension or reprimand is generally appropriate when a lawyer knowingly engages in conduct that involves misrepresentation and that adversely reflects on the lawyer's fitness to practice law. *Standards*, § 5.12, § 5.13.

11.

Several Oregon cases support the imposition of a suspension. *See, e.g., In re Foster*, 25 DB Rptr 201 (2011) (government attorney was suspended for 30 days when he took a water sample from a pool near the property of a business then being criminally prosecuted for alleged pollution violations; and thereafter, made misrepresentations to others, including his boss, about his role in the water sampling); *In re Nehring*, 21 DB Rptr 227 (2007) (attorney was suspended for 30 days for taking and disposing of personal property of a former girlfriend and a romantic rival; attorney also denied his conduct when first confronted by the former girlfriend).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of RPC 8.4(a)(3), the sanction to be effective June 7, 2014.

13.

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. In this regard, the Accused's law firm, Gevurtz Menashe, will have ongoing access to the Accused's client files and serve as the contact for clients in need of files during the term of the Accused's suspension.

14.

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.

15.

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.

16.

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.

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.

Cite as *In re De Muniz*, 28 DB Rptr 113 (2014)

EXECUTED this 19th day of May, 2014.

/s/ Paige Alina De Muniz

Paige Alina De Muniz

OSB No. 082466

EXECUTED this 20th day of May, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-22 and 13-23  
) SC S062139  
MITCHELL R. BARKER, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC  
1.7(a)(2), RPC 5.5(a), and ORS 9.160. Stipulation for  
Discipline. 1-year suspension.  
Effective Date of Order: May 29, 2014

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. The Accused is suspended from the practice of law in the State of Oregon for a period of one year from the effective the date of this order.

/s/ Thomas A. Balmer

THOMAS A. BALMER, 5/29/2014,

9:18:59 a.m.

CHIEF JUSTICE SUPREME COURT

**STIPULATION FOR DISCIPLINE**

Mitchell R. Barker, 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 May 17, 2000, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Ada and Canyon Counties, Idaho.

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, 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 (neglect of a legal matter); RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter or promptly comply with reasonable requests for information); RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 1.7(a)(2) (personal interest conflict of interest); RPC 5.5(a) (practicing law in a jurisdiction in violation of the regulation of the legal profession); and ORS 9.160 (practicing law or holding oneself out as able to practice law in Oregon while not an active member of the Bar).

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 2002, Joni Schweickart (hereinafter “Schweickart”) retained Idaho attorney, David Purnell (hereinafter “Purnell”), to establish visitation with her disabled brother, William Ripley (hereinafter “Ripley”), in Oregon. Schweickart’s sister, Claudia Groh (hereinafter “Groh”), was Ripley’s guardian and was not permitting Schweickart to talk to or to visit with Ripley.

6.

Purnell referred Schweickart to the Accused. Schweickart signed an agreement with Purnell and paid him a \$2,500 retainer. During the course of the probate matter in which the

Accused represented her, Schweickart paid the Accused (and/or the firms for which he was employed or associated) thousands of dollars in additional fees.

7.

In May 2007, the Accused successfully obtained a court order in Oregon circuit court, establishing a visitation schedule for Schweickart and Ripley. Schweickart was also granted attorney fees. However, when Groh objected to the fee award, the Accused did not timely respond, and in January 2008, Groh was awarded an attorney fee judgment against Schweickart in the amount of \$11,411.64. The Accused expressed to Schweickart that it was unfair for her to have to pay the judgment, since the error was not hers but had been entered as a result of the Accused's untimely response to Groh's objection. Schweickart understood that both Purnell and the Accused promised that they would satisfy this judgment.

8.

Once the Accused learned that his conduct had resulted in a judgment against Schweickart, there was a significant risk that his continued representation of Schweickart was or would be materially limited by the Accused's personal interest in avoiding or minimizing the consequences to himself. To the extent that Schweickart's consent after full disclosure was available to permit the Accused's continued representation, the Accused failed to explain to Schweickart the extent of this personal interest conflict; failed to advise Schweickart to seek independent advice regarding whether she should consent to the Accused's continued representation; and failed to obtain Schweickart's informed consent, confirmed in writing, to the Accused's continued representation.

9.

Groh's attorney offered to satisfy the judgment against Schweickart for \$9,200. Schweickart contends that the Accused acknowledged to her that he owed the judgment and represented that he would pay it. The Accused never paid the judgment.

10.

In January 2008, Groh was not complying with the scheduled visitation. Schweickart asked that the Accused move for an order of contempt. The Accused took no substantive action on this request, despite Schweickart's numerous subsequent requests that he do so. The Accused also failed to respond to Schweickart's messages and attempts to communicate with him.

11.

On June 5, 2008, the Accused was suspended from membership in the Oregon State Bar. Thereafter, the Accused continued to represent Schweickart in the Oregon probate matter in a limited manner. He did not notify Schweickart of his suspension.

12.

Groh later moved to amend the original court order to reduce Schweickart's visitation with Ripley and petitioned for an award of attorney fees. A hearing on Groh's motions was set for July 15, 2009.

13.

At Schweickart's request, the court rescheduled the case for September 25, 2009, and sent notice of the new hearing date to the Accused's address of record. The Accused was no longer at this address and had failed to inform the court or Schweickart that he had moved his office. Consequently, neither the Accused nor Schweickart received notice of the new hearing date. Despite subsequent inquiries from Schweickart, the Accused did not contact the court about the hearing date. Neither the Accused nor Schweickart appeared for the September 25, 2009 hearing. A judgment for \$5,694.80 was entered against Schweickart for Groh's attorney fees.

14.

Thereafter, the Accused filed motions attempting to address and reverse the September 25, 2009 judgment, but these motions were untimely filed. On March 23, 2010, the court entered another judgment against Schweickart, which awarded Groh additional attorney fees of \$4,038.13.

15.

On May 27, 2008, Schweickart was arrested and jailed in Polk County, Oregon for allegedly using marijuana in the presence of her children. On or about May 28, 2008, Schweickart's husband, Bert Schweickart (hereinafter "Bert") asked the Accused to represent Schweickart on this issue. The Accused requested and Bert paid \$5,000 for the Accused to undertake the representation. There was no written fee agreement. At the time, the Accused admittedly owed Schweickart more than \$11,000 for the judgment he had allowed to be entered against her in the probate matter.

16.

Given his status as a debtor of Schweickart, there was a significant risk that his representation of Schweickart in her criminal matter would be materially limited by the Accused's personal interest in avoiding or minimizing consequences to himself. To the extent that Schweickart's consent after full disclosure was available to permit the Accused to undertake her representation in the criminal matter, the Accused failed to explain to Schweickart the extent of this personal interest conflict; failed to advise Schweickart to seek independent advice regarding whether she should consent to the Accused's representation; and failed to obtain Schweickart's informed consent, confirmed in writing, to the Accused's representation.

17.

The Accused was suspended from practice in Oregon from on June 5, 2008, to September 17, 2009.

18.

On May 30, 2008, the Accused filed a notice of appearance on Schweickart's behalf, and it was entered on June 2, 2008, while he was still an active Oregon lawyer. After June 5, 2008, the Accused sent a letter on Schweickart's behalf to the district attorney handling Schweickart's case and requested discovery in the case, at a time when he was not an active member of the Oregon State Bar. The Accused did not notify Schweickart or the district attorney that he was not authorized to practice law in Oregon.

### **Violations**

19.

The Accused admits that, by engaging in the conduct described in the paragraphs above he violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 5.5(a), and ORS 9.160.

### **Sanction**

20.

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 duty to his client to refrain from conflicts of interest. *Standards*, § 4.3. He also violated his duty of diligence to his client, which includes the duty to adequately communicate. *Standards*, § 4.4. The *Standards* presume that the most important ethical duties are those which a lawyer owes to clients. *Standards*, p. 5, *Theoretical Framework*. The Accused also violated his duty to the profession to refrain from the unauthorized practice of law. *Standards*, § 7.0.
- b. **Mental State.** With the exception of his unlawful practice, all of the Accused's conduct was knowing. 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. *Standards, Definitions*. Negligence is the failure of a lawyer to heed a substan-

tial 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, Definitions*.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards, Definitions; In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, Schweickart was actually injured financially and otherwise (*e.g.*, impact on her credit) by the entry of multiple judgments against her. She was also potentially injured to the extent that her criminal case may have been delayed or undone because the Accused was not authorized to practice law in Oregon.

In addition, the Accused's failures to act and communicate with Schweickart caused some actual injury in terms of anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney neglect can constitute actual injury); *In re Schaffner II*, 325 Or 421, 426–27, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Prior disciplinary offenses. *Standards*, § 9.22(a). The Accused was suspended for 60 days in November 2010 for violation of RPC 5.5(a) (practicing law in a jurisdiction in violation of the regulation of the legal profession), RPC 8.1(a)(1) (making a false statement of material fact in connection with a disciplinary matter), and ORS 9.160 (practicing law or holding oneself out as able to practice law in Oregon while not an active member of the bar). Some of these violations are also present in this proceeding.
  2. Selfish motive. *Standards*, § 9.22(b).
  3. A pattern of misconduct. *Standards*, § 9.22(c). The Accused's transgressions occurred over a substantial period of time. In addition, the Accused's prior discipline is similar to some of his conduct in this matter, which, taken together, demonstrate a pattern of misconduct. *Standards*, § 9.22(c). *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
  4. Multiple offenses. *Standards*, § 9.22(d). The Accused engaged in several distinct acts, each of which constituted a separate violation of the disciplinary rules rather than one bad act charged under several rules. *In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).

5. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 2000, in Idaho in 1999, and in Utah in 1985.

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

1. Personal or emotional problems. *Standards*, § 9.32(c). During the time that preceded the Accused's suspension from the Bar, he suffered some medical problems that distracted his attention and may have contributed to his failure attend to Schweickart's matters or adequately communicate with her.
2. The Accused has expressed remorse for his conduct in these matters. *Standards*, § 9.32(l).

21.

Under the ABA *Standards*, a 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. A suspension is also generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Finally, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system; a reprimand is appropriate when a lawyer negligently engages in this conduct. *Standards*, § 4.32, § 4.42, § 7.2, § 7.3.

22.

Case law suggests that at least a one-year suspension is appropriate for the Accused's collective misconduct, particularly his personal-interest conflict. *See In re Trukositz*, 19 DB Rptr 78 (2005) (trial panel imposed a 12-month suspension for attorney's neglect in allowing his client's personal injury matter to be dismissed, and subsequently failing to follow through on attorney's promise to notify his malpractice carrier, all the while continuing to represent the client without obtaining proper consent. Attorney thereafter neglected the client's matter and failed to respond to her numerous attempts to communicate with him); *In re Burns*, 24 DB Rptr 266 (2010) (trial panel imposed 1-year suspension where attorney's firm undertook to represent conservator in protected proceeding, including advising the conservator concerning whether claims against the protected person or his estate should be paid, at a time when the firm claimed that the protected person owed the firm in excess of \$8,000 in attorney fees for services rendered prior to the establishment of the conservatorship); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons*, 345 Or 652, 202 P3d 165 (2009) (court found attorney committed a self-interest conflict and suspended him for 1 year

for undertaking to assist a client in collecting a debt from a third party while contemporaneously renegotiating the attorney's own debt owed to the client); *In re Levie*, 342 Or 462, 154 P3d 113 (2007) (attorney was suspended by the court for 1 year when he continued to represent a client after an arbitrator ordered that all the client's sculptures be turned over to a gallery for sale, when attorney's law firm held a security interest in and physically possessed some of the sculptures); *In re Wetsel*, 21 DB Rptr 129 (2007) (attorney was given an 18-month suspension by a trial panel for his failure to appear for a client in an arbitration and argue against a motion for attorney fees, and his failure to inform the client of the resulting attorney fee award or that the client was entitled to appeal the arbitrator's decision and have a trial *de novo*).

23.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for one year for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 5.5(a), and ORS 9.160, the sanction to be effective upon approval by the court.

24.

As a condition of this agreement, the Accused has repaid to Schweickart \$3,500 (a portion of the fees she paid for the Accused's services in the probate and criminal matters), and provided verification of payment to the Bar.

25.

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 represents that he has no clients in Oregon. He further represents that he is not in possession of any Oregon client files.

26.

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, as well as return the remaining balance of legal fees paid to him by Schweickart in the amount of \$13,500. 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.

27.

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 the denial of his reinstatement.

28.

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: Idaho and Utah.

29.

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 Oregon Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 19th day of March, 2014.

/s/ Mitchell R. Barker

Mitchell R. Barker

OSB No. 001490

EXECUTED this 24th day of March, 2014.

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. 13-103 and 13-104  
)  
JOHN P. SALISBURY, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Richard G. Helzer  
Disciplinary Board: None  
Disposition: Violation of RPC 1.7(a). Stipulation for Discipline. 60-day suspension, all stayed, 1-year probation. Upon successful completion of probation, sanction will be reduced to public reprimand.  
Effective Date of Order: June 1, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 60 days, all of which is stayed pending completion of a one-year term of probation, effective June 1, 2014, for violation of RPC 1.7(a).

It is further ordered that if the Accused successfully completes the one-year probation, the 60-day suspension shall be rescinded and replaced with a public reprimand.

DATED this 29th day of May, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

John P. Salisbury, 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 Columbia County, Oregon.

3.

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

4.

On September 21, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 1.7(a)(2) (lawyer self-interest conflict) 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.

#### **Bauska Complaint Case No. 13-103**

#### **Facts**

5.

In June 2012, Brandy Bauska (hereinafter “Bauska”) retained the Accused to represent her in a pending child custody dispute regarding her two young daughters in the State of Washington. At the time, Bauska was addicted to an illegal drug and had been involved in an abusive relationship; her mother was seeking temporary custody of the girls.

6.

Shortly after the representation began, the Accused started texting personal messages to Bauska late in the evenings; the messages were of an intimate nature unrelated to his

representation. Although he apologized following his transmission of these messages, the evening texts continued.

7.

The Accused also represented Bauska in an Oregon proceeding regarding custody of her infant son. At the time Accused undertook to represent her, Bauska had already signed a safety order/agreement with Oregon DHS regarding her son. Bauska was involved in an outpatient program and was prohibited from drinking when the infant was in her physical custody. Despite this, some of the texts the Accused sent to Bauska invited her to join him for drinks, or at least sit with him at a bar while he drank.

8.

Bauska did not accept the Accused's invitations but she felt she could not terminate the communications because she feared the Accused would get angry and drop her case. She had no money to hire another lawyer.

### **Violation**

9.

The Accused admits that his texts and requests that Bauska engage in conduct to her detriment for his personal benefit created a personal conflict of interest, in violation of RPC 1.7(a).

### **Fulmer Complaint Case No. 13-104**

#### **Facts**

10.

The Accused represented Tamara Fulmer (hereinafter "Fulmer") in connection with a probate proceeding in Clatsop County. Fulmer was a beneficiary of a decedent's estate that held multiple pieces of real property. Fulmer notified the Accused that she was attempting to remain clean and sober after overcoming a substance abuse problem.

11.

In February 2012, the Accused met Fulmer in Astoria to sign papers related to the probate and then drive around to view some of the properties. The Accused purchased alcohol for her, notwithstanding that Fulmer was prohibited from consuming alcohol as a term of a criminal probation. The Accused made verbal and physical advances, which Fulmer refused, and the Accused desisted.

### Violation

12.

The Accused admits that his requests that Fulmer engage in conduct to her detriment for his personal benefit created a personal conflict of interest, in violation of RPC 1.7(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 his duties to his clients to avoid conflicts of interest. *Standards*, § 4.3. The *Standards* provide that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, p. 5, *Theoretical Framework*.
- b. **Mental State.** The Accused acted knowingly, insofar as he was aware of the nature or attendant circumstances of the conduct but did not have the conscious objective or purpose to accomplish a particular result. *Standards, Definitions*.
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury can be considered. *Standards, Definitions; In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Both of the Accused’s clients were actually injured by being subjected to unwanted contact, which had the potential to cause the anxiety and distress.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A selfish motive. *Standards*, § 9.22(b). The Accused’s conduct was undertaken for his own personal benefit.
  2. A pattern of misconduct. *Standards*, § 9.22(c). The Accused engaged in similar behavior with two different clients in unrelated matters.
  3. Multiple offenses. *Standards*, § 9.22(d).
  4. Vulnerable victims. *Standards*, § 9.22(h).
  5. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused has been admitted in Oregon since 1982.

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior discipline. *Standards*, § 9.32(a). The Accused has no prior relevant disciplinary record.
  2. Absence of a dishonest motive. *Standards*, § 9.32(b).
  3. Personal or emotional problems. *Standards*, § 9.32(c). The Accused was reportedly experiencing personal and emotional problems, including matrimonial stressors at the time of the misconduct in these matters. These problems were exacerbated by the Accused's use of alcohol.
  4. Full and free disclosure/cooperative attitude toward proceedings. The Accused has cooperated fully in the Bar's investigation of his conduct and in these formal proceedings. *Standards*, § 9.32(e).
  5. Remorse. *Standards*, § 9.32(l).

14.

Under the *ABA Standards*, a 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. *Standards*, § 4.32.

15.

Like the *Standards*, Oregon cases suggest that a suspension is appropriate for the Accused's conduct. *See, e.g., In re Overton*, 25 DB Rptr 184 (2011) (deputy district attorney was suspended for 60 days when, while representing the state in enforcing child support obligations, he made sexually inappropriate comments to women who were child support obligors); *In re Ashcroft*, 25 DB Rptr 36 (2011) (judge suspended for 60 days when, after presiding over a criminal defendant's initial court appearances, purchased food and drink for a group that included the defendant, and thereafter did not disclose this when he presided over the defendant's bench trial. After he found the defendant not guilty, the judge engaged in a personal, but not physical, relationship with the defendant).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 1.7(a), effective June 1, 2014. However, all of the suspension shall be stayed pending completion of a one-year term of probation supervised by the State Lawyers Assistance Committee (hereinafter "SLAC"), which shall include the following terms and conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9.

- (b) Prior to June 15, 2014, the Accused shall undergo a substance abuse evaluation to determine whether and to what extent he has a dependency on alcohol or other substance abuse problem (hereinafter “evaluation”).
- (c) A member of SLAC or such other person approved by Disciplinary Counsel’s Office (hereinafter “DCO”) in writing shall supervise the Accused’s probation (hereinafter “Monitor”). The Accused currently is working with the Oregon Attorney Assistance Program (hereinafter “OAAP”). The Accused shall immediately notify SLAC upon approval of this Stipulation for Discipline by the Disciplinary Board of:
  - 1) the existence and contents of this Stipulation for Discipline,
  - 2) the history and status of any OAAP treatment or programs in which the Accused has or is participating;
  - 3) the history and status of any mental health treatment that the Accused has or is receiving;
  - 4) the findings of the Accused’s evaluation;
  - 5) the Accused’s willingness and commitment to the development of a SLAC treatment plan that addresses the results of the Accused’s evaluation and the objectives of his probation; and
  - 6) the Accused’s willingness to cooperate with SLAC in determining whether and how to modify his current OAAP plan to best accomplish the objectives of the Accused’s probation.
- (d) The Accused shall meet at least monthly with his Monitor for the purpose of reviewing the Accused’s compliance with the terms of the probation. The Accused shall cooperate and shall comply with all reasonable requests of SLAC, including submitting to random urinalysis, which will allow SLAC and DCO to evaluate the Accused’s compliance with the terms of this Stipulation for Discipline.
- (e) The Accused shall enter into or continue substance abuse treatment and/or mental health care as determined by SLAC to be appropriate, including any aftercare and relapse prevention education and therapy recommended by SLAC.
- (f) To the extent that SLAC or the Monitor recommends that the Accused attend OAAP, AA, NA, or equivalent meetings, the Accused agrees to obtain, upon SLAC’s request, verification of attendance at such meetings.
- (g) The Accused shall abstain from using alcohol to the extent recommended following his evaluation. The Accused shall abstain from using any controlled

substances not prescribed by a physician. Any prescribed medications shall be taken only as prescribed.

- (h) The Accused agrees that, if SLAC is alerted to facts that raise concern that the Accused may be violating his requirement to refrain from using alcohol or controlled substances, he will participate in an additional substance abuse evaluation at the request and direction of SLAC.
- (i) The Accused shall attend and continue to attend regular counseling or treatment sessions with the approved mental health provider and, if determined by SLAC to be appropriate, his substance abuse treatment provider for the entire term of his probation. The Accused shall continue to take, as prescribed, any mental-health-related medications.
- (j) The Accused shall not terminate his mental health counseling or treatment, or substance abuse counseling or treatment, if required, or reduce the frequency of these counseling or treatment sessions without first submitting to DCO a written recommendation from the mental health treatment provider or health care provider, as appropriate, that the Accused's counseling or treatment sessions should be reduced in frequency or terminated, and the Accused undergoes an independent mental health evaluation by a second like care provider acceptable to DCO and the Monitor, which evaluation confirms the Accused no longer requires counseling or treatment in the amount or frequency initially recommended.
- (k) The Accused shall report to his Monitor and to DCO within 14 days of the occurrence of any civil, criminal, or traffic action or proceeding initiated by complaint, citation, warrant, or arrest, or any incident not resulting in complaint, citation, warrant, or arrest, in which it is alleged that the Accused has possessed or consumed alcohol or any controlled substances not prescribed by a physician in kind or amount, or which raises concerns about mental health or dependency issues.
- (l) In the event the Accused fails to comply with any condition of this stipulation, the Accused shall immediately notify his Monitor, SLAC, and DCO in writing.
- (m) At least quarterly, and by such dates as established by DCO, the Accused shall submit a written report to DCO, approved in substance by his Monitor, advising whether he is in compliance or non-compliance with the terms of this stipulation and the recommendations of his treatment providers, and each of them. The Accused's report shall also identify: the dates and purpose of the Accused's meetings with his Monitor and the dates of meetings and other consultations between the Accused and all substance abuse and mental health

care professionals during the reporting period. In the event the Accused has not complied with any term of probation in this disciplinary case, the report shall also describe the non-compliance and the reason for it, and when and what steps have been taken to correct the non-compliance.

- (n) The Accused hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by SLAC, his Monitor, OAAP, or any other health or substance abuse treatment providers related to his compliance or non-compliance with the terms of this agreement. The Accused agrees to execute any additional waivers or authorizations necessary to permit such disclosures.
- (o) The Accused is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation.
- (p) 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 60 days of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

17.

The suspension shall be converted to a reprimand—and any publication of this Stipulation for Discipline shall recite the disposition as a reprimand—if the Accused successfully completes his term of probation.

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, as appropriate.

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: Washington and California.

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 Salisbury*, 28 DB Rptr 128 (2014)

EXECUTED this 13th day of May, 2014.

/s/ John P. Salisbury

John P. Salisbury

OSB No. 823860

EXECUTED this 19th day of May, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 12-38, 12-39, and 12-77  
) SC S061343  
PETER M. SCHANNAUER, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott

Counsel for the Accused: None

Disciplinary Board: Paul B. Heatherman, Chairperson  
John E. Laherty  
Steven P. Bjerke, Public Member

Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 8.1(a)(2), and RPC 8.4(a)(3). Supreme Court Order. Request for Review dismissed as moot, decision of the Trial Panel is final. 1-year suspension.

Effective Date of Order: June 12, 2014

**ORDER OF DISMISSAL**

The Bar seeks review of the Trial Panel's decision and argues that disbarment is the appropriate sanction. The Accused did not seek review and did not file an answering brief. On May 13, 2014, the Bar notified the court that a separate trial panel issued a decision disbarring the Accused for conduct in unrelated cases. The Bar further stated that the disbarment decision is now final and that the court need not take further action on the Bar's request for review in this matter.

As a result, the Bar's request for review is dismissed as moot and, under ORS 9.536(1), the decision of the trial panel is final.

/s/ Thomas A. Balmer

THOMAS A. BALMER, 6/12/2014

8:21:56 a.m.

CHIEF JUSTICE SUPREME COURT

## **TRIAL PANEL OPINION**

This matter came before a Trial Panel of the Disciplinary Board consisting of Paul B. Heatherman, Chairperson; John E. Laherty, Member; and Steven P. Bjerke, Public Member, on February 6, 2013. The Oregon State Bar (hereinafter “Bar”) is represented by Amber Bevacqua-Lynott, Assistant Disciplinary Counsel. Peter M. Schannauer (hereinafter “Accused”) is not represented and did not respond to the Formal Complaint. An Order of Default was entered against the Accused on November 14, 2012. The Trial Panel considered the pleadings and memoranda filed by the parties. Based on the findings and conclusions made below, we find that the Accused has violated RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 8.1(a)(2), and RPC 8.4(a)(3).

### **INTRODUCTION**

The Bar filed its Formal Complaint against the Accused on August 30, 2012. The Accused was served with the Formal Complaint on October 5, 2012, but failed to appear within the time provided by the Bar Rules of Procedure. The Bar filed a motion for order of default, and an Order of Default was granted on November 14, 2012, by Carl W. Hopp Jr., the Region 1 Disciplinary Board Chairperson. Pursuant to BR 5.8(a), the allegations of the Bar’s Formal Complaint are deemed true, and the sole issue before the Trial Panel is the issue of sanctions for the misconduct.

### **FACTS & FINDINGS**

At all relevant times, the Accused 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.

#### **FIRST CASE**

##### **(Olive Matter—No. 12-38)**

On or around October 2009, Wendy Olive hired the Accused to file an adoption petition. Ms. Olive paid the Accused a flat fee of \$600 and a \$200 filing fee. The Accused failed to utilize a written fee agreement allowing him to treat the flat fee as earned upon receipt. The Accused deposited the flat fee in his business account for his own use.

The Accused failed to hold client property separate from his own and failed to deposit and maintain client funds in trust. The Accused’s conduct involved dishonesty and violated RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

Between October 2009, and October 2010, the Accused failed to file Ms. Olive’s adoption petition, did not take steps to become familiar with the adoption process, did not notify Ms. Olive that he was not competent to handle her matter, and failed to respond to Ms.

Olive's status inquiries. In October 2010, Ms. Olive demanded a refund. The Accused had not earned any fees when he refused to refund Ms. Olive's funds.

On or around November 2010, the Accused told Ms. Olive that the adoption petition had been filed, but denied. This was false. Despite assurances that he would contact Ms. Olive, the Accused failed to communicate further with her.

On or around September or October 2011, Ms. Olive hired attorney Tim Brewer to complete her adoption. Mr. Brewer contacted the Accused, who represented he had filed the adoption petition in 2009. This representation was false and the Accused knew it was false when he made it. The Accused also failed to provide Mr. Brewer with a copy of his file or to refund Ms. Olive's funds.

The Accused's conduct constitutes a failure to provide competent representation, neglect of a legal matter entrusted to him, a failure to keep a client informed on status of a matter, a failure to explain a matter so as to permit a client to make informed decisions regarding representation, a charging or collecting of an excessive fee, a failure to promptly deliver property a client is entitled to receive, and conduct involving misrepresentation. Said conduct of the Accused is a violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(d), and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

On or about August 22, 2011, Ms. Olive complained to the Bar about the Accused's conduct. The complaint was referred to the Disciplinary Counsel's Office (hereinafter "DCO"). The Accused failed to respond to at least two inquiries from DCO. On or about January 31, 2012, DCO referred the matter to the Region 1 Local Professional Responsibility Committee (hereinafter "LPRC"). The Accused informed the LPRC investigator that he would contact DCO to respond to its inquiries. He failed to do so. The Accused failed to respond to telephone calls and correspondence and it became necessary to subpoena the Accused to obtain his response. The Accused's failure to respond to lawful demands for information from a disciplinary authority is a violation of RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct.

## **SECOND CASE**

### **(Fullbright Matter—No. 12-39)**

On or about November 1, 2011, Virgil Fullbright complained to the Bar about the Accused's conduct in connection with the representation of Mr. Fullbright's grandson in a domestic relations matter. The complaint was referred to DCO. The Accused failed to respond to at least two inquiries from DCO. On or about January 31, 2012, DCO referred the matter to the LPRC. The Accused informed the LPRC investigator that he would contact DCO to respond to its inquiries. He failed to do so. The Accused failed to respond to telephone calls and correspondence, and it became necessary to subpoena the Accused to obtain his response. The Accused's failure to respond to lawful demands for information

from a disciplinary authority is a violation of RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct.

**THIRD CASE**  
**(Myott Matter—No. 12-77)**

On or about August 11, 2011, Lanita Myott retained the Accused to bring an enforcement action in a domestic relations matter. Ms. Myott paid the Accused a \$750 retainer. There was no written fee agreement and the Accused did not deposit the retainer into his lawyer trust account, but converted the funds to his own use. On or about September 9, 2011, Ms. Myott paid the Accused \$220 for filing fees. Again, the Accused did not deposit the funds into his lawyer trust account, but converted the funds to his own use.

The Accused's failure to hold client property separate from his own, failure to deposit and maintain client funds in trust, and conduct involving dishonesty is a violation of RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

After September 9, 2011, the Accused failed to file Ms. Myott's petition or take other substantial action on her behalf. He also failed to respond to her numerous inquiries regarding status. On or about December 22, 2011, Ms. Myott terminated the Accused's services and demanded a return of the unearned portion of her retainer. The Accused did not respond or return any portion of Ms. Myott's funds.

The Accused neglected a legal matter entrusted to him, failed to keep a client reasonably informed as to status of a matter, charged or collected a clearly excessive fee, and failed to promptly deliver property a client is entitled to receive. Said conduct is a violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), and RPC 1.15-1(d) of the Oregon Rules of Professional Conduct.

On or about February 12, 2012, Ms. Myott complained to the Bar about the Accused's conduct. The complaint was referred to DCO. The Accused failed to respond to at least two inquiries from DCO. On or about April 20, 2012, DCO referred the matter to the LPRC. The Accused failed to respond to telephone calls and correspondence and it became necessary to subpoena the Accused to obtain his response. The Accused's failure to respond to lawful demands for information from a disciplinary authority is a violation of RPC 8.1(a)(2) of the Oregon Rules of Professional Conduct.

**SANCTIONS**

In Oregon, the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") are considered in determining the appropriate sanctions. 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 and potential injury; and (4) the existence of aggravating and mitigating circumstances.

Applying those *Standards* in this case it is clear that:

1. **Duty Violated.** The Accused violated duties to his clients, the public, and the profession.
2. **Mental State.** The Accused's conduct demonstrates both intent and knowledge. He accepted payments from clients, knowing he would not be able to complete the representation of the clients, and failed to return the monies. He intentionally deposited client funds in his business account for his own use rather than into his lawyer trust account. He knowingly misled another attorney as to the status of a matter, and knowingly provided false information to a client on a matter.
3. **Actual or Potential Injury.** As a result of the Accused's actions, the Accused's clients suffered monetary damages. In addition, the profession was injured in that the profession is judged by the conduct of its members. *See, e.g., In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993); *In re Holm*, 285 Or 189, 194, 590 P2d 233 (1979) (court noting lawyers' misconduct as examples of why the public holds members of the Bar in disrespect).
4. **Aggravating Circumstances.** There are aggravating factors in this case. The Accused has committed multiple offenses. *Standards*, § 9.22(d). His conduct demonstrates dishonest and selfish motives by his conversion of clients' funds. *Standards*, § 9.22(b). The Accused demonstrated indifference by failing to respond to the Bar's requests and by failing to return converted funds. *Standards*, § 922(j).

### CONCLUSION / SANCTIONS 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 to properly discharge their professional duties to clients, the public and the legal system and the legal profession." *Standards*, § 1.1; *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). The Trial Panel unanimously concluded that in order to protect the public and the Oregon State Bar, the Accused should be suspended from the practice of law for a period of one (1) year. The Trial Panel further concluded that before the Accused can be reinstated as an active member of the Oregon State Bar, the Accused must attend at least 10 hours of continuing legal education in ethics, and must provide full restitution to Wendy Olive, Virgil Fullbright's grandson, and Lanita Myott, including interest at the rate of 9 percent. Alternately, the Accused must reimburse the Client Security Fund (hereinafter "CSF") if the CSF has already paid said individuals. Finally, as a condition of any reinstatement, the Accused must utilize an attorney mentor in Oregon for a period of six (6) months after reinstatement. The Accused must meet

Cite as *In re Schannauer II*, 28 DB Rptr 137 (2014)

with the mentor at least once each month to review the status and handling of the Accused's cases.

DATED this 25th day of March, 2013.

/s/ Paul B. Heatherman  
Paul B. Heatherman, Trial Panel Chairperson

/s/ John E. Laherty  
John E. Laherty, Trial Panel Member

/s/ Steven P. Bjerke  
Steven P. Bjerke, Trial Panel Public Member

**Cite as 355 Or 679 (2014)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of )  
 )  
MICHAEL L. SPENCER, )  
 )  
Accused. )

(OSB 11–52; SC S060977).

En Banc.

Argued and Submitted Jan. 16, 2014.

June 26, 2014.

Michael A. Spencer, Klamath Falls, argued the cause and filed the brief in propria persona.

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

PER CURIAM.

