

**DISCIPLINARY
BOARD
REPORTER**

Report of Lawyer Discipline Cases
Decided by the Disciplinary Board
and by the
Oregon Supreme Court
for 2018

VOLUME 32

January 1, 2018, to December 31, 2018

Oregon
State
Bar

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 2018 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 32 DB Rptr ____ (2018).

In 2018, 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, 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 citation errors, but no substantive changes have been made to them. Because of space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar. Those interested in a verbatim copy of an opinion should submit a public records request to the Public Records Coordinator at <<https://tinyurl.com/osbar-publicrecords>>. Final decisions of the Disciplinary Board issued on or after January 1, 2016, are also available at the Oregon State Bar Web site, 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 318.

COURTNEY DIPPEL
Disciplinary Counsel
Oregon State Bar

CONTENTS

<i>Oregon Supreme Court, Board of Governors, State Professional Responsibility Board</i>	iv
<i>Disciplinary Board</i>	
2019	v
2018	vi
<i>List of Cases Reported in This Volume</i>	vii
<i>Cases</i>	1–424

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LIST OF CASES REPORTED

Volume 32 DB Reporter

(Includes summaries of Oregon Supreme Court stipulations and decisions
that also appear in the Advance Sheets)

<i>In re Ambrose</i>	28
Trial Panel Opinion. Dismissal.	
<i>In re Baran</i>	243
Violation of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c). Stipulation for Discipline. Public Reprimand.	
<i>In re Barrett</i>	51
Violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Stipulation for Discipline. 90-day suspension.	
<i>In re Bertoni</i>	327
Supreme Court Opinion. One-year suspension.	
<i>In re Bosket</i>	41
Violation of RPC 1.3, RPC 1.4(a), and RPC 1.16(a). Stipulation for Discipline. 30-day suspension, all stayed, one-year probation.	
<i>In re Bosse</i>	283
Violation of RPC 8.4(a)(2). Stipulation for Discipline. Six-month suspension.	
<i>In re Breathouwer</i>	348
Violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 8.1(a)(2). Stipulation for Discipline. Public Reprimand.	
<i>In re Bruce</i>	290
Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Stipulation for Discipline. Public Reprimand.	
<i>In re Buchanan</i>	308
Violation of RPC 1.5(a). Trial Panel Opinion. Public Reprimand.	
<i>In re Camacho</i>	150
Violation of RPC 3.4(c) and RPC 8.4(a)(4). Stipulation for Discipline. 6-month suspension, all but 30 days stayed, 2-year probation.	
<i>In re Champer</i>	226
Violation of RPC 8.4(a)(2) and ORS 9.527(2). Stipulation for Discipline. Six-month suspension.	

<i>In re Clark</i>	403
Violation of RPC 1.3. Stipulation for Discipline. Public Reprimand.	
<i>In re Crawford</i>	278
Violation of RPC 1.16(d). Stipulation for Discipline. Public Reprimand.	
<i>In re Daraee</i>	252
Violation of RPC 1.4(a), RPC 1.4(b), RPC 1.16(a)(3), RPC 1.16(c), and RPC 1.16(d). Stipulation for Discipline. Public Reprimand.	
<i>In re Duckler</i>	343
Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.	
<i>In re Fredrick</i>	388
Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(4), and ORS 9.160(1). Stipulation for Discipline. 120-day suspension, all but 60 days stayed, two-year probation.	
<i>In re Glass</i>	259
Violation of RPC 8.4(a)(4). Stipulation for Discipline. 60-day suspension, all stayed, one-year probation.	
<i>In re Gramson</i>	120
Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b). Stipulation for Discipline. 60-day suspension, all stayed, 2-year probation.	
<i>In re Griffith</i>	167
Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(4). Trial Panel Opinion. 18-month suspension.	
<i>In re Hanson</i>	159
Violation of RPC 1.1, RPC 1.2, RPC 1.5(a), RPC 8.4(a)(4). Stipulation for Discipline. 30-day suspension, all stayed, 1-year probation.	
<i>In re Hernandez</i>	72
Violation of RPC 1.1, RPC 1.5(a), RPC 1.7(a)(2), RPC 1.15-1(a), and RPC 1.16(a)(1). Stipulation for Discipline. 60-day suspension, all but 30 days stayed, 1-year probation.	
<i>In re Jagger</i>	1
Violation of RPC 1.9(a). Trial Panel Opinion. 60-day suspension with formal reinstatement.	
<i>In re Kang</i>	191
Violation of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 1.16(a)(1), and RPC 5.1(b). Stipulation for Discipline. 60-day suspension.	
<i>In re Klahn</i>	86
Violation of RPC 4.2, RPC 4.4(a), and RPC 8.4(a)(4). Stipulation for Discipline. 120-day suspension.	

<i>In re Klemp</i>	249
Supreme Court Opinion. Public Reprimand.	
<i>In re Landerholm</i>	372
Violation of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c), and RPC 5.3(a). Stipulation for Discipline. One-year suspension, all stayed, three-year probation.	
<i>In re Larvik</i>	129
Violation of RPC 1.16(d), RPC 3.3(a)(1), RPC 5.3, RPC 8.4(a)(3), RPC 8.4(a)(4). Stipulation for Discipline. 120-day suspension, all but 30 days stayed, pending 2-year probation.	
<i>In re Leonard</i>	358
Violation of RPC 1.7(a)(2), RPC 1.8(a), RPC 1.9(a), and RPC 1.9(c). Stipulation for Discipline. 90-day suspension, all but 30 days stayed, two-year probation.	
<i>In re Marshall</i>	140
Violation of RPC 8.4(a)(3). Stipulation for Discipline. 1-year suspension, all but 90 days stayed, 2-year probation.	
<i>In re Maurer</i>	387
Supreme Court Opinion. 30-day suspension.	
<i>In re McGraw</i>	158
Supreme Court Opinion. 18-month suspension.	
<i>In re Myers</i>	371
Violation of RPC 8.2(a), RPC 8.2(b), RPC 8.4(a)(3). Disciplinary Board Order Imposing Reciprocal Discipline. Disbarment.	
<i>In re Obert</i>	232
Violation of RPC 1.7(a)(2), RPC 1.9(a), RPC 1.16(a)(1), RPC 1.16(a)(3), and RPC 1.16(d). Stipulation for Discipline. 30-day suspension, all stayed, one-year probation.	
<i>In re O'Rourke</i>	36
Violation of RPC 1.16(d). Stipulation for Discipline. Public Reprimand.	
<i>In re Peters</i>	213
Violation of RPC 1.3, RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c), and RPC 8.4(a)(4). Stipulation for Discipline. 8-month suspension, all but 30 days stayed, 2-year probation.	
<i>In re Peterson</i>	10
Violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c). Stipulation for Discipline. 6-month suspension, all but 30 days stayed, 2-year probation.	
<i>In re Ramirez</i>	34
Supreme Court Opinion. 1-year suspension.	

<i>In re Redden</i>	302
Violation of RPC 1.15-1(d) and RPC 1.16(d). Stipulation for Discipline. 30-day suspension.	
<i>In re Sandlow</i>	385
Violation of RPC 8.4(a)(2). Disciplinary Board Order Imposing Reciprocal Discipline. Six-month suspension.	
<i>In re Schlesinger</i>	198
Violation of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 1.16(a)(1). Stipulation for Discipline. 30-day suspension, all stayed, 1-year probation.	
<i>In re Seher</i>	408
Violation of RPC 5.5(b)(2), RPC 7.1, RPC 8.1(a)(2), and RPC 8.4(a)(4). Trial Panel Opinion. Five-month suspension.	
<i>In re Sharp</i>	21
Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3). Trial Panel Opinion. Disbarment.	
<i>In re Steen</i>	322
Violation of RPC 1.6(a). Stipulation for Discipline. Public Reprimand.	
<i>In re Stewart</i>	317
Violation of RPC 1.3 and RPC 1.15-1(d). Stipulation for discipline. 30-day suspension.	
<i>In re Stuart</i>	268
Violation of RPC 8.4(a)(2) and ORS 9.527(2). Stipulation for Discipline. Seven-month suspension, all stayed, three-year probation.	
<i>In re Swihart</i>	296
Violation of RPC 1.5(a). Stipulation for Discipline. Public Reprimand.	
<i>In re Thompson</i>	328
Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.15-1(a). Stipulation for Discipline. Public Reprimand.	
<i>In re Trigsted</i>	208
Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.	
<i>In re Walton</i>	383
Violation of RPC 3.3(a)(1), RPC 5.4(a), RPC 5.5(a), and RPC 8.4(a)(3). Disciplinary Board Order Imposing Reciprocal Discipline. 30-day suspension.	
<i>In re Washburn</i>	419
Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.	
<i>In re Webb</i>	251
Supreme Court Opinion. Disbarment.	

<i>In re Wilson</i>	179
Violation of RPC 8.1(a)(2) and RPC 8.4(a)(3). Trial Panel Opinion. Disbarment.	
<i>In re Witte</i>	333
Violation of RPC 1.15-1(a) and RPC 1.15-1(b). Stipulation for Discipline. 30-day suspension, all stayed, two-year probation.	
<i>In re Wolf</i>	58
Violation of RPC 1.15-1(b), RPC 5.5(a), RPC 8.4(a)(3), and ORS 9.160(1). Stipulation for Discipline. 1-year suspension, all but 90 days stayed, 2-year probation.	

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case Nos. 16-153 and 17-49
)
JAMES C. JAGGER,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: None
Disciplinary Board: Debra E. Velure, Chairperson
James K. Walsh
George A. McCully, Public Member
Disposition: Violation of RPC 1.9(a). Trial Panel Opinion. 60-day
suspension with formal reinstatement.
Effective Date of Opinion: January 3, 2018

TRIAL PANEL OPINION

The James C. Jagger (hereinafter “Accused”) is an attorney, admitted by the Supreme Court of the State of Oregon and has been practicing 47 years. He resides in Lane County, Oregon, and is active in the Oregon State Bar.

Two cases were brought by the Oregon State Bar in its Amended Complaint:

1. Case No. 16-153, filed November 8, 2016, alleges that Accused violated RPC 1.5(a) and RPC 1.16(d). The Oregon State Bar (hereinafter “Bar”) alleges that the Accused charged an excessive fee and failed to return client files in representing Lisa Dunihoo (hereinafter “Dunihoo”). The Trial Panel found no violation.

2. Case No. 17-49, filed July 21, 2017, alleges that the Accused violated RPC 1.7(a)(2), RPC 1.9(a), and RPC 1.16(a)(1). The Bar alleges that the Accused simultaneously represented both Andrew Backer (hereinafter “Backer”) and DeDe Young (hereinafter “Young”) when there was a conflict. The Bar alleges that the Accused failed to obtain informed consent for this representation from Backer. The Trial Panel found the Accused to be in violation of RPC 1.9(a).

On September 29, 2017, the undersigned Trial Panel convened to hear the charges against the Accused. The hearing concluded in one day. The Accused appeared in person and represented himself. The Bar was represented by Amber Bevaqua-Lynott.

The Bar called the Accused and three other witnesses to testify and submitted a number of exhibits. The Accused testified on his own behalf and submitted several exhibits.