The Oregon State Bar charged the accused with violating two Rules of Professional Conduct, RPC 1.7(a) and RPC 1.8(a), arising out of his simultaneous representation of a client in a bankruptcy proceeding while also serving as her real estate broker. *Held*: (1) The accused’s agreement to serve as the client’s real estate broker amounted to a business transaction within the meaning of RPC 1.8(a); because the accused conceded that he did not provide the advice and obtain the necessary consent that RPC 1.8(a) requires, he violated that rule; (2) because the prospect of the accused’s receipt of a real estate commission, standing alone, did not pose a significant risk of materially limiting his representation of his client, the Bar did not establish a violation of RPC 1.7(a). The accused is suspended from the practice of law for a period of 30 days, commencing 60 days from the filing of this decision.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-37  
)  
PHILIP A. HINGSON, )  
)  
Accused. )

Counsel for the Bar: Susan Roedl Cournoyer  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(a) and RPC 8.4(a)(4). Stipulation  
for Discipline. 60-day suspension, all stayed, 2-year  
probation.  
Effective Date of Order: July 1, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 60 days, all of which is stayed pending completion of a two-year term of probation, effective the date of this order for violation of RPC 1.5(a) and RPC 8.4(a)(4).

DATED this 1st day of July, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Philip A. Hingson, 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, 1992, and has been a member of the 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 opportunity to seek the advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On May 17, 2014, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of Rules 1.5(a) and 8.4(a)(4) of the Oregon Rules of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

The Accused represented the conservator of a conservatorship estate pending in Washington County Circuit Court. On April 26, 2013, the Accused filed the second annual accounting to the court and included a sworn itemized statement for \$8,695.75 in attorney fees. On May 14, 2013, the Accused deposited a check for \$8,695.75, written by his client on the conservatorship checking account, into his client trust account. On May 15, 2013, after the statutory notice period had expired for objections to the second annual accounting, the Accused submitted a proposed order to the court approving payment of his fees. Before the court granted the order, the Accused transferred the client funds into his general account on June 3, 2013.

6.

On August 15, 2013, the Accused filed the conservator's final accounting, vouchers, and petition for general judgment directing distribution of assets. The final accounting and vouchers disclosed the \$8,695.75 payment to the Accused for legal fees in May 2013.

7.

In September 2013, the Accused submitted to the court a general judgment approving final accounting and directing distribution of assets. He did not request additional attorney fees.

8.

On October 18, 2013, the court returned the unsigned judgment to the Accused, noting that attorney fees had been paid without prior court approval and asking him to submit additional pleadings. The Accused did not submit the requested pleadings until January 14, 2014 (after the court sent him a reminder on November 15, 2013); he requested retroactive approval of his fees. The court denied this request.

9.

ORS 125.095(2)(c) (relating to compensation and expenses in protective proceedings) requires prior court approval before payment of fees from the funds of a person subject to a protective proceeding to any attorney who has provided services relating to a protective proceeding, including services provided in preparation or anticipation of the filing of a petition in a protective proceeding.

### **Violations**

10.

The Accused admits that, by collecting a fee from a conservatorship estate without prior court approval as described in paragraphs 5 through 9, he collected a fee in violation of applicable statute in violation of RPC 1.5(a) and engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

### **Sanction**

11.

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

- a. **Duty Violated.** By collecting a fee in violation of Oregon statute, the Accused violated his duty to the legal system to abide by the court's substantive and procedural rules and his duty to the profession to avoid collecting an excessive or illegal fee. *Standards*, § 6.0, § 7.0
- b. **Mental State.** In collecting an \$8,695.75 fee in conservatorship funds before ascertaining whether the court had approved his fee petition, the Accused acted knowingly, or with the conscious awareness of the nature or attendant circumstances of his conduct but without the conscious objective or purpose to accomplish a particular result. *Standards, Definitions*.
- c. **Injury.** The Accused's misconduct injured his client in that the unapproved expenditure of conservatorship funds may expose the conservator to liability to the estate or sanction by the court. The misconduct also resulted in harm to the court, as the judge and court staff were required to expend additional time to administer the conservatorship.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior discipline. *Standards*, § 9.32(a).
  2. Timely good faith effort to rectify consequences of misconduct (including disclosure to his client and the court). *Standards*, § 9.32(d).
  3. Full and free disclosure to OSB *Standards*, § 9.32(e).
  4. Remorse. *Standards*, § 9.32(l).

12.

Under the ABA *Standards*, absent aggravating or mitigating factors, suspension is generally appropriate when a lawyer knowingly violates a court rule and causes injury or potential injury to a party or interference with a legal proceeding. *Standards*, § 6.22. Because the mitigating factors outweigh the aggravating factor, a reduction in this presumptive suspension is appropriate.

13.

Oregon case law offers multiple cases in which attorneys have been suspended for taking fees from probate or conservatorship estates without prior court approval. *In re Altstatt*, 321 Or 324, 897 P2d 1164 (1995) (one-year suspension for illegal fee, conduct prejudicial to administration of justice, and self-interest conflict when attorney for personal representatives of a decedent's estate was also a debtor in default to the estate and took six separate fee payments without seeking court approval); *In re Weidner*, 320 Or 336, 883 P2d

1293 (1994) (disbarment for multiple violations in several matters, including taking legal fees from a decedent's estate without applying for court approval and removing additional funds to pay for services performed prior to the decedent's death without presenting a claim); *In re Devers*, 317 Or 261, 268, 855 P2d 617 (1993) (six-month suspension as reciprocal discipline for multiple violations in three separate client matters, including collecting a fee from a decedent's heirs without disclosure to the court); *In re Coe*, 302 Or 553, 731 P2d 1028 (1987) (disbarment for attorney who, acting as personal representative of a decedent's estate, paid himself attorney fees and a personal representative fee without seeking or obtaining court approval); *In re Sunderland*, 23 DB Rptr 61 (2009) (three-year suspension for multiple violations in connection with two conservatorship estates, including neglect, failing to provide competent representation, collecting attorney fees without seeking court approval, mishandling client funds, and making false and misleading statements about those funds); *In re Odman*, 22 DB Rptr 34 (2008) (181-day suspension for multiple violations in two client matters, including neglect, misrepresentation of material fact to a client, failure to provide competent representation to a conservator, collecting attorney fees from a conservatorship estate seven times without seeking court approval or disclosing the payments to the court, and eventually taking more than twice the amount of fees than approved); and *In re Nealy*, 20 DB Rptr 34 (2006) (four-month suspension for multiple violations in three client matters, including taking periodic payments for legal fees from a decedent's estate without seeking court approval). These cases can be distinguished from the present matter because each of these attorneys took fees without filing a petition or seeking the court's approval. The attorneys in *Devers* and *Odman* also did not fully disclose to the court their fees. In contrast, the Accused timely petitioned for approval of his fee; he waited for the statutory objection period to run and, hearing no objection, submitted a proposed order approving payment of his fee; he assumed based upon past experience that the court had approved his fee by the time he collected it; and he fully disclosed the payment of his fee in the final accounting he filed less than three months later.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 1.5(a) and RPC 8.4(a)(4), effective upon the date this Stipulation is approved. However, all of the suspension shall be stayed pending completion of a two-year term of probation supervised by Theresa Hollis (hereinafter "Supervisor") and including the following terms and conditions:

- (a) The Accused shall comply with all provisions of this Stipulation, the Rules of Professional Conduct, and the provisions of ORS chapter 9.
- (b) Prior to October 1, 2014, the Accused shall pay the sum of \$8,695.75 to the conservatorship estate and shall provide to Disciplinary Counsel's Office (hereinafter "DCO") written proof of the payment.

- (c) Prior to September 1, 2014, the Accused shall meet with a Professional Liability Fund Practice Management Advisor (hereinafter “PMA”) for evaluation of his office practices (including management of budget, overhead, cash flow, and staffing needs). The Accused shall notify DCO in writing of the PMA’s recommendations in his first quarterly report described in paragraph 14(g)(4) below. The Accused shall implement all recommended changes to the extent reasonably possible and shall participate in at least one follow-up meeting with the PMA to confirm implementation of and compliance with all recommended policies and procedures on or before May 1, 2015.
- (d) Prior to September 1, 2014, the Accused shall consult with a Professional Liability Fund (hereinafter “PLF”) claims attorney about the conservatorship, including its current status.
- (e) Immediately upon the effective date of this Stipulation, the Accused shall work with his Supervisor to complete the following tasks:
  - 1. Evaluate whether the Accused has a current client conflict of interest under RPC 1.7(a) (i.e., whether there is a significant risk that the Accused’s continued representation of the conservator will be materially limited by the Accused’s personal interest) that would require the Accused to obtain informed consent, confirmed in writing, from the conservator to the Accused’s continued representation.
  - 2. If a current client conflict of interest exists but is waivable under RPC 1.7(b), promptly seek and obtain informed consent (as defined in RPC 1.0(g)) from the conservator and thereafter diligently and competently represent the conservator, including: obtaining an order approving attorney fees; preparing and filing an annual accounting and/or a revised final accounting; and petitioning for an order approving the revised final accounting and general judgment directing distribution of assets or other appropriate termination of the protective proceeding.
  - 3. If a current client conflict of interest exists and the conservator does not give informed consent confirmed in writing, or if the Accused otherwise deems it appropriate to withdraw from representation, the Accused shall promptly seek the court’s permission to withdraw, shall take all reasonably practicable steps to protect his client’s interests upon withdrawal, and shall comply with all other requirements of RPC 1.16(d).
- (f) No later than July 30, 2015, the Accused will attend and successfully complete the Ethics School requirement set forth in BR 6.4.

- (g) On or before October 1, 2014, and on or before the first day of each third month thereafter, the Accused shall submit to DCO a written report, approved as to substance by his Supervisor, verifying that:
- (1) The Accused has implemented the PMA's recommended changes to his office practices (including management of budget, overhead, cash flow, and staffing needs) or advise DCO why the changes have not been implemented.
  - (2) The Accused has consulted with a PLF claims attorney regarding the conservatorship and the date of the consultation.
  - (3) The Accused has worked with his Supervisor to evaluate the presence of a conflict of interest and has withdrawn from representation or obtained the conservator's informed consent confirmed in writing to continued representation. If the Accused continues to represent the conservator, the Accused shall report on the status of the conservatorship.
  - (4) In the Accused's first quarterly report to DCO, he shall notify DCO of the PMA's recommended changes to his office practices.
  - (5) If the Accused has not complied with any term of this agreement, he shall notify DCO of the reasons for non-compliance in the quarterly report next due following the non-compliance.

15.

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.

16.

The Accused represents that he is not admitted to practice law (as an active, inactive or suspended member) in any jurisdictions other than the state of Oregon. The Accused acknowledges that based upon this representation, the Bar will not inform any other jurisdictions of the final disposition of this proceeding.

17.

This Stipulation 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 June, 2014.

/s/ Philip A. Hingson

Philip A. Hingson

OSB No. 923354

EXECUTED this 27th day of June, 2014.

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 No. 12-78  
)  
JEFF WILSON RICHARDS, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: Robert A. Miller, Chairperson  
Mary Lois Wagner (Resigned 2/21/2014)  
George A. McCully, Public Member  
Disposition: Violation of RPC 1.4(a), RPC 1.16(c), and RPC  
1.16(d). Trial Panel Opinion. 90-day suspension.  
Effective Date of Opinion: August 20, 2014

**TRIAL PANEL OPINION**

**NATURE OF THE CASE**

On February 23, 2013 the Accused was served with a copy of the Formal Complaint and Notice to Answer. The Accused failed to answer and thereafter was found in default via Order of Default entered on May 16, 2013.

Based on the default of the Accused the Trial Panel finds that the allegations set forth in the Formal Complaint are true and that the Accused is found to have failed to adequately communicate with his client, in violation of RPC 1.4(a), and failed to take care of his professional obligations upon the termination of his employment, in violation of RPC 1.16(c)–(d). The Trial Panel’s findings are based upon the allegations set forth in the Formal Complaint and the representations and arguments set forth in the Bar’s Sanction Memo on file herein.

A summary of the facts and violations are set forth as follows:

**1. The Bar’s First Cause of Complaint**

Jeff Wilson Richards (hereinafter “Accused”) undertook to represent Tamara Drake (hereinafter “Drake”) on March 28, 2011, regarding a contested case concerning client’s entitlement to Oregon Public Employee Retirement System Benefits (hereinafter “PERS benefits”). Subsequently, a contested case hearing was requested by the Accused on behalf of Drake, with the hearing set for January 10, 2012. The Accused failed to take any action to prepare for the contested case hearing, respond to Drake’s request for information about the matter, or otherwise advance Drake’s interest in the matter.

In July 2011, the Accused ceased communicating with Drake and did not respond to her repeated requests for information about the status of her case.

In late October 2011, after Drake had mailed a certified letter to the Accused and contacted the Oregon State Bar’s Client Assistant Office concerning the Accused’s lack of response, the Accused notified Drake that he had determined to close his practice but promised to assist Drake to find new counsel. Thereafter, the Accused again ceased communicating with Drake or responding to her calls. The Accused additionally took no action to assist Drake in finding new counsel.

The Accused’s conduct of failing to communicate with his client despite her repeated reasonable requests for information, and failure to inform his client that he was closing his practice until after the client sent a certified letter and contacted the Bar, followed by his again ceasing to communicate or assist the client is a violation of RPC 1.4(a), which states:

“A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”

RPC 1.16(c) states in relevant part:

“A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation.”

OAR 137-003-0520(7) required the Accused to provide written notice of his withdrawal from representing Drake, which he failed to comply with. Said action was a violation of RPC 1.16(c).

RPC 1.16(d) states:

“Upon termination of representation a lawyer shall take steps to the extent reasonably practical to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which a client is entitled and refunding any advance payments of fees or expense that has not been earned or incurred.”

The established facts prove that following directions by Drake to the Accused to immediately forward her file to her new attorney on November 21, 2011, the Accused failed to do so until a month later, just prior to the Christmas and New Year's holidays. The contested hearing was set for January 10, 2012, thereby giving new counsel inadequate time to prepare for the hearing. The Accused's failure to timely forward his client's file to her new attorney is a violation of RPC 1.16(d).

## **2. The Bar's Second Cause of Complaint**

The Accused is charged with violating RPC 8.1(a)(2) that provides in relevant part:

“A lawyer shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.”

The established facts prove that the Accused knowingly failed to respond to two Oregon State Bar Client Assistance Offices' mailings to the Accused regarding Drake's complaint, one on January 23, 2012, and the other on February 23, 2012. Thereafter client's complaint was forwarded to the Oregon State Bar Disciplinary Counsel's Office for further investigation. On or about March 8, 2012, and April 12, 2012, Oregon State Bar Disciplinary Counsel mailed to the Accused lawful inquiries concerning client's complaint. The Accused knowingly failed to respond

On or about May 17, 2012, upon notice to the Accused, client's complaint was referred to a local Professional Responsibility Committee for further investigation. The Accused thereafter cooperated with and responded to the lawful inquiries of the local Professional Responsibility Committee. The Accused's failure to reasonably respond to the Bar's Client Assistance Office and Disciplinary Counsel is a violation of RPC 8.1(a)(2).

Thereafter, the Bar submitted a Sanction Memo on October 7, 2013. The only issue to be determined by the Trial Panel is the sanction to be levied against the Accused.

## **SANCTIONS**

The appropriate sanctions are to be determined per reference to the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). Additionally, the state's own case law is to be considered for guidance in determining the appropriate sanction for lawyer misconduct. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002).

## **GENERAL DUTIES VIOLATED**

The Accused's failure to communicate with his client breached his general duty to act with reasonable promptness and diligence in representing a client. *Standards*, § 4.4. Accused's failure to take proper steps upon the termination of representation and respond to lawful disciplinary inquiries violated duties he owed as a professional. *Standards*, § 7.0.

## **MENTAL STATE**

Pursuant to *Standards, Definitions*, the Accused acted knowingly by failing to communicate with his client, to take proper steps to withdraw, and to respond to disciplinary inquiries over significant periods of time, despite urging from his client and the Bar.

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

Accused's failure to communicate, to properly withdraw from representation, and, upon withdrawal, to take reasonably practical steps to protect his client, caused potential injury to his client. Accused's failure to respond to disciplinary inquiries caused potential injury as such misconduct undermines the regulatory system of the court and the public confidence in the Bar. *Standards, Definitions; In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996).

## **PRELIMINARY SANCTION**

When a lawyer knowingly fails to perform services for a client and causes potential injury to a client, or a lawyer engages in neglect and caused potential injury to a client, suspension is generally appropriate. *Standards*, § 4.42.

Suspension is also generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes potential injury to a client. *Standards*, § 7.2.

## **AGGRAVATING AND MITIGATING CIRCUMSTANCES**

### **Aggravating Factors**

1. Multiple offences. *Standards*, § 9.22(d).

Accused violated multiple rules implicating different general duties owed to his client in the profession.

2. Bad faith obstruction of the disciplinary proceedings. *Standards*, § 9.22(e).

Accused failed to provide timely information in response to disciplinary inquiries, regarding an LPRC investigation.

### **Mitigating Factors**

1. Absence of a selfish or dishonest motive. *Standards*, § 9.32(a).

2. Timely good faith effort to make restitution or to rectify the consequences of misconduct. *Standards*, § 9.32(d).

Accused eventually forwarded his client's file to successor counsel, although he did so in an untimely fashion. Accused eventually cooperated with the Bar's investigation of his client's complaint.

### OREGON CASE LAW

A lawyer who neglects his duties to his clients and fails to cooperate with the disciplinary authorities is a threat to the profession and the public. That conduct warrants a significant sanction, as per *In re Bourcier II*, 325 Or 429, 436, 939 P2d 604 (1997).

Where a lawyer has completely failed to respond to disciplinary authorities and investigations and no other rule is violated the court has imposed suspensions of 120 days or more. *See, e.g., In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996); *In re Hereford*, 306 Or 69, 756 P2d 30 (1988).

Even if the Accused had cooperated with the Bar in their investigation, the knowing neglect of a single client matter can warrant a 60 day suspension. *In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004). In the case at hand, Accused’s failure to communicate with his client, to properly withdraw from the case and timely forward his client’s files to substitute counsel, and failure to timely cooperate with the Bar’s investigation warrants a suspension of 90 days and it is so ordered.

Dated this 19th day of June, 2014.

/s/ Robert A. Miller

Robert A. Miller, OSB #732050  
Trial Panel Chairperson

(Resigned from Disciplinary Board)

Mary Lois Wagner, OSB #804285  
Trial Panel Member

/s/ George A. McCully

George A. McCully, DMD  
Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 13-119  
)  
BRANDON G.W. CALHEIM, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.8(j) and RPC 1.16(a)(1). Stipulation  
for Discipline. 90-day suspension, all but 30 days  
stayed, 2-year probation.  
Effective Date of Order: August 19, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days, with all but 20 days stayed, pending the Accused's completion of a 2-year period of probation, effective from the date the order is signed, for violation of RPC 1.8(j) and RPC 1.16(a)(1).

DATED this 19th day of August, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Nancy M. Cooper

Nancy M. Cooper, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Brandon G. W. Calheim, 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 30, 1999, and has been a member of the Oregon State Bar continuously since that time, at the time of the events described below, the Accused’s office and place of business was located 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 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(j) and RPC 1.16(a)(1). 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 February 2012, the Accused began representing a client (hereinafter “A”) in juvenile dependency matters in which the state sought to terminate A’s parental rights. At the time the Accused began representing A, no sexual relationship existed between them.

6.

During the time that the Accused represented A in the juvenile dependency matters, he had consensual sexual relations with A, as that term is defined in RPC 1.8(j)(1). The Accused continued to represent A for several months thereafter.

## Violations

7.

The Accused admits that the initiation of a sexual relationship with A during the course of his representation violated RPC 1.8(j) (conflict of interest involving sexual relations with a current client), and his continued representation of A thereafter violated RPC 1.16(a)(1) (failure to withdraw from representation when required to do so).

## Sanction

8.

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

- a. **Duty Violated.** The Accused violated his duty to his client to avoid conflicts of interest, *Standards*, § 4.3, and a duty he owed as a professional, *Standards*, § 7.0.
- b. **Mental State.** The Accused knew he was engaging in a prohibited conflict of interest and knowingly failed to withdraw from representation when he was required to do so.
- c. **Injury.** There was potential harm to the Accused’s client, whose fitness as a parent was being questioned by the state and who temporarily misled state authorities concerning her sexual relationship with the Accused. There was some actual harm to the client and the legal system in that another attorney was required to take over the case when the Accused finally withdrew, in November 2012.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Selfish motive. *Standards*, § 9.22(b).
  2. Vulnerability of victim. *Standards*, § 9.22(h).
  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. Personal or emotional problems. The Accused suffered from an addiction to prescription painkillers that reportedly affected his judgment at

the time he entered into sexual relations with his client. *Standards*, § 9.32(c).

3. Remorse. *Standards*, § 9.32(1).

9.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows he is engaging in an improper conflict of interest and causes injury or potential injury to a client. *Standards*, § 4.32. Suspension is generally appropriate when a lawyer knowingly engages in conduct that violates a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

10.

Oregon case law is in accord. *See, e.g., In re Goode*, 26 DB Rptr 213 (2012) (120-day suspension for similar violation and improper contact with a represented party); *In re Peters*, 18 DB Rptr 238 (2004) (180-day suspension for similar violation in conjunction with additional violation for misrepresentation and a prior 120-day suspension for misrepresentation); *In re McHugh*, 14 DB Rptr 23 (2000) (60-day suspension for similar violation and additional violation of conduct prejudicial to the administration of justice for providing alcohol to the client, who was in a DUII diversion program in the case lawyer represented the client upon); *In re Hubbard*, 12 DB Rptr 53 (1998) (90-day suspension for similar violation).

11.

Probation is a sanction that can be imposed when a lawyer's practice of law needs to be monitored or limited. *Standards*, § 2.7. *Commentary*. However, probationary conditions must appropriately address the misconduct at issue. *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that, effective upon the approval of this stipulation, the Accused shall be suspended for 90 days for violation of RPC 1.8(j) and RPC 1.16(a)(1), with all but 30 days stayed, pending the Accused's successful completion of a 2-year period of probation supervised by the State Lawyers Assistance Committee (hereinafter "SLAC"). The portion of the suspension that is not stayed shall run concurrently with the 2-year probationary period.

13.

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.

14.

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) The Accused shall not possess or consume any controlled substance, except as specifically prescribed by a licensed medical doctor. The Accused shall consume any prescribed controlled substance only as prescribed.
- (c) The Accused shall obtain a probation monitor (hereinafter “Monitor”) by engaging the services of SLAC. The Accused agrees to cooperate and comply with all reasonable requests made by SLAC and his Monitor that SLAC and/or his Monitor, in their 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. The Accused shall meet with his Monitor in person at least once a month for the purpose of monitoring the Accused’s sobriety.
- (d) The Accused authorizes his Monitor 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 Disciplinary Counsel’s Office any information Disciplinary Counsel’s Office deems necessary to permit it to assess the Accused’s compliance.
- (e) On or before June 30, 2015, 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 denial of his reinstatement.

15.

The Accused shall bear the financial responsibility for the cost of all services required under the terms of this Stipulation for Discipline.

16.

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. 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 Oregon Supreme Court.

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: None.

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 13th day of August, 2014.

/s/ Brandon G.W. Calheim

Brandon G. W. Calheim, OSB No. 992343

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis, OSB No. 032221

Assistant Disciplinary Counsel

**Cite as 356 Or 32 (2014)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)
	)
Complaint as to the Conduct of	)
	)
DANIEL J. GATTI,	)
	)
Accused.	)

(OSB No. 1060; SC S061105)

Argued and Submitted Nov. 8, 2013.

Decided Aug. 21, 2014.

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

Mark J. Fucile, Fucile & Reising LLP, Portland, argued the cause and filed the briefs for the accused.

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

Peter R. Jarvis, Portland, filed a brief for amicus curiae Peter R. Jarvis.

Before BALMER, Chief Justice, and WALTERS, LANDAU, BREWER, and BALDWIN, Justices.

PER CURIAM.

Disciplinary proceedings against the accused arose from the accused’s joint representation of 15 sexual abuse victims (the Sprauer plaintiffs) in settling claims brought against the Portland Archdiocese and the State of Oregon for the actions of Father Michael Sprauer. All of the *Sprauer* plaintiffs had, at various times, been incarcerated at the MacLaren Home for Boys, a facility for juvenile offenders, and all alleged that, while there, they had been sexually molested by Father Sprauer, the facility’s chaplain. Following a complaint from one of the accused’s clients regarding the accused’s implementation of those settlements and a two-year investigation by the Bar, a trial panel of the Bar’s Disciplinary Board found that the accused had violated the following rules: RPC 1.4(b) (failing to explain matters to the extent reasonably necessary to allow clients to make informed decisions); RPC 1.7(a)(1) (failing to secure clients’ informed consent before engaging in representation that

constituted a current conflict of interest); RPC 1.8(g) (failing to secure clients' informed consent before participating in aggregate settlement of their claims); and RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on fitness to practice law). As a result of those findings, the trial panel imposed a six-month suspension from the practice of law as a sanction. *Held*: The accused violated RPC 1.4(b), RPC 1.7(a)(1), and RPC 1.8(g), but did not violate RPC 8.4(a)(3). A 90-day suspension is an appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 13-106  
)  
JENNIFER L. PEREZ, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None.  
Disciplinary Board: Charles J. Paternoster, Chairperson  
Bryan D. Beel  
Mary Beth Yosses, Public Member  
Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC  
8.1(a)(2), and RPC 8.4(a)(3). Trial Panel Opinion.  
1-year suspension.  
Effective Date of Opinion: August 26, 2014

**TRIAL PANEL OPINION**

**INTRODUCTION**

Attorney Jennifer L. Perez (hereinafter “Ms. Perez”) is accused by the Oregon State Bar (hereinafter “Bar”) of failing to competently represent a client in a personal injury matter, neglecting the matter, failing to communicate with the client, and dishonesty. Ms. Perez is also accused of knowingly disregarding disciplinary inquiries regarding the matter.

A default judgment was entered based on Ms. Perez’s failure to respond to the Formal Complaint (hereinafter “Complaint”) brought by the Bar, attached hereto as Exhibit 1, after which the parties were afforded an opportunity to submit for the Disciplinary Trial Panel’s consideration evidence and legal authority regarding whether the alleged disciplinary violations were established by the Bar and, if so, the appropriate sanction.

For the reasons set forth below, the Trial Panel concludes that the Bar has established that Ms. Perez violated Oregon Rules of Professional Conduct: RPC 1.1, RPC 1.3, RPC

1.4(a), RPC 8.4(a)(3), and RPC 8.1(a)(2). The Trial Panel concludes that the appropriate sanction for these violations is a one-year suspension from the practice of law.

### **ORDER OF DEFAULT**

In this case, an order of default was entered based on the failure by Ms. Perez to respond to the allegations brought by the Bar in its Formal Complaint. Pursuant to Bar Rule of Procedure 5.8, upon the filing of an order of default, the Trial Panel “shall thereafter deem the allegations in the formal complaint to be true” and “shall thereafter proceed to render its written opinion based on the formal complaint, or at the discretion of the trial panel, after considering evidence or legal authority limited to the issue of sanction.” *See also In re Koch*, 345 Or 444, 198 P3d 910 (2008) (after a default, factual allegations in formal complaint are deemed true, but panel still must determine and state in its opinion whether the facts as pled constitute the disciplinary rule violations alleged).

In this case, the Trial Panel extended the opportunity to both parties to provide written submissions on whether the alleged disciplinary violations were established by the Bar, and, if so, the appropriate sanction. The Bar filed a memorandum on these issues. The Trial Panel received no submission from Ms. Perez.

### **ANALYSIS**

As an initial matter, the Trial Panel must determine whether the facts set forth in the Complaint, deemed true by default, establish the disciplinary rules violations alleged by the Bar. *In re Koch*, 345 Or 444, 198 P3d 910 (2008). The Bar has alleged two causes in its Complaint. The First Cause of the Complaint alleges violation of RPC 1.1 (competence), RPC 1.3 (neglect), RPC 1.4(a) (client communication), and RPC 8.4(a)(3) (dishonesty and misrepresentation). The Second Cause of the Complaint alleges violation of RPC 8.1(a)(2) based on the failure of Ms. Perez to respond to the disciplinary inquiry.

#### **I. First Cause of Complaint (RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3))**

The First Cause of the Complaint alleges Perez violated multiple disciplinary rules in connection with her representation of Dorothy Ross with respect to personal injury claims brought by Ms. Ross against Lake District Hospital (hereinafter “Lake District Hospital matter”).

##### **A. The Applicable Disciplinary Rules**

The Bar contends Perez violated RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3) in connection with her representation of Ms. Ross in the Lake District Hospital matter.

RPC 1.1 requires, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

RPC 1.3 prohibits a lawyer from neglecting a legal matter. Neglect is defined as, “the failure to act or the failure to act diligently.”

RPC 1.4(a) requires that “a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”

RPC 8.4(a)(3) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” In order to violate RPC 8.4(a)(3), the misrepresentation must be knowing, false, and material in the sense that it could significantly influence the decision making process or conduct of the recipient. *In re Obert*, 336 Or 640, 648–49, 89 P3d 1173 (2004).

### **B. The Established Facts**

The facts set forth in the Complaint, and deemed true based on the order of default, are as follows:

- Ms. Perez agreed to represent Dorothy Ross on her personal injury claims against Lake District Hospital. ¶ 3.
- Ms. Perez twice failed to appear on her own motion to change venue. ¶ 4.
- Ms. Perez failed to respond appropriately to repeated requests by Lake District Hospital for medical records. ¶ 6.
- Ms. Perez failed to provide discovery of medical records that she had not objected to providing. ¶ 6.
- Ms. Perez never formally responded to the Lake District Hospital’s production requests although the court required her to do so. ¶ 6
- Ms. Perez failed to produce responsive medical records in her possession. ¶ 7.
- Ms. Perez ignored defense counsel’s attempts to schedule depositions. ¶¶ 8–9.
- Ms. Perez did not communicate with her client about the need to schedule a deposition. ¶ 11.
- Although defense counsel noticed a deposition for a date three weeks away, Ms. Perez did not notify her client that a deposition was scheduled. ¶¶ 10–11.
- Ms. Perez did not appear for the deposition, and only informed defense counsel that she would not appear the day before it was scheduled. ¶ 10.
- Ms. Perez never again communicated with defense counsel despite the active litigation. ¶ 12.
- Ms. Perez failed to respond to the defendant’s motion to compel discovery and for sanctions. ¶ 13, ¶ 12.

- Although the Trial Court granted the defense motion for sanctions and ordered production of discovery, Ms. Perez did not provide the discovery. ¶ 15, ¶ 12.
- Ms. Perez did not notify her client of court orders requiring production of discovery and appearance at a deposition. Ms. Perez did not communicate with defense counsel regarding the production and appearance. Despite adequate notice and prompting from defense counsel, Ms. Perez did not appear for the deposition on the appointed date or communicate to her client about the need to appear. ¶¶ 15–18, ¶ 12.
- Ms. Perez failed to respond to the defendant’s subsequent motion for sanctions and dismissal of the lawsuit. ¶ 19, ¶ 12.
- Ms. Perez failed to notify her client of the rescheduled date for the motion to change venue. ¶ 5.
- Ms. Perez failed to notify her client that the defendant sought discovery of additional medical records and contended records had not been provided. ¶ 7.
- Ms. Perez failed to inform her client of communications from the defendant seeking to schedule the client’s deposition, the date noticed for the deposition, or the failure to appear at the deposition. ¶¶ 8–11.
- Ms. Perez failed to inform her client of the defendant’s motion to compel discovery and for sanctions. ¶¶ 13–14.
- Ms. Perez failed to inform her client of court orders requiring the client to provide discovery and appear for a deposition, attempts by the defendant to schedule the court-ordered deposition, and the subsequent failure to appear at the court-ordered deposition. ¶¶ 15–18.
- Ms. Perez failed to inform her client of the defendant’s motion for sanctions and dismissal of the lawsuit. ¶¶ 19–20.
- Ms. Perez misled the client about the status of the lawsuit and withheld material facts concerning its status (saying the defendant had postponed deposition of the client when the facts were that Ms. Perez had repeatedly ignored attempts to schedule depositions, the client was considered to have failed to appear at the depositions, and the defendant had moved for sanctions and to dismiss). ¶ 21.
- Ms. Perez failed to inform her client that the court dismissed the client’s lawsuit and entered a judgment against the client for the defendant’s costs and fees. ¶¶ 19–24, ¶ 25.
- Ms. Perez ignored the client’s requests for an explanation about what had occurred. ¶ 27.

- Ms. Perez told her client that the client’s deposition had been postponed. That statement was affirmatively false, because it had not been so postponed. It was also false by omission since it conveyed to the client that her deposition was being scheduled when, in reality, it had been repeatedly missed and had become the basis for the hospital seeking sanctions and dismissal of the lawsuit. ¶¶ 21–23.
- Ms. Perez permitted her client to believe the suit was ongoing, with depositions being scheduled even after it was dismissed and a judgment had been entered against the client for the costs and fees of the opposing party. ¶¶ 24–26.
- Ms. Perez was aware of and failed to respond to months of lawful inquiries from disciplinary authorities concerning the Lake District Hospital matter, sent to Ms. Perez’s addresses of record, place of employment, and home address. ¶¶ 30–34.

### **C. Trial Panel Conclusions**

Based on the established facts set forth above, the Trial Panel concludes that Ms. Perez violated RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3), in connection with her representation of Ms. Ross in the Lake District Hospital matter. There can be little question that the representation provided by Ms. Perez in the matter was incompetent and constituted gross neglect. Ms. Perez refused to appear at scheduled motions, failed to comply with discovery requests from opposing counsel or produce responsive documents, failed to adequately communicate with her client regarding discovery deadlines and depositions, and ignored a court order requiring the production of documents. The ultimate result of Ms. Perez’s conduct was the dismissal of the lawsuit brought by Ms. Ross, as well as a judgment against her for more than \$9,000 in fees and costs.

The Trial Panel also concludes that Ms. Perez violated RPC 8.4(a)(3) in making misrepresentations to Ms. Ross regarding the status of her lawsuit. The facts establish that Ms. Perez affirmatively told her client that her deposition had been postponed—a statement she knew to be false. The facts further establish that Ms. Perez permitted her client to believe that her lawsuit against Lake District Hospital was ongoing even after the case had been dismissed and a judgment had been entered against Ms. Ross for the costs and fees of the defendant in the lawsuit. Based on these facts, there is ample basis for the Trial Panel to conclude that Ms. Perez made misrepresentations that were material and raise serious questions as to her fitness to practice law.

## **II. Second Cause of Complaint (RPC 8.1(a)(2))**

The Second Cause of the Complaint contends Ms. Perez violated RPC 8.1(a)(2) by knowingly failing to respond to the inquiries of the Bar regarding this matter.

### **A. The Applicable Disciplinary Rule**

RPC 8.1(a)(2) provides that a lawyer shall not “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.”

### **B. The Established Facts**

In this case, the facts established in the Complaint demonstrate as follows:

- Ms. Perez was aware of and refused to make any response to lawful inquiries regarding the Lake District Hospital matter made by Disciplinary Counsel on April 18, 2013. These inquiries were mailed and emailed to the addresses of record Ms. Perez had provided to the Oregon State Bar. ¶ 30.
- Ms. Perez was aware of and refused to make any response to lawful inquiries regarding the Lake District Hospital matter made by Disciplinary Counsel on May 15, 2013. These inquiries were mailed and emailed to the addresses of record Ms. Perez had provided to the Oregon State Bar. ¶ 31.
- Ms. Perez was aware of and refused to make any response to lawful inquiries regarding the Lake District Hospital matter made by Disciplinary Counsel on May 20, 2013. These inquiries were mailed to Ms. Perez’s place of employment in Arizona. ¶ 32.
- Ms. Perez was aware of and refused to make any response to lawful inquiries regarding the Lake District Hospital matter made by Disciplinary Counsel on August 9, 2013. These inquiries were mailed to Ms. Perez’s home and place of employment in Arizona. ¶ 33.

### **C. Trial Panel Conclusion**

Based on the undisputed facts established by the Complaint, the Trial Panel concludes that Ms. Perez knowingly failed to provide responsive information to Disciplinary Counsel inquiries and violated RPC 8.1(a)(2).

## **APPROPRIATE SANCTION**

Having concluded that the Bar has established the disciplinary rules violations set forth in the Complaint, the Trial Panel turns to the appropriate sanction. When considering the appropriate sanction, the Trial Panel begins its analysis by reviewing the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”). Generally, the *Standards* contemplate the duty violated by the Accused, the mental state of the Accused, and the injury

resulting from the violation. Once these factors are analyzed, the Trial Panel may adjust the sanction based on the existence of aggravating or mitigating factors.

In this case, Ms. Perez breached her duty to provide diligent and competent representation to her client. *Standards*, § 4.4, § 4.5. In addition, Ms. Perez breached her duty of candor to her client. *Standards*, § 4.6. By knowingly failing to respond to the inquiries of Bar Disciplinary Counsel, Ms. Perez also breached duties she owed as a professional. *Standards*, § 7.0.

The Trial Panel further notes that the mental state of Ms. Perez reveals a degree of intentional conduct that warrants serious concern. While some of the conduct of Ms. Perez in failing to diligently prosecute the lawsuit of Ms. Ross might be deemed merely incompetent or negligent, there is ample evidence from which the Trial Panel can conclude that Ms. Perez's acts were also intentional, including Ms. Perez's affirmative misrepresentations to her client regarding important events in the case (such as the status of depositions), and the omission of material facts related to the dismissal of the lawsuit and accompanying award of fees and costs against Ms. Ross.

Finally, a review of the extent of the actual injury suffered by Ms. Ross arising from Ms. Perez's conduct should be noted in considering the appropriate sanction. In this case, Ms. Perez's failure to adequately represent and communicate with her client resulted in not merely the dismissal of Ms. Ross's lawsuit as a sanction but also in a judgment against Ms. Ross for more than \$9,000 in fees and costs.

The Trial Panel also notes that Ms. Perez has a previous disciplinary history, which includes two admonishments by the Bar. The Trial Panel further notes that one of these admonishments, dated February 14, 2008, was for violating RPC 8.4(a)(4) for failing to appear at a scheduled hearing and not providing notice to any party or the court. The second admonishment, dated June 9, 2008, was for failing to keep a client reasonably informed.

In its written submission to the Trial Panel, the Bar seeks as a sanction a one-year suspension for Ms. Perez. Based on a review of the facts and the *Standards*, the Trial Panel concludes that this sanction is appropriate under the circumstances.

### **CONCLUSION**

For the reasons set forth above, the Trial Panel concludes that the appropriate sanction for Ms. Perez's violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 8.4(a)(3), and RPC 8.1(a)(2) is a one-year suspension from the practice of law.

DATED this 23rd day of June, 2014.

/s/ Charles J. Paternoster  
Charles J. Paternoster, Trial Panel Chairperson

/s/ Bryan D. Beel  
Bryan D. Beel, 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 Nos. 12-118, 12-119, and 12-120  
)  
ERIC KAUFMAN, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: Deanna L. Franco, Chairperson  
Andrew M. Cole  
Joan J. LeBarron, Public Member  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), RPC  
1.16(d), and RPC 8.1(a)(2). Trial Panel Opinion.  
Disbarment.  
Effective Date of Opinion: September 9, 2014

**TRIAL PANEL OPINION**

**Procedural History**

This matter is before a Region 7 Trial Panel of the Oregon State Bar Disciplinary Board on a Formal Complaint consolidating 13 causes of complaint in connection with three (3) separate domestic relations client matters to consider the sanctions sought by the Bar against the Accused.

On October 19, 2012, the Bar filed a Formal Complaint alleging the Accused's violation of the Oregon Rules of Professional Conduct.

On March 7, 2013, the Oregon Supreme Court granted the Bar's motion to serve the Accused by publication in *The Daily Journal of Commerce*.

The Accused was served by publication on March 13, 2013, March 20, 2013, March 27, 2013, and April 3, 2013, with a certified copy of the Bar's Formal Complaint and Notice to Answer published in *The Daily Journal of Commerce*.

On April 26, 2013, the Accused was served with the Bar's Notice of Intent to Take Default by mail, addressed to his last known address. The Accused failed to answer or otherwise appear within the time allowed.

On May 10, 2013, the Bar filed a Motion for Order of Default against the Accused. On May 22, 2013, pursuant to BR 5.8(a), the Region 7 Chairperson signed an Order granting the Bar's motion for default and holding the facts alleged in the Formal Complaint to be true.

On June 24, 2013, the Trial Panel Chairperson mailed a letter to the Bar and the Accused informing both parties of the entry of the Order of Default and requesting that both parties submit Sanctions Memorandums to assist the Trial Panel in rendering an opinion in regard to the sanction only. The deadline for submitting the Sanctions Memorandums was Wednesday, August 21, 2013 (75 days from when the Trial Panel Chairperson received the pleadings).

On June 25, 2013, the Trial Panel Chairperson received an email message from the Accused, requesting that the Trial Panel Chairperson invoke BR 5.8(b) to allow the Accused to resign from the practice of law. By way of response, on July 10, 2013, the Trial Panel Chairperson referred the Accused to the Bar concerning his request for resignation in lieu of the formal sanctions process. The matter was calendared for thirty (30) days to see if there were any decisions or agreements made between the Accused and the Bar relative to the Accused's request to resign. Wednesday, August 21, 2013, was the deadline to receive Sanctions Memorandums from both parties.

On August 21, 2013, the Bar filed a Sanctions Memo Following Default Judgment recommending sanctions, together with copies of the documents of record. The Trial Panel received no information in connection with the Accused's request to the Bar that he be permitted to resign.

On May 27, 2014, the Trial Panel conferred on the matter. The Accused failed to provide any evidence of mitigation and no further communications have been received from the Accused. Therefore, the only issues considered by the Trial Panel was whether the facts, deemed true by virtue of the default, constitute the disciplinary rule violations alleged and, if so, whether the sanction sought by the Bar is appropriate.

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

In the usual disciplinary proceeding, the Bar has the burden of establishing the Accused's misconduct by clear and convincing evidence. BR 5.2. Clear and convincing means that the truth of the facts asserted are highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994). In the instant action, however, the failure of the Accused to respond to the Formal Complaint and the issuance of the default relieves the Bar of this burden as all of the facts alleged in the Formal Complaint are deemed to have been conclusively established. BR 5.8(a); *In re Magar*, 337 Or 548, 551–53, 100 P3d 727 (2004); *In re Kluge*, 332 Or 251,

27 P3d 102 (2001). The only remaining burden to be met by the Bar is to establish that the sanction sought is appropriate for the misconduct deemed proven.

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

At all relevant times, the Accused, Eric Kaufman, was an attorney at law, duly admitted by the Supreme Court of the State of Oregon on April 20, 2001, to practice law in this state and was a member of the Bar, having his office and place of business in the County of Clackamas, State of Oregon.

As explained below, the Trial Panel finds that the appropriate sanction in this case is disbarment. In making its determination, the Trial Panel considered the allegations of the Bar's Formal Complaint; the Order of Default; and the Bar's August 21, 2013 Sanctions Memo Following Default Judgment. Because of the entry of default, the facts alleged in the Formal Complaint are deemed to have been conclusively established. BR 5.8(a). The Accused has not submitted any materials for consideration. The Trial Panel has reviewed the facts as established by default, considering *de novo* the conclusions to be drawn therefrom. We summarize the facts in the Formal Complaint drawing our own conclusions as follows:

The Accused is charged with thirteen (13) causes of complaint in connection with three (3) client matters including: (a) neglect of legal matters entrusted to him and failure to adequately communicate with his clients (RPC 1.3 and RPC 1.4(a)); (b) failing to promptly deliver property his clients were entitled to receive (RPC 1.15-1(d)); (c) failing to 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 (RPC 1.16(d)); and (d) failure to respond to the requests of the Disciplinary Counsel's Office. These charges all represent violations of the Oregon State Bar Rules of Professional Conduct.

Based on its consideration of the allegations and evidence received, the Trial Panel finds proven the professional duties violated by the Accused.

#### **A. The Accused violated RPC 1.3**

RPC 1.3 states:

A lawyer shall not neglect a legal matter entrusted to the lawyer.

The Trial Panel finds that the Accused violated RPC 1.3 by neglecting the legal matters entrusted to him by his clients by failing to complete the legal matters for which he had been retained. Specifically, the Accused had informed his client's that he would prepare documents and/or communicate with opposing counsel in regard to his client's positions. In all three (3) client matters, the Accused failed to complete the actions that he had assured his

clients he would take. The neglect in turn resulted in harm to the Accused's clients in their underlying proceedings.

**B. The Accused violated RPC 1.4(a)**

RPC 1.4(a) provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Accepting the allegations in the Formal Complaint as true, the Trial Panel finds that the Accused violated RPC 1.4(a) in all three (3) matters in that he repeatedly and consistently failed to adequately communicate with his clients, failed to respond to their efforts to communicate with him, and refused to provide information when requested.

**C. The Accused violated RPC 1.15-1(d)**

RPC 1.15-1(d) provides in relevant part:

(d) . . . Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

The Trial Panel finds that the Accused violated RPC 1.15-1(d) when, in all three (3) client matters, the Accused, after a specific request from each of his clients, failed to timely provide his clients with their files or to return the unearned portion of the their retainer.

**D. The Accused violated RPC 1.16**

RPC 1.16(d) provides in relevant part:

(d) 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.

Accepting the allegations in the Formal Complain as true, the Trial Panel finds that in all three (3) cases, by failing to refund the unearned portion of fees and by failing to account for and deliver to his clients all unearned fees and expenses upon the termination of his employment, the Accused violated RPC 1.16(d).

**E. The Accused violated RPC 8.1(a)(2)**

RPC 8.1, in relevant part provides:

(a) . . . , a lawyer . . . in connection with a disciplinary matter, shall not:

(2) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

A lawyer may violate RPC 8.1(a)(2) when he knowingly fails to respond to the inquiries or requests of Disciplinary Counsel. *In re Paulson III*, 346 Or 676, 216 P3d 859 (2009), *adh'd to as modified on recons*, 347 Or 529, 225 P3d 41 (2010); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons*, 345 Or 652, 202 P3d 165 (2009). The court has expressed a virtual no-tolerance approach to a lawyer's failure to cooperate. *In re Miles*, 324 Or 218, 222–23, 923 P2d 1219 (1996). The Trial Panel finds that the Accused failed to respond to multiple hand delivered notices that the Disciplinary Counsel's office taped to his door (June 8, 2012; June 11, 2012; and July 16, 2012) to provide information and documents associated with information identified in the Bar's Formal Complaint.

## SANCTION

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), in addition to its own case law for guidance determining the appropriate sanction for lawyer misconduct. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993); *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002).

### A. *ABA Standards*

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using three (3) factors; (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury caused by the conduct. *Standards*, § 3.0. Once these factors are analyzed, the court makes a preliminary determination of sanction, after which it adjusts the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances. The Trial Panel addresses each of the factors in order:

#### 1. **Ethical Duties Violated**

The Accused's violation of duties set forth in RPC 1.3 (diligence/neglect) and RPC 1.4(a) (duty to communicate with the client), breached his general duty to act with reasonable promptness and diligence in representing a client (*Standards*, § 4.4) and his duty of candor (*Standards*, § 4.6).

The Accused's violation of duties set forth in RPC 1.15-1(d) (duty to deliver property belonging to client) and RPC 1.16(d) (failure to take proper steps upon the termination of representation), violated his duty to preserve and return client property. *Standards*, § 4.1.

The Accused's violation of duties set forth in RPC 8.1(a)(2) (failure to respond to disciplinary inquiries), violated his general duties as a professional. *Standards*, § 7.0.

## **2. Mental State**

The relevant mental states are defined as follows:

“Intent” is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result.

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. *Standards, Definitions*.

By definition the Accused’s failure to act on behalf of his clients or to communicate with them was knowing, and intentional. “A lawyer’s failure to act can be characterized as intentional . . . if the lawyer fails to act over a significant period of time, despite the urging of the client and the lawyer’s knowledge of a professional duty to act.” *In re Sousa*, 323 Or 137, 144, 915 P2d 408 (1996); *In re Loew*, 292 Or 806, 810–11, 642 P2d 1171 (1982).

The evidence establishes that the Accused had knowledge of each violation of the Rules of Professional Conduct, and by virtue of his communications with the Trial Panel Chairperson, knowledge of the disciplinary investigation.

## **3. Extent of Actual of Potential Injury**

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

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

The Accused caused actual and potential injury to his clients, the legal system, and the profession. The Accused’s misconduct caused the resolution of his client’s matters to be stalled or delayed and further caused his client’s to experience emotional turmoil, anxiety, and frustration. Moreover, many clients also suffered financial loss as a result of the Accused’s delay or were prejudiced. The Accused’s failure to return fees or timely return documents and files frustrated his clients’ ability to pursue their matters through other counsel.

The Accused obstructed investigation by the Bar disciplinary authorities, causing actual injury to both the legal profession and to the public. *See In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (noting injury to the Bar from non-cooperation, including the need to conduct more time consuming investigation and the diminished public respect resulting from not being able to provide a timely and informed process to client’s complaints).

## **B. Preliminary Sanction.**

Absent aggravating or mitigating circumstances, the following *Standards* appear to apply:

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

“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 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.

## **C. Aggravating and Mitigating Circumstances**

In fashioning its sanction in this case, the Trial Panel took into account both aggravating and mitigating circumstances. The following factors, which are recognized as aggravating under the *Standards*, exist in this case:

1. A pattern of misconduct. *Standards*, § 9.22(c). The Accused’s pattern of misconduct extends across a significant period of time and involves multiple clients.
2. Multiple offenses. *Standards*, § 9.22(d). The Accused has violated several rules, many repeatedly, involving many of the most basic general duties owed to his clients and the profession.
3. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused has practiced law in Oregon since 2001 and had substantial experience at the time he committed these violations.

In mitigation, the Trial Panel took into account the following factor, which is recognized as mitigating under the *Standards*:

4. Absence of a prior disciplinary record. *Standards*, § 9.32(a). The Accused has no record of prior discipline.

On balance, the aggravating factors outweigh those in mitigation both in number and in severity and justify an increase in the degree of presumptive discipline to be imposed. *Standards*, § 9.21. The appropriate sanction in this case is disbarment.

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.” *Standards*, § 4.41.

Oregon cases arrive at a similar conclusion.

#### **D. Oregon Case Law**

Sanctions in disciplinary matters are not intended to penalize the accused lawyer, but instead are intended “to protect the public and the integrity of the profession.” *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). “[A]ppropriate discipline deters unethical conduct.” *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

Disbarment is appropriate when a lawyer neglects his clients’ matters, fails to return clients funds and property, and abruptly leaves his law practice without notifying his clients or finding other lawyers for his clients. *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994); *In re Coe*, 302 Or 553, 731 P2d 1028 (1987) (lawyer was disbarred for, among other things, failing to complete one legal matter and then closing his law office and leaving the area without informing his client or the court).

#### **Conclusion**

“The purpose of lawyer discipline proceedings 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; *In re Huffman*, 328 Or 567, 587, 983 P2d 534 (1999).

For the reasons given and upon the facts found herein, the *Standards* and Oregon case law, the Trial Panel unanimously concludes that the Accused should be disbarred.

#### **Order**

IT IS HEREBY ORDERED that the Accused, Eric Kaufman, be, and upon the effective date of this Order shall be DISBARRED.

Cite as *In re Kaufman*, 28 DB Rptr 174 (2014)

Dated this 29th day of June, 2014

/s/ Deanna L. Franco

Deanna L. Franco, OSB #010470  
Trial Panel Chairperson

/s/ Andrew M. Cole

Andrew M. Cole, OSB #890346  
Trial Panel Member

/s/ Joan J. LeBarron

Joan J. LeBarron, Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 13-70
	)	
NATHAN D. SANDERS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 3.4(c) and RPC 8.4(a)(4). Stipulation for Discipline. 120-day suspension with BR 8.1 reinstatement.
Effective Date of Order:	September 15, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Nathan D. Sanders is suspended for 120 days, effective ten days from the date the order is signed, for violation of RPC 3.4(c) and RPC 8.4(a)(4). Sanders shall be required to apply for reinstatement to the active practice of law pursuant to the requirements of BR 8.1, and such reinstatement shall be subject to the additional conditions set forth in the stipulation.

DATED this 5th day of September, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

Nathan D. Sanders, 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 Clackamas County, Oregon.

3.

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

4.

On July 21, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of RPC 3.4(c) and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

#### The Mezyk-Gerlack Matter

5.

Beginning about September 2005, the Accused represented Roberta Siegel (hereinafter “Siegel”) who had been appointed as personal representative for the estate of Delores Mezyk-Gerlack (hereinafter “Mezyk-Gerlack”) in Multnomah County Circuit Court Case No. 0509-91393 (hereinafter “the Mezyk-Gerlack estate”). Siegel was at the time the spouse of the Accused and she also was admitted to the practice of law in Oregon.

6.

On November 21, 2006, the court issued an order directing the Accused and Siegel to appear before the court on December 21, 2006, to show cause why an accounting had not

been filed and explain why the estate could not be distributed. The delay resulted in part because Siegel had not provided all the necessary information. On December 18, 2006, the Accused obtained a set-over of the show cause hearing to January 22, 2007, at 8:45 a.m. The Accused failed to timely appear before the court on January 22, 2007, but he advised the court via telephone that he would be late. When the Accused appeared later that morning, the show cause hearing was continued to February 20, 2007, at 8:45 a.m. The Accused appeared on February 20, 2007, and filed the annual accounting.

7.

On May 15, 2008, the court issued an order directing the Accused to appear on June 17, 2008, to show cause why a final accounting had not been filed. The Accused states that the accounting was delayed in part because Siegel had not provided all the necessary information. On July 18, 2008, the court appointed a successor personal representative but did not excuse Siegel from rendering required accountings. Siegel filed a final accounting for the Mezyk-Gerlack estate on or about July 21, 2008. Because the Accused failed to give the successor personal representative notice to object to the final accounting, the court ordered the Accused to reimburse the successor personal representative's attorney fees for a subsequent appearance regarding the accounting.

### **The Volz Matter**

8.

Beginning about October 2008, the Accused was appointed personal representative for the estate of Alice Wendell Volz in Multnomah County Circuit Court Case No. 0810-91579 (hereinafter "the Volz estate"). The Accused failed to timely file an inventory and filed an inventory only after the court issued an order to show cause in January 2009. The Accused failed to timely file an increased bond and filed an increased bond only after the court issued an order to show cause in April 2009.

9.

The Accused failed to timely file a final or annual accounting for the Volz estate. On December 28, 2009, the court issued an order requiring the Accused to appear before the court on January 28, 2010, to show cause why no accounting had been filed and explain why the estate could not be distributed. The Accused appeared before the court on January 28, 2010, and the show cause hearing was continued to February 19, 2010. The Accused filed a first annual accounting for the Volz estate on February 17, 2010.

10.

The Accused permitted the bond for the probate of the Volz estate to lapse and failed to promptly reinstate the bond. On March 11, 2010, the court issued an order requiring the Accused to file proof of reinstatement of the bond or appear before the court on April 12,

2010, to explain his failure to do so. The Accused appeared before the court April 12, 2010, but he had not reinstated the bond. The show cause hearing was set over to April 26, 2010. The Accused appeared on that date and filed proof that the bond had been reinstated.

11.

On or about September 8, 2010, on motion of an interested party, the court ordered the Accused to appear before the court on September 27, 2010, to show cause why the Volz estate could not be distributed. The Accused received due notice of the motion and the hearing date. The Accused did not appear before the court September 27, 2010. The court removed the Accused and appointed a successor personal representative for the Volz estate.

12.

The Accused failed to timely file a final accounting for the Volz estate. On November 18, 2010, the court issued an order directing the Accused to file a final accounting or appear before the court on December 20, 2010, to show cause why a final accounting had not been filed. The Accused did not file a final accounting. The Accused appeared before the court on December 20, 2010. The court ordered the Accused to file the final accounting by 5 p.m., December 23, 2010. On December 23, 2010, the Accused contacted the court and obtained additional time to file the final accounting. The Accused filed a final accounting for the Volz estate on December 27, 2010.

### **The Sumner Matter**

13.

On or about April 12, 2005, the Accused was appointed successor conservator for Donald H. Sumner in Multnomah Circuit Court Case No. 0111-92136 (hereinafter “the Sumner conservatorship”). At the time he was appointed, the Accused was required by court order to file a bond in the amount of \$145,000 and acknowledgments of restricted assets.

14.

The Accused failed to timely file a bond in the Sumner conservatorship matter. On or about May 17, 2005, the court issued an order requiring the Accused to remedy his failure to file bond or appear on July 7, 2005, to show cause why no bond had been filed. On or about May 23, 2005, the Accused filed the bond.

15.

The Accused failed to timely file the required acknowledgments of restricted assets for the Sumner conservatorship. On or about August 18, 2005, the court issued an order requiring the Accused to appear on September 7, 2005, to show cause why the required acknowledgments of restricted assets had not been filed. The Accused inadvertently missed the September 7, 2005, show cause hearing. The court contacted the Accused by telephone and he expressed his remorse for the oversight. On September 8, 2005, the Accused filed one

of the acknowledgments. The Accused obtained the other acknowledgment and filed it the following week.

16.

The Accused failed to timely file an annual accounting for the Sumner conservatorship. On or about June 13, 2007, the court directed the Accused to cure his failure or appear on July 13, 2007, to show cause why he had not timely filed the accounting. The Accused thereafter filed an annual accounting, so no appearance was required.

17.

The Accused failed to timely file an annual accounting for the Sumner conservatorship. On or about June 17, 2008, the court directed the Accused to cure his failure or appear on July 17, 2008, to show cause why he had not timely filed the accounting. The Accused thereafter filed the annual accounting and no appearance was required.

18.

On or about August 4, 2008, the court approved the Accused's annual accounting for the Sumner conservatorship and ordered the Accused to file an increased bond. The Accused failed to timely file an increased bond. On September 12, 2008, the court issued an order requiring the Accused to cure the failure or appear on October 17, 2008, to show cause why he had failed to file the increased bond. The Accused thereafter filed the required proof of additional bond and no appearance was required.

19.

The Accused failed to maintain the bond for the Sumner conservatorship. On or about February 8, 2010, the court was notified that the bond had been cancelled. On March 11, 2010, the court issued an order requiring the Accused to file proof that the bond had been reinstated or appear on April 12, 2010, to show cause why he had failed to do so. The Accused failed to obtain reinstatement of the bond. On April 12, 2010, the Accused appeared before the court, and the show cause hearing was continued to April 26, 2010. The Accused thereafter reinstated the bond and filed the required proof on April 26, 2010.

20.

On or about May 20, 2010, the court approved the Accused's annual accounting for the Sumner conservatorship and issued an order requiring the Accused to file proof of an increased bond. The Accused failed to timely file proof of increased bond. On June 25, 2010, the court issued an order requiring the Accused to cure the failure or appear on July 26, 2010, to show cause why he had not done so. The Accused failed to file proof of increased bond. On July 26, 2010, the Accused appeared, and the court continued the show cause hearing to August 11, 2010. The Accused appeared on August 11, 2010, and filed the required proof of increased bond.

21.

The Accused failed to timely file the next annual accounting for the Sumner conservatorship. On or about June 13, 2011, the court directed the Accused to appear on July 14, 2011, to show cause why he had not timely filed the accounting. The Accused appeared before the court on July 14, 2011, and was directed by the court to file the annual accounting before the end of the day or be removed. The Accused filed an annual accounting on July 15, 2011.

22.

Sumner died on or about July 22, 2011. Attorney Rodney Adams (hereinafter “Adams”) represented the personal representative of Sumner’s estate. The Accused delayed the probate of Sumner’s estate because he did not respond to Adams’s communications or cooperate in closing the conservatorship.

23.

The Accused failed to timely file a final accounting for the Sumner conservatorship. On September 27, 2011, the court directed the Accused to appear on October 27, 2011, to show cause why a final accounting had not been filed. The Accused did not take action in response to the court’s order. When the Accused did not appear before the court on October 27, 2011, the Accused was removed as conservator, and the personal representative was appointed as successor conservator. The Sumner conservatorship was completed thereafter in a timely fashion by Adams and the successor conservator/personal representative.

### **The Bledsoe Matter**

24.

Beginning about 2002, the Accused represented Siegel, who had been appointed as conservator for May E. Bledsoe, Multnomah County Circuit Court Case No. 0206-91002 (hereinafter “the Bledsoe conservatorship”).

25.

The Accused failed to timely file an annual accounting for the Bledsoe conservatorship in 2009. The delay resulted in part because the Accused’s client had not provided all the necessary information. On September 8, 2009, the court directed the Accused to file the annual accounting or appear before the court on October 8, 2009, to show cause why he had not timely filed the accounting. The Accused did not file the annual accounting. The Accused overlooked the court’s notice and he did not appear before the court on October 8, 2009, as directed.

26.

On October 9, 2009, the court issued a citation requiring the Accused and his client to appear before the court on October 22, 2009, to show cause why his client should not be found in contempt. The Accused appeared before the court on October 22, 2009, and promised to file the annual accounting on behalf of his client later that day. The Accused filed the annual accounting for the Bledsoe conservatorship on or about October 23, 2009.

27.

In September 2009, the Accused filed a motion to remove a restriction on the disposition of real property in the Bledsoe conservatorship. The Accused's motion to remove restriction was contested by some of Bledsoe's relatives. The Accused represented Siegel, the conservator, at a November 20, 2009, hearing on the motion and objections to it. At the conclusion of the hearing, the court made rulings and directed the Accused to prepare and submit a corresponding judgment for the court's signature. Because of ongoing negotiations between Siegel and the Bledsoe family to resolve the dispute, the Accused was delayed submitting the judgment.

28.

On December 28, 2009, the court issued an order directing the Accused to submit the judgment in the Bledsoe conservatorship or appear before the court on January 28, 2010, to show cause why the judgment had not been submitted. The Accused did not submit the judgment by January 28, 2010. The Accused appeared to explain the status of the matter to the court and he submitted the judgment soon thereafter.

29.

On or about February 10, 2010, a judgment was entered in the Bledsoe conservatorship removing restrictions on the disposition of real property. The judgment required an increased bond for the conservatorship. Siegel failed to timely obtain the increased bond. On March 11, 2010, the court issued an order directing the Accused to file the increased bond or appear before the court on April 12, 2010, to explain why he had not done so. On April 12, 2010, the Accused appeared before the court as directed and explained why the increased bond had not been filed. The court continued the show cause hearing to April 26, 2010. The Accused appeared before the court April 26, 2010 and filed the increased bond.

30.

Siegel failed to timely provide an annual accounting for the Bledsoe conservatorship. On September 9, 2010, the court directed the Accused and Siegel to file the annual accounting or appear before the court on October 12, 2010, to show cause why it had not been filed. The Accused appeared before the court on October 12, 2010, and filed the annual accounting.

31.

In February 2011, the Accused and Siegel began the process of ending their marital relationship. On March 8, 2011, the court mailed to the Accused and Siegel a notice that the guardian's annual report for the Bledsoe conservatorship was due and enclosed a form for the report. The annual guardian's report was not timely filed. On April 13, 2011, the court directed the Accused and Siegel to file the annual guardian's report or appear before the court on May 13, 2011, to show cause why it was not filed. Neither the Accused nor Siegel filed the annual guardian's report. The Accused did not appear before the court on May 13, 2011.

32.

On May 13, 2011, the court issued a show cause citation requiring the Accused and Siegel to appear before the court on May 31, 2011. On May 31, 2011, the Accused appeared with Siegel and her new attorney. The Accused was permitted to withdraw from the Bledsoe conservatorship/guardianship matter.

### **The Tate Matter**

33.

Beginning about 2003, the Accused represented Thomas Tate (hereinafter "Tate") as conservator for Fannie Mae Tate in Multnomah County Circuit Court Case No. 0308-91463 (hereinafter "the Tate conservatorship"). Tate was located in Tennessee and the Accused found him difficult to work with.

34.

The fourth annual accounting for the Tate conservatorship was not timely filed. On December 17, 2007, the court directed the Accused and Tate to file the accounting or appear before the court on January 17, 2008, to show cause why it was not filed. The Accused did not file the annual accounting. The Accused did not appear before the court on January 17, 2008. The Accused states he was unable to get the necessary cooperation from Tate until after the court threatened to impose sanctions.

35.

The court contacted the Accused regarding his failure to appear on January 17, 2008, on the Tate conservatorship matter and warned the Accused that if he failed to file the accounting and appear before the court on February 7, 2008, to explain his failure to appear, the court intended to notify the Oregon State Bar. The court continued the show cause hearing to February 7, 2008.

36.

The annual accounting was not filed before February 7, 2008. The Accused appeared before the court on that date, and the court continued the show cause hearing to March 13, 2008. The Accused did not file the annual accounting before March 13, 2008. On March 13, 2008, the Accused appeared before the court. The Accused filed the annual accounting on March 18, 2008.

37.

Over the following two years, the Accused and Tate responded to the court's show cause orders and no further appearance was required regarding them.

38.

A timely annual accounting was not filed for the Tate conservatorship in November 2010. On December 15, 2010, the court issued an order requiring, if an accounting was not filed before January 18, 2011, the Accused and Tate to appear before the court on January 18, 2011, to show cause why it had not been filed. The Accused did not file an accounting. The Accused failed to appear before the court on January 18, 2011.

39.

On January 18, 2011, the court issued a citation requiring the Accused to appear before the court on February 18, 2011, to show cause why he should not be held in contempt. The court set over the show cause hearing regarding the annual accounting for the Tate conservatorship on the same date. The Accused learned that Tate had ceased communicating with him out of a mistaken belief that, because the protected person had died, no further action was necessary. The Accused appeared before the court on February 18, 2011. The show cause hearings for contempt and for failure to file an accounting were continued to March 18, 2011. The court asked the Accused to file an accounting by March 15, 2011. The Accused did not file the accounting.