There were no relevant or disputed prehearing rulings. All parties agreed to have the hearing in Eugene, at the office of the Trial Panel Chair.

The Accused filed a Motion to Reopen the Record on October 5, 2017, which was objected to by the Bar. The Accused's Motion is granted and the additional evidence submitted by the Accused has been considered in this decision.

REVIEW STANDARD

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

CASE NO. 16-153

SUMMARY OF FACTS

On March 18, 2015, Duniho hired the Accused to represent her on criminal drug charges for a flat fee of \$6,500. On June 12, 2015, after Duniho failed to appear for a court appearance where a bench warrant was issued, the court signed an order allowing the Accused to withdraw as counsel. At the time of his withdrawal, the Accused had not completed all legal services under the fee agreement with Duniho. Duniho requested that her file be turned over to substitute defense counsel. On August 12, 2015, Duniho's client file was provided to substitute defense counsel. On January 20, 2016, the accused returned \$250 to Duniho as the unearned portion of his fee.

DISCUSSION AND CONCLUSIONS

The applicable RPC provide as follows:

RULE 1.5 FEES

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

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

...

- (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.

The Bar concedes that the actual fee charged by the Accused is not excessive, but, instead, its position is that the Trial Panel should find a violation of RPC 1.5(a) and RPC 1.16(d) because the Accused retained the fee and client file for an unreasonable period of time. While the Bar argued that the bar complaint filed by Duniho on July 22, 2015 triggered the Accused's attempts to refund a portion of his fee and return her file, the facts do not support such a theory.

The Accused outlined reasonable attempts and circumstances that resulted in delays in the return of Duniho's file and unearned portion of the fee. The Bar's only witness, the substitute defense counsel, confirmed the personality traits and circumstances of Duniho that accounted for any delays encountered by the Accused in meeting his responsibilities as to returning client files and unearned fees under the RPC. The absence of testimony from Duniho created a lingering doubt about the Bar's theory and undermined its attempt to provide clear and convincing evidence of a violation of RPC 1.5(a) or RPC 1.16(d). The Trial Panel concludes that there has been no violation of RPC 1.5(a) or RPC 1.16(d).

CASE NO. 17-49

SUMMARY OF FACTS

The Accused represented Backer in a criminal matter stemming from an October 31, 2015 arrest relating to an altercation with Young, the mother of his child. On December 23, 2015, the Accused notified the Lane County District Attorney's office by letter of his representation of Backer and asked that he be contacted if charges were filed. Nearly a year later, at some point between August 15 and August 22, 2016, Backer contacted the Accused and told him about an event on August 15, 2016 where Young attempted to run him down with her car. On August 22, 2016, Young was arrested and taken in to custody for her criminal actions against Backer. The Accused met with Young that day at the jail and filed a formal motion for Young's release. The Accused filed a formal notice of representation with the court on August 23, 2016. Backer learned of the Accused's representation of Young on August 23, 2016 and he contacted the Accused on August 25, 2016 by voice message to remind him about the connection between the defense of Young and the August 15, 2016 incident they had discussed earlier. The Accused contacted Backer by email asking if it was "alright with you that I represent [Young] on that criminal matter?" On August 29, 2016, Backer responded by email that he "consent[s] fully" to the Accused's representation of Young.

DISCUSSION AND CONCLUSIONS

The Accused concedes that there was a current conflict of interest between Backer and Young during his representation under RPC 1.7.

The issue before the Trial Panel is whether the Accused obtained “informed consent” from Backer when he continued to represent Young under RPC 1.7(b) which provides:

- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
 - (4) each affected client gives informed consent, confirmed in writing.

RPC 1.0(g) defines “informed consent” as

the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

The Accused first requested Backer’s consent by email on August 25, 2016. The Accused stated that he spoke to Backer and explained there was a “conflict.” The Accused believed identifying the situation as a “conflict” to Backer was sufficient. Backer testified that he was under duress in “wanting to get [Young] out of jail” out of concern for his son’s care. Also, his initial email response to the Accused stated that he “would appreciate it if you did not represent [Young] in this criminal case.” He eventually sent an email August 29, 2016 indicating that he “fully consented” to the Accused representation of Young.

What is revealed further from Backer’s testimony is that the Accused failed to provide adequate information about the material risks of having information about the criminal incident provided by Backer that might compromise his position in a custody dispute. He failed to explain a number of risks, including the possibility that his representation might be limited as to advice he could provide regarding custody of his son. The Accused not only failed to provide adequate information but he failed to explain the material risks. Most importantly, however, the Accused failed to provide adequate, or even any, information about the reasonably

available alternatives to the proposed course of action to allowing him to represent both Backer and Young. A lawyer who did not have a duty to Young would have identified that the outcome of the Young criminal matter would have a significant impact when deciding custody. Finally, the August 29, 2016 email from Backer to the Accused “fully consenting” does not meet the requirements of RPC 1.0(g).

The Accused provided an implausible explanation in an attempt to excuse his conduct in letting a conflict be created to begin with. While admitting he had contact with Backer before he met with Young in jail to initiate his representation, he testified he did not remember the conversation with Backer when he first met with Young. He offered that Young was just too distraught for him to put the pieces together to lead to the connection between the story relayed to him by Backer and the altercation for which Young was detained. He had prior knowledge of the relationship between Backer and Young where Backer had been charged in an altercation. It is highly improbable that the Accused simply “forgot.”

The Accused also exhibited “blame shifting” in his testimony to circumvent responsibility. He identified staff as the culprit in filing a notice of representation before obtaining consent and used his communications with legal counsel as a cover for his lack of compliance. What is most revealing is that counsel for the Accused specifically advised him to withdraw from his representation of Young and he choose not to follow that advice before sending his first email to Backer to obtain consent.

The Trial Panel concludes that the Accused failed to obtain the informed consent of Backer where a current-client conflict existed in violation of RPC 1.9(a).

SANCTION

Finding that the Accused did violate the Rules of Professional Conduct, we must impose a sanction, and look first to the *ABA Standards for Imposing Lawyer Sanctions*, 2005 (hereinafter “*Standards*”). Under *Standards*, § 3.0, the following factors are considered:

- (a) the duty violated;
- (b) the lawyer’s mental state;
- (c) the potential or actual injury caused by the lawyer’s misconduct; and
- (d) the existence of aggravating or mitigating factors.

From consideration of the first three we may arrive at a baseline sanction that may be affected by aggravating or mitigating factors. We address each of the four factors in order.

a. Duty Violated.

The Trial Panel looks to the *ABA Standards* for guidance in the appropriate resolution to ethics violations. With respect to the two duties violated the ABA says that:

4.3 Failure to Avoid Conflicts of Interest

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

...

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client;

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

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

4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

b. Mental State.

Standards, Definitions, defines the relevant mental states as follows:

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

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

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

“Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

The Trial Panel concludes based on our credibility assessment of the Accused and other witnesses that the Accused acted with knowledge regarding his handling of the current conflict of interest, but there was no intent by the Accused to benefit from that conflict. He clearly intended to proceed with representing Backer regardless of the clear conflict inherent with his representation of Young which was beyond negligence. We do not find the Accused acted maliciously or with the specific intent to cause damage or harm either client.

c. Injury.

The injuries in this matter are difficult to quantify. The Accused continued to represent Young until the conclusion of her criminal matter. We have no information as to the resolution of any custody matter between Backer and Young.

d. Aggravating or Mitigating Circumstances.

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose. Aggravating circumstances consist of any considerations or factors that may justify an increase in the degree of discipline to be imposed.

Aggravating factors include:

(a) Prior disciplinary offenses. This factor is significant in that this matter is the Accused's fifth disciplinary matter.

(b) Dishonest or selfish motive. This factor is not applicable in this matter. The Trial Panel does not find the Accused to have had a dishonest or selfish motive.

(c) A pattern of misconduct. This factor is not applicable in this case.

(d) Multiple offenses. This factor is not applicable in this matter.

(e) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. This factor is not applicable in this matter.

(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. This factor is not applicable in this matter.

(g) Refusal to acknowledge wrongful nature of conduct. This factor is somewhat applicable in this matter as the Accused blamed a secretary for actions relevant to creating the conflict and attempted to absolve himself from responsibility as he testified he was relying on the advice of counsel.

(h) Vulnerability of victim. This factor is applicable in this case. Backer's testimony demonstrated that he was under pressure to consent to help the mother of his child.

(i) Substantial experience in the practice of law. This factor is applicable this case.

(j) Indifference to making restitution. This factor is applicable in this case. As explained above in the Accused's continued representation of Young, despite counsel's advice to withdraw.

(k) Illegal conduct, including that involving the use of controlled substances. This factor is not applicable in this case.

There are also a number of factors that should be taken into account in mitigation of an accused's conduct. Mitigation or mitigating circumstances consist of any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

Mitigating factors include:

(a) Absence of a prior disciplinary record. This factor is not applicable in this matter.

(b) Absence of a dishonest or selfish motive. This factor is applicable in this case as the Accused appeared to be motivated to achieve what was best for Backer's child.

(c) Personal or emotional problems. This factor is not applicable in this case.

(d) Timely good-faith effort to make restitution or to rectify consequences of misconduct. This factor is not applicable in this case.

(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. This factor is not applicable in this case.

(f) Inexperience in the practice of law. This factor is not applicable in this case.

(g) Character or reputation. There was no evidence presented relating to this factor.

(h) Physical disability. This factor is not applicable in this case.

(i) Mental disability or chemical dependency including alcoholism or drug. This factor is not applicable in this case.

(j) Delay in disciplinary proceedings. This factor is not applicable in this matter.

(k) Imposition of other penalties or sanctions. This factor is not applicable in this case.

(l) Remorse. This factor is not applicable in this case.

DISPOSITION

The Bar has requested a 7 month suspension. While it is clear that a suspension is the required sanction under the *ABA Standards*, the Trial Panel believes that 7 months is disproportionate in this matter. *See In re Campbell*, 345 Or 670, 202 P3d 871 (2009). Therefore, based on the above, it is the decision of the Trial Panel that the Accused be suspended for a period of 60 days. However, in light of the aggravating circumstances

discussed above, including four prior disciplinary matters, for the protection of the public, the Accused shall be required to seek formal reinstatement.

IT IS SO ORDERED.

Dated November 3, 2017

/s/ Debra E. Velure

Debra E. Velure, Trial Panel Chairperson

/s/ James Walsh

James Walsh, Trial Panel Member

/s/ George McCully

George McCully, Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 17-06
)
RAYLYNNA J. PETERSON,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: Christopher R. Hardman
Disciplinary Board: None
Disposition: Violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c). Stipulation for Discipline. 6-month suspension, all but 30 days stayed, 2-year probation.
Effective Date of Order: January 22, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Raylyнна J. Peterson is suspended for six (6) months, with all but thirty (30) days of the suspension stayed, pending Raylyнна J. Peterson’s successful completion of a two (2)-year term of probation, effective January 22, 2018, for violations of RPC 1.15-1(a); RPC 1.15-1(b); and RPC 1.15-1(c).

DATED this 16th day of January, 2018.

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

STIPULATION FOR DISCIPLINE

Raylynna J. Peterson, attorney at law (“Peterson”), and the Oregon State Bar (“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.

Peterson was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 23, 2002, and has been a member of the Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

Peterson 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 22, 2017, a Formal Complaint was filed against Peterson pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.15-1(a) (failure to safeguard and keep separate client property); RPC 1.15-1(b) (the deposit of lawyer funds into trust for reasons other than bank service charges or minimum balance requirements); and RPC 1.15-1(c) (the withdrawal of client funds from trust before earned). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

Between approximately November 2015 and late September 2016, Peterson failed to properly track and account for client funds coming into and out of her possession, resulting in payments applied to client invoices but not transferred from her lawyer trust account; duplicate payments to clients made out of her lawyer trust account from other clients’ unearned funds; deposits of unearned client funds into her business account rather than her lawyer trust account; and merchant services account fees deducted from unearned client funds in her lawyer trust account.

6.

On September 29, 2016, Peterson's law firm's lawyer trust account records reflected that her lawyer trust account held a balance of approximately \$8,148.26, which represented funds for 12 different clients. In actuality, her trust account had a balance of \$2,594.74.

7.

On September 29, 2016, Peterson wrote a check for \$2,950.87 from her lawyer trust account against an actual balance of \$2,594.74. The check was honored by the bank and overdrew the account by \$356.13. The bank also charged a \$35 overdraft fee to the account.

8.

When Peterson learned of the overdraft, she immediately reversed a \$1,384 transfer to herself for earned fees that she had initiated the day before, and deposited \$35 of her own funds into the trust account to correct overdraft fee. Following an audit of her lawyer trust account, Peterson deposited \$5,890.43 into her trust account to refund her prior unauthorized withdrawals of client funds.

Violations

9.

Peterson admits that, by failing to adequately account for client funds and failing to regularly reconcile her trust account, she failed to protect client funds, drawing on at least a portion of them prematurely or in error, in violation of RPC 1.15-1(a) and (c).

She further admits that the deposit of her own funds into trust required to cure the overdraft was for reasons other than minimum balance requirements or bank fees, and therefore violated RPC 1.15-1(b).

Sanction

10.

Peterson 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* ("*Standards*"). The *Standards* require that Peterson'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.** Peterson violated her duties to her clients to safeguard and preserve client property. *Standards* § 4.1. The *Standards* presume that the most important ethical duties are those obligations which lawyers owe to their clients. *Standards* at 5.
- b. **Mental State.** Peterson acted negligently and knowingly. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but

without the conscious objective or purpose to accomplish a particular result. *Standards* at 9. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Peterson’s initial mishandling of her trust account may have been negligent; however, Peterson became aware at some point that she was moving funds without proper documentation, and that she had not properly reconciled her accounts for some time.

- c. **Injury.** Injury can be potential or actual. *Standards* § 3.0; *Standards* at 9; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Peterson’s failure to use appropriate accounting procedures caused actual and potential injury to her clients as it created a risk that the clients’ funds would not be timely paid out to the appropriate persons in the correct amounts. Additionally, by failing to comply with the trust account rules, Peterson “caused actual harm to the legal profession.” *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012) (quoting *In re Peterson*, 348 Or 325, 343, 232 P3d 940 (2010)).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. A prior record of discipline. *Standards* § 9.22(a). In 2015, Peterson was suspended for 60 days (all stayed, pending a two-year probation) for violations of RPC 1.3 (neglect of a legal matter); and RPC 1.4(b) (failure to explain a matter to the extent necessary to permit her client to make informed decisions regarding the representation).
 2. A pattern of misconduct. *Standards* § 9.22(c). Despite her awareness of the proper procedures, Peterson mishandled and failed to properly account for client funds on more than one occasion. *See In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).
 3. Multiple offenses. *Standards* § 9.22(d).
 4. Substantial experience in the practice of law. *Standards* § 9.22(i). Peterson has been a lawyer since 1997, and has been admitted in Oregon since 2002.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a dishonest motive. *Standards* § 9.32(b).
 2. Cooperative attitude toward proceedings. *Standards* § 9.32(e).

3. Timely good-faith effort to make restitution or to rectify consequences of misconduct. *Standards* § 9.32(d). When alerted to the overdraft, Peterson retained a professional to audit the account to determine the circumstances behind it, and made restitution to the balance the account.
4. Remorse. *Standards* § 9.32(l). Peterson expresses regret that client funds were placed in jeopardy and has taken steps to insure that proper procedures and have since been put in place, and hopes that continued monitoring will enforce good habits going forward.

11.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property and causes injury or potential injury to a client. *Standards* § 4.12. Given that the aggravating and mitigating factors are in equipoise, a suspension is the presumptive sanction under the *Standards*.

12.

Like the *Standards*, Oregon cases suggest that a suspension is warranted for Peterson's conduct. *In re Obert*, 352 Or at 262 (court held that the usual sanction for violation of RPC 1.15-1 is a suspension of between 30 and 60 days); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (experienced attorney's single unintentional mishandling of client trust account warranted 60-day suspension). Peterson has several such violations. The court in *Obert* also wrote that violation of RPC 8.1(a)(2) can result in a public reprimand or up to a 60-day suspension. The attorney in *Obert* was suspended for 6 months. An overall suspension of 6 months appears appropriate here as well. *See, e.g., In re Soto*, 26 DB Rptr 81 (2012) (attorney whose conduct was mitigated by personal and emotional problems was suspended for 7 months where she failed to deposit client funds in trust. She also repeatedly deposited her own funds into trust, to pay her own bills and those of clients); *In re Bertoni*, 26 DB Rptr 25 (2012) (attorney suspended for 150 days where he negligently withdrew client funds from his law firm's trust account before the funds were earned; failed to maintain complete trust account records; periodically deposited his own funds into the firm trust account in amounts that exceeded bank service charges and minimum balance requirements; and was unable to distinguish client money from his own money); *In re Oh*, 23 DB Rptr 25 (2009) (attorney suspended for 8 months when he failed to deposit client funds into a trust account despite a fee agreement specifying that he would do so. Attorney also failed to deposit into trust funds paid by the client in advance for expenses); *In re Levie*, 22 DB Rptr 66 (2008) (attorney suspended for 6 months for intentionally using his trust account as his own personal account, depositing his own funds and paying personal and business expenses directly from that account in order to shield those funds from creditors); *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (attorney was suspended for one year when it was determined that he failed to reconcile his monthly trust account statements or maintained a trust account ledger to keep track of client funds and was negligent

in his trust accounting practices); *In re Goyak*, 19 DB Rptr 179 (2005) (attorney who deposited and maintained personal funds in his trust account and failed to maintain required trust account records was suspended for 6 months); *In re Koessler*, 18 DB Rptr 105 (2004) (attorney suspended for 6 months where she failed to deposit a retainer into trust, failed to maintain any records of the funds, and failed to render an accounting for them, among neglect and other charges).

13.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Peterson shall be suspended for six (6) months for violations of RPC 1.15-1(a); RPC 1.15-1(b); and RPC 1.15-1(c), with all but thirty (30) days of the suspension stayed, pending Peterson's successful completion of a two (2)-year term of probation. The sanction shall be effective January 22, 2018, or upon approval by the Disciplinary Board, whichever is later ("effective date").

15.

Peterson's license to practice law shall be suspended for a period of thirty (30) days beginning on the effective date ("actual suspension"), assuming all conditions have been met. Peterson understands that reinstatement is not automatic and that she cannot resume the practice of law until she has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Peterson re-attains her active membership status with the Bar, Peterson shall not practice law or represent that she is qualified to practice law; shall not hold herself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

16.

Probation shall commence upon the date Peterson is reinstated to active membership status and shall continue for a period of two (2) years, ending on the day prior to the second (2nd) year anniversary of the commencement date (the "period of probation"). During the period of probation, Peterson shall abide by the following conditions:

- (a) Peterson will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with her probationary terms.
- (b) Peterson shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (c) During the period of probation, Peterson shall attend not less than eight (8) MCLE accredited programs, for a total of twenty-four (24) hours, which shall emphasize law practice management, time management, and appropriate trust accounting and client file management. These credit hours shall be in addition to those MCLE credit hours required of Peterson for her normal MCLE reporting period. The Ethics School requirement does not count towards the twenty-four (24) hours needed. Upon completion of the CLE programs described in this paragraph, and prior to the end of her period of probation, Peterson shall submit an Affidavit of Compliance to DCO.
- (d) Throughout the term of probation, Peterson shall diligently attend to client matters and adequately communicate with clients regarding their cases. Attorney shall also regularly review and reconcile her trust and business bank accounts.
- (e) Each month during the period of probation, Peterson 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, and properly handling and accounting for client funds.
- (f) Each month during the period of probation, Peterson shall:
 - (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills;
 - (2) review her monthly trust account records and client ledgers and reconcile those records with her monthly lawyer trust account bank statements; and
 - (3) ensure she has adequate billing records to support any and all withdrawals and transfers of client funds from trust.
- (g) On or before the day prior to the first (1st) and second (2nd) year anniversary of the commencement date, Peterson shall arrange for an accountant to conduct an audit of her lawyer trust account and to prepare a report of the audit for submission to DCO within 30 days thereafter.

- (h) Leigh Hudson (OSB No. 022228) shall serve as Peterson’s probation supervisor (“Supervisor”). Peterson shall cooperate and comply with all reasonable requests made by her Supervisor that Supervisor, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Peterson’s clients, the profession, the legal system, and the public.
- (i) Beginning with the first month of the period of probation, Peterson shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) allowing her Supervisor to review the status of Peterson’s law practice and her performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) files or 10% of Peterson’s active caseload, whichever is greater, to determine whether Peterson is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect her clients’ interests upon the termination of employment; and
 - (2) permitting her Supervisor to inspect and review Peterson’s accounting and record-keeping systems to confirm that she is reviewing and reconciling her lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Peterson agrees that her Supervisor may contact all employees and independent contractors who assist Peterson in the review and reconciliation of her lawyer trust account records.
- (j) Peterson authorizes her Supervisor to communicate with DCO regarding her compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Peterson’s compliance.
- (k) Within seven (7) days of her reinstatement date, Peterson shall contact the Professional Liability Fund (“PLF”) and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Peterson shall schedule the first available appointment with the PLF and notify DCO of the time and date of the appointment.
- (l) Peterson shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF, Peterson shall adopt and implement those recommendations.

- (m) No later than sixty (60) days after recommendations are made by the PLF, Peterson shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of her consultation(s) with the PLF; identifying the recommendations that she has adopted and implemented; and identifying the specific recommendations she has not implemented and explaining why she has not adopted and implemented those recommendations.
- (n) On a monthly basis, on dates to be established by DCO beginning no later than thirty (30) days after her reinstatement to active membership status, Peterson shall submit to DCO a written "Compliance Report," approved as to substance by her Supervisor, advising whether Peterson is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Peterson's meetings with her Supervisor.
 - (2) The number of Peterson's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Peterson has completed the other provisions recommended by her Supervisor, if applicable.
 - (4) In the event that Peterson has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (o) Peterson is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (p) Peterson's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of her Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (q) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (r) The SPRB's decision to bring a formal complaint against Peterson for unethical conduct that occurred or continued during the period of her probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

17.