40.

The Accused appeared before the court on March 18, 2011. The court ordered that if the Tate conservatorship accounting was not filed by March 23, 2011, the court would commence assessing fines. The show cause hearings were set over to March 23, 2011. On March 22, 2011, the Accused filed a final accounting for the Tate conservatorship.

### **The Herrett Matter**

41.

Beginning about 2005, the Accused represented Kathleen Herrett-Heistuman (hereinafter "Herrett-Heistuman") in her role as guardian in the guardianship of William B. Herrett,

Multnomah County Circuit Court Case No. 0505-90750 (hereinafter “the Herrett guardianship”).

42.

An annual guardian’s report was required to be filed on or about July 9, 2011, for the Herrett guardianship. No report was filed. The Accused states that he had trouble communicating with Herrett-Heistuman. The Accused learned Herrett-Heistuman had been placed into a care facility and was suffering from dementia.

43.

On July 14, 2011, the court mailed the Accused a courtesy notice requesting the overdue guardian’s report for the Herrett guardianship. A successor guardian for the Herrett guardianship was appointed by the court on or about July 26, 2011.

44.

On August 18, 2011, the court issued an order to appear on September 19, 2011, to the Accused to show cause why no annual report had been filed for the Herrett guardianship. The Accused did not appear on September 19, 2011, as directed.

45.

On September 19, 2011, the court issued to the Accused an order directing him to appear before the court on September 29, 2011, to show cause why he should not be held in contempt for his failure to appear as directed by the August 18, 2011 order, described above. The Accused received the order. The Accused did not take any action in response. The Accused did not appear as directed.

46.

On November 7, 2011, the court found the Accused in contempt for the conduct described in paragraphs 42 through 45, above.

### **Violations**

47.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 46, he violated RPC 3.4(c) and RPC 8.4(a)(4).

### **Sanction**

48.

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 obey the rulings of a tribunal and to refrain from conduct that is prejudicial to the administration of justice. *Standards*, § 6.0.
- b. **Mental State.** The Accused was aware of the nature or attendant circumstances of his conduct and of the consequences to him and his clients of failing to file required reports and failing to appear in court pursuant to orders to show cause. Hence the Accused acted knowingly. *Standards, Definitions.* The Accused's failures were in part caused by personal, emotional, and mental health issues.
- c. **Injury.** The legal system suffered some injury in that the Accused's conduct interfered with the court's supervision of matters, and required additional hearings.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Pattern of misconduct. *Standards*, § 9.22(c);
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior discipline. *Standards*, § 9.32(a);
  2. Absence of dishonest or selfish motive. *Standards*, § 9.32(b);
  3. From about 2005, mental health issues began interfering with the Accused's ability to practice law. The Accused began treatment for sudden onset of Post Traumatic Stress Disorder (hereinafter "PTSD") and sought assistance from the Oregon Attorney Assistance Program. Although the Accused continued to receive treatment, the PTSD, and personal difficulties related to the end of his relationship with Siegel, interfered with the Accused's ability to practice to the extent that he voluntarily ceased practicing law in 2011, and failed to pursue substantial fees he was owed for his prior efforts. *Standards*, § 9.32(c).

49.

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

50.

Oregon case law is in accord. See *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006) (six-month suspension imposed with additional condition of formal reinstatement to practice when lawyer knowingly and intentionally failed to pursue matters for which he was retained and appointed, failed to respond to court inquiries and was held in contempt on two different occasions, failed to deposit client funds in trust and render proper accountings for them, and failed to cooperate with Bar disciplinary investigation); *In re Wyllie*, 326 Or 447, 952 P2d 550, *adh'd to on recons*, 326 Or 622, 956 P2d 951 (1998) (lawyer suspended for four months for conduct prejudicial to the administration of justice as the result of appearing intoxicated in court five times over a three-year period and for failing to cooperate with SLAC); *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (lawyer suspended ninety-one days for neglecting a probate matter and a real estate matter and repeatedly failing to respond to the court's requests for action in the probate matter).

51.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 120-days for violation of RPC 3.4(c) and RPC 8.4(a)(4). The Accused shall be required to apply for reinstatement to the active practice of law pursuant to the requirements of BR 8.1, including certification by a physician or licensed mental health professional acceptable to the Bar that the Accused is psychologically fit to practice law. Should the Accused be reinstated to the practice in the future, for a period of 12 months after reinstatement, he shall (1) be supervised by a member of SLAC to monitor his continuing mental health treatment and relapse prevention; (2) comply with the directives of his supervising SLAC member; and (3) submit quarterly reports to Disciplinary Counsel's Office, including a report from his SLAC supervisor, of his compliance with the treatment plan developed by his treating physician or licensed mental health professional and compliance with the directives of his SLAC supervisor. The sanction described herein is to be effective ten (10) days after this stipulation for discipline is approved by the Disciplinary Board.

52.

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.

53.

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 the denial of his reinstatement.

54.

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

EXECUTED this 28th day of August, 2014.

/s/ Nathan D. Sanders

Nathan D. Sanders

OSB No. 793731

EXECUTED this 28th day of August, 2014.

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. 13-17, 13-18, 13-19, 13-27,  
) 13-28, 13-29, and 13-57  
GARY B. BERTONI, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott

Counsel for the Accused: Wayne Mackeson

Disciplinary Board: None

Disposition: Violation of RPC 1.4(a), RPC 1.4(b), RPC 1.5(c)(3),  
RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC  
1.16(d), RPC 8.1(a)(2), RPC 8.4(a)(2), and RPC  
8.4(a)(3). Stipulation for Discipline. 6-month  
suspension.

Effective Date of Order: November 21, 2014

**ORDER APPROVING AMENDED STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Bertoni is suspended for six months, effective November 21, 2014, for violation of RPC 1.4(a), RPC 1.4(b), RPC 1.5(c)(3), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(d), RPC 8.1(a)(2), RPC 8.4(a)(2), and RPC 8.4(a)(3).

DATED this 13th day of November, 2014.

/s/ Pamela E. Yee

Pamela E. Yee

State Disciplinary Board Chairperson

/s/ Nancy M. Cooper

Nancy M. Cooper, Region 5

Disciplinary Board Chairperson

### AMENDED STIPULATION FOR DISCIPLINE

The Accused, Gary B. Bertoni, attorney at law (hereinafter “Bertoni”), 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.

Bertoni was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1978, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Bertoni 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 11, 2013, an Amended Formal Complaint was filed against Bertoni pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.4(a) (failing to keep a client reasonably informed of the status of a matter and promptly comply with reasonable requests for information); RPC 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions); RPC 1.5(a) (charging or collecting an excessive fee); RPC 1.5(c)(3) (entering into an improper flat fee agreement); RPC 1.15-1(a) (failure to deposit client funds in trust); RPC 1.15-1(c) (failure to properly handle client funds); RPC 1.15-1(d) (failure to promptly provide client property and account, upon request); RPC 1.16(d) (failure to properly withdraw); RPC 8.1(a)(2) (knowingly fail to respond to lawful requests for information from a disciplinary authority); RPC 8.4(a)(2) (criminal conduct reflecting adversely on a lawyer’s fitness to practice); RPC 8.4(a)(3) (dishonest conduct including knowing conversion); and RPC 8.4(a)(3) (conduct involving misrepresentation). 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.

**Case No. 13-17  
(Karpinski Matter)**

**Facts**

5.

Under 26 USC § 7202, it is unlawful for a person who is required to collect, account for, and pay over any tax to willfully fail to collect or truthfully account for and pay over such tax.

6.

Between 2009 and 2011, Bertoni was the sole owner of Bertoni & Associates (hereinafter “firm”) and the person responsible for firm tax matters. For those years, the firm employed a number of individuals and was required to deduct and withhold from employee wages federal income, Social Security, and Medicare taxes, and to pay the government each quarter the amounts withheld.

7.

Between 2009 and 2011, Bertoni failed to pay over the amounts deducted and withheld from employee wages.

8.

In paychecks and year-end wage and tax statements provided to firm employees for the years 2009 through 2011, Bertoni knowingly misrepresented that a portion of their gross wages had been or would be timely withheld and paid over to the Internal Revenue Service on their behalf for income, Social Security, and Medicare taxes.

9.

Beginning in 2009, in paychecks provided to his employees, Bertoni knowingly misrepresented that contributions by the employees to a retirement fund had been or would be timely withheld and deposited into the appropriate retirement account.

10.

On June 29, 2012, Disciplinary Counsel’s Office received a complaint from Alan Karpinski (hereinafter “Karpinski”) regarding Bertoni’s conduct.

11.

On November 7, 2012, Disciplinary Counsel’s Office requested Bertoni’s response to a number of issues on or before November 21, 2012. Bertoni obtained an extension until December 14, 2012, but then knowingly failed to respond to the November 7, 2012 letter and to a subsequent letter reminding him of his duty to respond.

**Violations**

12.

Bertoni acknowledges that his failure to pay over the amounts deducted and withheld from employee wages violated RPC 8.4(a)(2). In addition, he admits that his contrary representations to his employees regarding taxes and other withholdings, as well as contributions to the retirement fund, violated RPC 8.4(a)(3). Further, Bertoni admits that his failures to respond to inquiries from Disciplinary Counsel's Office regarding Karpinski's complaint violated RPC 8.1(a)(2).

13.

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

**Case No. 13-19  
(OSB Matter)**

**Facts**

14.

Under ORS 316.167(1), employers are required to deduct and retain from wages certain amounts for each employee's personal income taxes. Under ORS 316.168(3), employers are required to remit to the Oregon Department of Revenue the amounts deducted and retained from employee wages.

15.

In July 2012, Disciplinary Counsel's Office received information that Bertoni may not have remitted employee withholding taxes to the Oregon Department of Revenue.

16.

On November 7, 2012, Disciplinary Counsel's Office requested Bertoni's response to a number of issues on or before November 21, 2012. Bertoni obtained an extension until December 4, 2012, but then knowingly failed to respond to the November 7, 2012 letter and to a subsequent letter reminding him of his duty to respond.

**Violation**

17.

Bertoni acknowledges that his failures to respond to inquiries from Disciplinary Counsel's Office violated RPC 8.1(a)(2).

18.

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

**Case No. 13-18  
(Kliwer Matter)**

**Facts**

19.

Between December 6, 2010, and March 27, 2012, Bertoni undertook to represent a number of clients, all of whom signed written flat fee agreements that failed to explain that the funds paid to Bertoni would not be deposited into his lawyer trust account, that the client may discharge Bertoni at any time, and that if the client discharged Bertoni that the client may be entitled to a refund of all or part of the fee if the services for which the fee was paid were not completed.

20.

On January 20, 2012, the Disciplinary Board approved a stipulation for discipline, effective March 27, 2012, suspending Bertoni from the practice of law for 150 days. Bertoni arranged for Ronnee Kliwer (hereinafter “Kliwer”) to represent some of his clients with pending matters during the suspension.

21.

Prior to March 27, 2012, Bertoni failed to inform one or more clients that he would be suspended from the practice of law, that he had withdrawn or would be withdrawing from representing them, and that Kliwer had been or would be substituted as their lawyer.

22.

As of March 27, 2012, Bertoni withdrew from representing all of his clients in pending litigation. Prior to that date, Bertoni failed to notify one or more clients of his withdrawal, and failed to promptly surrender certain client files to Kliwer or otherwise at the direction of the client.

23.

In July 2012, Disciplinary Counsel’s Office received a complaint from Kliwer regarding Bertoni’s conduct.

24.

On November 8, 2012, Disciplinary Counsel’s Office requested Bertoni’s response to a number of issues on or before November 23, 2012. Bertoni obtained an extension until

December 14, 2012, but then knowingly failed to respond to the November 8, 2012 letter and to a subsequent letter reminding him of his duty to respond.

### **Violations**

25.

Bertoni acknowledges that his use of an improper fee agreement between December 2010, and March 2012, violated RPC 1.5(c)(3). He also acknowledges that his failure to ensure that all clients were aware of his suspension and Kliewer's intended substitution violated RPC 1.4(a) and RPC 1.4(b), and his failure to take steps to the extent reasonably practicable to protect a client's interests upon withdrawal, including surrendering client files, violated RPC 1.16(d). Further, Bertoni admits that his failures to respond to inquiries from Disciplinary Counsel's Office violated RPC 8.1(a)(2).

26.

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.5(a) (excessive fee) should be and, upon the approval of this stipulation, is dismissed.

### **Case No. 13-29 (Chilcott Matter)**

#### **Facts**

27.

In late August 2011, Angela Chilcott (hereinafter "Chilcott") entered into a written fee agreement with Bertoni in which she agreed to pay a \$1,500 flat fee, which was non-refundable and earned upon receipt. The agreement failed to explain that the funds paid to Bertoni would not be deposited into his lawyer trust account, that Chilcott could discharge Bertoni at any time, and that if she discharged Bertoni that she may be entitled to a refund of all or part of the fee if the services for which the fee was paid were not completed.

28.

In late December 2012, Disciplinary Counsel's Office received a complaint from Chilcott regarding Bertoni's conduct.

29.

On January 4, 2013, Disciplinary Counsel's Office requested Bertoni's response to the complaint and to a number of issues on or before January 25, 2013. Bertoni knowingly failed to respond to the January 4, 2013 letter and to a subsequent letter reminding him of his duty to respond.

**Violations**

30.

Bertoni admits that his use of an improper fee agreement in his representation of Chilcott violated RPC 1.5(c)(3). He further admits that his failures to respond to inquiries from Disciplinary Counsel's Office violated RPC 8.1(a)(2).

**Case No. 13-28  
(Cheadle Matter)**

**Facts**

31.

In 1993 and 1994, Bertoni represented Joseph Cheadle (hereinafter "Cheadle") in a criminal matter which was resolved with a plea agreement. Cheadle was sentenced to a minimum of 30 years in prison with the possibility of parole.

32.

In 2001, the State of Oregon obtained an amended judgment imposing a lifetime of post-prison supervision upon Cheadle and served a copy on Bertoni. Bertoni failed to inform Cheadle that the State of Oregon had sought and obtained the amended judgment.

33.

In 2007, Cheadle learned that the State of Oregon may have breached the plea agreement and that there were other potential problems with his sentence. In September 2007, Bertoni undertook to represent Cheadle regarding resentencing and in a post-conviction relief proceeding.

34.

On October 1, 2012, Disciplinary Counsel's Office received a complaint from Cheadle regarding Bertoni's conduct.

35.

On October 5, 2012, Disciplinary Counsel's Office requested Bertoni's response to the complaint and to a number of issues on or before October 26, 2012. Bertoni obtained an extension until December 21, 2012, but then knowingly failed to respond to the October 5, 2013 letter.

**Violations**

36.

Bertoni acknowledges that his failure to notify Cheadle of the amended judgment violated DR 6-101(B) prior to 2005, and RPC 1.4(a) and RPC 1.4(b) after January 1, 2005.

Bertoni further acknowledges that his failures to respond to inquiries from Disciplinary Counsel's Office violated RPC 8.1(a)(2).

37.

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.5(a) (excessive fee) and RPC 1.16(d) (failure to take steps upon withdrawal to protect client interests) should be and, upon the approval of this stipulation, are dismissed.

**Case No. 13-27  
(Weivoda Matter)**

**Facts**

38.

In October 2008, Charolette Weivoda (hereinafter "Weivoda") retained Bertoni to represent her in an appeal of a criminal matter and a post-conviction relief proceeding. On April 20, 2011, Bertoni received \$569 from Weivoda's husband to pay filing fees in the post-conviction relief proceeding and in a separate personal injury matter.

39.

On February 21, 2012, Weivoda terminated Bertoni's representation. Bertoni failed to refund the \$569, even though he had not filed the post-conviction relief proceeding or the personal injury matter.

40.

In late October 2012, Disciplinary Counsel's Office received a complaint from Weivoda's husband regarding Bertoni's conduct.

41.

On November 5, 2012, Disciplinary Counsel's Office requested Bertoni's response to the complaint and to a number of issues on or before November 26, 2012. Bertoni obtained an extension until December 14, 2012, but then knowingly failed to respond to the November 5, 2012 letter and to a subsequent letter reminding him of his duty to respond.

**Violations**

42.

Bertoni admits that his failure to return Weivoda's unused funds following the termination of the attorney-client relationship violated RPC 1.16(d). He also admits that his failures to respond to inquiries from Disciplinary Counsel's Office violated RPC 8.1(a)(2).

**Case No. 13-57**  
**(OSB-CSF-Ramirez Matter)**

**Facts**

43.

In July 2010, Angel Ramirez (hereinafter “Ramirez”) retained Bertoni to represent him in sentencing and appeal of a criminal matter and paid Bertoni \$7,500. Bertoni failed to deposit and maintain those funds in his lawyer trust account until they were earned.

44.

In mid-March 2012, Bertoni informed Ramirez that he would be withdrawing from the representation and promised to provide an accounting and partial refund to Ramirez. Bertoni failed to provide an accounting until August 2012 and failed to make any refund to Ramirez.

**Violations**

45.

Bertoni admits that, by failing to deposit and maintain Ramirez’s funds in trust until they were earned, he violated RPC 1.15-1(a) and RPC 1.15-1(c). He further admits that by failing to promptly render a full accounting to Ramirez and remit unearned funds following termination of the attorney-client relationship, he violated RPC 1.15-1(d) and RPC 1.16(d).

**Sanction**

46.

Bertoni 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 Bertoni’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.** Bertoni violated his duty to his clients to preserve and properly handle their files and other property. *Standards*, § 4.1. He also violated his duty of diligence to his clients, which includes the duty to adequately communicate. *Standards*, § 4.4. The *Standards* provide that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, p. 5, *Theoretical Framework*.

Bertoni also violated his duty to the public to maintain his personal integrity. *Standards*, § 5.1. He also violated his duties as a professional to cooperate

with disciplinary proceedings and refrain from using improper fee agreements. *Standards*, § 7.0.

- b. **Mental State.** Apart from his negligent failure to provide Cheadle with the amended judgment and his negligent use of an improper fee agreement, all of Bertoni's conduct was knowing. 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. *Standards, Definitions*. 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, Definitions*.
- c. **Injury.** "Because the purpose of professional discipline is to protect the public, an 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).

It is unknown whether Bertoni's failure to pay the assessed withholding taxes and corresponding misrepresentations to his employees caused any actual injury. It had the potential to cause injury to the state and federal taxing authorities because firm employees were entitled to rely on the figures he provided to file (and potentially receive returns from) the Oregon Dept. of Revenue and US Treasury based upon the amounts Bertoni claimed he paid on their behalf. Firm employees were also potentially injured to the extent that they were in jeopardy of not receiving their retirement contributions had something happened to Bertoni before he fulfilled his oral promise to bring their account contributions current.

Bertoni's failures to provide client files and failures 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).

Bertoni's failure to return client monies has caused actual injury to clients, particularly those in need of those funds to secure other representation in their legal matters.

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

*In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (court concluded that, when a lawyer persisted in his failure to respond to the Bar’s inquiries, 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. A prior record of discipline. *Standards*, § 9.22(a). This aggravating factor “refers to offenses that have been adjudicated prior to imposition of the sanction in the current case.” *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997). Bertoni was suspended for 150 days in 2012 for violation of RPC 1.15-1(a)–(c) (failing to properly handle client funds and trust funds). *In re Bertoni*, 26 DB Rptr 25 (2012) (hereinafter “*Bertoni I*”).

However, some of the conduct that led to Bertoni’s prior discipline occurred within the same time period or shortly before the cases at issue here. To the extent that the conduct in these cases predates the imposition of the prior discipline in *Bertoni I*, the prior discipline is given little weight as an aggravating factor. *Jones*, 326 Or at 200. However, Bertoni’s failure to cooperate with Disciplinary Counsel occurred after he had served his suspension in *Bertoni I*, so those violations are substantially aggravated by Bertoni’s prior discipline. *Jones*, 326 Or at 200.

2. A pattern of misconduct. *Standards*, § 9.22(c). Bertoni’s conduct in failing to properly handle his tax obligations and in utilizing improper fee agreements occurred over a substantial period of time; moreover, taken with his prior discipline, some of which is similar to the conduct at issue in these matters, demonstrates a pattern of misconduct. *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
3. Multiple offenses. *Standards*, § 9.22(d). Bertoni engaged in several distinct acts, each of which constituted a separate violation of the disciplinary rules rather than one bad act charged under several rules. *In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).
4. Obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. *Standards*, § 9.22(e). Bertoni delayed in responding to Disciplinary Counsel’s requests for production, necessitating a motion to compel and two motions for sanctions to elicit a substantive response.

5. Substantial experience in the practice of law. *Standards*, § 9.22(i). Bertoni was admitted in Oregon in 1978.
6. Indifference to making restitution. *Standards*, § 9.22(j). Bertoni has not returned any client funds, despite acknowledging the need to do so.

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

1. Personal or emotional problems. *Standards*, § 9.22(c). Bertoni was undergoing serious financial and tax issues during a portion of the relevant time period in these matters. He was also under significant stress from the pending Bar proceeding resulting in *Bertoni I* and the resulting suspension.
2. Imposition of other penalties or sanctions. *Standards*, § 9.32(k). Bertoni has had federal tax liens imposed upon him and has been involved in proceedings initiated by the Oregon Department of Revenue.

47.

f. **Presumptive Sanction.**

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. *Standards*, § 4.12. A reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. *Standards*, § 4.43. A suspension is generally appropriate when a lawyer knowingly engages in conduct that violates statutory law and that seriously adversely reflects on the lawyer's fitness to practice. *Standards*, § 5.12. A reprimand is generally appropriate when a lawyer knowingly engages in non-criminal conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. *Standards*, § 5.13. A suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

When considered in conjunction with the applicable aggravating and mitigating factors, the *Standards* provide that a suspension is appropriate for Bertoni's conduct in these matters.

48.

**g. Oregon Case Law**

Oregon case law reaches the same conclusion. In fact, the court has noted that a six-month to two-year suspension is the appropriate sanction in most cases involving a lawyer's failure to file tax returns. *In re DesBrisay*, 288 Or 625, 606 P2d 1148 (1980) (imposing four-year suspension for attorney's conviction for failing to file his income tax return for one year and his subsequent failure to file over next five years). *See also, In re Means*, 207 Or 638, 298 P2d 983 (1956) (six-month suspension for attorney's failure to file federal tax returns for two consecutive years); *In re Kolstoe*, 21 DB Rptr 43 (2007) (four-year suspension by trial panel for failing to file state and federal tax returns for seven consecutive years). *But, c.f., In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001) (60-day suspension mitigated substantially by delay in the Bar proceedings—a fact not present here—for failing to timely file personal income tax returns over three consecutive years due to mishaps by tax preparer).

Similarly, “[t]he failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation,” itself deserving a suspension ranging from 60 to 120 days. *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000). *See, e.g., In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (although no substantive charges were brought, the attorney was suspended for 120 days for non-cooperation with the Bar). Suspensions of 120 days are common. *See In re Murphy*, 349 Or 366, 245 P3d 100 (2010); *In re Koch*, 345 Or 444, 198 P3d 910 (2008); *In re Paulson II*, 341 Or 542, 145 P3d 171 (2006), *cert den*, 549 US 1304 (2007). *See also In re Reali*, 27 DB Rptr 120 (2013) (received 120-day suspensions from trial panels, at least in part for failing to cooperate with the Bar); *In re Browning*, 26 DB Rptr 176 (2012) (same); *In re Nielson*, 25 DB Rptr 196 (2011) (same); *In re Shatzen*, 18 DB Rptr 213 (2004) (same); *In re Clark*, 17 DB Rptr 231 (2003) (same).

Collectively, at least a six-month suspension is appropriate for Bertoni's misconduct.

49.

Consistent with the *Standards* and Oregon case law, the parties agree that Bertoni shall be suspended for six months for violation of RPC 1.4(a), RPC 1.4(b), RPC 1.5(c)(3), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(d), RPC 8.1(a)(2), RPC 8.4(a)(2), and RPC 8.4(a)(3), the sanction to be effective November 21, 2014.

50.

Bertoni 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, Bertoni has arranged for Robin Runstein, an active member of the Oregon State Bar, to either take possession of or have ongoing access to Bertoni's client files and serve as the contact person for clients in need of the files during the term of Bertoni's suspension. In the event that Robin Runstein is unable to fulfill this role for any part of Bertoni's term of suspension, Bertoni represents that he will locate another active member within three (3) business days to assume that role and immediately notify DCO of the replacement.

51.

Bertoni 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. Bertoni 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.

52.

Bertoni 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.

53.

Bertoni 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 Bertoni is admitted: none.

54.

This Amended 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 Bertoni*, 28 DB Rptr 196 (2014)

EXECUTED this 30th day of October, 2014.

/s/ Gary B. Bertoni

Gary B. Bertoni

OSB No. 781414

EXECUTED this 3rd day of November, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-85  
)  
BRETT COREY JASPERS, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 3.3(d), RPC 3.5(b), and RPC  
8.4(a)(4). Stipulation for Discipline. Public Reprimand.  
Effective Date of Order: September 10, 2014

**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 3.3(d), RPC 3.5(b), and RPC 8.4(a)(4).

DATED this 10th day of September, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ James C. Edmonds

James C. Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

The Accused, Brett Corey Jaspers, attorney at law (hereinafter “Jaspers”), 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.

Jaspers was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 6, 1998, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Benton County, Oregon.

3.

Jaspers 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 August 22, 2014, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against Jaspers for alleged violation of RPC 3.3(d) (fail to inform the tribunal of all material facts in an *ex parte* proceeding); RPC 3.5(b) (improper *ex parte* communication); and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice) 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 April 2010, Rick Shafer (hereinafter “Father”) and Karen Canan (hereinafter “Mother”) obtained a general judgment setting forth custody and parenting time regarding the couple’s son (hereinafter “Son”). The judgment awarded sole physical and legal custody of Son to Father and reasonable parenting time to Mother.

6.

In July 2011, Mother filed a motion for an order to show cause re enforcement of parenting time. After a hearing in August 2011, Father was found in contempt for denying Mother parenting time with Son to which she was entitled.

7.

In October 2011, Father moved from Oregon to Pennsylvania, leaving Son with Mother in Oregon. The parenting time agreement provided that if a parent relocated more than 60 miles away, the residential schedule would have to be modified. When Father moved to Pennsylvania, he left Son with Mother, but without any order in place reflecting that Mother now had custody.

8.

In late February, Mother learned that Father planned to return to Oregon very soon to pick up Son and transport him back to Pennsylvania for a two- or three-week visit. However, Mother was concerned—particularly in light of Father’s prior disregard for the judgment related to parenting time—that Father would not return Son following the planned visit.

9.

On February 24, 2012, believing that the circumstances qualified as an emergency situation under ORS 107.139, Jaspers filed an *ex parte* motion on Mother’s behalf seeking a status quo order restraining Father from taking the child out of state or interfering with his daily schedule. However, regardless of whether the circumstances satisfied the requirements for obtaining an *ex parte* motion under ORS 107.139, the statute required procedural steps that Jaspers failed to take (to confer, to have Mother appear in court at a hearing, and to serve the order on Father per ORCP 7). Jaspers did not take any of these steps, including notifying Father, who was then unrepresented.

10.

Jaspers’ motion did not indicate that it was pursuant to ORS 107.139. It asserted that Son’s usual place of residence was with Mother, but did not mention the existence of a general judgment that awarded custody to Father. Jaspers’ motion stated that Father planned to “come get the child and take him to the state of Pennsylvania for an extended visit,” but did not state that Father had proposed a visit of two to three weeks. He also did not disclose that the general judgment allowed each parent up to 14 additional days to be used as vacation time for planned trip, presuming reasonable notice. These facts were known to Jaspers and relevant to the court’s assessment of the motion, but Jaspers did not disclose them, believing that the court had sufficient familiarity with the case.

11.

After the court signed the status quo order, Jaspers did not serve it on Father, but sent a copy to Father’s new counsel a few days later.

### Violations

12.

Jaspers admits that, because his motion failed to meet the statutory requirements under ORS 107.139, his *ex parte* communication was not “authorized by law,” and he therefore violated RPC 3.5(b). Jaspers further admits that by failing to fully inform the court in the *ex parte* proceeding of all facts known to him and relevant to the court’s assessment of the motion, he violated RPC 3.3(d).

Finally, Jaspers acknowledges that his collective conduct—in making an unauthorized *ex parte* contact, which was not the proper form, and in failing to mention facts material to the court’s determination, which resulted in his obtaining an improper order that he then failed to properly serve on Father—wasted the court’s time and significantly interfered with Father’s custodial/visitation rights, which taken together amounted to conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

### Sanction

13.

Jaspers 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 Jaspers’ 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.** Jaspers violated his duties to the legal system to avoid improper communications and conduct prejudicial to the administration of justice. *Standards*, § 6.2, § 6.3.
- b. **Mental State.** Jaspers acted knowingly and negligently. 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. *Standards, Definitions*. 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, Definitions*.

Jaspers negligently believed that his motion was proper. He also negligently believed that the court had familiarity with the facts resulting in his knowing election not to recite them. Finally, Jaspers negligently interfered with the administration of justice.

- c. **Injury.** 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). In this case, there was potential substantial injury to Father’s custody and parenting time rights, during the pendency of the status quo order. However, he was offered visitation with Son shortly after the entry of the status quo order and elected not to exercise it.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  - 1. Substantial experience in the practice of law, having been admitted in Oregon in 1998. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of prior discipline. *Standards*, § 9.23(a).
  - 2. Absence of a dishonest or selfish motive. Jaspers was attempting to assist his client address legitimate concerns. *Standards*, § 9.23(b).
  - 3. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards*, § 9.23(e).

14.

Under the ABA *Standards*, a reprimand generally appropriate when a lawyer negligently engages in conduct prejudicial to the administration of justice and causes injury to a client or other party. A reprimand is also 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*, § 6.23, § 6.33.

15.

Oregon case law is in accord. See *In re McGavic*, 22 DB Rptr 248 (2008) (attorney reprimanded for improper *ex parte* contact, conduct prejudicial to administration of justice, and direct contact with a represented person); *In re Carusone*, 20 DB Rptr 231 (2006) (in a post-judgment domestic relations proceeding, attorney was reprimanded where he filed motions for the appointment of a guardian ad litem and a receiver of a trust, and appeared in court *ex parte* to obtain orders on those motions, without notice to opposing counsel and without complying with applicable court rules); *In re Bean*, 20 DB Rptr 157 (2006) (attorney was reprimanded for, while presenting an *ex parte* custody order to a judge, failing to disclose to the court that the *pro se* opposing party was in the hallway waiting to be heard).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that Jaspers shall be publicly reprimanded for violation of RPC 3.3(d), RPC 3.5(d), and RPC 8.4(a)(4), the sanction to be effective upon approval by the Disciplinary Board.

17.

Jaspers 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.

18.

Jaspers 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 Jaspers 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 28th day of August, 2014.

/s/ Brett Corey Jaspers

Brett Corey Jaspers

OSB No. 980650

EXECUTED this 29th day of August, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 13-04, 13-05, and 13-72  
)  
DEBBE J. von BLUMENSTEIN, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: John L. Barlow, Chairperson  
Robert C. McCann  
Fadd E. Beyrouty, Public Member  
Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC  
1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.16(a)(2),  
RPC 8.1(a)(2), and RPC 8.4(a)(4). Trial Panel Opinion.  
2-year suspension.  
Effective Date of Opinion: September 16, 2014

**TRIAL PANEL OPINION**

**Introduction**

Debbe J. Von Blumenstein, (hereinafter “Accused”) has been charged with 35 violations of Oregon Rules of Professional Conduct arising from her representation of clients in three different matters and subsequent Bar Complaints. A Formal Complaint was signed by then Disciplinary Counsel John S. Gleason on June 24, 2013. The Accused was personally served with the Formal Complaint and Notice to Answer on July 31, 2013. The Accused did not file an Answer or otherwise appear in this proceeding. The Accused was given a ten-day notice of the Oregon State Bar’s (hereinafter “Bar”) intent to seek a Default Order and the Motion for Order of Default was filed following expiration of the notice. An Order of Default was signed on November 22, 2013. by the Regional Chairperson. That Order requires the Trial Panel to deem the allegations in the Bar’s Formal Complaint true; the Trial Panel must then treat all factual allegations in the Formal Complaint as having been proven and then determine whether the proven facts constitute the disciplinary rule violations alleged by the

Bar. After making that determination, the Trial Panel must determine what sanction is appropriate.

### **The Bar's Complaint**

The Bar charged the Accused with violation of RPC 1.1 (competent representation to a client); RPC 1.4(a) (keeping a client reasonably informed about the status of a matter and promptly complying with reasonable requests for information); RPC 1.4(b) (explaining matters to the extent reasonably necessary to permit the client to make informed decisions); RPC 1.5(a) (charging and collecting an excessive fee); RPC 1.15-1(a) (failing to hold client property separate from the accused's own property); RPC 1.15-1(c) (failing to deposit and maintain client money in trust); RPC 1.15-1(d) (failing to promptly deliver to the client client property); RPC 1.16(a)(2) (failure to withdraw from representation); RPC 8.1(a)(2) (failing to respond to Bar inquiry); RPC 8.4(a)(3) (conduct involving dishonesty); and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

### **The Accused's Answer**

The Accused did not file an Answer to the Formal Complaint.