In addition, on or before December 31, 2018, Peterson shall pay to the Bar its reasonable and necessary costs in the amount of \$325, incurred in obtaining bank records and conducting her deposition. Should Peterson fail to pay \$325 in full by December 31, 2018, the Bar may thereafter, without further notice to her, obtain a judgment against Peterson 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.

Peterson 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, Peterson has arranged for Leigh Hudson (OSB No. 022228), an active member of the Bar, to either take possession of or have ongoing access to Peterson's client files and serve as the contact person for clients in need of the files during the term of her actual suspension. Peterson represents that Leigh Hudson has agreed to accept this responsibility.

19.

Peterson 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. Peterson also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until she is notified that her license to practice has been reinstated.

20.

Peterson 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. This requirement is in addition to any other provision of this agreement that requires Peterson to attend or obtain continuing legal education (CLE) credit hours.

21.

Peterson 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 Peterson is admitted: California.

22.

This Stipulation for Discipline is subject to review by DCO 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 Peterson*, 32 DB Rptr 10 (2018)

EXECUTED this 5th day of January, 2018.

/s/ Raylynna J. Peterson

Raylynna J. Peterson

OSB No. 021433

APPROVED AS TO FORM AND CONTENT:

/s/ Christopher R. Hardman

Christopher R. Hardman

OSB No. 792567

EXECUTED this 10th day of January, 2018.

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. 16-47 and 16-55
)
DIRK D. SHARP,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: None
Disciplinary Board: John E. Laherty, Chairperson
Michael H. McGean
Larry Lehman, Public Member
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC
1.5(a), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3).
Trial Panel Opinion. Disbarment.
Effective Date of Opinion: January 17, 2018

TRIAL PANEL OPINION

On or about August 30, 2017, the Disciplinary Board Regional Chairperson entered an Order of Default in the above-captioned cases 16-47 and 16-55 (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, Chair; Michael H. McGean, Attorney Member; and Larry Lehman, Public Member.

After due notice to both the Office of Disciplinary Counsel and the Accused, Dirk D. Sharp (“Sharp”), 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 Disciplinary Board Clerk provided written notice of the briefing schedule to both the Office of Disciplinary Counsel and the Accused. The Office of Disciplinary Counsel, through Assistant Disciplinary Counsel Amber Bevacqua-Lynott, submitted a sanctions memorandum. Sharp did not.

FINDINGS OF FACT

1. In light of Sharp's default and entry of an Order of Default against him, 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, Sharp has been deemed to have violated the following Oregon Rules of Professional Conduct: 1.3, 1.4(a), 1.4(b), 1.5(a), 1.16(d), 8.1(a)(2), and 8.4(a)(3).

CONCLUSIONS

In fashioning a sanction in this case, the Trial Panel considers the ABA *Standards for Imposing Lawyer Sanctions* ("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 Sharp'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. Applying those factors to the facts of this case, the Trial Panel concludes as follows:

A. Duty Violated.

Sharp violated his duties to his clients to safeguard their property, to act diligently on their behalf, including adequately communicating with them, and to be honest and candid in dealing with them. *Standards* § 4.1. The *Standards* provide that the most important ethical duties are those which lawyers owe to their clients. *Standards* at 5. Sharp also violated his duties to the profession to avoid excessive fees, to properly withdraw from matters, and 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 at 9.

Insofar as the facts alleged in the Formal Complaint are deemed true, the Trial Panel can and does find Sharp acted knowingly and intentionally when he took fees, failed to perform any services for his clients, and failed to refund any portion of the fees upon termination. *See In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1988) (lawyer's mental state can be inferred

from the facts). Sharp's abandonment of his practice demonstrates an awareness of the illegitimacy of his actions, particularly following his suspension in California for similar misconduct, including the mishandling of client funds.

The Trial Panel also finds that Sharp acted knowingly in failing to respond to Bar inquiries. The letters sent by DCO were duly directed and both mailed and emailed. BR 1.8(d) provides that service of pleadings or documents is complete when deposited in the mail. Although the Oregon Rules of Evidence do not apply to these proceedings, it is worth noting that ORE 311(1)(q) provides that when a letter is duly directed and mailed, a presumption can be made that it was received in the regular course of the mail. The Trial Panel therefore concludes that Sharp acted at least with knowledge when he failed to respond to DCO. *In re Miles*, 324 Or 218, 221–22, 923 P2d 1219 (1996).

The remainder of Sharp's conduct was some combination of negligent and knowing. For example, while Sharp initially may have been merely negligent in failing to communicate with clients, at some point their repeated attempts at communication made his continuing silence knowing.

C. Injury.

For the purposes of determining an appropriate disciplinary sanction, the Trial Panel may take into account both actual and potential injury. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Sharp caused actual injury to his clients, whose matters were delayed by his inaction. Sharp's failures to act and communicate 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*, 325 Or 421, 426–27, 939 P2d 39 (1997). In fact, both reported adverse impacts on their personal health as a result of Sharp's conduct (Ex 5). Sharp's clients were also actually injured to the extent that they are both without their funds paid to Sharp and without the legal services they had paid for. They were potentially injured insofar as (because they had paid funds to Sharp) they were without the funds necessary to pay someone else to attend to their legal matters. And, at least Sanchez was also actually injured by Sharp's election not to return his client materials to him.

Sharp'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*, 325 Or at 427; *In re Miles*, 324 Or at 222; *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. Presumptive Sanction.

Drawing together the factors of duty, mental state, and injury (and absent aggravating or mitigating circumstances), the following *Standards* apply:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- 4.41 Disbarment is generally appropriate when:
 - (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
 - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
 - (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
- 4.42 Suspension is generally appropriate when:
 - (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
 - (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
- 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.
- 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

E. Aggravating/Mitigating Circumstances.

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

1. 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). Sharp was suspended by the Court for one year in December 2015 for violations of RPC 1.1 (failure to provide competent representation); RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and comply with reasonable requests for information); RPC 1.5(a) (excessive fee); RPC 1.15-1(c) (failure to deposit and maintain client funds in trust); RPC 1.15-1(d) (failure to account for and return client funds); RPC 1.16(d) (failure to take steps upon termination of representation to protect client interests, including return of client funds); and RPC 8.4(a)(3) (misrepresentations to his clients regarding the status of an appeal). In that matter, Sharp was paid a \$25,000 advance fee to explore appellate options for an incarcerated client. Thereafter, Sharp communicated very sparsely with the client over the next four years, whereupon Sharp provided the client with copies of a notice of appeal and an application for a writ of habeas corpus, dated years prior, in an attempt to mislead the client into believing the work had been performed, when Sharp never filed anything on the client's behalf. Many of these violations are the very same ones at issue in the present complaint, which is a significant aggravating factor.¹
2. A dishonest or selfish motive. *Standards* § 9.22(b). At best, Sharp collected funds, never performed services for them, and then refused to account to his clients or respond to the Bar for self-serving reasons.
3. A pattern of misconduct. *Standards* § 9.22(c). These matters, taken together, and with Sharp's prior misconduct, show a pattern of deceptive practices, neglect, and avoidance. *See In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or at 427.
4. Multiple offenses. *Standards* § 9.22(d).

¹ The ABA *Standards* provide that absent aggravating or mitigating circumstances:

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

5. Substantial experience in the practice of law. Sharp was admitted to California in 1987 and the Oregon State Bar in 1996. *Standards* § 9.22(i).
6. Indifference to making restitution. *Standards* § 9.22(j). Despite promises, Sharp has made no effort to account for or return any money to either of his clients.

As Sharp has not substantively communicated with the Bar in these formal proceedings, the Bar has not been made aware of any applicable mitigating factors, nor were any uncovered during the Bar's investigation.

Sharp's aggravating factors and absence of any mitigating factors justify an increase in the degree of presumptive discipline to be imposed. *Standards* § 9.21. As the presumptive sanction is already disbarment, the application of Sharp's aggravating factors only solidifies the appropriateness of that sanction.

SANCTION

Sanctions in disciplinary matters are not intended to penalize the accused lawyer, but instead are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992). 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, Sharp's repeated misconduct and the existence of aggravating factors establishes that he is unable to conform his conduct to the basic rules demanded of all lawyers. 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. Dirk Sharp shall be, and hereby is, disbarred from the practice of law in accordance with BR 6-3.

DATED this 13th day of November, 2017.

/s/ John E. Laherty

John E. Laherty, Trial Panel Chairperson

/s/ Michael H. McGean

Michael H. McGean, Trial Panel Member

/s/ Larry Lehman

Larry Lehman, Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 16-61
)
DAVID R. AMBROSE,)
)
Accused.)

Counsel for the Bar: Nik T. Chourey
Counsel for the Accused: Brian B. Williams
Disciplinary Board: Ronald W. Atwood, Chairperson
David Doughman
Virginia Anne Symonds, Public Member
Disposition: Trial Panel Opinion. Dismissal.
Effective Date of Opinion: January 17, 2018

TRIAL PANEL OPINION

The Oregon State Bar (The Bar) filed a complaint in this matter October 12, 2016. The Accused filed an Answer December 16, 2016. The Bar subsequently filed a First Amended Formal Complaint on June 9, 2017; the Accused filed its Answer July 28, 2017.

Hearing was held in this matter in Tigard on August 28 and 29 of 2017. Mr. Nik Chourey and Ms. Amber Bevacqua-Lynott represented The Bar; Mr. Brian Williams represented the Accused.

Exhibits 1, 1A, 2 through 36, 40 and 43 were offered and admitted. Exhibits 37, 38, 41, and 42 are excluded. Exhibits 39, 44 and 45 are admitted over the objection of counsel. Exhibits 46 through 50, 54 through 73, 75, 82 and 83, 85, and 100 through 103 were admitted without objection. Exhibit 51 was admitted over the objection of The Bar. The Bar objected to exhibit 52 and 53; ruling was deferred and counsel for the defense did not later ask for a ruling. These documents are discovery depositions; in light of the fact that both individuals testified at hearing, the discovery depositions are excluded. The Bar objected to exhibit 74; ruling was deferred and the document is excluded as irrelevant and immaterial to an issue in this matter. Exhibits 76 through 81 are excluded. Exhibits 86, 87 and 105 were simply identified.

The trial panel finds The Bar failed to prove the charges in the First Amended Formal Complaint by clear and convincing evidence.

Nature of the Charges and Defense

The Bar alleged a violation of RPC 8.4(a)(3). This action arises from representation by the Accused of Rhonda and Keith Johnson in their attempt to avoid judicial foreclosure of their home, as more fully set out below.

Summary of the Facts

Rhonda and Keith Johnson were sued in Clackamas County Circuit Court by Everbank in a judicial foreclosure proceeding. They retained the Accused on July 30, 2013. Our record does contain a standard attorney fee retention agreement signed by Mr. or Ms. Johnson. (Ex 46). However, it is in exhibit 3 that we find the essential terms of the representation.

The first paragraph discusses some means to reduce debt and the potential there might be enough equity in the house to pay off the loan. The second paragraph discussed steps to protect the client relative to the foreclosure suit. The third paragraph mentions the proposition that is at the heart of this matter. It will be discussed in more detail below. It is not until the sixth paragraph that the official fee arrangement is set out. The Accused noted that his hourly rate is \$385. It also mentions that other members of the firm, both lawyers and legal assistants, might work on the matter and sets out their rates. The seventh paragraph notes bills would be sent on a monthly basis with the expectation the bills would be paid monthly. The phrase due upon receipt is mentioned.