### **Findings of Fact**

#### **A. Lowell Jenkins Matter (Case No. 13-04)**

1. Lowell Charles Jenkins (hereinafter "Jenkins") hired the Accused on November 1, 2012 to represent him on a DUII charge in Polk County. Pursuant to their written Fee Agreement, Jenkins paid the Accused a flat fee of \$1,250 for pre-trial representation including a DMV hearing. The Fee Agreement did not designate the fee as "non-refundable" and the Accused did not inform Jenkins that the fee would not be deposited into the Accused's lawyer trust account, and did not state that Jenkins might be entitled to a refund of all or part of his fee if the services for which the fee was paid were not completed by the Accused.

2. The Accused deposited Jenkins' fee directly into her business account and spent the funds for business and personal expenses unrelated to Jenkins' case.

3. After being retained by Jenkins, the Accused took no substantial action on Jenkins' legal matter and did not respond to his attempts to communicate with her. When Jenkins appeared as scheduled for his November 15, 2012 arraignment, the Accused did not appear. The Accused did not notify the court or Jenkins that she would not be appearing at the arraignment nor did she notify Jenkins of the time set for his DMV hearing.

4. Jenkins hired a new attorney who made several attempts to contact the Accused and made multiple requests for a refund of Jenkins' fee. The Accused did not respond to any of these contacts.

5. This conduct of the Accused constituted failure to provide competent representation to Jenkins in violation of RPC 1.1; neglect of a legal matter entrusted to the Accused in violation of RPC 1.3; failure to keep a client reasonably informed of the status of a case and to respond to reasonable requests for information, violating RPC 1.4(a); failure to explain a matter reasonably necessary to allow the Accused's client to make informed decisions regarding the representation, violating RPC 1.4(b); charging and collecting an excessive fee, violating RPC 1.5(a); failing to hold client property separate from the Accused's own property, violating RPC 1.15-1(a); failing to deposit and maintain client money in trust, violating RPC 1.15-1(c); failing to promptly deliver to the client client property, violating RPC 1.15-1(d); conduct prejudicial to the administration of justice by failing to appear without notice to the court and Jenkins in violation of RPC 8.4(a)(4); and failure to withdraw from representation of Jenkins when the Accused's physical or mental condition materially impaired the Accused's ability to represent the Accused's client, in violation of RPC 1.16(a)(2).

**B. Polk County Court Appearances (Case No. 13-05)**

1. On multiple occasions in November and December 2012, the Accused had cases in which the opposing attorney was Timothy Wong of the Polk County District Attorney's Office.

2. On multiple occasions in November and December 2012, the Accused failed to appear for scheduled court appearances, failed to contact Mr. Wong, her clients, or the court in advance of these court appearances to notify them that she would not appear.

3. Prior to May 2013, the Accused was hired to represent Bruce Sickles and Darla Littlefield as co-defendants in a criminal matter in Polk County. On May 20, 2013, without notice to her clients, the District Attorney's Office, or the court, the Accused failed to appear for a scheduled pre-trial conference on behalf of Mr. Sickles and Ms. Littlefield.

4. Immediately after the missed appearance, the court left multiple messages for the Accused inquiring about her absence and her readiness for trial scheduled for May 28, 2013. In response, on or about May 21, 2013, the Accused sent an email to the court stating that she would be ready for the jury trial representing Mr. Sickles and Ms. Littlefield on May 28, 2013. On May 28, 2013, without notice to her clients, the District Attorney's Office, the Jury Coordinator, or the court, the Accused failed to appear for the trial.

5. In approximately June 2012, the Accused began suffering from one or more serious physical and/or mental conditions that materially impaired her ability to represent clients in their legal matters in Polk County. Despite being fully aware of her impairments, the Accused accepted clients' cases in November and December 2012, and thereafter did not make any efforts to withdraw.

6. The conduct of the Accused in the Polk County court appearances amounts to failure to provide competent representation in violation of RPC 1.1; neglect of a legal matter entrusted to the Accused in violation of RPC 1.3; failure to keep a client reasonably informed of the statute of a case and to respond to reasonable requests for information in violation of RPC 1.4(a); failure to explain a matter to the extent reasonably necessary to allow her client to make informed decisions regarding the representation, in violation of RPC 1.4(b); failure to withdraw from representation when her physical or mental condition materially impaired her ability to represent her client, in violation of RPC 1.16(a)(2); and conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

**C. Haburn and Hermann Matter (Case No. 13-72)**

1. In September 2012, Jayne Haburn hired the Accused to defend her son (hereinafter “Minor”) against a charge of minor in possession of alcohol. Haburn paid the Accused a \$1,500 flat fee. The Accused did not provide Haburn with a written fee agreement nor did she deposit the fee into her lawyer trust account.

2. The Accused dealt with an erroneous dual filing of the charge against Minor in traffic court in October, 2012, but otherwise took no substantial action on Minor’s legal matter and did not respond Haburn’s attempts to communicate with her. The Accused did not notify Minor or Haburn that the District Attorney had offered to dismiss a disorderly conduct charge against Minor as part of a plea agreement.

3. The Accused rescheduled one court appearance due to asserted illness and rescheduled a number of appointments with Haburn also citing illness.

4. Hermann’s trial was scheduled for January 2013. The Accused was not prepared to proceed to trial. Without notice to Minor, Haburn, or the court, the Accused failed to appear for Minor’s trial.

5. Following the trial date, and without the Accused’s assistance, Haburn settled Minor’s case with the District Attorney’s Office. Thereafter, the Accused did not return any portion of the Minor’s fee.

6. The Accused accepted Minor’s case in September 2012, despite being fully aware of her physical and/or mental impairments, and did not thereafter make any efforts to withdraw from representation of Minor.

7. The Accused’s conduct in the Haburn and Minor matter constituted failure to provide competent representation in violation of RPC 1.1; neglect of a legal matter entrusted to her in violation of RPC 1.3; failure to keep a client reasonably informed of the status of a case and to respond to reasonable requests for information in violation of RPC 1.4(a); failure to explain a matter to the extent reasonably necessary to allow her client to make informed decisions regarding the representation, in violation of RPC 1.4(b); charging and collecting an excessive fee in violation of RPC 1.5(a); failure to hold client property separate from the

Accused's own property in violation of RPC 1.15-1(a); failure to deposit and maintain client money in trust in violation of RPC 1.15-1(c); failure to promptly deliver client property in violation of RPC 1.15-1(d); failure to withdraw from representation when her physical or mental condition materially impaired her ability to represent her client, in violation of RPC 1.6(a)(2); and engaging in conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

**D. Conduct Related to Oregon State Bar Investigation**

1. On November 29, 2012, Jenkins and Didrio, his new lawyer, complained to the Bar about the Accused's conduct. The complaint was referred to Disciplinary Counsel's Office (hereinafter "DCO") for investigation.

2. On December 13, 2012, DCO requested by letter the Accused's response to the Jenkins Complaint. The Accused knowingly failed to respond to this request and to a subsequent request for a response.

3. On January 24, 2013, DCO referred the matter to the Polk County Local Professional Responsibility Committee (hereinafter "LPRC") for additional investigation. The LPRC subpoenaed the Accused for an interview and for the production of records, and the Accused complied with the subpoena.

4. On December 4, 2012, Deputy District Attorney Wong complained to the Bar about the Accused's conduct in the Polk County matters. The complaint was referred to DCO.

5. On December 13, 2012, DCO requested the Accused's response to Wong's complaint. The Accused knowingly failed to respond to this request by DCO and to a subsequent request for her response.

6. On January 24, 2013, DCO referred the matter to LPRC for additional investigation. The LPRC subpoenaed the Accused for an interview and for the production of records, and the Accused complied with the subpoena.

7. On February 14, 2013, Haburn complained to the Bar about the Accused's conduct in the Haburn and Minor matter. On or about February 27, 2013, DCO requested the Accused's response to Haburn's complaint. DCO specifically requested that the Accused provide her complete file on the Minor matter and that she account for the Minor's fee. After several additional requests, the Accused eventually provided documents which she stated constituted Minor's file. The Accused did not account for the Minor's fee.

8. The Accused's failure to respond to initial inquiries and subsequent failures to provide requested information and financial accounting, constitute knowing failures to respond to a lawful demand for information in a disciplinary manner in violation of RPC 8.1(a)(2).

## Sanction

In considering the appropriate sanction, the Trial Panel must consider 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 aggravating and mitigating factors.

**Duty Violated.** In this case, the Accused owed ethical duties to each of her clients, to provide competent representation, to act with reasonable diligence and promptness, to adequately communicate with her clients so that they may make informed decisions, and to preserve and return their property. *ABA Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) § 1.1, § 4.4, and § 4.5. The *Standards* provide that the most important ethical duties are those obligations that the lawyer owes to clients. The Accused also has a duty to the legal profession to refrain from charging or collecting excessive fees and to cooperate with disciplinary investigations. *Standards*, § 7.0. The Accused violated these *Standards* in all three matters.

**Mental State.** The ABA Standards define “knowledge” 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.” The Standards define “negligence” as “the failure of a lawyer to heed a substantial risk that circumstances exist or a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” The Standards define “intent” as “the conscious objective or purpose to accomplish a particular result.”

In this case, the Accused acted knowingly and intentionally in taking on cases and accepting client funds knowing of her impairments and that those impairments made it unlikely that she would be able to complete representation. The Accused acted knowingly in failing to respond to inquiries from the Bar.

The Accused’s failure to communicate with her clients to keep them reasonably informed and to explain matters were initially negligent, but when she consistently failed to respond to their inquiries, or inquiries made on their behalf, her conduct was knowing. A lawyer’s conduct prejudicial to the administration of judgment does not require a mental state and, in determining an appropriate sanction for this violation, the effect or potential effect of the conduct is the focus.

**Actual or Potential Injury.** Jenkins and Minor suffered actual financial injury, in that the Accused kept money from them that they could have used to retain other, competent counsel. In addition, her failures to appear for scheduled court proceedings caused them to incur additional costs.

Clients’ anxiety and frustration also constitute actual injury under Oregon law. Each client who appeared in court, only to find that the Accused was not appearing on his or her behalf, suffered actual injury in this regard. She also caused actual injury to the court system,

which suffered loss of scheduled court time and delays in the administration of justice as a result of the Accused's multiple failures to appear without notice.

The Accused's failure to cooperate with each investigation of her conduct by the Bar caused actual injury to the legal profession and to the public in that the Bar investigations required more activity and took more time.

**Standards for Discipline.** The following *Standards* apply in this case:

*Standards*, § 4.12. A lawyer who knows or should know that he or she is dealing improperly with client property and causes injury or potential injury to a client should be suspended.

*Standards*, § 4.42. A lawyer who knowingly fails to perform services for a client and causes injury or potential injury to a client, or a lawyer who engages in a pattern of neglect and causes injury or potential injury to a client, is subject to suspension.

*Standards*, § 7.2. When a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public or the legal system, suspension is generally appropriate.

**Aggravating Circumstances.** According to the *Standards*, the following factors are to be considered aggravating factors in considering an appropriate sanction:

1. A prior record of discipline. *Standards*, § 9.22(a). The Accused had a 30-day suspension in 2000 for violation of former DR 1-102(A)(3) (conduct involving misrepresentation (RPC 8.4(a)(3))) and former DR 5-101(A) (personal interest conflict (RPC 1.7(a)(2))).
2. Selfish motive. *Standards*, § 9.22(b). The Accused took on new clients and accepted advance payment for fees notwithstanding her continued and disabling health conditions. The Accused made immediate use of the funds, not related to representation of the clients, rather than depositing them into a trust account. She did not return the funds to the clients when she did not complete the services for which she was hired.
3. A pattern of misconduct. *Standards*, § 9.22(c). The Accused's conduct in all of the cases shows a pattern of neglect and disregard for her clients' interest.
4. Multiple offenses. *Standards*, § 9.22(d). The Accused violated numerous Disciplinary Rules in all of the matters discussed above.
5. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to the Oregon State Bar in 1997.
6. Failure to make restitution. *Standards*, § 9.22(j). The Accused has not returned any money to the clients involved in the matters discussed above.

The Accused has not provided any information describing any efforts to return any of the funds wrongfully taken.

**Mitigating factors.** Under the *Standards*, § 9.32(c) an attorney’s health, personal, or emotional problems that existed during the time the rules violations were committed may be considered in mitigation of the sanction. As the Bar correctly points out, the Accused has identified serious substance abuse problems but has not provided sufficient information to enable this Trial Panel to determine the extent and cause of her impairment. Accordingly, the Trial Panel does not give great weight to this factor.

The foregoing discussion of aggravating and mitigating factors is consistent with Oregon case law.

### **Other Factors Considered in Imposing Sanctions**

The Oregon State Bar Rules of Procedure, BR 8.1, requires “any person who has been a member of the Bar, but who has been suspended for misconduct for a period of more than six months, . . . and who desires to be reinstated as an active member or to resume the practice of law in this state shall be reinstated as an active member of the Bar only upon formal application and compliance with the Rules of Procedure in effect at the time of such application.”

The above-stated requirement automatically applies to any suspension of six months or more; the Trial Panel emphasizes this requirement in this case because it has substantial concerns about the Accused’s ability to resume practice without using the term of her suspension to undergo complete treatment and rehabilitation.

BR 6.1(a) provides that “in conjunction with a disposition or sanction referred to in this rule, an accused may be required to make restitution of some or all of the money, property or fees received by the accused in the representation of a client.” In this case, the Trial Panel believes that the Accused should make restitution to the clients whose money she received without performing significant services. Accordingly, the Accused should make restitution of \$1,250 to Lowell Jenkins and \$1,500 to Jayne Haburn.

### **Conclusion and Disposition**

Having found by clear and convincing evidence that the Accused violated Oregon Rules of Professional Conduct RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a)–(c), RPC 1.16(a)(2), RPC 8.1(a)(2), and RPC 8.4(a)(4), and considering the Oregon case law and relevant ABA *Standards*, the Trial Panel makes the following disposition:

The Accused is suspended from the practice of law for a period of two years;

The Accused shall make restitution of \$1,250 to Lowell Jenkins and \$1,500 to Jayne Haburn; and

The Accused shall make formal application for reinstatement pursuant to BR 8.1 at the conclusion of her suspension.

/s/ John L. Barlow

John L. Barlow, OSB #811590

Trial Panel Chairperson

/s/ Robert C. McCann, Jr.

Robert C. McCann, Jr., OSB #810741

Trial Panel Member

/s/Fadd E. Beyrouy

Fadd E. Beyrouy

Trial Panel Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case Nos. 12-143 and 12-144  
)  
JUSTIN E. THRONE, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: Megan B. Annand, Chairperson  
John E. Davis  
Thomas W. Pyle, Public Member  
Disposition: Probation Revoked. 1-year suspension.  
Effective Date of Order: October 27, 2014

**ORDER REVOKING PROBATION**

This matter came on before Pamela E. Yee, State Chairperson of the Disciplinary Board of the Oregon State Bar, upon the Bar's Petition to Revoke Probation pursuant to BR 6.2(d). The Chairperson being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED that the Accused's probation is revoked and the one-year suspension ordered by the trial panel in these matters is imposed effective ten days from the date of this order.

EXECUTED this 17th day of October, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-02  
)  
DONALD R. SLAYTON, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Dayna E. Underhill  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a) and RPC 8.1(a)(2). Stipulation  
for Discipline. 120-day suspension, all stayed, 2-year  
probation.  
Effective Date of Order: November 3, 2014

**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 Donald Slayton is suspended for 120 days, effective seven days from the date of this order, for violation of RPC 1.4(a) and RPC 8.1(a)(2). However, all of the 120-day suspension shall be stayed pending completion of a two-year term of probation, on the terms and conditions recited in the parties' Stipulation for Discipline.

DATED this 3rd day of November, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Robert A. Miller

Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

The Accused, Donald R. Slayton, attorney at law (hereinafter “Slayton”), 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.

Slayton was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 19, 1986, 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.

Slayton 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 May 17, 2014, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against Slayton for alleged violation of RPC 1.4(a) (failure to keep a client reasonably informed); and RPC 8.1(a)(2) (knowing failure to respond to inquiries from disciplinary authority) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

In late August 2011, Renné Miller (hereinafter “Miller”) retained Slayton post-dissolution to help her with respect to assets divided in her divorce, particularly in light of her former husband’s recent bankruptcy filing. Miller wanted Slayton to protect her interests with regard to three categories of assets: (1) personal items allegedly still in the husband’s possession; (2) residential real estate; and (3) alimony.

6.

Slayton investigated Miller’s issues and ultimately determined that the first two goals would not be cost effective, and that the third (alimony payments) was adequately protected

by existing bankruptcy law (non-dischargeable) and Miller's former husband was still making payments.

7.

Miller failed to pay Slayton in full for the legal services he had billed her for. Around mid-October 2011, Slayton explained to Miller that she was delinquent in paying her bill, which she was obligated to pay. He further told her that her desired results were likely not achievable, that attempting to achieve them would require substantial additional legal work and would be costly, and that the cost would likely not be justified by the probable result. Miller did not thereafter pay her bill. Slayton did not communicate to Miller that he did not intend to do any further work on her behalf or that he would be withdrawing from her legal matter, and he subsequently failed to respond to Miller's attempts to communicate with him.

8.

In March 2013, Miller complained to the Bar, and the Bar's Client Assistance Office (hereinafter "CAO") requested and obtained a response from Slayton. On August 15, 2013, CAO referred Miller's complaint against Slayton to Disciplinary Counsel's Office (hereinafter "DCO"). By letter dated August 23, 2013, DCO requested Slayton's response to Miller's complaint. The letter was addressed to Slayton at the address then on record with the Bar (hereinafter "record address") and was sent by first class mail. The letter was not returned undelivered, and Slayton did not respond to it.

9.

By letter dated September 27, 2013, DCO again requested Slayton's response to Miller's complaint. The letter was sent by both first class and by certified mail to Slayton's record address. An agent signed the certified mail receipt and the first-class letter was not returned undelivered, but Slayton did not respond to DCO's inquiries.

10.

On January 21, 2014, DCO filed a Petition for Suspension pursuant to BR 7.1, and served it upon Slayton at his record address. That petition prompted Slayton to provide a response to DCO's inquiries on January 30, 2014, by and through his counsel, Dayna E. Underhill.

### **Violations**

11.

Slayton admits that, by failing to notify Miller of his intent to discontinue work or withdraw, and by failing to respond to her subsequent telephone calls, he violated RPC 1.4(a). Slayton further admits that his failure to respond to lawful demands from a disciplinary authority violated RPC 8.1(a)(2).

## Sanction

12.

Slayton 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 Slayton’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.** Slayton violated his duty of diligence to his client, which includes the duty to adequately communicate. *Standards*, § 4.4. The *Standards* provide that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, p. 5, *Theoretical Framework*. Slayton also violated his duty as a profession to cooperate with disciplinary proceedings. *Standards*, § 7.0.
- b. **Mental State.** Slayton was negligent in his failures to notify Miller of his withdrawal but his conduct became knowing when he failed to respond to her subsequent telephone calls. Slayton’s failures to respond to DCO were knowing. 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. *Standards, Definitions*. 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, Definitions*.
- c. **Injury.** “Because the purpose of professional discipline is to protect the public, an 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).

Slayton’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).

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

*In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (court concluded that, when a lawyer persisted in his failure to respond to the Bar’s inquiries, 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. Prior disciplinary offenses. *Standards*, § 9.22(a). In 2004, Slayton was reprimanded for violating DR 1-102(A)(4) (conduct prejudicial to the administration of justice) after he negligently signed a motion for issuance of bench warrant that inaccurately claimed that an opposing party had failed to appear at a show cause hearing. *In re Slayton*, 18 DB Rptr 56 (2004).

In 2010, Slayton was suspended for 60 days, for violating RPC 8.4(a)(3) (misrepresentation) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). *In re Slayton II*, 24 DB Rptr 106 (2010). In that matter, Slayton stated to the court that he could not appear for trial because of a conflict with another trial—a vehicular homicide matter—set in Lane County Municipal Court. Upon a closer questioning by the court, Slayton admitted that the appearance involved a citation issued against him personally for jay walking.

In 2012, Slayton was admonished for violating RPC 1.4(a) (failure to communicate with a client). *In re Slayton*, OSB Case No. 12-127 (Sept. 5, 2012).

2. A pattern of misconduct. *Standards*, § 9.22(c). This matter, taken with his prior discipline, some of which is similar to the conduct at issue in these matters, demonstrate a pattern of misconduct. *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
3. Multiple offenses. *Standards*, § 9.22(d). Slayton engaged in distinct acts, which constituted separate violations of the disciplinary rules rather than one bad act charged under several rules. *In re Strickland*, 339 Or 595, 606, 124 P3d 1225 (2005).
4. Obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. Slayton delayed in responding to DCO’s requests for information, necessitating the filing of a BR 7.1 petition to elicit a response. *Standards*, § 9.22(e);

5. Substantial experience in the practice of law. Slayton has been a lawyer in Oregon since 1986. *Standards*, § 9.22(i)

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

1. Absence of a dishonest motive. *Standards*, § 9.32(b).
2. Personal or emotional problems. Shortly before Miller retained Slayton, a member of Slayton's immediate family unexpectedly passed away, resulting in Slayton experiencing tremendous grief and depression during the time of the incidents at issue. *Standards*, § 9.32(c).

13.

- f. **Presumptive Sanction.** Under the ABA *Standards*, suspension is generally appropriate when a lawyer, albeit initially negligently, fails to perform services for a client and causes injury or potential injury to a client, and then 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*, § 4.42(a), § 7.2.

14.

- g. **Oregon Case Law.** Oregon cases also hold that a suspension is appropriate for Slayton's collective conduct. *See, e.g., In re Murphy*, 349 Or 366, 245 P3d 100 (2010) (120-day suspension primarily for neglect, failing to communicate with clients and failing to respond to DCO); *See also In re Reali*, 27 DB Rptr 120 (2013) (120-day suspension by trial panel for single charge of knowingly failing to cooperate with DCO, even though lawyer had no prior discipline); *In re Hereford*, 306 Or 69, 756 P2d 30 (1988) (126-day suspension by court for non-cooperation (*current* RPC 8.1(a)(2)), even though attorney was found not guilty of all other charges); *In re Schaffner*, 323 Or 472, 481, 918 P2d 803 (1996) (120-day suspension by court for failing to respond to the Bar's inquiries in a timely manner—court specifically referenced that 60 days of the suspension was attributable to the attorney's underlying neglect and 60 days was attributable to his failure to respond to the Bar).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Slayton shall be suspended for 120 days for violation of RPC 1.4(a) and RPC 8.1(a)(2), effective October 1, 2014, or seven days after approval by the Disciplinary Board, whichever is later. However, all of the suspension shall be stayed, pending completion of a two-year term of probation which shall include the following terms and conditions:

- (a) Slayton shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9.
- (b) Arden J. Olson or such other person approved by DCO in writing shall supervise Slayton's probation (hereinafter "Supervising Attorney"). Slayton agrees to cooperate and comply with all reasonable requests made by his Supervising Attorney that the Supervising Attorney, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Slayton's clients, the profession, the legal system, and the public.
- (c) Within 30 days of the effective date of this agreement, Slayton shall meet with his Supervising Attorney in person at least once for the purpose of reviewing the status of Slayton's law practice and his performance of legal services on the behalf of clients. Thereafter, Slayton shall meet with his Supervising Attorney at least once on or before the 15th day of each third month to review his law practice and performance of legal services and Slayton's compliance with the terms of the probation. Slayton shall cooperate and shall comply with all reasonable requests of his Supervising Attorney that will allow the Supervising Attorney and DCO to evaluate Slayton's compliance with the terms of this stipulation for discipline.
- (d) Every month for the term of this agreement, Slayton shall review all client files to ensure that he is timely attending to the clients' matters and that he is maintaining adequate communication with clients, the court, and opposing counsel.
- (e) During the meetings between Slayton and his Supervising Attorney, in addition to providing an opportunity to discuss any general or specific practice management concerns, Slayton and his Supervising Attorney shall audit a random sampling of approximately 10% of Slayton's active files to verify:
  - (1) Slayton is timely attending to the clients' matters and that he is adequately communicating with clients, the court, and opposing counsel, as appropriate.
  - (2) Slayton 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, Slayton shall attend not less than 6 MCLE accredited programs, for a total of 20 hours, which shall emphasize client management, adequate communication, and how to get along with difficult

people. These credit hours shall be in addition to those MCLE credit hours required of Slayton for his normal MCLE reporting period.

- (g) Upon completion of the MCLE programs described in paragraph (e), and no later than August 31, 2016, Slayton shall submit an Affidavit of Compliance to DCO regarding this condition.
- (h) Slayton shall meet with office management consultants from the Professional Liability Fund (hereinafter “PLF”) within 60 days of the effective date of this agreement, or as soon thereafter as a PLF practice manager is available. The PLF practice manager shall conduct an evaluation of whether Slayton would benefit from changes to his office practices or management. When Slayton receives recommendations from the PLF regarding his office practices or management, he shall notify DCO of the PLF’s recommendations in his next due quarterly report described in paragraph 15(k) below. Slayton shall implement all recommended changes, to the extent reasonably possible, and provide an explanation as to the reasons any recommendations have not been implemented. Slayton shall participate in at least one follow-up review by the PLF on or before August 31, 2015. Slayton shall promptly report implementation of recommendations to his Supervising Attorney.
- (i) On or before August 31, 2015, Slayton shall enroll in and complete the Oregon Attorney Assistance Program’s (hereinafter “OAAP”) program, “Getting it Done” or a similar OAAP program. In the alternative, on or before August 31, 2015, Slayton shall arrange for, attend, and complete individual counseling session(s) with an OAAP attorney representative, or other program suggested or recommended by OAAP that cover the same subject matter as the “Getting it Done” program referred to herein.
- (j) In the event Slayton fails to comply with any condition of this stipulation, he shall immediately notify his Supervising Attorney and DCO in writing.
- (k) At least quarterly, on or before the last business day of the month, Slayton 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 Slayton’s meetings with his Supervising Attorney.
  - (2) The number of Slayton’s active cases and percentage reviewed in the audit with his Supervising Attorney per paragraph 15(e) and the results thereof.

- (3) Whether Slayton has completed the other provisions recommended by his Supervising Attorney, if applicable.
  - (4) In the event Slayton 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.
- (l) Slayton authorizes his Supervising Attorney to communicate with DCO regarding Slayton'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 Slayton's compliance.
  - (m) Slayton is responsible for the cost of any professional services required under the terms of this stipulation and the terms of probation.
  - (n) Any failure by Slayton to comply with any condition of his probation, any failure to comply with any reasonable request of his Supervising Attorney, or any subsequent finding by the SPRB that there is probable cause that Slayton 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.
  - (o) In the event Slayton fails to comply with any condition of his probation, DCO may initiate proceedings to revoke his probation pursuant to BR 6.2(d), and impose the stayed 120 days of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

16.

Slayton acknowledges that reinstatement is not automatic on expiration of any period of suspension, if any stayed period of suspension is actually imposed. If a period of suspension is necessitated by his non-compliance with the terms of his probation, he will be required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Slayton also acknowledges that, should a suspension occur, 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.

17.

Slayton 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.

Slayton 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 Slayton 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 15th day of October, 2014.

/s/ Donald R. Slayton

Donald R. Slayton

OSB No. 862898

EXECUTED this 20th day of October, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 13-49  
)  
JEFFREY G. ROBERTSON, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: Bradley F. Tellam  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.7(a)(2) and RPC 8.4(a)(4).  
Stipulation for Discipline. 120-day suspension.  
Effective Date of Order: November 7, 2014

**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 120-days, effective three days from the date this stipulation is approved, for violation of RPC 1.7(a)(2) and RPC 8.4(a)(4).

DATED this 4th day of November, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Nancy M. Cooper

Nancy M. Cooper, Region 5  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Robertson was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 28, 2003, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Robertson 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 25, 2013, a Formal Complaint was filed against Robertson pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.4(b), RPC 1.7(a)(2), RPC 3.4(b), RPC 4.1(a), 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 October 5, 2009, Robertson undertook to represent employer Weyerhaeuser Company (hereinafter “Weyerhaeuser”) in a dispute between Weyerhaeuser and the Central States Southeast and Southwest Areas Pension Fund (hereinafter “the Fund”) concerning a notice and demand for payment of a \$4,266,447.32 withdrawal liability that the Fund had made upon Weyerhaeuser pursuant to 29 USC § 1399(b)(1). The Fund demanded payment in full or payment in monthly interim installments of \$63,624.37.

6.

At all relevant times herein 29 USC § 1401(a)(1) provided:

Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of

this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

- (A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or
- (B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

7.

At all relevant times herein 29 USC § 1401(b)(1) provided:

If no arbitration has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

8.

From October 2009, through October 13, 2010, Robertson erroneously advised Weyerhaeuser, in substance, that it need not initiate arbitration of the dispute with the Fund concerning the appropriate determination of its withdrawal liability until November 2011, when the total of the monthly interim payments reached the amount of the withdrawal liability Weyerhaeuser was willing to concede, i.e. approximately \$1.6 million, and Weyerhaeuser could then trigger arbitration by ceasing interim payments, although either Weyerhaeuser or the Fund could request arbitration sooner.

9.

After October 2009, Robertson prepared letters to the Fund for the purpose of tolling the period for initiating arbitration under 29 USC § 1401(a)(1) or initiating such arbitration. Robertson failed to mail the letters to the Fund or his client, Weyerhaeuser, until October 2010.

10.

Robertson consistently failed to utilize appropriate measures to document the preparation, mailing, and subsequent necessary action with respect to the letters described in paragraph 9. As a result of those deficient practices, he was unable to recognize that the letters described in paragraph 9 above had not been mailed, accurately verify whether the letters had been mailed, or properly advise his client regarding the withdrawal liability dispute.

11.

On July 28, 2010, the Fund notified Robertson of the Fund's position that all deadlines for arbitration of the withdrawal liability dispute had passed without arbitration having been initiated and the balance of the \$4,266,447.32 withdrawal liability was due and owing. Robertson continued to advise and represent Weyerhaeuser regarding the withdrawal liability dispute until October 30, 2010, when Weyerhaeuser retained another law firm to pursue arbitration of the withdrawal liability dispute.

12.

In order for Weyerhaeuser to make informed decisions regarding its dispute with the Fund and Robertson's representation, it was necessary beginning July 28, 2010, for Robertson to explain to Weyerhaeuser that the Fund contended that Robertson had not, on behalf of Weyerhaeuser, timely requested arbitration, and the balance of the \$4,266,447.32 withdrawal liability was due and owing.

13.

Beginning July 28, 2010, there existed a significant risk that Robertson's representation of Weyerhaeuser would be materially limited by his personal interests. Robertson did not seek nor obtain informed consent to his continued representation of Weyerhaeuser, confirmed in writing.

14.

From July 28, 2010, through October 13, 2010, Robertson failed to inform Weyerhaeuser of the Fund's contention that Weyerhaeuser had not timely requested arbitration and that the balance of the \$4,266,447.32 withdrawal liability was due and owing.

15.

On October 13, 2010, Robertson received correspondence from the Fund in which the Fund contended that Weyerhaeuser had not timely initiated arbitration and the balance of the \$4,266,447.32 withdrawal liability was due and owing. Robertson promptly informed Weyerhaeuser of that correspondence.

16.

On October 13, 2010, Robertson informed Weyerhaeuser and the Fund that he had mailed to the Fund letters described in paragraph 9 above for the purpose of tolling the period for initiating arbitration under 29 USC § 1401(a)(1) or initiating such arbitration. Robertson did not inform Weyerhaeuser that he may not have mailed the letters described in paragraph 9 above until after Weyerhaeuser, in reliance on Robertson's statements, expended substantial resources of the court and the parties seeking to compel arbitration of the withdrawal liability dispute in a federal court proceeding.

### Violations

17.

Robertson admits that by continuing the representation of Weyerhaeuser after a significant risk arose that his personal interests might impair the representation, he violated RPC 1.7(a)(2). By failing to assure that he had mailed the letters described in paragraph 9 before Weyerhaeuser relied upon his doing so and pursued federal court proceedings, Robertson violated RPC 8.4(a)(4). Upon further factual inquiry, the parties agree that the charges of alleged violation of RPC 1.4(b), RPC 3.4(b), RPC 4.1(a), and RPC 8.4(a)(3) should be and, upon the approval of this stipulation, are dismissed.

### Sanction

18.