Although exhibit 3 states this is a billable hourly case in which the bill is to be paid monthly, that was not the understanding of the client. They heard they needed to pay \$500 up front and the remainder of the bill would be paid from the equity in their house, upon sale. Their confusion arises from the unusual proposition in paragraph three.

The paragraph begins with a reference to a real estate brokerage company the Accused partially owned that is located in Bend. The proposal notes there might be a way to reduce legal expenses. It would require the selling broker to send 20% of their commission to the real estate company partially owned by the Accused, Total Property Resources (TPR). This was described as a referral fee, even though no one at TPR would know about the agreement. If the house sold and the referral fee was paid, it would lower the legal fees owed by either \$1500 or 80% of the actual referral fee, whichever is lower. It was clear from the math that it was unlikely to completely pay any remaining legal fees owed to the Accused.

As explained in the testimony at hearing, a broker at TPR would receive this referral fee without making a referral, working on the matter or even knowing anything about it. It would simply be free money. There is testimony in the record that referral fees are common in the industry, as long as the referral fee goes to a licensed broker. The example used the most

was a request that a referral fee might go to a family member. No one used as an example a referral fee going to a complete stranger, which is the case here.

The Accused advised the client to retain a real estate agent to first determine the amount of the equity in the home and to put it on the market, if there was sufficient equity to pay off the indebtedness. The condition requested as part of the fee agreement was that the selling agent agrees to pay TPR a referral fee of 20% out of the commission. The client agreed and so notified the Accused on August 2, 2013. (Ex. 4 & 5).

The Accused took steps to protect the clients from default. The clients worked to sell their home. Beginning in November 2013 the emails between the Accused and the clients are demands for payment of legal fees and their understanding of the fee agreement. Although the clients felt strongly that the legal fees would be paid from the equity of their home, that is inconsistent with the writing in exhibit 3 and the understanding of the Accused. As 2013 moved into 2014, all of the communication between the Accused and his clients related to the ultimate fee dispute. The Accused resigned as counsel June 1, 2014 and notified the client they were writing off the remaining obligation rather than filing suit to collect the unpaid fees. (Ex. 29 & 30). A formal motion was filed June 4, 2014. (Ex. 65).

In early November 2014, Lawrence Peterson filed a complaint with the Bar against the Accused and Jack Wieselmann. (Ex 67). The primary complaint was made against Mr. Wieselmann and arose from his representation of Mr. and Ms. Johnson in a matter involving Finaliner, LLC. (Ex 32 & 33). Those allegations are not part of this matter.

The house sold for a total of \$425,000; the settlement date was October 23, 2015. (Ex. 103). In the end, the entire debt was paid to the bank and the listing agent received her entire commission.

The Accused was notified a complaint was to be filed by letter dated May 23, 2016. (Ex. 75). This proceeding followed.

Applicable Law

The Bar has alleged the Accused violated RPC 8.4(a)(3), which provides:

“(a) It is professional misconduct for a lawyer to:

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

Analysis

In the beginning it must be made clear that the trial panel is very uncomfortable with the proposal made by the Accused in this case. We are uncomfortable with the idea some unnamed real estate agent was to receive money from this transaction without doing any work or being a part of the process in any way. We are uncomfortable with the formula used and do not see it as much of a benefit to the client. Nor are we sure why the listing agent should reduce

their commission in order to pay the client's legal fees. However, our discomfort does not lead us to conclude the Accused violated RPC 8.4(a)(3) in this matter.

It is also clear that the client did not fully understand the proposed fee agreement. They thought their legal fees would be paid from the referral fee paid to TPR plus some \$500 paid ahead. We are not sure where this confusion comes from. It is clear from the agreement that the referral fee is designed to reduce their fees, not pay it. The remainder of the document also makes it clear this is a billable hour case in which the client was expected to pay the fees billed monthly. Ultimately, whether the client fully understood the agreement is not critical to our findings. As a result, we decline to make findings relating to the credibility of the Accused or his clients.

We turn to the First Amended Formal Complaint to determine if the Bar has proved by clear and convincing evidence the primary facts alleged in the complaint.

We look first to paragraph 13. The Bar alleges paying money to TPR would defraud the listing agent of a portion of her commission. It is clear that listing agents pay referral fees routinely. There is not enough information in our record to indicate how often it occurs. The listing agent in this case was willing to pay the fee in order to get the listing. The only concern voiced by the listing agent and her boss was to make sure the recipient of the referral fee was a licensed agent. TPR is licensed, so payment to them does not violate common practice in the real estate industry; nor do we believe it violated the law. We repeat: we are very uncomfortable with the proposed payment in this case to an agent who has no connection to the sellers in order to reduce legal fees.¹

The Bar fails here because we are unconvinced the referral scheme exposed the listing agent to discipline for a violation of ORS 695.301(1), ORS 696.301(3) or ORS 696.301(14).

A number of experts testified. Their testimony had a number of themes. They testified referral fees are common. They testified that referral fees must be paid to a licensed broker. There was some testimony that some of the statutes relied upon by the Bar might not be enforceable. In determining whether the Bar had proved its case, we rely primarily on the testimony of Selina Barnes, regulations manager for the Oregon Real Estate Agency. (Tr. 327). Of all of the experts, she is the only person who is involved in enforcing the applicable statutes and is in the best position to outline the position of the Agency. Ms. Barnes outlined two circumstances in which they would be concerned, neither of which are involved in this matter.

¹ A question we do not address in this opinion is why a lawyer would direct money to an employee of a real estate company of which he is a partial owner as a means to lower the fees paid to him and his law firm. We recognize the referral fee could not go to the lawyer, since he is not a licensed real estate agent. Since an agent would receive the money, it does not even go indirectly to the lawyer. It is just odd.

First, she would be concerned if the licensee from TPR made a demand for the fee without actually making the referral. That is not a fact alleged in the complaint. Nor is it a fact to be inferred from the complaint. It is a fact that would arise, if at all, when the house sold. By then, the Accused no longer represented the client. By then, the client had notified the listing agent that no referral fee was due to be paid.

Second, Ms. Barnes would be concerned with the payment of a referral fee directly or indirectly. In this case, the agreement would not pay a referral fee directly to the Accused. Nor are there sufficient facts for us to conclude money would be paid indirectly to the Accused. There is testimony that an unnamed agent would get a portion of the commission and another portion would go to the “house”. There are insufficient facts to conclude the referral fee would go to the Accused directly or indirectly.

Ms. Barnes made it clear that the listing agent would only be subject to investigation if she knew the money was going to the Accused directly or indirectly. The listing agent made it quite clear in her testimony that she would only allow payment of the referral fee if it went to a licensed broker. As a result, we cannot conclude the referral agreement proposed by the Accused subjected the listing agent to discipline by the Oregon Real Estate Agency.

In terms of paragraph 14, we come to the same conclusion. The TPR agent would only be subject to discipline if they demanded the referral fee. That did not occur here. While the listing agent agreed to pay the referral fee, we would be speculating as to what the unknown TPR agent would do if the listing agent refused to pay the referral fee. More importantly from our standpoint is the fact that the legal fees would only be reduced if the referral fee was paid. If the listing agent refused, then the outstanding legal bill would be unaffected.

In terms of paragraph 15, the Bar fails here because there is no evidence the referral fee would go directly to the Accused. As discussed above, the Bar did not prove how the referral fee would get to the lawyer indirectly.

Again, the unknown TPR agent would get a portion of the referral fee. The resident broker at TPR would also get a portion. The Accused is entitled to a portion of the profits of TPR. We do not know what they are. We do know that profits equal the amount left over after expenses are deducted from income. While some of the profits of TPR could arguably be traced to the referral fee paid to TPR, the connection feels too weak to be an indirect fee paid to the Accused. Finally, the amount of the profit paid by TPR to the Accused would be less than the amount the fees were reduced, so in the end the Accused would appear to personally lose money in the transaction.

Based on the foregoing, it is the opinion of the trial panel the Bar did not prove a violation of RPC 8.4(a)(3) by clear and convincing evidence. That is not to say that we are comfortable with the fee agreement proposed in this case. We simply do not believe it violated the ethical rule as alleged in this case.

This matter is dismissed.

Dated this 17th day of November 2017.

/s/ Ronald W. Atwood
Ronald W. Atwood, Trial Panel Chairperson

/s/ David Doughman
David Doughman, Trial Panel Member

/s/ Virginia Symonds
Virginia Symonds, Trial Panel Public Member

Cite full opinion as 362 Or 370 (2018)

In re:)
)
Complaint as to the Conduct of)
)
SAMUEL A. RAMIREZ,)
)
Accused.)

(OSB 14116; SC S064697)

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

Samuel A. Ramirez filed the brief on his own behalf.

Susan Roedl Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief on behalf of the Oregon State Bar.

Before Balmer, Chief Justice, and Kistler, Walters, Nakamoto, and Flynn, and Duncan, Justices.*

* Landau, J., retired December 31, 2017, and did not participate in the decision of this case. Nelson, J., did not participate in the consideration or decision of this case.

PER CURIAM

In this lawyer disciplinary proceeding, the Oregon State Bar (the Bar) charged Samuel A. Ramirez (the accused) with violating several Oregon Rules of Professional Conduct (RPC). A trial panel concluded that the accused had failed to provide competent representation, neglected a legal matter, represented a client when the representation involved a personal conflict of interest, and improperly settled a potential malpractice claim with an unrepresented party, in violation of RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.7(a)(2) and RPC 1.7(b) (current-client conflict of interest), and RPC 1.8(h) (current-client conflict of interest, special rule), respectively. Based on those violations and an assessment of aggravating and mitigating factors, the trial panel suspended the accused from the practice of law for one year. The accused petitioned this court for review of the trial panel's decision. On review, the accused concedes that he committed the violations found by the trial panel, but asserts that the trial panel erred in (1) rejecting his argument that the disciplinary proceeding was barred by the statute of limitations set out in ORS 12.110, and (2) assessing the aggravating and mitigating factors and imposing the one-year suspension. Reviewing *de novo*, we conclude that the disciplinary proceeding was not barred by the statute of limitations, the accused violated

the disciplinary rules as the trial panel found, and the appropriate sanction is a one-year suspension.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 17-64
)	
JAMES F. O'ROURKE,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Wayne Mackeson
Disciplinary Board:	None
Disposition:	Violation of RPC 1.16(d). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	January 22, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by James F. O'Rourke and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and O'Rourke is publicly reprimanded for violation of RPC 1.16(d).

DATED this 22nd day of January, 2018.

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

STIPULATION FOR DISCIPLINE

James F. O'Rourke, attorney at law ("O'Rourke"), and the Oregon State Bar ("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.