Robertson 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 Robertson’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 continued representation of Weyerhaeuser without Weyerhaeuser’s informed consent regarding the potential for material impairment arising from Robertson’s personal interest violated a lawyer’s duty to avoid conflicts. *Standards*, § 4.3. Robertson’s deficient practices, failure prior to the time his client sought to compel arbitration to verify whether the letters described in paragraph 9 had been mailed, and inability to accurately verify whether the letters were mailed resulted in a violation of the lawyer’s duty avoid abuse of the legal process. *Standards*, § 6.2.
- b. **Mental State.** Robertson acted knowingly with respect to his violation of RPC 1.7(a)(2). He was aware of the nature or attendant circumstances of his conduct but without the conscious objective or purpose to accomplish the result. He initially thought the Fund’s claims that he had failed to timely initiate arbitration were merely an aggressive posture taken by counsel for the Fund. Robertson acted knowingly with respect to his violation of RPC 8.4(a)(4). He was aware that his practices with respect to the letters described in paragraph 9 were deficient. In both respects Robertson failed to heed a substantial risk that circumstances existed or a result would follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

- c. **Injury.** Robertson's impaired representation of Weyerhaeuser after a conflict of interest developed and his deficient practices with respect to the letters described in paragraph 9 caused substantial actual injury to Weyerhaeuser, the Fund, and the federal court in Weyerhaeuser's abortive attempt to compel arbitration based on the letters.
- 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. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  - 2. Cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e).
  - 3. Remorse. *Standards*, § 9.32(l).

19.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards*, § 4.32. Suspension is generally appropriate when a lawyer knowingly engages in conduct that constitutes abuse of the legal process and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding. *Standards*, § 6.22.

20.

Suspension is in accord with Oregon case law. The presumptive sanction for a knowing conflict of interest is a thirty-day suspension. *In re Hostetter*, 348 Or 574, 603, 238 P3d 13 (2010). The court has imposed longer suspensions when, as here, a knowing conflict of interest resulted in substantial injury. *See, e.g., In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999) (four-month suspension imposed when, as a result of impaired representation caused by lawyer's self-interest, client was forced into protracted litigation in an attempt to collect on her loan and, although she eventually recovered the principal, incurred substantial legal fees in doing so and never recovered the majority of the interest that she was owed). Conduct prejudicial to the administration of justice has resulted in suspension when, as here, the resulting injury was substantial. *See, e.g., In re Paulson*, 341 Or 13, 136 P3d 1087 (2006), *cert den*, 549 US 1116 (2007) (six-month suspension imposed when attorney's pattern of misconduct prejudicial to the administration of justice undermined clients' objectives, caused clients to incur tens of thousands of dollars in attorney fees based on claims that were ultimately found to be meritless as a matter of law, forced clients to file for bankruptcy, and subjected the court system to numerous unnecessary hearings).

21.

Consistent with the *Standards* and Oregon case law, the parties agree that Robertson shall be suspended 120 days for violation of RPC 1.7(a)(2) and RPC 8.4(a)(4), the sanction to be effective 3 days after this stipulation is approved.

22.

In addition, on or before January 31, 2015, Robertson shall pay to the Bar its reasonable and necessary costs in the amount of \$1,051.85, incurred for depositions. Should Robertson fail to pay \$1,051.85 in full by January 31, 2015, the Bar may thereafter, without further notice to him, obtain a judgment against Robertson 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.

Robertson 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, Robertson has arranged for Iris Tilley, an active member of the Bar, to either take possession of or have ongoing access to Robertson's client files and serve as the contact person for clients in need of the files during the term of his suspension. Robertson represents that Iris Tilley has agreed to accept this responsibility.

24.

Robertson 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. Robertson 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.

Robertson 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.

Robertson 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 Robertson is admitted: none.

27.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Bar and to approval 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 30th day of October, 2014.

/s/ Jeffrey G. Robertson

Jeffrey G. Robertson

OSB No. 031673

EXECUTED this 30th day of October, 2014.

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. 14-87  
)  
JAMES L. McGEHEE, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3 and RPC 1.4(a). Stipulation for  
Discipline. Public Reprimand.  
Effective Date of Order: November 4, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

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

DATED this 4th day of November, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ James C. Edmonds

James C. Edmonds, Region 6  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

McGehee was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 18, 1980, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

McGehee 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 September 16, 2014, a Formal Complaint was filed against McGehee pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (failure to keep a client reasonably informed and comply with reasonable requests for information). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

In August 2010, Rodney Rhodes (hereinafter “Rhodes”) hired McGehee to assist him with a dispute with Pacific Auto Body & Paint (hereinafter “Pacific Auto”), which had painted Rhodes’ pickup in 2006 and was then refusing to honor its “lifetime warranty.”

6.

McGehee was slow to send the initial demand letter despite multiple requests from Rhodes but, in November 2010, obtained an agreement from Pacific Auto to repaint the pickup. However, Pacific Auto failed to follow through on terms that were acceptable to Rhodes.

7.

In mid-January 2011, McGehee sent a second demand letter to Pacific Auto. Between January 2011, and mid-May 2011, McGehee took no substantive action on Rhodes' legal matter and failed to respond to numerous messages from Rhodes.

8.

In June 2011, McGehee sent another letter to Pacific Auto but failed to notify Rhodes of their response.

9.

In January 2012, acting on McGehee's instructions, Rhodes took the pickup to Northwest Auto Fab to determine why the paint had failed. McGehee represented to Rhodes that he would file a lawsuit against Pacific Auto as soon as he received a report on why the paint had failed.

10.

In April 2012, Northwest Auto Fab provided McGehee with a written report (with pictures) detailing why the paint job had failed. Between April 2012, and mid-June 2013, McGehee took no substantive action on Rhodes legal matter and failed to respond to numerous messages from Rhodes.

11.

In June 2013, McGehee filed a complaint against Pacific Auto but thereafter failed to take any action in the matter and in October 2013, an attorney for Pacific Auto moved to dismiss the case.

12.

Between late-October and mid-November 2013, Rhodes left McGehee multiple messages but McGehee did not respond.

13.

In early December 2013, Rhodes' case against Pacific Auto was dismissed. Rhodes called McGehee's office but McGehee did not respond.

### **Violations**

14.

McGehee admits that, by failing to more timely attend to Rhodes' matter, he neglected a legal matter in violation of RPC 1.3. McGehee further admits that he failed to adequately communicate the status of Rhodes' legal matter to him, and failed to promptly comply with his reasonable requests for information, in violation of RPC 1.4(a).

## Sanction

15.

McGehee 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 McGehee’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.** McGehee violated his duty of diligence to his client, which includes the duty to adequately communicate. *Standards*, § 4.4. The *Standards* presume that the most important ethical duties are those obligations which a lawyer owes to clients, including diligence. *Standards*, p. 5, *Theoretical Framework*.
- b. **Mental State.** McGehee’s initial failure to act was negligent, as were his initial failures to communicate with Rhodes. 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, Definitions*. However, his conduct became knowing when Rhodes repeatedly reminded him of the need to act and requested responses to his communications. “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*.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Rhodes was actually injured by the dismissal of his case. Moreover, the Oregon Supreme Court has held that there is actual injury to a client where an attorney fails to actively pursue the client’s case. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). In addition, McGehee’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. Multiple offenses. *Standards*, § 9.22(d).

2. Substantial experience in the practice of law. *Standards*, § 9.22(i). McGehee was admitted in Oregon in 1980.
- 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. Personal or emotional problems. *Standards*, § 9.32(c). During the time when Rhodes' case came to a head, McGehee had a family member suffering a terminal illness.
  4. Remorse. *Standards*, § 9.32(l). McGehee made a straight-forward admission that his handling of this matter was not up to the standard his client had a right to expect.

16.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client, while a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42, § 4.43.

Considering the level of injury with the aggravating and mitigating factors relevant to McGehee, a reprimand is the appropriate result.

17.

Oregon cases reach a similar result. *See, e.g., In re Kleen*, 27 DB Rptr 213 (2013) (reprimand for violations); *In re Witte*, 24 DB Rptr 10 (2010) (reprimand for negligent violation of neglect and failure to communicate, among others, related to the dismissal of her client's unemployment case, where mitigating and aggravating factors were equipoise); *In re Bryant*, 25 DB Rptr 167 (2011) (reprimand for attorney's failure to file timely a request for a hearing disputing a proposed administrative order in a child support matter, failure to communicate a settlement proposal to his client or respond to the proposal, failure to appeal the order, and failure to respond to the client's requests for information); *In re Slininger*, 25 DB Rptr 8 (2011) (reprimand for attorney who failed to respond to his incarcerated client's requests for assistance in correcting the criminal judgment that erroneously stated the client was not eligible for good time credit. A corrected judgment ultimately was entered, but not until the client had nearly completed the full term of his sentence); *In re Pieretti*, 24 DB Rptr 277 (2010) (attorney reprimanded after agreeing to an abatement order so his client's case could be submitted to arbitration, he lost track of the matter, during which the case was dismissed by the court for lack of prosecution); *In re Rose*, 20 DB Rptr 237 (2006) (reprimand for attorney who failed to file a motion for summary judgment in a child support matter, and failed to file a motion for summary judgment in a child support matter, and failed to file a motion for summary judgment in a child support matter).

mand for negligent violation of neglect of a legal matter, and failure to communicate, among others when, as here, mitigating factors outweighed aggravating ones).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that McGehee shall be publicly reprimanded for violation of RPC 1.3 and RPC 1.4(a), the sanction to be effective upon approval by the Disciplinary Board.

19.

McGehee 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.

20.

McGehee 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 McGehee is admitted: none.

21.

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

EXECUTED this 21st day of October, 2014.

/s/ James L. McGehee

James L. McGehee

OSB No. 800794

EXECUTED this 27th day of October, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 12-142, 13-98, and 13-99
	)	SC S062307
ERIC EINHORN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	None.
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.7(a)(2), RPC 1.15-1(d), and RPC 8.1(a)(2). Stipulation for Discipline. 1-year suspension.
Effective Date of Order:	December 6, 2014

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. The Accused is suspended from the practice of law in the State of Oregon for a period of one-year, effective 30 days from the date of this order.

/s/ Thomas A. Balmer  
 THOMAS A. BALMER, 11/6/2014  
 8:01:37 a.m.  
 CHIEF JUSTICE SUPREME COURT

**STIPULATION FOR DISCIPLINE**

Eric Einhorn, attorney at law, (hereinafter “Einhorn”), 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.

Einhorn was admitted by the Oregon Supreme Court to the practice of law in Oregon on July 10, 2001, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Hood River County, Oregon.

3.

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

4.

On July 11, 2013, pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), a Formal Complaint was filed against Einhorn in OSB Case No. 12-142 (the “Charles matter”), alleging violation of RPC 1.1, RPC 1.7(a)(2), and RPC 8.1(a)(2) of the Rules of Professional Conduct. On March 5, 2014, pursuant to the authorization of the SPRB, a Formal Complaint was filed against Einhorn in OSB Case No. 13-98 (the “McKinney matter”) alleging violation of RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2); and OSB Case No. 13-99 (the “Flanagan matter”), alleging violation of RPC 1.3, RPC 1.4(a), RPC 1.7(a)(2), RPC 1.15-1(d), and RPC 8.1(a)(2). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceedings.

## **Facts**

### **Case No. 12-142 (Charles Matter)**

5.

In June 2007, True Line Incorporated filed a construction lien against real property owned by Richard Charles (hereinafter “Charles”), Snipes Acre LLC, RFCF LLC, and the Arnold Kirkeby Trust (hereinafter “AKT”), (collectively, “Property Owners”), for the entire price for three subcontracts allegedly owed to True Line by the contractor, Norman Pratt (hereinafter “Pratt”).

6.

Einhorn had represented Pratt on previous matters and continued to represent Pratt in the True Line dispute. Einhorn challenged the lien because the majority of the alleged debt to True Line had already been paid by Pratt prior to the filing of the lien. Counsel for True Line

filed an amended lien in August 2007, reducing the alleged debt to less than \$3,000 plus interest.

7.

In September 2007, True Line initiated a civil action in Wasco County Circuit Court: Case No. 0700285CC, *True Line Incorporated v. Snipes Acre LLC et al.* (hereinafter “*True Line v. Snipes Acre*”), alleging a breach of contract against Pratt, and sued the Property Owners, personally, for foreclosure of the lien and for damages based on quantum meruit.

8.

Einhorn arranged for Pratt to indemnify the Property Owners against all claims by True Line and to obtain a surety bond, which Einhorn believed released the real property and stood in the place of the real property in the lien foreclosure claim. The Property Owners then completed a sale of the property to a bona fide purchaser.

9.

Beginning about September 2007, Einhorn began representing the Property Owners in the defense of the civil action, and continued to represent Pratt.

10.

In January 2008, Einhorn filed in *True Line v. Snipes Acre* an answer, affirmative defenses, and counterclaims on behalf of Pratt, and a motion for dismissal on behalf of the Property Owners.

11.

On or about April 16, 2008, the court denied Einhorn’s motion for dismissal described in paragraph 10 above and ordered that the Property Owners must file a responsive pleading within 20 days. Einhorn failed to timely file a responsive pleading on behalf of the Property Owners.

12.

In July 2008, *True Line v. Snipes Acre* was ordered to be transferred to arbitration. Einhorn continued to represent the Property Owners and Pratt in arbitration after his failure to file a timely responsive pleading on behalf of the Property Owners.

13.

On or about January 21, 2009, the arbitrator entered an order of default and award against the Property Owners in *True Line v. Snipes Acre*, and an award against Pratt. Einhorn continued to represent the Property Owners in appealing the arbitration award to the circuit court and requesting a trial *de novo* for Pratt. Einhorn’s appeal was denied by the circuit court. Pratt’s motion for trial *de novo* was granted. This resulted in a segregation of the proceedings involving claims against Pratt and claims against the Property Owners.

14.

In February 2009, the attorney for True Line filed a motion for an order of default against the Property Owners. Einhorn did not respond. On or about March 23, 2009, an order of default, judgment and money award, and a judgment lien were entered against the Property Owners, including a judgment for personal liability against the Property Owners for the lien foreclosure claim. True Line requested a judgment for costs against the Property Owners, including for costs against the Property Owners personally for costs associated with the lien foreclosure action. In May 2009, a cost bill was awarded and a judgment lien entered personally against the Property Owners.

15.

In September 2009, Einhorn moved on behalf of the Property Owners to set aside the default judgment entered against them.

16.

The court concluded Einhorn had failed to act with due diligence on behalf of the Property Owners and, in November 2009, the motion to set aside was denied. Since Pratt had agreed to indemnify the Property Owners, and the decisions against the Property Owners impacted Pratt's ongoing case, Einhorn advised Pratt to request and the Property Owners to permit Einhorn to initiate an appeal of the adverse judgment in *True Line v. Snipes Acre*. The appeal was to include a challenge to the jurisdiction of the circuit court to enter the original personal judgment against the Property Owners for a lien foreclosure action after a bond was substituted for the property, a challenge to the entry of an amended judgment based on in rem jurisdiction that was never alleged in True Line's pleadings, and a challenge to the court's jurisdiction to award quantum meruit damages to a subcontractor against a property owner prior to proving exhaustion of remedies against the contractor.

17.

A continuance was granted by the Oregon Court of Appeals, and eventually consolidated with the subsequent appeal filed by Pratt, addressed in paragraph 20, below. In January 2010, True Line presented the judgment under appeal to the bonding company, and the bonding company paid True Line the full amount of the surety bond.

18.

Einhorn continued to represent Pratt in the ongoing circuit court proceedings, through a trial in February 2010. The circuit court only considered claims and counterclaims involving the contracts and True Line, and would not consider any matters involving the quantum meruit or lien foreclosure claims against the Property Owners. The circuit court agreed with Pratt's representation of the written and oral contracts, rejected True Line's representations of the written and oral contracts, and ruled that Pratt had paid all but \$1,000 owing on the contracts.

19.

Einhorn challenged the judgment and costs bill submitted by True Line based on the argument that it contained costs previously awarded and paid by the bond. Einhorn also sought to set aside the prior judgment against the Property Owners because the court lacked personal jurisdiction over the Property Owners in a lien foreclosure action, and True Line never amended its complaint to allege in rem jurisdiction over the property or to substitute the bond in lieu of the property as required.

20.

Due to delays and rescheduling of the post-trial motions, Einhorn initiated an appeal of the circuit court's decisions at the behest of Pratt. The appeal was consolidated with the prior appeal of the judgment against the Property Owners and continued at Einhorn's request, pending resolution of the post-trial motions pending in the circuit court.

21.

The circuit court ruled on the post-trial motions about July 2011, modifying the final award to True Line. Despite being indemnified by Pratt, in July 2011, Charles decided he wanted the entire matter to be concluded promptly, and directed Einhorn to negotiate a complete settlement and satisfaction of all claims in *True Line v. Snipes Acre*. A settlement was reached and Charles gave Einhorn \$3,000 to deliver to True Line in satisfaction and release of all claims against all defendants related to *True Line v. Snipes Acre*. Einhorn hand-delivered the \$3,000 and a satisfaction of judgments and release of all claims to True Line's counsel, who was to sign and file it with the circuit court. Counsel for True Line did not immediately file the satisfaction and release. Einhorn failed to respond to Charles's multiple attempts to contact Einhorn about the need to file the satisfaction and release and Einhorn did not contact True Line's counsel about the need to file the Satisfaction and Release. Counsel for True Line did not file the satisfaction and release until January 2014, after Charles contacted True Line's counsel.

22.

At all times herein there was a significant risk that Einhorn's simultaneous representation of Pratt and the Property Owners would materially limit his representation of each and every other client in *True Line v. Snipes Acre*.

23.

Einhorn believed that after Pratt had agreed to indemnify the Property Owners, the continued representation of Pratt and the Property Owners did not require Einhorn to contend for something on behalf of any client that he had a duty to oppose on behalf of another client.

24.

At all times after Einhorn failed to timely file a responsive pleading on behalf of the Property Owners, as described in paragraph 11 above, there was a significant risk that Einhorn's personal interests would materially limit his representation of the Property Owners.

25.

To the extent Einhorn was permitted to simultaneously represent Pratt and the Property Owners with the informed consent of all affected clients, Einhorn discussed the situation with Pratt and the Property Owners. Einhorn, however, failed to confirm such discussions in writings signed by the clients, which reflected a recommendation that the clients seek independent legal advice to determine if consent should be given.

26.

In August 2012, Charles notified the Bar of his complaints regarding the conduct of Einhorn in *True Line v. Snipes Acre*. On or about August 22, 2012, Disciplinary Counsel for the Bar (hereinafter "Disciplinary Counsel") mailed Einhorn a lawful request for information regarding Einhorn's representation of Charles and Pratt. Although Einhorn received the request, Einhorn did not respond.

27.

On or about September 17, 2012, Disciplinary Counsel sent Einhorn a second lawful request for information regarding Einhorn's representation of Charles and Pratt. Although Einhorn received this second request, he did not respond.

28.

Investigation of Einhorn's representation of Charles and Pratt was referred to a Local Professional Responsibility Committee (hereinafter "LPRC"). Beginning in January 2013, and continuing through February 2013, an investigator for the LPRC repeatedly requested from Einhorn, by telephone and in written correspondence, a copy of Einhorn's file concerning the matter in which Einhorn had represented Charles and Pratt. Einhorn repeatedly promised he would provide a copy of the file for the LPRC investigator. Einhorn failed to provide a copy of the file or make the file available to the LPRC investigator.

29.

Einhorn admits that, by engaging in the conduct described in paragraphs 5 through 25, he violated RPC 1.1 (failing to provide competent representation); RPC 1.7(a)(2) (current client conflict of interests involving multiple clients); RPC 1.7(a)(2) (current client conflict of interests involving a personal interest of the lawyer); and RPC 8.1(a)(2) (duty to respond to disciplinary authorities).

**Case No. 13-99 (Flanagan Matter)**

30.

On or about February 9, 2011, Wilma Flanagan (hereinafter “Flanagan”) and her daughter Melissa McKinney (hereinafter “McKinney”) retained Einhorn to pursue legal claims against a contractor, Cameron Curtis (hereinafter “Curtis”) and his business, Curtis Homes, LLC (hereinafter “Curtis Homes”) regarding the construction of a home and the failure to pay subcontractors who had worked on the home. Flanagan and McKinney paid Einhorn a \$5,000 retainer toward his legal fees. Flanagan and McKinney gave Einhorn documents and photographs regarding the construction dispute.

31.

Einhorn advised McKinney and Flanagan to pursue claims through the Construction Contractors Board (hereinafter “CCB”). In April 2011, Einhorn filed on behalf of Flanagan a complaint to the CCB against Curtis and Curtis Homes.

32.

On or about June 15, 2011, the CCB requested a response from Einhorn regarding Flanagan’s complaint against Curtis and Curtis Homes. Einhorn was notified that, if he did not respond within the requested time, Flanagan’s complaint would be closed. Einhorn failed to timely respond.

33.

At all times after Einhorn failed to timely respond to the CCB’s June 15, 2011 request, there was a significant risk that Einhorn’s personal interests in avoiding embarrassment or liability for that failure would materially limit his representation of Flanagan in the Curtis and Curtis Homes matter. To the extent the informed consent of his client, confirmed in writing, may have permitted Einhorn to continue the representation, Einhorn did not obtain such consent.

34.

On or about July 22, 2011, the CCB notified Flanagan and Einhorn that Flanagan’s complaint against Curtis and Curtis Homes was closed and:

“If you do not agree with this order you may file a written petition for reconsideration within 60 days from the date of this order. You must file your petition with the Construction Contractors Board, and it must comply with OAR 137-004-0080. If you file a timely petition for reconsideration, you will be able to file a petition for judicial review with the Circuit Court if the Construction Contractors Board denies your petition. You are entitled to judicial review of this order by a Circuit Court only after the Construction Contractors Board makes a decision on your petition for reconsideration.”

35.

On or about July 25, 2011, McKinney sent Einhorn an email asking how the CCB case against Curtis and Curtis Homes had become closed and directing him on behalf of Flanagan and herself to file a petition for reconsideration. Einhorn did not respond. Einhorn did not timely file the petition for reconsideration.

36.

On or about August 14, 2011, August 16, 2011, August 22, 2011 and August 30, 2011, McKinney sent further emails to Einhorn asking for information regarding the status of the Curtis and Curtis Homes matter and providing telephone numbers at which McKinney and Flanagan could be reached. Einhorn did not respond.

37.

On or about September 2, 2011 and September 7, 2011, McKinney telephoned and emailed Einhorn asking for information regarding the status of the Curtis and Curtis Homes matter and expressing concern whether a petition for reconsideration had been filed with the CCB. Einhorn did not respond.

38.

At all times after Einhorn failed to timely file a petition for reconsideration as described above, there was a significant risk that Einhorn's personal interests in avoiding embarrassment or liability for that failure would materially limit his representation of Flanagan in the Curtis and Curtis Homes matter. To the extent informed consent of the client, confirmed in writing, may have permitted Einhorn to continue the representation, Einhorn did not obtain such consent.

39.

On or about September 22, 2011, Einhorn filed with the CCB on behalf of Flanagan a petition to reopen the complaint against Curtis and Curtis Homes. Einhorn emailed a copy of the petition to McKinney.

40.

On September 30, 2011, the CCB notified Einhorn that his petition to reopen Flanagan's complaint against Curtis and Curtis Homes was denied as untimely.

41.

Over the following months, from on or about November 1, 2011 through on or about September 25, 2012, McKinney repeatedly requested information from Einhorn via telephone and email concerning the status of Flanagan's legal matter. Einhorn did not communicate with McKinney or Flanagan until September 25, 2012.

42.

On September 25, 2012, via email to McKinney, Einhorn assured McKinney that he would pursue Flanagan's claims against Curtis and Curtis Homes in circuit court and that he would speak with McKinney regarding her questions within two days. Einhorn did not communicate with McKinney or Flanagan regarding the Curtis and Curtis Homes matter at any time thereafter. Einhorn did not pursue Flanagan's claims in circuit court. Einhorn took no further action in the Curtis and Curtis Homes matter.

43.

On or about January 21, 2013, attorney Bradley Timmons (hereinafter "Timmons") accurately informed Einhorn that Timmons had been retained to represent Flanagan in her dispute with Curtis and Curtis Homes. Timmons asked Einhorn to forward Flanagan's file to him. Einhorn did not respond. Einhorn did not forward Flanagan's file to Timmons.

44.

On or about February 4, 2013, Timmons's assistant reached Einhorn by telephone and Einhorn promised that he would forward Flanagan's file and contact Timmons to discuss the case. Einhorn did not forward Flanagan's file. Einhorn did not contact Timmons.

45.

On or about February 11, 2013 and February 13, 2013, Timmons's assistant left telephone messages for Einhorn reminding him to forward Flanagan's file. Einhorn did not respond. Timmons mailed further letters to Einhorn on February 19, 2013 and March 12, 2013, demanding Flanagan's file. Einhorn did not respond.

46.

On or about May 21, 2013, Flanagan complained to the Bar about the conduct of Einhorn in the Curtis and Curtis Homes matter. On May 24, 2013 and June 25, 2013, the Client Assistance Office of the Bar sent letters to Einhorn seeking information regarding Flanagan's complaint. Einhorn received those letters and promised Bar staff that he would respond. Einhorn did not respond and, on July 16, 2013, he was notified that Flanagan's complaint was referred to Disciplinary Counsel for further investigation.

47.

On or about July 18, 2013, Disciplinary Counsel sent Einhorn a letter requesting his response by August 8, 2013, to inquiries regarding Flanagan's complaint, her file and the handling of her retainer. Disciplinary Counsel warned Einhorn that a failure to respond could violate RPC 8.1(a)(2). Einhorn received that July 18, 2013, letter, but he did not respond.

48.

On or about August 9, 2013, Disciplinary Counsel sent Einhorn a demand that Einhorn respond to the July 18 letter described in paragraph 47 above. Einhorn received that August 9, 2013, letter, but he did not respond.

49.

On or about September 13, 2013, Einhorn was personally served with a subpoena duces tecum pursuant to BR 2.3(b)(3)(C) requiring him to appear September 19, 2013 at 10:00 a.m. at the Hood River County Courthouse, Room 101, to give a sworn statement to Disciplinary Counsel and bring documents regarding Flanagan's complaint. Einhorn did not respond and did not appear for the sworn statement. Einhorn did not provide the requested documents.

50.

Einhorn admits that, by engaging in the conduct described in paragraphs 32 through 49, he violated RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to communicate with client), RPC 1.7(a)(2) (current client conflict of interest involving a personal interest of the lawyer), RPC 1.15-1(d) (duty to promptly account for and deliver property of another in the lawyer's possession) and RPC 8.1(a)(2) (duty to respond to disciplinary authorities).

**Case No. 13-98 (McKinney Matter)**

51.

Melissa McKinney's son, Christopher Henrikson, fathered two boys (hereinafter "grandsons") with his wife Tegan Henrikson, now known as Tegan Shermikas. The Henrikson marriage was dissolved and a judgment, which incorporated a parenting plan, was entered in December 2010, *Henrikson and Henrikson*, Wasco County Circuit Court No. 1000019D (hereinafter "the *Henrikson and Henrikson* case.")

52.

Christopher Henrikson lived with the McKinnies and exercised his parenting time at their home from the end of his marriage until he moved away at the end of August 2011. On or about September 24, 2011, McKinney retained Einhorn to pursue on behalf of herself and her husband Timothy McKinney visitation rights with the grandsons. In early February 2012, Einhorn prepared a parenting plan that provided for the McKinnies to have formal visitation with the grandsons, but Christopher Henrikson and Tegan Shermikas initially refused to agree to the proposed plan. On or about February 15, 2012, McKinney directed Einhorn to initiate a court proceeding to obtain formal visitation rights with the grandsons.

53.

Einhorn recognized that in order to claim a parent-child relationship under the applicable statute, ORS 109.119, an action must be filed within six months of the claimed parent-child relationship. ORS 109.119 authorizes a claimant to initiate a claim either by petition if no proceedings are pending or motion for intervention. Einhorn concluded that no proceedings were pending because the *Henrikson and Henrikson* judgment and parenting plan had been entered previously, and no post-judgment matters had been initiated. On behalf of the McKinneys, on or about February 22, 2012, Einhorn filed in the *Henrikson and Henrikson* case a status quo order to continue the McKinneys' ongoing and regular but informal visitations with the grandsons. Based upon his reading of the applicable statutes, Einhorn filed a petition for third-party visitation and a motion for third-party visitation rights (hereinafter "the third-party visitation case").

54.

On or about March 6, 2012, Katherine Young (hereinafter "Young"), the lawyer representing Tegan Shermikas, notified Einhorn of her position that he must first obtain permission to intervene in the *Henrikson and Henrikson* case. Young further notified Einhorn of her position that his petition and motions on behalf of the McKinneys did not allege a sufficient basis for finding a parent-child relationship. Young warned Einhorn that the court was empowered to assess fees and costs in these matters, and she would move to dismiss and seek attorney fees against the McKinneys. Einhorn advised the McKinneys of his views regarding Young's positions and various counterarguments, and the McKinneys chose to proceed. To address Young's positions, Einhorn filed a motion to intervene in the *Henrikson and Henrikson* case on behalf of the McKinneys, but the motion to intervene was filed more than six months after the claimed parent-child relationship.

55.

Young opposed the motion to intervene. Christopher Henrikson changed his position concerning formal visitation rights for the McKinneys and signed a stipulated judgment that approved intervention by the McKinneys, asserted the existence of a former parent-child relationship between the McKinneys and the grandsons, and attempted to formally assign some of his court-ordered parenting time with the grandsons to become formal visitation with the McKinneys.

56.

On or about May 23, 2012, McKinney paid Einhorn \$3,000 toward his fees in the third-party visitation case.

57.

On or about July 27, 2012, at the conclusion of a hearing, the court denied the petition and motions Einhorn had filed on behalf of the McKinneys, based on conclusions that: when

the parents were divorced, a motion to intervene was the only allowable method to initiate a third-party visitation proceeding; the pleadings filed in February 2012 did not preserve the McKinneys' claims of a parent-child relationship; and therefore the McKinneys' claims of a parent-child relationship based on the subsequently-filed motion to intervene expired prior to the filing of the motion to intervene. The court also awarded Young's client Shermikas the fees and costs of defending against the McKinneys' petition and motions.

58.

The McKinneys attended the July 27, 2012 hearing, heard the judge's oral ruling, including the imposition of fees and costs. While at the courthouse, the McKinneys discussed with Einhorn the court's ruling and their options, including some of the potential objections to certain fees and costs Young might attempt to recover.

59.

On or about August 1, 2012, Young sent a statement for Shermikas's fees, costs, and disbursements to Einhorn. Einhorn reviewed the statement on behalf of the McKinneys but did not inform the McKinneys about the specific fees, costs, and disbursements claims. Einhorn did not inform Young whether he had any objections on behalf of the McKinneys.

60.

On or about August 22, 2012, Young sent a proposed supplemental judgment for Shermikas's fees and costs to Einhorn. Einhorn did not inform the McKinneys about Young's proposed supplemental judgment. Einhorn did not inform Young whether he had any objections on behalf of the McKinneys.

61.

On or about August 29, 2012, the court entered a supplemental judgment and money award against the McKinneys for the fees and costs claimed by Shermikas. Einhorn did not inform the McKinneys about the supplemental judgment and money award entered against them.

62.

McKinney repeatedly called and emailed Einhorn from on or about September 14, 2012, through on or about September 25, 2012, seeking information regarding the status of the third-party visitation case. Einhorn did not respond until on or about September 25, 2012, when he sent a return email apologizing for his lack of contact and promising to speak with her in two days' time. Einhorn never communicated with the McKinneys thereafter.

63.

On or about September 26, 2012, McKinney sent a letter requesting the return of her files and the refund of the unused portion of the funds she had paid for Einhorn's legal fees in the third-party visitation case. Einhorn did not respond.

64.

McKinney wrote to the court for information about the third-party visitation case and learned of the supplemental judgment and money award entered against her and in favor of Shermikas.

65.

On or about May 21, 2013, McKinney complained to the Bar about Einhorn's conduct of the third-party visitation case and failure to account for or refund the funds she'd provided. Einhorn neither responded with information about his representation, nor provided any accounting for the funds McKinney had provided. On May 24, 2013, Einhorn was notified that McKinney's complaint was referred to Disciplinary Counsel for further investigation.

66.

On or about June 6, 2013, Disciplinary Counsel sent a letter to Einhorn requesting, by June 28, 2013, a response to McKinney's complaint, an accounting for the funds McKinney paid, and copies of documents from Einhorn's file pertaining to his representation of McKinney. Disciplinary Counsel warned Einhorn that a failure to respond could violate RPC 8.1(a)(2). Einhorn received the June 6, 2013 letter and he promised to respond. However, Einhorn never responded.

67.

On or about July 10, 2013, Disciplinary Counsel sent a further request for Einhorn's response to the June 6, 2013 letter described in paragraph 66 above. Einhorn received the July 10, 2013 request from Disciplinary Counsel, but he did not respond.

68.

On or about September 13, 2013, Einhorn was personally served with a subpoena duces tecum pursuant to BR 2.3(b)(3)(C) requiring him to appear September 19, 2013 at 10:00 a.m. at the Hood River County Courthouse, Room 101, to give a sworn statement to Disciplinary Counsel and bring documents regarding McKinney's complaint. Einhorn did not respond. Einhorn did not appear for the sworn statement. Einhorn did not provide the requested documents.

69.