O'Rourke 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 Bar continuously since that time, having his office and place of business in Multnomah 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 August 26, 2017, the State Professional Responsibility Board ("SPRB") authorized formal disciplinary proceedings against O'Rourke for alleged violations of RPC 1.5(c)(3) (failure to make proper disclosures in connection with an earned-upon-receipt fee); RPC 1.15-1(a) (failure to segregate client funds); RPC 1.15-1(c) (failure to deposit and maintain client funds in trust); and RPC 1.16(d) (failure to take steps upon termination to protect client interests, including return of client funds and property) 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 November 2013, Nancy Cole ("Cole") hired O'Rourke to seek an early release from incarceration for her grandson, Thomas Spisla ("Spisla"). Cole reported that, during sentencing, Spisla had been informed by the judge that his crime permitted a "Second Look" option, which would allow Spisla to petition for release at the halfway point of his sentence.

6.

O'Rourke prepared an Attorney Employment and Fee Agreement ("Agreement") that called for a \$9,880 nonrefundable fee. The Agreement was signed by O'Rourke, and a guarantee incorporated into the Agreement was signed by Cole.

7.

Over some months, as O'Rourke investigated, he discovered that Spisla's crime did not qualify for a Second Look option. O'Rourke continued to investigate options and learned about a policy change in the Multnomah County District Attorney's Office that he believed could be useful to Spisla. This other option was presented to Spisla and to Cole (with Spisla's permission) and they agreed to this different approach. However, on July 5, 2015, before O'Rourke was able to present a proposal to the district attorney, Cole sent a letter to O'Rourke, terminating the relationship, and seeking a full refund of the \$9,880 paid. O'Rourke did not refund any portion of the fee prior to the initiation of these formal proceedings.

Violations

8.

O'Rourke admits that failing to refund any portion of the fee, despite the fact that he did not complete the services for which the fee was paid, constituted a failure to return client property following termination of representation, in violation of RPC 1.16(d).

O'Rourke admits that he owes a refund to Cole in the amount of \$4,940, representing the amount of the fee paid that was unearned at the time that O'Rourke was terminated by Cole, which has been repaid.

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 1.5(c)(3), RPC 1.15-1(a), and RPC 1.15-1(c) should be and, upon the approval of this stipulation, are dismissed.

Sanction

9.

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* ("Standards"). The *Standards* require that O'Rourke'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 duty as a professional to take all necessary steps upon termination to protect a client's interests. *Standards* § 7.3.
- b. **Mental State.** O'Rourke's conduct was a combination of negligent and knowing. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards* at 9. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* O'Rourke knew that he had retained some client property, insofar as he offered Cole to arbitrate the dispute; however, he negligently failed to appreciate his obligation to return funds and the timing of the obligation following the termination of the attorney-client relationship.
- c. **Injury.** Cole was actually injured to the extent that she was out the use of the money she paid to O'Rourke, and without the full extent of the legal services for which the fees were paid. Similarly, both Cole and Spisla were potentially injured to the extent that they then lacked the funds to hire other counsel to

complete Spisla's legal matter. However, O'Rourke has agreed in conjunction with this stipulation to refund half of the fee paid by Cole (\$4,940).

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

1. A prior record of discipline. *Standards* § 9.22(a). In 2010, O'Rourke was reprimanded for a violation of RPC 1.1 (failure to provide competent representation) under circumstances dissimilar to the conduct at issue in this matter.
2. Substantial experience in the practice of law. *Standards* § 9.22(i). O'Rourke was admitted in Oregon in 1978.

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

1. Absence of a dishonest motive. *Standards* § 9.32(b).
2. Cooperative attitude toward proceedings. *Standards* § 9.32(e)

10.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards* § 7.3.

11.

Oregon cases support that a reprimand is generally sufficient where a lawyer delays in returning client property, following termination of the attorney/client relationship. *See, e.g., In re Meyer*, 29 DB Rptr 64 (2015) (attorney reprimanded after personal injury client terminated his contingency representation, he asserted a lien on client's personal injury file and refused to provide it to successor counsel until client paid attorney at his hourly rate for his time spent on the case); *In re Zackheim*, 28 DB Rptr 9 (2014) (attorney reprimand where, in a personal injury action, after clients terminated respondent's representation and instructed him to forward their files to new counsel, he refused, improperly asserting that he was entitled to retain them); *In re Kleen*, 27 DB Rptr 213 (2013) (respondent reprimanded when it took nearly eight months after the end of the attorney-client relationship to return funds that the client had paid him to obtain an expert opinion that he never sought); *In re Lounsbury*, 24 DB Rptr 53 (2010) (attorney reprimanded after he failed to refund a portion of a client's fee when he was terminated by the client before the legal services were completed).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that O'Rourke shall be publicly reprimanded for violation of RPC 1.16(d), the sanction to be effective following proof of payment to Cole of \$4,940, and upon approval by the Disciplinary Board.

13.

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.¹⁴

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 O'Rourke is admitted: Washington.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on November 2, 2017. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 11th day of January, 2018.

/s/ James F. O'Rourke

James F. O'Rourke

OSB No. 783286

APPROVED AS TO FORM AND CONTENT:

/s/ Wayne Mackeson

Wayne Mackeson

OSB No. 823269

EXECUTED this 17th day of January, 2018.

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. 17-91
)	
LYLE BOSKET,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Mark J. Fucile
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), and RPC 1.16(a). Stipulation for Discipline. 30-day suspension, all stayed, one-year probation.
Effective Date of Order:	February 1, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved. Bosket is suspended for 30 days, all of the suspension stayed pending successful completion of a 1-year term of probation, effective February 1, 2018, or upon approval of this Order, whichever is later, for violations of RPC 1.3, RPC 1.4(a), and RPC 1.16(a).

DATED this 24th day of January, 2018.

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

STIPULATION FOR DISCIPLINE

Lyle Bosket, attorney at law (“Bosket”), and the Oregon State Bar (“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.

Bosket 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 Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On October 23, 2017, a Formal Complaint was filed against Bosket pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (failure to promptly comply with reasonable requests for information from a client); and RPC 1.16(a) (a failure to decline or withdraw from representation where the lawyer’s physical or mental condition materially impaired his ability to represent his client). 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 August 20, 2015, Miguel Castro-Romero (“Castro-Romero”) was rear-ended at a stop light. On March 10, 2016, Castro-Romero hired Bosket to represent him in bringing claims related to the August 2015 accident.

6.

Beginning around the summer of 2016, Bosket began experiencing significant personal problems, including marital issues, requiring significant absences from the office through mid-2017, and which were exacerbated by his assistant’s absence due to medical issues. Bosket’s personal problems caused him substantial stress and anxiety and seriously affected his ability to devote time and attention to legal work on behalf of clients, including Castro-Romero.

7.

On July 20, 2016, Castro-Romero notified Bosket that he was medically stable and ready to begin exploring settlement. In response, Bosket stated that he would order medical records and prepare a settlement demand for Castro-Romero.

8.

Between July 20, 2016, and January 24, 2017, Bosket took no action on Castro-Romero's legal matter.

9.

Between July 20, 2016, and January 24, 2017, Bosket did not communicate with Castro-Romero, or his wife, Kandra Luna ("Luna"), or respond to their numerous calls and emails inquiring about the status of Castro-Romero's legal matter.

10.

Beginning in December 2016, Bosket began experiencing serious health problems that necessitated hospitalizations and significant convalescence that also impacted his ability to perform legal work for clients, including Castro-Romero.

11.

On January 24, 2017, Luna submitted a complaint to the Bar that assumed from Bosket's lack of communication that he was no longer representing Castro-Romero and sought assistance in retrieving the client file from Bosket.

12.

At no time between March 2016 and January 24, 2017, did Bosket withdraw from Castro-Romero's legal matter.

Violations

13.

Bosket admits that, by failing to act or respond to Castro-Romero or Luna, he neglected his client's legal matter in violation of RPC 1.3 and failed to respond to a client's reasonable requests for information, in violation of RPC 1.4(a).

Bosket further admits that his failure to withdraw from Castro-Romero's representation in light of his personal and medical issues that were affecting his ability to adequately represent Castro-Romero's interests, violated RPC 1.16(a).

Sanction

14.

Bosket 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* ("*Standards*"). The *Standards* require that Bosket'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.** Bosket violated his duty to his clients to act with diligence in their representation (including the duty to promptly respond to client communications). *Standards* § 4.4. The *Standards* presume that the most important ethical duties are those obligations that lawyers owe to their clients. *Standards* at 5. Bosket also violated his duty to the profession to properly withdrawal from representation when required by his physical and mental conditions. *Standards* § 7.0.
- b. **Mental State.** There are three mental states recognized by the *Standards*. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Intent” is the conscious objective or purpose to accomplish a particular result. *Id.*

While Bosket’s neglect and lack of communication may have initially been negligent, particularly in light of his personal distractions, they became at least knowing when Luna and Castro-Romero began in earnest to communicate with him, and he failed to respond their requests for information. Similarly, Bosket’s failure to withdraw became knowing when his physical and mental conditions were ever more compromised by each successive event during 2016 and 2017. The Bar does not contend that any of Bosket’s conduct was intentional.

- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, the Disciplinary Board may take into account both actual and potential injury. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Although there is no indication that Castro-Romero’s personal injury claims were actually injured by Bosket’s inattention, there was potential for injury, particularly if Castro-Romero and Luna had not been vigilant in following up on Castro-Romero’s potential claims. Moreover, both Castro-Romero and Luna were actually injured in terms of anxiety and frustration they suffered in attempting to communicate with Bosket and getting him to act. *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*, 325 Or 421, 426–27, 939 P2d 39 (1997).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Multiple offenses. *Standards* § 9.22(d). There are multiple violations stemming from separate conduct by Bosket.

2. Substantial experience in the practice of law. *Standards* § 9.22(i). Bosket has been an attorney in Oregon since 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). Bosket has provided evidence of marital and physical health issues at the time of some of the misconduct at issue in this matter.
 4. Cooperative attitude toward proceedings. *Standards* § 9.32(e). Bosket cooperated fully in the Bar's investigation of his conduct and the resolution of this formal proceeding.
 5. Physical disability. *Standards* § 9.32(h). Bosket was physically unable to attend to his law practice during a portion of the time at issue in this matter.
 6. Remorse. *Standards* § 9.32(l). Bosket sent a letter of apology to Castro-Romero and Luna, explaining his circumstances and offering to help facilitate information and assistance in the resolution of Castro-Romero's claims.

15.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or engages in a pattern of neglect and causes injury or potential injury to a client. *Standards* § 4.42. A suspension is also generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards* § 7.2. While the *Standards* provide that a term of suspension should generally be equal to or greater than six months (*Standards* § 2.3), taking into account Bosket's substantial mitigation, a short-term suspension appears sufficient to address his misconduct.

16.