Einhorn admits that, by engaging in the conduct described in paragraphs 51 through 68, he violated RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (communication with a client), RPC 1.15-1(d) (duty to promptly account for and deliver property of another in the lawyer's possession), and RPC 8.1(a)(2) (duty to respond to disciplinary authorities).

## Sanction

70.

Einhorn 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 Einhorn’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.** Einhorn’s failure to bring reasonably necessary preparation and thoroughness to the Charles matter violated his duty to provide competent representation to his client. *Standards*, § 4.5. By representing his clients in the Charles and Flanagan matters without informed consent of the clients when current client conflicts of interest existed, Einhorn violated his duty to his clients to avoid conflicts of interest. *Standards*, § 4.3. Einhorn’s neglect of the McKinney and Flanagan matters and his failures to communicate with his clients in those matters violated his duty to diligently represent his clients. *Standards*, § 4.4. Einhorn’s failure to promptly account for or deliver client property in his possession in the Flanagan and McKinney matters violated his duty to preserve a client’s property. *Standards*, § 4.1. Einhorn’s failure to respond to disciplinary authorities in the Charles, Flanagan, and McKinney matters violated a duty he owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards, Definitions*. Regarding all the above violations, Einhorn acted knowingly.
- c. **Injury.** In all three matters, Einhorn’s failure to respond to disciplinary inquiries caused actual injury to the regulation of the profession in delay and the need to expend resources in largely unsuccessful efforts to obtain responsive information from Einhorn.
  1. In the Charles matter, Einhorn’s lack of competent legal representation caused actual and potential injury to clients who never received a determination on the merits of the dispute. His continued representation of the clients after his malpractice was apparent raised the potential for further harm. A less self-interested lawyer might have taken more timely and effective action, including referring the parties to a third entity for action against himself. Einhorn’s misconduct caused his client to suffer anxiety, frustration, and a loss of respect for the legal profession.

2. In the Flanagan matter, Einhorn's neglect caused actual and potential injury to his client, who lost the opportunity to pursue a resolution of her dispute via the CCB. A less self-interested lawyer might have taken more timely and effective action, including referring the parties to a third entity for action against himself. Even after the client obtained assistance from another attorney, Einhorn's failure to deliver file materials hampered the efforts of the other attorney. Einhorn's client suffered anxiety and frustration as a result of Einhorn's inaction and lack of communication.
3. In the McKinney matter, Einhorn's neglect caused actual and potential injury to his client, who was unaware of the specifics of the opposing party's request for fees and costs until after a judgment had been entered against her. Einhorn's client suffered considerable anxiety and frustration as a result of Einhorn's failures to keep her informed, to act on her behalf, and to respond to her reasonable requests for information.

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

1. Prior disciplinary history. *Standards*, § 9.22(a).<sup>1</sup> In the same time period as the Charles matter, and prior to the Flanagan and McKinney matters, Einhorn was admonished for failing to communicate with a client and neglecting the client's legal matter. (OSB Case No. 09-31). Einhorn has also been previously admonished for engaging in a conflict of interest. (OSB Case No. 05-27).<sup>2</sup>
2. Pattern of misconduct. *Standards*, § 9.22(c). There is a consistent pattern of neglect, failure to communicate with clients, and obstruction of the disciplinary system across three matters and over a period of years.

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<sup>1</sup> This aggravating factor refers to offenses adjudicated prior to imposition of a sanction in the current case. The court analyzes five factors that serve to heighten or diminish the significance of earlier offenses: (1) the relative seriousness of the prior offense and sanction; (2) the similarity of the prior offense to the present offense; (3) the number of prior offenses; (4) the relative recency of prior offenses; and (5) whether the prior sanction was imposed before the lawyer engaged in the present offense. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

<sup>2</sup> A letter of admonition should be considered as evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue. *In re Cohen*, 330 Or 489, 500, 8 P3d 953 (2000).

3. Multiple offenses. *Standards*, § 9.22(d). Einhorn violated multiple rules involving different duties owed to his clients and the profession.
  4. Bad faith obstruction of the disciplinary process. *Standards*, § 9.22(e). Einhorn knowingly or intentionally failed to provide information in response to disciplinary inquiries.
  5. Substantial experience in the practice of law. *Standards*, § 9.22(i). Einhorn has been a member of the Washington State Bar since 1989 and the Oregon State Bar since 2002.
- e. There are no mitigating circumstances.

71.

Under the ABA *Standards*, suspension is generally appropriate when, as in the Flanagan and McKinney matters, a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. Suspension is also appropriate when, as in the Charles matter, a lawyer knowingly provides representation that lacks the required level of competence and causes injury or potential injury to a client. *Standards*, § 4.52. Suspension is appropriate when, as in the Charles and Flanagan matters, 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. Suspension is appropriate when, as in the Flanagan and McKinney matters, 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. Finally, suspension is appropriate when, as in the Charles, Flanagan, and McKinney matters, a lawyer knowingly engages in conduct that violated duties owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2

72.

Failure to bring the necessary competence to a client's legal matter warrants suspension. *See, e.g., In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (60-day suspension when lawyer representing the conservator of an estate failed to comply with applicable procedural and substantive rules, failed to handle substantive issues, and failed to give the requisite attention to the case; the lawyer had substantial experience in the practice of law and no prior record of discipline.). In the absence of mitigating factors, the knowing neglect of a single client matter warrants a 60-day suspension. *See In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004). A single knowing conflict of interest violation also warrants suspension. *Knappenberger*, 337 Or at 32. A lawyer who cannot or will not respond to disciplinary inquiries undermines the regulatory system of the court and public confidence in the Bar. *See, e.g., In re Miles*, 324 Or 218, 923 P2d 1219 (1996). The court has imposed suspensions

of 120 days or more when lawyers completely failed to respond to disciplinary authorities, even though no other rule violation occurred. *Miles*, 324 Or 218.

73.

A lawyer who neglects his clients *and* fails to cooperate with disciplinary authorities is recognized as a threat to the profession and the public, and his conduct warrants a significant sanction. *In re Bourcier II*, 325 Or 429, 436, 939 P2d 604 (1997). In the following cases, lawyers who had previously been sanctioned for similar misconduct received multi-year suspensions: In *In re Chandler*, 306 Or 422, 428–32, 760 P2d 243 (1988), the court imposed a 2-year suspension upon a lawyer found guilty of neglecting a client’s legal matter, failing to return that client’s property in a timely fashion, despite repeated requests, and failing to cooperate fully with the Bar and the State Lawyers Assistance Committee. Chandler had been previously disciplined by the court for similar misconduct. In addition, as in this case, some of Chandler’s misconduct occurred after the Bar initiated proceedings against him for the same type of misconduct. In *In re Recker*, 309 Or 633, 789 P2d 663 (1990), the court imposed a 2-year suspension upon a lawyer who neglected two client matters, engaged in conduct involving misrepresentations, and failed to cooperate with disciplinary investigations, after having been previously disciplined by the court for similar misconduct.

74.

Consistent with the *Standards* and Oregon case law, the parties agree that Einhorn shall be suspended for one year for violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.7(a)(2), RPC 1.15-1(d), and RPC 8.1(a)(2), the sanction to be effective upon approval of this stipulation.

75.

In addition, on or before November 30, 2014, Einhorn shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$795.12 incurred for service fees and the attempted sworn statement and deposition of Einhorn. Should Einhorn fail to pay \$795.12 in full by November 30, 2014, the Bar may thereafter, without further notice to Einhorn, obtain a judgment against Einhorn for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

76.

Although Einhorn is not currently engaged in the practice of law in Oregon, he 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, Einhorn has arranged for Wayne Mackeson, an active member of the Oregon State Bar, to either take possession of or have ongoing access to Einhorn’s client files and serve as the contact-person for clients in

need of the files during the term of Einhorn's suspension. Einhorn represents that Mackeson has agreed to accept this responsibility.

77.

Einhorn 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. Einhorn 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.

78.

Einhorn 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 the denial of his reinstatement.

79.

Einhorn represents that, in addition to Oregon, he also is admitted to practice law in the State of Washington, whether his current status is active, inactive, or suspended, and he acknowledges that the Bar will be informing the Washington State Bar of the final disposition of this proceeding.

80.

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 Oregon Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 3rd day of September, 2014.

/s/ Eric Einhorn

Eric Einhorn

OSB No. 021569

EXECUTED this 4th day of September, 2014.

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. 14-05
	)	
MELISSA N. KENNEY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 5.5(a), RPC 5.5(b)(2), and RPC 7.1. Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	January 16, 2015

**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 60 days after the stipulation has been approved, for violation of RPC 5.5(a), RPC 5.5(b)(2), and RPC 7.1.

DATED this 17th day of November, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Kathy Proctor  
Kathy Proctor, Region 4  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Kenney was at all times herein admitted to the practice of law in the State of Maryland and maintained an office in Washington County, Oregon, for the representation of clients in matters before the Social Security Administration. Kenney is not and was not at any time herein admitted to the practice of law in Oregon.

3.

Kenney 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 21, 2014, a Formal Complaint was filed against Kenney pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 5.5(a), RPC 5.5(b)(2), and RPC 7.1. 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 June 2009, Kenney was admitted to the practice of law in the State of Maryland. At all times herein Kenney was not admitted to practice before the court of any other state, territory, district, or insular possession of the United States, or before the Supreme Court of the United States or the inferior federal courts of the United States.

6.

At all relevant times herein and in pertinent part, ORS 9.160 prohibited a person from practicing law in Oregon, or representing that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar. At all relevant times herein, RPC 5.5(d) recognized that a lawyer admitted in another United States jurisdiction,

and not disbarred or suspended from practice in any jurisdiction, may provide legal services in Oregon where the legal services are services the lawyer is authorized to provide by federal law.

7.

At all relevant times herein, 42 USC § 406 provided in pertinent part: “An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District or insular possession of his residence or before the Supreme Court of the United States of the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security.”

8.

At all relevant times herein, 20 CFR § 404.1705(a)(1) provided that a claimant before the Commissioner of Social Security may appoint as the claimant’s representative any attorney in good standing who has the right to practice law before a court of a state, territory, district, or insular possession of the United States, or before the Supreme Court or a lower federal court of the United States.

9.

On March 17, 2011, Kenney submitted to the Maryland Bar an affidavit seeking her transfer to an “inactive” status. At all times herein, Maryland Code 10-1601 prohibited a person from practicing, attempting to practice, or offering to practice law in the State of Maryland unless admitted to the Maryland Bar. Maryland Code 10-1601 specified that an individual on inactive Maryland Bar membership status was prohibited from performing any act that constitutes practicing law.

10.

On July 1, 2011, Kenney’s Maryland Bar membership was transferred to “inactive” status. From July 1, 2011, through April 14, 2013, Kenney represented claimants before the Social Security Administration. Kenney failed to appreciate that by transferring to an inactive status in Maryland, she was no longer entitled to act as an attorney representative before the Social Security Administration.

11.

On November 6, 2012, Kenney was informed by the Oregon State Bar Client Assistance Office that a member of the public had expressed concern that she was improperly practicing law in Oregon. Kenney returned to active status in Maryland on April 14, 2013.

12.

From July 1, 2011, through April 14, 2013, Kenney held herself out in advertisements in Oregon as qualified to serve as an attorney in federal administrative matters when she was not qualified to do so and without clarifying that she was admitted to the practice of law only

in Maryland. Kenney also failed to update her advertisements concerning other professional qualifications and memberships as they changed.

### Violations

13.

Kenney admits that by representing clients as an attorney representative in Social Security Administration matters when she was not an active lawyer, and not entitled to practice law in any relevant jurisdiction, she violated RPC 5.5(a) and RPC 5.5(b)(2). Kenney admits that she made communications about her services that were misleading, in violation of RPC 7.1(a)(1).

### Sanction

14.

Kenney 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 Kenney’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.** Kenney’s failure to abide by regulations concerning qualifications to practice law and communications about legal services violated duties owed as a professional. *Standards*, § 7.0.
- b. **Mental State.** Kenney acted with the knowledge of the nature or attendant circumstances of her conduct, but without the conscious objective or purpose to violate her professional duties.
- c. **Injury.** There was potential for injury as Kenney’s clients may have relied upon the mistaken belief that Kenney was an Oregon State Bar member, familiar with Oregon legal issues, licensed and insured to practice law in Oregon.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. A pattern of misconduct involving multiple rule violations over an extended period. *Standards*, § 9.22(c).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).

15.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

16.

Oregon case law supports the proposed sanction. See *In re Foster*, 27 DB Rptr 163 (2013) (30-day suspension when lawyer practiced administrative law while suspended and made misleading communications about her ability to perform services); *In re Johnson*, 20 DB Rptr 223 (2006) (30-day suspension when, as a result of asserted confusion regarding reinstatement procedures, lawyer practiced law while suspended).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that Kenney shall be suspended thirty days for violation of RPC 5.5(a), RPC 5.5(b)(2), and RPC 7.1, the sanction to be effective 60 days after this stipulation is approved.

18.

Kenney acknowledges that she has certain duties and responsibilities under the Rules of Professional Conduct to immediately take all reasonable steps to avoid foreseeable prejudice to her clients during the term of her suspension. In this regard, Kenney has arranged for Lisa Porter, an active member of the Bar, to either take possession of or have ongoing access to Kenney's client files and serve as the contact person for clients in need of the files during the term of her suspension. Kenney represents that Lisa Porter has agreed to accept this responsibility.

19.

Kenney acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that her failure to timely complete that requirement may adversely impact her eligibility to practice law in Oregon.

20.

Kenney 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 Kenney is admitted: Maryland, Social Security Administration.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 7th day of November, 2014.

/s/ Melissa N. Kenney

Melissa N. Kenney

EXECUTED this 10th day of November, 2014.

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. 14-03, 14-68, 14-69, 14-70,  
) 14-71, and 14-72  
SARA LYNN ALLEN, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Richard G. Helzer  
Disciplinary Board: None.  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), RPC 1.16(d), and RPC 8.1(a)(2). Stipulation for Discipline. 6-month suspension, all stayed, 3-year probation.  
Effective Date of Order: November 24, 2014

**AMENDED 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 6 months, all stayed pending completion of a 3-year probation, effective 7 days after the stipulation is approved, for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), RPC 1.16(d), and RPC 8.1(a)(2).

*Nunc Pro Tunc* this 17th day of November, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Anthony A. Buccino

Anthony A. Buccino, Region 7  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Allen was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 30, 1999, and has been a member of the Bar continuously since that time, having her office and place of business in Clackamas County, Oregon.

3.

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

4.

On July 19, 2014, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against Allen for alleged violation of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (duty to adequately communicate with client); RPC 1.4(b) (duty to explain matter reasonably necessary to permit the client to make informed decisions); RPC 1.16(c) (duty to comply with rules upon withdrawal); RPC 1.16(d) (duty to take practicable steps to protect client upon termination of employment); and RPC 8.1(a)(2) (duty to respond to a disciplinary authority) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

#### **Carolyn Mundon Matter**

#### **Case No. 14-03**

#### **Facts**

5.

In July 2013, Carolyn Mundon (hereinafter “Mundon”) hired Allen for a flat fee of \$2,500 to represent her in an uncontested guardianship involving her grandson. Mundon expressed some urgency. Allen assured Mundon that she would act promptly, however Allen was slow to start working on the matter because (1) she was moving her office to her home

(early September 2013), and (2) she was wrestling with depression. For these same reasons, Allen also failed to respond to Mundon's attempts to contact her.

6.

When nothing was accomplished by early October 2013, Mundon fired Allen and demanded a refund of her \$2,500 retainer, which Allen ultimately returned in full after Mundon filed a complaint with the Bar. Allen subsequently failed to timely respond to the Bar's requests for information.

### **Violations**

7.

Allen admits that she neglected Mundon's legal matter and failed to timely respond to inquiries following Mundon's Bar complaint, in violation of RPC 1.3 and RPC 1.4(a). Allen also admits that her failure to return promptly the unearned retainer violated RPC 1.16(d), and her failure to timely respond to disciplinary inquiries violated RPC 8.1(a)(2).

### **Hon. Brian C. Dretke Matter Case No. 14-68**

### **Facts**

8.

In mid-May 2013, Allen filed a response and counterclaim on behalf of Tara Cranmer (hereinafter "Cranmer") in a Union County custody matter over which Honorable Brian C. Dretke (hereinafter "Judge Dretke") presided. The case was referred to mediation.

9.

In mid-November 2013, the court notified Allen of a status hearing set for January 13, 2014, but the notice was returned as undeliverable because Allen had moved her office without notice to the court.

10.

On January 3, 2014, the court emailed Allen to ask that she update her address and telephone number. Allen did not respond.

11.

On January 13, 2014, Cranmer and the opposing party appeared for the status hearing. Judge Dretke telephoned Allen at her old law firm, which told him that she had left. He left a message on the cell phone number they gave him but she did not return it. Approximately a week later, Judge Dretke called Allen again but her voicemail was full. That same day, he wrote to her at the address provided by Allen's old law firm. The letter was not returned but Allen did not respond.

12.

Oregon UTCR 3.140 states that the attorney who files the initial appearance for a party is deemed to be that party's attorney of record until the attorney otherwise notifies the court and opposing parties in open court or makes an application to resign pursuant to ORS 9.380. ORS 9.380(1) allows lawyers to withdraw from ongoing litigation only if they file either a consent to withdraw or the court grants a motion to withdraw based on good and sufficient cause.

### **Violation**

13.

Allen admits that her failure to comply with UTCR 3.140 and ORS 9.380 regarding notice to or permission of a tribunal when terminating representation in Cranmer's matter violated RPC 1.16(c).

### **Dawn E. Murphy Matter Case No. 14-69**

#### **Facts**

14.

In late February 2013, Dawn Murphy (hereinafter "Murphy") retained Allen to prepare and file a guardianship petition for her disabled son, paying her \$1,550. Murphy called and emailed Allen repeatedly but received limited responses. Although Allen provided a draft of the guardianship papers, she failed to timely file them with the court. Allen believes that the delay in filing was due, in part, to her struggles with depression. In mid-September 2013, Murphy terminated Allen's services.

15.

Allen failed to respond to the Bar's inquiries concerning Murphy's matter for several months, but eventually did so.

#### **Violations**

16.

Allen admits that her failure to substantively progress on Murphy's legal matter between February 2013, and September 2013, constituted neglect of a legal matter in violation of RPC 1.3. Allen also acknowledges that her failure to respond to Murphy's attempts to communicate with her violated RPC 1.4(a) and that her several-month delay in responding to the Bar violated RPC 8.1(a)(2).

**Greg A. Reitz Matter**

**Case No. 14-70**

**Facts**

17.

In May 2012, Greg Reitz (hereinafter “Reitz”) hired Allen to handle his divorce. In early 2013, at a spousal support hearing in Washington County Circuit Court, the judge was concerned that Allen had not had her client complete the Uniform Child Support Affidavit. He made her and Reitz complete a Uniform Child Support affidavit in the hallway outside the courtroom.

18.

Following that spousal support hearing, Reitz fired Allen and hired new counsel. Reitz asked for a refund. However, Allen did not refund any of his money or timely account for the money she had received from him.

**Violation**

19.

Allen admits that her failure to timely account for Reitz’s funds following his termination of her services violated RPC 1.16(d).

**Charles R. Waterman Matter**

**Case No. 14-71**

**Facts**

20.

In August 2012, Charles Waterman (hereinafter “Waterman”) retained Allen to represent him in a custody parenting time case. She represented him well through the trial in November 2012, but after sending him the judgment in early December 2012, stopped communicating with him despite his efforts to contact her.

21.

In late August 2013, Waterman learned that another judgment had been entered against him (judgment of paternity, custody, parenting time, and a lien for attorney fees) without his knowledge. Allen did not respond to or forward Waterman the proposed judgment. Waterman retained new counsel and requested that Allen provide him with an accounting of his \$3,000 retainer. Allen did not timely respond to Waterman’s or the Bar’s inquiries.

### **Violations**

22.

Allen admits that she neglected Waterman's legal matter in violation of RPC 1.3. She further admits that her failures to adequately communicate with him, including failing to notify him of the proposed judgment and explain its import, violated RPC 1.4(a) and RPC 1.4(b). Allen also admits that her failure to timely respond to the Bar concerning Waterman's matter violated RPC 8.1(a)(2).

### **MeiMei Welker Matter**

#### **Case No. 14-72**

### **Facts**

23.

Prior to September 2013, MeiMei Welker (hereinafter "Welker") hired Allen to represent her in a divorce proceeding. Allen moved her office in September 2013, without ensuring that Welker was specifically aware of her relocation. She also failed to respond to a number of Welker's telephone calls and emails.

24.

In December 2013, divorce papers were submitted to the court for signature. Allen assured Welker that she would let her know when they were signed but lost track of the matter for several weeks, and not until after Welker contacted the court directly and was notified that they had been signed.

### **Violations**

25.

Allen admits that her erratic communication and failure to notify Welker that the divorce papers had been signed violated RPC 1.4(a) and RPC 1.4(b).

### **Sanction**

26.

Allen 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 Allen'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.** Allen violated her duty of diligence to her clients, including her duty to adequately communicate with them. *Standards*, § 4.4. She also violated her duty to her clients to properly handle their property, particularly following termination of representation. *Standards*, § 4.1. The *Standards* presume that the most important ethical duties are those obligations that lawyers owe to their clients. *Standards*, p. 5, *Theoretical Framework*. Allen also violated her duty to the legal system to comply with rules of a tribunal, *Standards*, § 6.2, and her duty to the profession to respond to inquiries from the Bar. *Standards*, § 7.0
- b. **Mental State.** Allen acted knowingly and negligently. “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*. “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, Definitions*.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Allen’s neglect of her clients’ matters caused both actual and potential injury. Their cases were stalled and resolutions of their matters were delayed. Allen’s failures to act and communicate with her clients caused further actual injury in terms of anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney neglect can constitute actual injury); *In re Schaffner II*, 325 Or 421, 426–27, 939 P2d 39 (1997).

In addition, Allen caused either potential or actual injury to those clients who did not timely receive accountings of their fees or the unearned portions of their retainers. Allen did eventually send refunds to Mundon and Murphy, and also assisted Murphy in having the guardianship completed.

Allen’s failure to cooperate with the Bar’s investigations of her conduct caused actual injury to both the legal profession and to the public because many requests were necessitated by her failures to respond to the Bar or provide complete information, thereby delaying the Bar’s investigations and, consequently, the resolution of the complaints against her. *In re Schaffner II*, 325 Or at 426–27; *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A pattern of misconduct. *Standards*, § 9.22(c). Allen’s violations spanned multiple matters over approximately a one-year period of time. *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
  2. Multiple offenses. *Standards*, § 9.22(d).
  3. Substantial experience in the practice of law. *Standards*, § 9.22(i). Allen was admitted to practice in Oregon in 1999.
- 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. Personal or emotional problems. *Standards*, § 9.32(c).
  4. Remorse. *Standards*, § 9.32(l).

27.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42(a)–(b). Suspension is also generally appropriate when a lawyer knows or should know that he is dealing improperly with client property (such as failing to promptly account for and return it to clients) and causes injury or potential injury to a client. *Standards*, § 4.12. A reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding. *Standards*, § 6.23. Finally, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

28.

Oregon cases also support the imposition of a substantial suspension for Allen’s misconduct. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (2000) (four-year suspension for knowing neglect, including failing to respond to client messages, and knowing failure to respond to Bar inquiries in four matters); *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997) (two-year suspension for neglect, failing to return client property, and failing to fully respond to the Bar); *In re Bourcier*, 322 Or 561, 909 P2d 1234 (1996) (three-year suspension for neglect and failing to respond to the Bar, as well as misrepresentations and dishonesty); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (two-year suspension for neglect of five client matters, three instances of failing to return client property, and substantially refusing to cooperate with Bar authorities).

*See also In re Morasch*, 26 DB Rptr 146 (2012); *In re Kent*, 20 DB Rptr 136 (2006); *In re O'Dell*, 19 DB Rptr 287 (2005); *In re Ames*, 19 DB Rptr 66 (2005); *In re Cumfer*, 19 DB Rptr 27 (2005); *In re Barrow*, 13 DB Rptr 126 (1999) (all stipulations to two-year suspensions for neglect or failure to respond to the Bar, or both, related to numerous client matters).

In light of Allen's mitigating factors, particularly her absence of prior discipline and depression issues, a probated term of suspension is appropriate.

29.

Consistent with the *Standards* and Oregon case law, the parties agree that Allen shall be suspended for six months for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(c), RPC 1.16(d), and RPC 8.1(a)(2), effective October 1, 2014 or seven days after approval by the Disciplinary Board, whichever is later. However, all of the suspension shall be stayed, pending completion of a three-year term of probation supervised by the State Lawyers Assistance Committee (hereinafter "SLAC"), which shall include the following terms and conditions:

- (a) Allen shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9.
- (b) A member of SLAC, or such other person approved by Disciplinary Counsel's Office (hereinafter "DCO") in writing, shall supervise Allen's probation (hereinafter "Supervising Attorney"). Allen is currently is working with the Oregon Attorney Assistance Program (hereinafter "OAAP") on treatment. Allen shall immediately notify SLAC, upon approval of this Stipulation for Discipline by the Disciplinary Board, of: 1) the existence and contents of this Stipulation for Discipline; 2) the history and status of any OAAP treatment or programs in which Allen has or is participating; and 3) discuss with SLAC whether and how to modify her current treatment plan to best accomplish the objectives of Allen's probation.
- (c) Beth Wolfson, or such other person approved by DCO in writing, shall perform as a mentor during the term of Allen's probation (hereinafter "Mentoring Attorney"). Allen agrees to cooperate and comply with all reasonable requests made by her Mentoring Attorney that the Mentoring Attorney, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Allen's clients, the profession, the legal system, and the public.
- (d) Allen shall meet at least monthly with her Supervising Attorney for the purpose of reviewing Allen's compliance with the terms of the probation.

Allen shall cooperate and shall comply with all reasonable requests of SLAC that will allow SLAC and DCO to evaluate her compliance with the terms of this Stipulation for Discipline.

- (e) Allen shall continue regular treatment sessions with Dr. Garen Weitman (hereinafter “Dr. Weitman”) or another treatment provider determined by SLAC to be appropriate.
- (f) Within 60 days of the effective date of this agreement, Allen shall provide Reitz and Waterman with accountings of monies paid to her by them or on their behalf, and verify this fact to DCO.
- (g) Allen agrees that, if SLAC is alerted to facts that raise concern that she may be violating her requirements as described in paragraph 29(b) above, she will participate in a further evaluation at the request and direction of SLAC.
- (h) Allen shall arrange for and meet with Dr. Weitman or another health care professional acceptable to DCO and her Supervising Attorney to develop and implement a course of treatment that will address any identifiable concerns.
- (i) Allen shall continue to attend regular counseling or treatment sessions with the approved health care professional for the entire term of her probation. Allen shall obtain and take and/or continue to take, as prescribed, any health-related medications.
- (j) Allen shall not terminate her counseling/or treatment, or reduce the frequency of her counseling or treatment sessions, without first submitting to DCO a written recommendation from the health care professional that her counseling or treatment sessions should be reduced in frequency or terminated, and Allen undergoes an independent evaluation by a second professional acceptable to DCO and the Supervising Attorney, which evaluation confirms her fitness.
- (k) Within 30 days of the effective date of this agreement, Allen shall meet with her Mentoring Attorney in person at least once for the purpose of reviewing the status of Allen’s law practice and her performance of legal services on the behalf of clients. Thereafter, Allen shall meet with her Mentoring Attorney at least once on or before the 15th day of each third month to review her law practice and performance of legal services and Allen’s compliance with the terms of the probation. Allen shall cooperate and shall comply with all reasonable requests of her Mentoring Attorney that will allow the Mentoring Attorney and DCO to evaluate her compliance with the terms of this Stipulation for Discipline.
- (l) Every month for the term of this agreement, Allen shall review all client files to ensure that she is timely attending to the clients’ matters and that she is

maintaining adequate communication with clients, the court, and opposing counsel.

- (m) During the meetings between Allen and her Mentoring Attorney, in addition to providing an opportunity to discuss any general or specific practice management concerns, Allen and her Mentoring Attorney shall audit a random sampling (15%–20%) of Allen’s active files to verify:
  - (1) Allen is timely attending to the clients’ matters and that she is adequately communicating with clients, the court, and opposing counsel, as appropriate.
  - (2) Allen has reviewed her client files and reconciled them with her calendaring system, such that all necessary appearances and deadlines are noted and memorialized.
- (n) During the term of her probation, Allen shall attend not less than 9 MCLE accredited programs, for a total of 30 hours, which shall emphasize client management, adequate communication, and how to get along with difficult people. These credit hours shall be in addition to those MCLE credit hours required of Allen for her normal MCLE reporting period.
- (o) Upon completion of the MCLE programs described in paragraph 29(n), and no later than August 31, 2017, Allen shall submit an Affidavit of Compliance to DCO regarding this condition.
- (p) Allen shall meet with office management consultants from the Professional Liability Fund (hereinafter “PLF”) within 60 days of the effective date of this agreement, or as soon thereafter as a PLF practice manager is available. The PLF practice manager shall conduct an evaluation of whether Allen would benefit from changes to her office practices or management. When Allen receives recommendations from the PLF regarding her office practices or management, she shall notify DCO of the PLF’s recommendations in her next due quarterly report described in paragraph 29(t) below. Allen shall implement all recommended changes, to the extent reasonably possible, and provide an explanation as to the reasons any recommendations have not been implemented. Allen shall participate in at least one follow-up review by the PLF on or before August 31, 2015. Allen shall promptly report implementation of recommendations to her Mentoring Attorney.
- (q) On or before August 31, 2015, Allen shall enroll in and complete the OAAP program, “Getting it Done” or a similar OAAP program. In the alternative, on or before August 31, 2015, Allen shall arrange for, attend, and complete individual counseling session(s) with an OAAP attorney representative, or

other program suggested or recommended by OAAP that covers the same subject matter as the “Getting it Done” program.

- (r) In the event Allen fails to comply with any condition of this stipulation, she shall immediately notify her Supervising Attorney, her Mentoring Attorney, SLAC and DCO in writing.
- (s) At least quarterly, and by such dates as established by DCO, Allen shall submit a written report to DCO, approved in substance by her Supervising Attorney, advising whether she is in compliance or non-compliance with the terms of this stipulation and the recommendations of her treatment providers, and each of them. Allen’s report shall also identify: the dates and purpose of her meetings with her Supervising Attorney and the dates of meetings and other consultations between Allen and all health care professionals during the reporting period. In the event Allen 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.
- (t) At least quarterly, and by such dates as established by DCO, Allen shall submit a written report to DCO, approved in substance by her Mentoring Attorney, advising whether she is in compliance or non-compliance with the terms of this stipulation, including:
  - (1) The dates and purpose of Allen’s meetings with her Mentoring Attorney.
  - (2) The number of Allen’s active cases and percentage reviewed in the audit with her Mentoring Attorney per paragraph 29(m) and the results thereof.
  - (3) Whether Allen has completed the other provisions recommended by her Mentoring Attorney, if applicable.
  - (4) In the event Allen 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.
- (u) Allen hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by OAAP, SLAC, her Mentoring Attorney, her Supervising Attorney, or any other health care treatment providers of her compliance or non-compliance with this stipulation and their treatment recommendations to SLAC and DCO. Allen agrees to execute any additional waivers or authorizations necessary to permit such disclosures.

- (v) Allen is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation.
- (w) In the event Allen fails to comply with any condition of her probation, DCO may initiate proceedings to revoke her probation pursuant to BR 6.2(d), and impose the stayed six months of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

30.

Allen 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. In this regard, Allen has arranged for Beth Wolfsong, an active member of the Bar, to either take possession of or have ongoing access to Allen's client files and serve as the contact person for clients in need of the files during the term of her suspension. Allen represents that Beth Wolfsong has agreed to accept this responsibility.

31.

Allen acknowledges that reinstatement is not automatic on expiration of any period of suspension, if any stayed period of suspension is actually imposed. If a period of suspension is necessitated by her non-compliance with the terms of her probation, she will be required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. Allen also acknowledges that, should a suspension occur, 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.

32.

Allen 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.

33.

Allen 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 Allen is admitted: none.

34.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 Allen*, 28 DB Rptr 275 (2014)

EXECUTED this 7th day of November, 2014.

/s/ Sara Lynn Allen

Sara Lynn Allen

OSB No. 992081

EXECUTED this 10th day of November, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 14-67
	)	
JOHN J. KOLEGO,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(2) and RPC 8.4(a)(2). Stipulation for Discipline. 90-day suspension.
Effective Date of Order:	February 1, 2015

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days, effective February 1, 2015, for violation of DR 1-102(A)(2) and RPC 8.4(a)(2).

DATED this 17th day of November, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Robert A. Miller  
Robert A. Miller, Region 2  
Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Kolego was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 19, 1985, and has been a member of the Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

Kolego 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 August 4, 2014, a Formal Complaint was filed against Kolego pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of DR 1-102(A)(2) and RPC 8.4(a)(2) (criminal act reflecting adversely on fitness to practice law). 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 relevant times herein, 26 USC § 7202 provided that it was unlawful for a person who was required to collect, account for, and pay over any tax to willfully fail to collect or truthfully account for and pay over such tax. At all relevant times herein, 26 USC § 7203 made it unlawful for a person to willfully fail to make a tax return otherwise required by law.

6.

Between 1992 and 2008, Kolego, acting in his individual capacity or through his professional corporation, employed one or more individuals and was required to deduct and withhold from employee wages federal income, social security, and Medicare taxes, and to pay to the government the amounts withheld each quarter. Kolego was also required to file

federal Form 941 on a quarterly basis to report employee wages and the amount of payroll taxes withheld from those wages.

7.

Between 1992 and 2008, Kolego periodically knowingly and willfully failed to pay over the amounts deducted and withheld from employee wages, in violation of 26 USC § 7202. Kolego also knowingly and willfully failed to file federal Form 941 on a quarterly basis, in violation of 26 USC § 7203.

8.

Between 1992 and 2008, Kolego knowingly and willfully failed to file federal personal or corporate income tax returns, or both, and pay taxes for multiple calendar years, in violation of 26 USC § 7203.

### **Violations**

9.

Kolego admits his failures to ensure he complied with his obligations to file and pay over taxes constituted criminal acts that reflected adversely on his fitness to practice law, in violation of DR 1-102(A)(2) of the Oregon Code of Professional Responsibility (for conduct through December 31, 2004) and RPC 8.4(a)(2) of the Oregon Rules of Professional Conduct (for conduct occurring on or after January 1, 2005).

### **Sanction**

10.

Kolego 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 Kolego’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.** Kolego violated his duty to the public to maintain his personal integrity. *Standards*, § 5.1.
- b. **Mental State.** Kolego does not dispute that he 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, Definitions*.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). There was actual injury to the

taxing authorities as a result of Kolego's elections not to file and timely pay his obligations. There was not actual or potential injury to Kolego's employee(s) because the tax authorities do not hold employees responsible for such withholdings. Rather, the employees are permitted to seek refunds as if the amounts were actually received.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A pattern of misconduct. *Standards*, § 9.22(c). Kolego failed to timely file taxes periodically over nine years.
  2. Multiple offenses. *Standards*, § 9.22(d). Although it is the same charge, each election by Kolego to foregoing filing or paying constituted a separate violation of the rule.
  3. Substantial experience in the practice of law. *Standards*, § 9.22(i). Kolego has been a lawyer in Oregon since 1985.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary history. *Standards*, § 9.32(a). Kolego has practiced primarily in court-appointed or low-income criminal defense since his admission nearly 30 years ago. Despite his practice area, Kolego has no prior history of discipline.
  2. Absence of a dishonest motive. *Standards*, § 9.32(b). Kolego's failures to file or pay were the result of financial considerations.
  3. Personal or emotional problems. *Standards*, § 9.32(c). In addition to his financial troubles, during portions of the relevant time period, Kolego lost two close family members, after long medical battles, and experienced other tragic events within his extended family.
  4. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards*, § 9.32(e).
  5. Character or reputation. *Standards*, § 9.32(g). Kolego is well-regarded in the legal community as a very capable advocate for his clients, a formidable opponent in the courtroom, and a professional practitioner.
  6. Imposition of other penalties or sanctions. *Standards*, § 9.32(k). Kolego has lost real and personal property to an IRS lien foreclosure.
  7. Remorse. *Standards*, § 9.32(l).

11.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously and adversely reflects on the lawyer's

fitness to practice. *Standards*, § 5.12. The *Standards* also provide that where a suspension is warranted, it should generally be for “a period of time equal to or greater than six months.” *Standards*, § 2.3. However, the disproportion of Kolego’s mitigating factors to his aggravating ones suggests a significant downward departure from the presumptive sanction under the *Standards* is appropriate.

12.

Oregon cases support a suspension of less than six months for failures to comply with tax obligations, when mitigation is significant. *See, e.g., In re Fuller*, 26 DB Rptr 166 (2012) (attorney was suspended for 90 days for failing to pay payroll taxes or make retirement contributions withheld from employees’ pay for two years, but had no prior discipline); *In re Carroll*, 16 DB Rptr 306 (2002) (attorney suspended for 120 days when she failed to file income tax returns for two years, but all returns filed and taxes were paid before she reported herself to the Bar). *But, c.f., In re Steves III*, 26 DB Rptr 283 (2012) (attorney was given a one-year suspension for several matters, including willfully failing to file federal income tax returns timely or pay the tax due for three years, when aggravating factors, including prior disciplinary offenses, substantially outweighed those in mitigation); *In re Street*, 24 DB Rptr 258 (2010) (attorney suspended for one year, partially stayed pending a two-year probation, for failing to file personal income tax returns for several years or pay the taxes due. Taxes remained unpaid at time of stipulation. Probation required payment plans with IRS and Oregon DOR); *In re Bowman*, 24 DB Rptr 144 (2010) (attorney suspended for one year, partially stayed pending a two-year probation, for willful failure to file income tax returns, or pay income tax due, over a three-year period. Aggravating factors included initially obstructing the disciplinary process).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Kolego shall be suspended for 90 days for violation of DR 1-102(A)(2) and RPC 8.4(a)(2), the sanction to be effective February 1, 2015.

14.

Kolego 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, Kolego has arranged for Andrew L. Kraushaar, an active member of the Bar, to either take possession of or have ongoing access to Kolego’s client files and serve as the contact person for clients in need of the files during the term of his suspension. Kolego represents that Andrew L. Kraushaar has agreed to accept this responsibility.

15.

Kolego 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. Kolego also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

16.

Kolego acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension or the denial of his reinstatement.

17.

Kolego 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 Kolego is admitted: none.

18.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 3rd day of November, 2014.

/s/ John J. Kolego

John J. Kolego

OSB No. 850570

EXECUTED this 5th day of November, 2014.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 14-74  
)  
FOSTER A. GLASS, )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(4). Stipulation for Discipline.  
30-day suspension.  
Effective Date of Order: December 15, 2014

**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 December 12, 2014, or 14 days following approval by the Disciplinary Board, for violation of RPC 8.4(a)(4).

DATED this 1st day of December, 2014.

/s/ Pamela E. Yee

Pamela E. Yee  
State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.

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

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Glass was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 19, 1975, and has been a member of the Bar continuously since that time, having his office and place of business in Deschutes County, Oregon.

3.

Glass 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 19, 2014, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against Glass for alleged violation of RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

### Facts

5.

Between September 2013, and January 2014, on several occasions in multiple client matters, Glass failed to appear for scheduled court hearings in the Deschutes County Circuit Court.

6.

On September 9, 2013, Glass failed to appear for a permanency hearing in a dependency case. He was aware of the hearing because he attended a previous hearing at which it was scheduled. Glass’s pro-bono client attended the hearing alone; a judgment was entered that affected the client’s parental rights.

7.

On September 12, 2013, Glass and his client failed to appear for a trial readiness hearing. Glass knew of this hearing because he attended a previous hearing at which it was scheduled. Glass's client was in custody, so his appearance was waived. The court took the trial off the docket because of Glass's non-attendance.

8.

On September 19, 2013, Glass failed to appear at a hearing on the opposing party's motion to waive the no-contact provision of his client's conditional release. The client appeared. Glass knew about the hearing because a court scheduler had called him the day before to confirm his availability.

9.

On October 9, 2013, Glass failed to appear for a hearing on his own motion to quash a subpoena. Glass had scheduled a conflicting matter in Baker County, even though he knew about the August 30, 2013 hearing on his motion. Glass did not contact the court to inform them of his conflict. The motion was summarily denied.

10.

On October 14, 2013, Glass failed to appear for his client's arraignment. He knew about the October 14, 2013 arraignment date because he attended a previous hearing at which it was scheduled. His client, who was in custody, appeared by video. The arraignment was continued to the next day and the client remained in custody.

11.

On January 21, 2014, Glass failed to appear for a review hearing in a dependency case. His client did attend and told the court that he and Glass had confirmed the hearing date and time the day before.

12.

The aforementioned missed appearances impacted the court's ability to manage its dockets and the legal interests of his clients.

### **Violations**

13.

Glass admits that, by engaging in the conduct described in paragraphs 5 through 12, he violated RPC 8.4(a)(4).

## Sanction

14.

Glass 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 Glass’ 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.** Glass violated a duty he owed to the legal system to avoid conduct prejudicial to the administration of justice. *Standards*, § 6.0.
- b. **Mental State.** Glass acted knowingly in some respects and negligently in others. “Knowledge” is the conscious awareness of the nature or attendant circumstances of his conduct but without the conscious objective or purpose to accomplish a particular result. *Standards, Definitions*. “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, Definitions*.
- c. **Injury.** The court sustained actual injury because Glass’ failure to appear for court hearings created unnecessary work for the court, caused the court to spend more time on these matters than would otherwise have been required, and did, or at least had the potential to, disrupts the court’s ability to efficiently manage its docket. *See In re Morris*, 326 Or 493, 504–05, 953 P2d 387 (1998) (attorney caused harm to the administration of justice by creating circumstances requiring an ancillary inquiry by the court). His clients were potentially injured by Glass’s conduct because it may have caused them to lose their opportunity to have their day in court or incur unnecessary expenses.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Substantial experience in the practice of law. Glass has been a licensed lawyer since 1975. *Standards*, § 9.22(i).
  2. A prior record of discipline. *Standards*, § 9.22(a). In 1989, Glass was suspended for 91 days for the following violations: DR 1-102(A)(3) (conduct involving dishonesty); DR 1-103(C) (failure to timely respond to inquiries); and DR 7-102(A)(1) (file an action merely to harass). *In re Glass*, 308 Or 297, 779 P2d 612 (1989).

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

1. Cooperative attitude toward the proceeding. *Standards*, § 9.32(e).

15.

Under the ABA *Standards*, 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.

16.

Under similar circumstances, a suspension has been imposed. *In re Carini*, 354 Or 47, 308 P3d 197 (2013) (30-day suspension of a lawyer who failed to appear at multiple court hearings when attorney had prior discipline history and substantial experience in the practice of law.).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that Glass shall be suspended for 30 days for violation of RPC 8.4(a)(4), the sanction to be effective December 12, 2014, or 14 days after the stipulation is approved, whichever is later.

18.

Glass 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, Glass has arranged for Nathan Steele, an active member of the Bar, to either take possession of or have ongoing access to Glass's client files and serve as the contact person for clients in need of the files during the term of his suspension. Glass represents that Nathan Steele has agreed to accept this responsibility.

19.

Glass 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. Glass 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.

Glass 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.

If Glass is admitted to practice law in other 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. Foster Glass represented he is not admitted in any other jurisdictions.

22.

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

EXECUTED this 12th day of November, 2014.

/s/ Foster A. Glass

Foster A. Glass

OSB No. 751334

EXECUTED this 20th day of November, 2014.

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. 13-20  
)  
DANIEL H. KOENIG , )  
)  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: John C. Fisher  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and  
RPC 1.16(a)(1). Stipulation for Discipline. Public  
Reprimand.  
Effective Date of Order: December 22, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.16(a)(1).

DATED this 22nd day of December, 2014.

/s/ Pamela E. Yee

Pamela E. Yee

State Disciplinary Board Chairperson

/s/ Robert A. Miller

Robert A. Miller, Region 2

Disciplinary Board Chairperson

### STIPULATION FOR DISCIPLINE

Daniel H. Koenig, attorney at law (hereinafter “Koenig”), 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.

Koenig was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 21, 1973, 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.

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

4.

On February 4, 2013, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against Koenig for alleged violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.16(a)(1), and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

#### **Facts**

5.

In June 2005, Koenig represented Shawn Field (hereinafter “Field”) in a criminal matter in which he was charged in Benton County with murder, assault, and criminal mistreatment of his girlfriend’s 3-year old daughter, and manufacture of a controlled substance. Koenig was first appointed to represent Field at trial.

6.

Field was acquitted on all counts of aggravated murder and intentional murder but was convicted of felony murder. In December 2006, Koenig agreed to file an appeal on behalf of Field. Koenig was retained by Field’s parents to handle the appeal to the Oregon Court of Appeals. Field’s Notice of Appeal was filed on December 6, 2006. On July 9, 2007, Koenig filed the appellate brief. On September 30, 2009, the Oregon Court of Appeals

affirmed the trial court's decision. Under ORAP 9.05(2)(a), Field had 35 days to file a motion for review by the Oregon Supreme Court.

7.

When Field and his parents told Koenig they could not pay for further appeals, Field requested that Koenig withdraw and have the Oregon Public Defense Services Appellate Division (hereinafter "OPDS-AD") substituted as counsel. Field also requested that Koenig advise him of the deadline to file his petition for review by the Oregon Supreme Court. Koenig agreed to assist Field to secure the appointment of new counsel.

8.

Over several months, Field requested Koenig provide him with information about his appeal and, in particular, about the deadline for filing a petition for review or whether OPDS-AD could be or had been substituted as counsel. Koenig provided Field with copies of documents he filed with the Oregon Supreme Court, but failed to correspond with Field between October 29, 2009, and March 2010, about these issues of the status of the case.

9.

In October 2009, Koenig filed a motion for extension of time (hereinafter "MOET") to file the petition for review by the Oregon Supreme Court. The Oregon Supreme Court granted the MOET and gave Koenig to December 14, 2009, to file the petition.

10.

For a period between October 2009, and December 2009, Koenig attempted to secure OPDS-AD's agreement to substitute into Field's case. Koenig was unsuccessful in persuading OPDS-AD to substitute as counsel; he failed to personally inform Field that OPDS-AD declined the representation.

11.

Koenig filed a second MOET and requested a 120-day extension. The Oregon Supreme Court denied the 120-day extension but granted a 50-day extension to February 2, 2010.

12.

Koenig filed a third MOET on January 21, 2010, and requested an extension to April 13, 2010. The Oregon Supreme Court denied Koenig's third MOET request. Between January and March 2010, Koenig failed to consult with Field about whether to file a third MOET and that it was denied by the court; failed to inform Field that the time for filing the petition for review had expired; failed to inform Field that OPDS-AD would not substitute as counsel; and failed to inform Field that he had not withdrawn from the case and that he did not file a petition for review on Field's behalf.

13.

During this period Field made several attempts to contact Koenig. Koenig received Field's written inquiries but did not respond. Koenig believed that his office assistant had forwarded copies of the court orders to Field and assumed he was aware of the status of his case. Koenig did not take any affirmative steps to confirm whether Field received the correspondence.

14.

Koenig took no action in response to the dismissal, failed to pursue the matter further, failed to withdraw from the case or secure substitute counsel, and failed to personally inform Field of the dismissal until October 2010.

### **Violations**

15.

Koenig admits that, by engaging in the conduct described in paragraphs 5 through 14, he violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.16(a)(1).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.4(a)(3) (engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) should be and, upon the approval of this stipulation, is dismissed.

### **Sanction**

16.

Koenig 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 Koenig'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 ethical duties are those obligations that a lawyer owes to clients. *Standards*, p. 5, *Theoretical Framework*. In this case, Koenig violated his duty to act with reasonable diligence and promptness in representing his client. *Standards*, § 4.4. Koenig also violated a duty he owed to the profession to withdraw when he was required to do so. *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. *Standards*, *Definitions*. "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, Definitions*. Koenig acted negligently in failing to withdraw from the case. However, Koenig knowingly failed to notify Field of the status of his case or thereafter consult with him on next steps after the OPDS-AD refused to substitute on to the case and the Oregon Supreme Court dismissed the appeal.

- c. **Injury.** Injury can be either actual or potential under the Standards. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Although it is questionable how viable Field's appeal was at the time of the dismissal, there was potential injury to the extent that the appeal had any merit. There was actual injury insofar as Field was not able to have his day in court or be heard on his appeal. While Koenig had ample time to locate other substitute counsel, he thereafter failed to withdraw or procure the OPDS-AD on Field's behalf, resulting in dismissal of Field's appeal. Koenig's failure to communicate with Field also 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 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. Substantial experience in the practice of law. *Standards*, § 9.22(i). Koenig has been a lawyer in Oregon since 1973.
  - 2. Vulnerability of victim. *Standards*, § 9.22(h). Field was an inmate in an Oregon correctional facility without the ability to contact his attorney other than by letter writing or telephone.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  - 1. Absence of prior disciplinary record. *Standards*, § 9.32(a).
  - 2. He cooperated with the disciplinary authority in the investigation of his conduct and in resolving this proceeding. *Standards*, § 9.32(e).

17.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. *Standards*, § 4.43. The Standards provide that a suspension is appropriate where 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. In so far as Koenig has no prior discipline history and this appears to be an isolated incident, a reprimand appears to be the appropriate sanction.

18.

Oregon case law is in accord for similar misconduct. See *In re MacNair*, 21 DB Rptr 316 (2007) (reprimand for violation of RPC 1.3 and RPC 1.4(a)); *In re Bisaccio*, 21 DB Rptr 35 (2007) (reprimand for violation of DR 6-101(B) and RPC 8.4(a)(4)); *In re McBride*, 21 DB Rptr 19 (2007) (reprimand for violation of RPC 1.3).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that Koenig shall be publicly reprimanded for violation of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (failure to keep client reasonably informed about the status of a case or respond to reasonable requests for information); RPC 1.4(b) (failure to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation); and RPC 1.16(a)(1) (failure to withdraw from representation when the lawyer's representation will result in violation of the Rules of Professional Conduct or other laws), the sanction to be effective once the stipulation is approved.

20.

Koenig 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.

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

22.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel of the Oregon State Bar, the charges and sanction were approved by the State Professional Responsibility Board, and 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 4th day of December, 2014.

/s/ Daniel H. Koenig

Daniel H. Koenig

OSB No. 731724

EXECUTED this 12th day of December, 2014.

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. 14-73  
)  
SCOTT P. BOWMAN, )  
)  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: Michael J. Slominski  
Disciplinary Board: None.  
Disposition: Violation of RPC 8.4(a)(2). Stipulation for Discipline.  
180-day suspension, all but 30 days stayed, 2-year  
probation.  
Effective Date of Order: February 21, 2015

**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 180 days, all but 30 days stayed pending the Accused's successful completion of a 2-year period of probation, effective 60 days after the stipulation is approved, for violation of RPC 8.4(a)(2).

DATED this 23rd day of December, 2014

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Bowman was admitted by the Oregon Supreme Court to the practice of law in Oregon on June 9, 2003, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

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

4.

On September 15, 2014, a Formal Complaint was filed against Bowman pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 8.4(a)(2). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

### Facts

5.

On December 14, 2012, in violation of ORS 813.010(1)–(4), Bowman drove a vehicle upon a premises open to the public while he was under the influence of intoxicating liquor and had 0.08 percent or more by weight of alcohol in his blood as shown by chemical analysis of the breath or blood made under ORS 813.100, ORS 813.140, or ORS 813.150.

6.

On January 11, 2013, Bowman’s driving privileges were suspended or revoked under ORS 813.410, by a court or the Department of Transportation, as a result of his refusal to take a test prescribed in ORS 813.100 or taking a breath or blood test the result of which disclosed a blood alcohol content of 0.08 percent or more by weight.

7.

On January 31, 2013, in violation of ORS 813.010(1) and ORS 811.182(4)(c), Bowman drove a vehicle upon a highway and premises open to the public while he was under the influence of intoxicating liquor and had 0.08 percent or more by weight of alcohol in his blood as shown by chemical analysis of the breath or blood made under ORS 813.100, ORS 813.140, or ORS 813.150. Bowman's driving privileges remained suspended or revoked on that date as described in paragraph 6 above, and he knew at the time he was driving that those privileges remained suspended or revoked.

8.

On November 18, 2013, in connection with his conviction for violating ORS 813.010 for the December 12, 2012, and January 31, 2013, incidents described above, the court ordered that Bowman's driving privileges be suspended.

9.

On December 21, 2013, in violation of ORS 811.182(1), Bowman drove a vehicle upon a highway. Bowman's driving privileges remained suspended or revoked on that date as described in paragraph 8 above, and he knew at the time he was driving that those privileges remained suspended or revoked.

### **Violations**

10.

Bowman admits that by repeatedly and knowingly driving under the influence of intoxicants, and while his driving privileges were suspended or revoked, he engaged in criminal conduct that reflected adversely on his fitness to practice law, in violation of RPC 8.4(a)(2).

### **Sanction**

11.

Bowman 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 Bowman'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.** Bowman's criminal conduct violated his duty to maintain personal integrity. *Standards*, § 5.1.
- b. **Mental State.** Bowman acted knowingly.

- c. **Injury.** Bowman's acts of driving while under the influence of intoxicants involved great potential for harm. Every time that he chose to drive while intoxicated, Bowman risked serious bodily injury to others. *In re McDonough*, 336 Or 36, 42, 77 P3d 306 (2003). When he repeatedly chose to drive after his driver license was suspended for driving while intoxicated, Bowman caused actual injury to the legal system by undermining the orders that had suspended his driving privileges and by demonstrating an indifference to the law. Bowman's criminal offenses also caused potential injury to the legal profession by damaging the public's confidence in lawyers. *McDonough*, 336 Or at 42.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior disciplinary offenses. *Standards*, § 9.22(a). In 2010, Bowman was found to have violated RPC 8.4(a)(2) (criminal conduct—willful failure to file or pay taxes for tax years 2005–2007—that reflected adversely on fitness to practice); RPC 8.1(a)(2) (knowing failure to provide information to disciplinary authorities); RPC 5.5(a) (practicing law when not authorized to do so); RPC 5.4(a) (sharing legal fees with a non-lawyer); RPC 1.15-1(a), (c) (failing to safeguard client funds); RPC 1.8(h)(1), (3) (improperly entering into an agreement with a client to limit malpractice liability); and RPC 1.4(a) (failure to keep a client reasonably informed). Bowman was suspended for one year, all but four months stayed pending a two-year probation that included treatment for depression and anxiety. *In re Bowman*, 24 DB Rptr 144 (2010). Bowman successfully completed probation in September 2012.
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Full and free disclosure and cooperative attitude toward proceedings. Bowman was cooperative in the Bar's investigation of his conduct. *Standards*, § 9.32(e)
  2. Imposition of other penalties or sanctions. *Standards*, § 9.33(k). Bowman served a total of 36 days of incarceration and was assessed over \$6,000 in criminal fines as a result of his criminal driving offenses described above.
  3. Remorse. *Standards*, § 9.33(l).

12.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that reflects seriously adversely on the lawyer's fitness to

practice but the conduct does not involve elements of dishonesty, distribution of controlled substances, or intentional killing of another. *See Standards*, § 5.12.

13.

In *In re McDonough*, 336 Or 36, 77 P3d 306 (2003), the court imposed an 18-month suspension upon an attorney who had four acts of DUII, five acts of DWS, three acts of reckless driving, one act of fourth-degree assault, and one act of recklessly endangering another person (which also involved one of the incidents of driving when he should not have been). By the time of the adjudication, McDonough had admitted he needed treatment for his alcoholism but had not established any meaningful and sustained recovery from his alcohol dependency. Bowman has done more in terms of acknowledging his dependency and taking steps to address it than had McDonough. In *In re Chase*, 339 Or 452, 121 P3d 1160 (2005), the court imposed a 30-day suspension upon a lawyer who had willfully and repeatedly failed to comply with a child support order. The present matter is more serious than *Chase* but less serious than *McDonough*.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Bowman shall be suspended 180 days for violation of RPC 8.4(a)(2), the sanction to be effective 60 days after this stipulation is approved. All but 30 days of the suspension shall be stayed pending Bowman's successful completion of a 2-year period of probation with the following conditions:

- (a) Bowman shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (b) Bowman shall not possess or consume any alcoholic beverages, controlled substances, drug paraphernalia, or prescription medications, except as prescribed by a licensed physician. Bowman shall consume any prescribed substance only as prescribed.
- (c) Bowman is currently subject to an agreement with the State Lawyers Assistance Committee (hereinafter "SLAC"). In Bowman's first monthly report to Disciplinary Counsel's Office, he shall provide a written list of the terms and recommendations in the alcohol abuse treatment program supervised by SLAC. Bowman shall comply with all of the terms of that agreement and any subsequent modifications to that agreement.
- (d) A designee of SLAC shall serve as Bowman's probation supervisor (hereinafter "Supervisor"). Bowman agrees to cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Bowman's clients, the profession, the legal system, and the

public. Bowman shall meet with Supervisor in person twice a month for the purpose of monitoring Bowman's sobriety and compliance with the terms of this stipulation for discipline.

- (e) Bowman authorizes Supervisor to communicate with Disciplinary Counsel's Office regarding Bowman's compliance or noncompliance with the terms of this agreement and to release to Disciplinary Counsel's Office any information Disciplinary Counsel's Office deems necessary to permit it to assess Bowman's compliance.
- (f) Bowman shall successfully complete his formal criminal probation as required in Clackamas County Case Nos. CR1310111 and CR 1311963.
- (g) In the event Bowman possesses or consumes alcoholic beverages or controlled substances, except medications prescribed by a licensed physician, Bowman shall immediately notify Supervisor.
- (h) Bowman shall report to Supervisor and Disciplinary Counsel's Office within 7 days of the occurrence of any civil, criminal or traffic action or proceeding initiated by complaint, citation, warrant or arrest, or any incident not resulting in complaint, citation, warrant or arrest, in which it is alleged that he has consumed alcohol or any controlled substance.
- (i) Bowman shall report to Supervisor and Disciplinary Counsel's Office any violation of his formal criminal probation, within 7 days of the violation.
- (j) Bowman shall submit to random urinalysis tests at a facility designated by the Bar and that is licensed or accredited to perform such tests, and shall submit to such tests within eight (8) hours of the Bar's requests that he do so.
- (k) On or before the 15th day of each month after Bowman is reinstated to active practice, Bowman shall submit to Disciplinary Counsel's Office a written report, approved as to substance in writing by Supervisor, verifying that:
  - (1) Bowman has maintained his sobriety during the quarter and has not engaged in any incidents involving alcohol or controlled substances;
  - (2) Bowman has participated in and complied with the terms of the alcohol treatment as directed by SLAC;
  - (3) Bowman has cooperated and complied with all reasonable requests made by SLAC and Supervisor.
  - (4) Bowman is otherwise in compliance with the terms of this agreement applicable to his treatment for alcohol abuse.
- (l) Bowman hereby waives any privilege or right of confidentiality to permit the disclosure by Supervisor to Disciplinary Counsel's Office

of any privileged information concerning compliance or non-compliance with this agreement, and any recommendations by any treatment provider.

- (m) Bowman hereby authorizes Supervisor, his personal health care professionals, the Oregon Attorney Assistance Program, SLAC, Alcoholics Anonymous, and other medical, mental health, and drug and alcohol treatment providers, and each of their respective representatives, to communicate with and release information otherwise protected from disclosure by state or federal law to Disciplinary Counsel's Office and Supervisor, to the extent necessary to disclose Bowman's participation, compliance, and non-compliance with the terms of this agreement. Bowman agrees to sign any releases required by his treatment providers to permit them to communicate with Disciplinary Counsel's Office and Supervisor.
- (n) Bowman acknowledges that Supervisor will report violations of this agreement to Disciplinary Counsel's Office.
- (o) Bowman authorizes Supervisor to communicate with Disciplinary Counsel's Office regarding Bowman's compliance or noncompliance with the terms of this agreement, and to release to Disciplinary Counsel's Office any information, including information from SLAC, that Disciplinary Counsel deems necessary for it to assess Bowman's compliance.
- (p) Bowman has been represented in this proceeding by Michael J. Slominski (hereinafter "Slominski"). Bowman and Slominski hereby authorize direct communication between Bowman and Disciplinary Counsel's Office after the date this agreement is signed by both parties, for the purposes of administering this agreement and monitoring Bowman's compliance.
- (q) If Bowman has not complied with any term of this agreement, he shall notify Disciplinary Counsel's Office of his non-compliance and the reasons for noncompliance in the monthly report next due following the noncompliance.
- (r) Bowman is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation.
- (s) In the event Bowman fails to comply with any conditions of his probation, Disciplinary Counsel's Office may initiate proceedings to revoke Bowman's probation pursuant to BR 6.2(d), and impose the

stayed 150 days of the suspension. In such event, the probation and its terms shall be continued until resolution of the revocation proceedings.

15.

Bowman 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, Bowman has arranged for Jon Henrickson, an active member of the Bar, to either take possession of or have ongoing access to Bowman's client files and serve as the contact person for clients in need of the files during the term of his suspension. Bowman represents that Henrickson has agreed to accept this responsibility.

16.

Bowman 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. Bowman 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.

17.

Bowman 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.

Bowman 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 Bowman is admitted: None.

19.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the 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 Bowman*, 28 DB Rptr 308 (2014)

EXECUTED this 5th day of December, 2014.

/s/ Scott P. Bowman

Scott P. Bowman

OSB No. 032174

EXECUTED this 15th day of December, 2014.

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. 14-125  
)  
ROBERT ROSENTHAL, )  
)  
Accused. )

Counsel for the Bar: Susan Roedl Cournoyer  
Counsel for the Accused: Mark J. Fucile  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(2). Stipulation for Discipline.  
Public Reprimand.  
Effective Date of Order: December 30, 2014

**ORDER APPROVING STIPULATION FOR DISCIPLINE**

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of RPC 8.4(a)(2).

DATED this 30th day of December, 2014.

/s/ Pamela E. Yee  
Pamela E. Yee  
State Disciplinary Board Chairperson

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

### STIPULATION FOR DISCIPLINE

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

1.

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

2.

Rosenthal was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 21, 1973, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Rosenthal 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 22, 2014, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against Rosenthal for alleged violation of RPC 8.4(a)(2) (committing a criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer in other respects) 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 2010, Rosenthal began a long-term relationship with an adult female prostitute. Over a period of years, Rosenthal paid her a fee to engage in sexual conduct or sexual contact. Although the prostitute operated her business in her home—which was located in a residential neighborhood and in which her minor child resided—the child was never in or near the house during Rosenthal’s sexual contacts or encounters with the prostitute. In April 2014, Rosenthal pleaded guilty to and was convicted of five counts of patronizing a prostitute, in violation of ORS 167.008, a Class A misdemeanor.

## Violations

6.

Rosenthal admits that, by repeatedly patronizing a prostitute over an extended period of time, he violated RPC 8.4(a)(2).

## Sanction

7.

Rosenthal 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 Rosenthal’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.** Rosenthal violated his duty to the public and to the profession to maintain his personal integrity. *Standards*, § 5.0, § 7.0.
- b. **Mental State.** By paying a fee to another to engage in sexual conduct or sexual contact, Rosenthal acted intentionally.
- c. **Injury.** Rosenthal’s criminal conduct caused injury to the profession and the public, and potential injury to the prostitute’s minor child and neighbors.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
  1. Pattern of misconduct. *Standards*, § 9.22(c);
  2. Multiple offenses. *Standards*, § 9.22(d);
  3. Substantial experience in the practice of law. *Standards*, § 9.22(b); and
  4. Selfish motive. *Standards*, § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
  1. Absence of prior discipline. *Standards*, § 9.32(a);
  2. Full and free disclosure (Rosenthal cooperated with law enforcement and reported his conviction to the Bar). *Standards*, § 9.32(e); and
  3. Imposition of other penalties (Rosenthal was sentenced to 18 months’ probation in the criminal proceeding). *Standards*, § 9.32(k).

Under the *ABA Standards*, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that does not involve elements of false swearing, fraud, theft, selling controlled substances, or intentional killing but that seriously adversely reflects on fitness to practice. *Standards*, § 5.12. Reprimand is generally appropriate when a

lawyer knowingly engages in other conduct that reflects adversely upon fitness to practice law. *Standards*, § 5.13. “[A] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate such indifference to legal obligation as to justify a reprimand.” *Standards*, § 5.13, *Commentary*.

8.

Oregon case law does not offer any similar fact patterns for guidance in this matter. However, many cases involving the commission or conviction of misdemeanors have resulted in public reprimands when there is no prior discipline. *See, e.g., In re Flannery*, 334 Or 224, 47 P3d 891 (2002) (attorney convicted of submitting false application for a driver license (ORS 807.530)); *In re Levy*, 25 DB Rptr 32 (2011) (attorney convicted of harassment by offensive physical contact with the intimate parts of another); *In re Bernabei*, 23 DB Rptr 1 (2009) (attorney convicted of public indecency (ORS 163.465)); *In re Arnold*, 22 DB Rptr 13 (2008) (attorney convicted of providing alcohol to a person under the age of 21 years (ORS 471.410(2))).

9.

Consistent with the *Standards* and Oregon case law, the parties agree that Rosenthal shall be publically reprimanded for violation of RPC 8.4(a)(2), the sanction to be effective the date this stipulation is approved.

10.

Rosenthal 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.

11.

Rosenthal 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 Rosenthal is admitted: Illinois.

12.

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

EXECUTED this 23rd day of December, 2014.

/s/ Robert Rosenthal

Robert Rosenthal

OSB No. 732597

EXECUTED this 24th day of December, 2014.

OREGON STATE BAR

By: /s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer

OSB No. 863381

Assistant Disciplinary Counsel



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