Oregon cases similarly support the imposition of a short suspension under similar circumstances, particularly where combined with a probationary period aimed at addressing the conditions leading to the misconduct. *See, e.g., In re Peterson*, 29 DB Rptr 221 (2015) (respondent was suspended for 60 days, all stayed, pending a 2-year probation, where he failed to complete grandparent adoption for a year, despite assurances that it was a simple process that would only take a few months, and failed to notify the client that the matter had been placed on the backburner or return her numerous calls requesting an update); *In re Lopata*, 29

DB Rptr 170 (2015) (respondent was suspended for 90 days, all stayed, pending a 2-year probation, when he failed to complete the filing of a trademark application or respond to the client's inquiries about the status of the application for approximately a year); *In re Vernon*, 29 DB Rptr 12 (2015) (respondent was suspended for 60 days, all stayed, pending a 2-year probation, when, after she discovered that she had not filed an amended PCR petition for her client, and that the matter had been dismissed, she informed the client of the dismissal and promised to seek its reinstatement, but failed to do so despite calls from the client and a complaint to the Bar); *In re Snell*, 29 DB Rptr 5 (2015) (respondent was suspended for 60 days, all but 30 days stayed, pending a 2-year probation, where she filed liens against a hotel on behalf of Clients 1 and 2, filed a lawsuit seeking to foreclose Client 1's lien, and also filed an answer on behalf of Client 2 which cross-claimed against the other lien-holder defendants, including Client 1; for nearly two years, respondent did nothing to advance Client 2's cross-claim); *In re Segarra*, 28 DB Rptr 69 (2014) (attorney who suffered from debilitating migraines was suspended for 60 days, all but 30 days stayed, pending a 2-year probation, where he accepted domestic relations cases but failed to timely attend to matters, file motions, comply with discovery requests, and was unable to appear for scheduled proceedings, resulting in attorney fees being awarded against at least one of his clients); *In re Fitting*, 304 Or 143 (1987) (attorney, suffering from emotional difficulties and depression, was suspended for 90 days and placed on a 2-year probation for neglect when his client's lawsuit was dismissed because of the attorney's failure to pursue the case and to file a pretrial order, all resulting in sanctions being imposed by the court on both the attorney and the client).

17.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Bosket shall be suspended for thirty (30) days for violations of RPC 1.3, RPC 1.4(a), and RPC 1.16(a), with all of the suspension stayed, pending Bosket's successful completion of a one (1)-year term of probation. The sanction shall be effective February 1, 2018, or upon approval by the Disciplinary Board, whichever is later ("effective date").

19.

Probation shall commence upon the effective date and shall continue for a period of one (1) year, ending on the day prior to the first (1st) year anniversary of the commencement

date (the “period of probation”). During the period of probation, Bosket shall abide by the following conditions:

- (a) Bosket will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Bosket has been represented in this proceeding by Mark Fucile (“Fucile”). Bosket and Fucile hereby authorize direct communication between Bosket and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Bosket’s compliance with his probationary terms.
- (c) Bosket shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (d) During the period of probation, Bosket shall attend not less than four (4) MCLE accredited programs, for a total of twelve (12) hours, which shall emphasize law practice management, time management, and effective client communication. These credit hours shall be in addition to those MCLE credit hours required of Bosket for his normal MCLE reporting period. The Ethics School requirement does not count towards the twelve (12) hours needed. Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Bosket shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the term of probation, Bosket shall diligently attend to client matters and adequately communicate with clients regarding their cases. Attorney shall also ensure that he is physically and emotionally able to competently handle the number and complexity of all active client matters.
- (f) Each month during the period of probation, Bosket 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.
- (g) Ron Sayer (OSB No. 951910) shall serve as Bosket’s probation supervisor (“Supervisor”). Bosket shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Bosket’s clients, the profession, the legal system, and the public.
- (h) Beginning with the first month of the period of probation, Bosket shall meet with Supervisor in person at least once a month for the purpose of allowing his Supervisor to review the status of Bosket’s law practice and his performance of

legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) files or 10% of Bosket's active caseload, whichever is greater, to determine whether Bosket is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.

- (i) Bosket authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Bosket's compliance.
- (j) Within seven (7) days of the effective date, Bosket shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Bosket shall schedule the first available appointment with the PLF and notify DCO of the time and date of the appointment.
- (k) Bosket shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF, Bosket shall adopt and implement those recommendations.
- (l) No later than sixty (60) days after recommendations are made by the PLF, Bosket shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (m) On a monthly basis, on dates to be established by DCO beginning no later than thirty (30) days after the effective date, Bosket shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Bosket is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Bosket's meetings with his Supervisor.
 - (2) The number of Bosket's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.

- (3) Whether Bosket has completed the other provisions recommended by his Supervisor, if applicable.
- (4) In the event that Bosket has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (n) Bosket is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (o) Bosket's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (p) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (q) The SPRB's decision to bring a formal complaint against Bosket for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

20.

Bosket 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 his suspension, if any stayed period of suspension is actually imposed. In this regard, in the event that a suspension is imposed Bosket has arranged for Ron Sayer (OSB No. 951910), an active member of the Bar, to either take possession of or have ongoing access to Bosket's client files and serve as the contact person for clients in need of the files during the term of his actual suspension. Bosket represents that Ron Sayer has agreed to accept this responsibility.

21.

Bosket acknowledges that reinstatement is not automatic on expiration of the period of suspension, if any stayed period of suspension is actually imposed. If a period of suspension is necessitated by his noncompliance 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. Bosket 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.

22.

Bosket 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 Bosket is admitted: Washington and the U.S. District Court for the District of Oregon.

23.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 9, 2017. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 8th day of January, 2018.

/s/ Lyle Bosket
Lyle Bosket
OSB No. 990313

APPROVED AS TO FORM AND CONTENT:

/s/ Mark J. Fucile
Mark J. Fucile
OSB No. 822625

EXECUTED this 22nd day of January, 2018.

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. 16-139 and 16-140
)	
JENNIFER BARRETT,)	
)	
Accused.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Stipulation for Discipline. 90-day suspension.
Effective Date of Order:	February 5, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Jennifer Barrett is suspended for ninety (90) days, effective ten days after the stipulation is approved for violations of RPC 1.3, RPC 1.4(a) and RPC 1.4(b) and in Case No. 16-139 and RPC 1.3, RPC 1.4(a) and RPC 1.4(b) in Case No. 16-140.

DATED this 26th day of January, 2018.

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

STIPULATION FOR DISCIPLINE

Jennifer Barrett, attorney at law (“Barrett”), and the Oregon State Bar (“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.

Barrett was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 30, 2004, and has been a member of the Bar continuously since that time, having her office and place of business in Douglas County, Oregon.

3.

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

4.

On October 22, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Barrett for alleged violations of the Oregon Rules of Professional Conduct (“RPC”): RPC 1.3, RPC 1.4(a), RPC 1.4(b) and RPC 8.4(a)(3) in Case No. 16-139 and RPC 1.3, RPC 1.4(a) and RPC 1.4(b) in Case No. 16-140. 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 March 7, 2017, a Formal Complaint was filed against Barrett pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(3) in Case No. 16-139 and RPC 1.3, RPC 1.4(a), and RPC 1.4(b) in Case No. 16-140. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this consolidated proceeding.

Facts

Case No. 16-139 (Pricila Lopez)

5.

In early March 2014, Pricila Lopez (“Lopez”) hired Barrett to represent her in filing and completing a marital dissolution. On March 7, 2014, Barrett filed the petition for dissolution. Between March 7, 2014, and approximately March 2016, Barrett took no substantive action with respect to Lopez’s legal matter.

6.

On May 15, 2014, the court issued a (Rule 7) 63-day notice of dismissal in Lopez's marital dissolution case. Barrett was copied with this notice but took no action and did not provide a copy of the dismissal notice to Lopez.

7.

On October 16, 2014, the court entered a general judgment of dismissal of Lopez's marital dissolution case. The court record indicates that the court notified Barrett of the dismissal.

8.

Between March of 2014 and February of 2016, Lopez made numerous requests for information and status updates on her case, both by telephone and by personal visits to Barrett's office. Barrett did not respond to the majority of Lopez's voicemails or other communication attempts, and did not provide Lopez with timely status updates regarding her case.

Violations

9.

Barrett admits that, by not taking any action after filing the petition for dissolution, allowing the case to be dismissed, and not responding to Lopez's communication attempts, she neglected a legal matter entrusted to her, did not keep her client reasonably informed about the case, did not comply with reasonable requests for information, and did not explain the matter to enable Lopez to make informed decisions regarding the case. Barrett admits that she violated RPC 1.3, RPC 1.4(a), RPC 1.4(b) in Case No. 16-139.

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

Case No. 16-140 (Kristine Reese)

10.

In July 2013, Barrett began representing Kristine Reese ("Reese") in a child custody dispute. In mid-January 2014, the court awarded Reese sole custody of her daughters and directed Barrett to prepare the judgment.

11.

After January 2014, Barrett failed to prepare or file the judgment, despite receiving multiple reminder letters, notices of the intent to dismiss, and extensions of time from the court. During this time, Barrett was also receiving repeated requests from Reese that she complete and file the judgment.

12.

Between February 2014 and January 2015, Reese attempted to communicate with Barrett over two dozen times, requesting information and updates about the status of the judgment. Barrett only answered or responded to Reese's calls on a handful of occasions. When Barrett did respond, she told Reese that she would complete the judgment soon, but then failed to do so.

13.

In January of 2015, when Barrett still had not filed the judgment, Reese terminated the representation.

Violations

14.

Barrett admits that, by not preparing the judgment and being uncommunicative with Reese over an extended period of time, she neglected Reese's matter, failed to comply with reasonable requests for information and failed to explain a matter to permit Reese to make informed decisions regarding the representation, and thereby violated RPC 1.3, RPC 1.4(a), and RPC 1.4(b) in Case No. 16-140.

Sanction

15.

Barrett 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* ("Standards"). The *Standards* require that Barrett'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 a lawyer owes are to her clients. *Standards* at 5. Barrett violated the most important duties that she owed to her clients to act with reasonable diligence and promptness, which includes the obligation to timely and effectively communicate. *Standards* §§ 4.4, 4.6.
- b. **Mental State.** The *Standards* recognize three possible mental states: negligent, knowing, and intentional. *Standards* at 9. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. 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. Intent is the conscious objective or purpose to accomplish a particular result. *Id.*

In both cases, Barrett acted with a knowing mental state, or with “conscious awareness of the nature or the attendant circumstances of her conduct but without the conscious objective or purpose to accomplish to a particular result.” *Id.*

- c. **Injury.** Lopez and Reese both sustained actual injuries as a result of Barrett’s conduct. A client sustains actual injury when an attorney fails to actively pursue her client’s case. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (2000). Additionally, Barrett’s lack of communication and failure to complete Lopez’s dissolution and Reese’s custody dispute caused both to experience stress, frustration, and anxiety. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997). The father of Reese’s children manipulated his visits because Barrett did not timely file a judgment, which only compounded Reese’s frustration and anxiety and caused Reese to hire another attorney to complete the judgment Barrett promised.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. A pattern of misconduct; *Standards* § 9.22(b)
 2. Multiple offenses; *Standards* § 9.22(d); and
 3. Substantial experience in the practice of law—Barrett has been practicing since 2004. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of prior disciplinary record; *Standards* § 9.32(a),
 2. Absence of a dishonest or selfish motive; *Standards* § 9.32(b); and
 3. Remorse; *Standards* § 9.32(l).

16.

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

17.

Barrett’s neglect of her two clients’ matters and failure to communicate with both clients warrant a suspension under Oregon case law. *See, e.g., In re Murphy*, 349 Or 366, 245 P3d 100 (2010) (120-day suspension); *In re Redden*, 342 Or 393 (2007) (60 day suspension for attorney’s failure to complete a child support arrearage matters for a client for nearly two years); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (120-day suspension where attorney was not prepared for a settlement conference he had requested, failed to send his calendar of

available dates to an arbitrator, failed to respond to messages from the arbitrator’s office, and failed to take steps to pursue arbitration after a second referral to arbitration by the court); and *In re Koch*, 345 Or 444, 198 P3d 910 (2008) (attorney suspended for 120 days when she failed to advise her client that another lawyer would prepare a qualified domestic relations order for the client and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter); *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006) (90-day suspension for neglect of two separate client matters and neglect of a client’s appeal which resulted in the case being dismissed).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Barrett shall be suspended for 90 days for violations of RPC 1.3, RPC 1.4(a) and RPC 1.4(b) and in Case No. 16-139 and RPC 1.3, RPC 1.4(a) and RPC 1.4(b) in Case No. 16-140, the sanction to be effective ten days after this stipulation is approved.

19.

Prior to this stipulation, Barrett arranged for the Professional Liability Fund (“PLF”) to take possession of Barrett’s client files and serve as the contact person for clients in need of the files. Barrett represents that the PLF has agreed to accept this responsibility. Barrett further represents that she is not practicing law and is not currently representing clients.

20.

Barrett 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. Barrett 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.

21.

Barrett 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. This requirement is in addition to any other provision of this agreement that requires Barrett to attend or obtain continuing legal education (CLE) credit hours.

22.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 18, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 24th day of January, 2018.

/s/ Jennifer Barrett

Jennifer Barrett

OSB No. 044667

EXECUTED this 25th day of January, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case Nos. 16-147 and 17-05
) SC S065582
AMBER N. WOLF,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: None
Disciplinary Board: None
Disposition: Violation of RPC 1.15-1(b), RPC 5.5(a), RPC 8.4(a)(3),
and ORS 9.160(1). Stipulation for Discipline. 1-year
suspension, all but 90 days stayed, 2-year probation.
Effective Date of Order: February 12, 2018

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, with all but 90 days of that period stayed pending respondent's successful completion of a two-year term of probation, effective February 12, 2018. The accused must adhere to all the terms and conditions set out in the stipulation.

/s/ Thomas A. Balmer
Chief Justice, Supreme Court
2/1/2018 1:45 p.m.

STIPULATION FOR DISCIPLINE

Amber N. Wolf, attorney at law ("Wolf"), and the Oregon State Bar ("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.

Wolf was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 29, 2003, and has been a member of the Bar continuously since that time, having her office and place of business in Washington County, Oregon.

3.

Wolf 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 May 22, 2017, a Formal Complaint was filed against Wolf pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.15-1(b) (deposit of lawyer funds into trust for reasons other than service charges or minimum balance requirements); RPC 5.5(a) (practice of law in violation of the regulation of the legal profession); RPC 8.4(a)(3) (knowing misrepresentations); and ORS 9.160 (practice of law when not an active member of the Oregon State 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.

Case No. 16-147

Trust Account Overdraft

Facts

5.

Prior to June 2016, Wolf had both a lawyer trust account and a business account at Chase Bank.

6.

Beginning on or about June 19, 2016, Wolf began depositing personal money into her Chase Bank lawyer trust account, in lieu of her business account, which was frozen due to suspected fraud. Wolf utilized the personal funds in her Chase Bank lawyer trust account to pay several bills, including her rent, electric bill, and phone bill.

Violations

7.

Wolf admits that, by depositing her own funds into her lawyer trust account for purposes other than bank service charges or to meet minimum balance requirements, she violated RPC 1.15-1(b).

Case No. 17-05

OSB Matter

Facts

8.

In or around April 2016, Wolf tendered a check to the Professional Liability Fund (“PLF”) for her 2016 assessment. That check was returned NSF, and her PLF assessment remained unpaid.

9.

Beginning in May 2016, the PLF issued multiple delinquency notices to Wolf, stating that she would be automatically suspended if the assessment were not paid by July 14, 2016. The delinquency notices were directed to Wolf at her email and mailing addresses on record with the Bar: amber@bankruptcywolf.com (“record email”); and Wolf Law Offices, LLC, 10260 SW Greenberg Road, Suite 415, Portland, OR 97223 (“record address”).

10.

On July 7, 2016, the PLF emailed Wolf at her record email a “PLF FINAL COURTESY NOTICE: Your deadline is fast approaching!” advising that her PLF assessment must be physically received by July 14, 2016, to avoid suspension.

11.

Wolf did not pay her PLF assessment, and, on or about July 15, 2016, Wolf was administratively suspended for failing to pay the PLF assessment. That same day, the Bar mailed a letter to her record address notifying her that she was suspended from the practice of law in Oregon. The letter was not returned as undeliverable.

12.

On July 15, 2016, Wolf was the attorney of record in 13 pending bankruptcies. On or after July 15, 2016, Wolf did not withdraw from any of the 13 pending bankruptcy cases. On July 27, 2016, Wolf appeared at a hearing in one of the pending bankruptcy cases.

13.

On or after July 15, 2016, Wolf filed at least seven new bankruptcy petitions on behalf of clients, one or more of which were filed with full knowledge of her suspended status.

14.

In or around late September, Wolf began taking steps to be reinstated to active practice in Oregon. On September 27, 2016, Wolf signed and submitted a Statement in Support of BR 8.4 Reinstatement (“BR 8.4 Statement”), under oath, in which she attested that she had not engaged in the practice of law in Oregon during her suspension. Wolf’s attestation in her BR 8.4 Statement was not accurate and Wolf knew that it was inaccurate when she made it. However, she reportedly acted under the misimpression that her suspension would be cured retroactive to July 15, 2016, upon her reinstatement.

15.

On September 21, 2016, Wolf signed and submitted a Request for (PLF) Exemption and Prorated Refund (“Exemption Request”) in which she certified that her last day of private practice in Oregon was July 15, 2016, and that she was thereafter exempt from the requirement to carry malpractice coverage because, “I did not practice due to lack of PLF coverage.” She further certified in the Exemption Request that she did not presently engage in private practice; and that she was exempt from the requirement to carry PLF coverage because she was “presently unemployed.” Wolf’s certifications in her Exemption Request were inaccurate and she knew that they were inaccurate and material when she made them.

16.

On September 26, 2016, the PLF received Wolf’s Exemption Request. That day, the PLF’s assessment coordinator, Kathy Medford (“Medford”), acknowledged receipt of the Exemption Request by email to Wolf’s record email confirming “...the 2016 Mid-Year Exemption is complete with your last day of practice in Plan Year as July 15, 2016.” Medford further advised Wolf that “When you have been reinstated, notify us if you will need PLF coverage and a pro-rated bill will be issued for you.” Wolf replied by email with a prompt, “Thank you!”

17.

On October 3, 2016, Wolf paid her PLF assessment and was reinstated to active practice.

18.

Between October 3, 2016, and on about November 30, 2016, Wolf did not obtain PLF coverage, although she was an active member of the Oregon State Bar and engaged in the practice of law.

Violations

19.

Wolf admits that, by filing bankruptcy petitions and practicing law during her suspension for failing to pay her PLF assessment, she engaged in the practice of law in

violation of the regulation of the legal profession and while not an active member of the Oregon State Bar, in violation of RPC 5.5(a) and ORS 9.160.

Wolf further admits that her practice of law, following reinstatement, but without PLF coverage, constituted the practice of law in violation of the regulation of the legal profession, in violation of RPC 5.5(a).

Finally, Wolf admits that the statements in her BR 8.4 Statement and Exemption Request that she had not engaged in the practice of law while suspended, and was therefore exempt from coverage requirements were knowing misrepresentations in violation of RPC 8.4(a)(3).

Sanction

20.

Wolf and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the *ABA Standards for Imposing Lawyer Sanctions* (“*Standards*”). The *Standards* require that Wolf’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.** Wolf’s improper use of her trust account violated her duty to her clients to appropriately safeguard and handle their funds (even though under the specific circumstances, it does not appear that client funds were in her lawyer trust account). *Standards* § 4.1. Wolf’s misrepresentations to the Bar violated her duty to the legal system to act with candor in such situations. *Standards* § 6.1. Finally, Wolf’s unlawful practice of law violated of her duty to the profession to comply with rules regulating the practice of law. *Standards* § 7.0.
- b. **Mental State.** There are three types of mental state recognized under the *Standards*: “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* at 9.

Wolf’s misuse of her lawyer trust account was knowing. She was aware that she was depositing funds into trust that were not client funds, and is presumed to know the ethics rules (in this instance that personal funds are not appropriate to place in trust).

Wolf's unlawful practice—prior to her reinstatement—was both negligent and knowing. She “should have known,” given her history of quarterly payments to the PLF alone, that she was both in arrears and in jeopardy of being suspended. She also should have recognized that she was suspended when she admittedly received her first-class correspondence containing her arrears and suspension notices (i.e., at least by August 9, 2016). At minimum, Wolf was admittedly aware of her suspension before she filed the bankruptcy proceeding for a client on September 26, 2016, in an attempt to avoid a foreclosure sale on the client's property scheduled for the following day.

Wolf's practice without PLF coverage—following her reinstatement—was arguably negligent given the flurry of information thrown around during the reinstatement process, notwithstanding Medford's specific direction that she “notify us if you will need PLF coverage and a prorated bill will be issued for you.”

Finally, Wolf's misrepresentations to the Bar and the PLF in the reinstatement process were knowing. Despite her claimed misunderstanding about directions given to her by Bar staff, Wolf admittedly knew that her statements in both the PLF Exemption Request and the BR 8.4 Statement were not accurate at the time that she made them. Wolf claims that she either thought that she was required to respond in the manner that she did (regardless of the accuracy of her representation) or that her reinstatement would somehow cure the inaccuracies (to the extent that it was retroactive to the date of her suspension).

- c. **Injury.** The Court may take into account both actual and potential injury. *Standards* at 9; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. *Standards* at 9.

It does not appear that there was any actual injury to clients as a result of Wolf's conduct; however, there was potential injury to the extent that client funds may have been impacted (as there were some instances in which client funds made their way into trust). There was also potential injury due to Wolf's lack of coverage during the time that she was suspended from the practice of law but continued to practice. Additionally, by failing to comply with the trust account rules, Wolf “caused actual harm to the legal profession.” *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012) (quoting *In re Peterson*, 348 Or 325, 343, 232 P3d 940 (2010)).

There was both potential and actual injury to the judicial functioning and the Bar by the misrepresentations in Wolf's reinstatement forms. The Court has held that both the legal profession and the public are actually injured where attorney conduct hampers or delays Bar regulatory processes, including investigations and, consequently, the resolution of Bar complaints. *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997); *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 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 selfish motive. Nearly all of Wolf's conduct in these matters can be attributed to self-serving motives. She utilized her trust account as a personal account out of convenience, and continued to engage in the practice of law notwithstanding her suspension and lack of PLF coverage. *Standards* § 9.22(b).
2. A pattern of misconduct. *Standards* § 9.22(c). Wolf knowingly misused her trust account for a significant time and also engaged in the unauthorized practice of law for a prolonged period, even after she was unmistakably made aware of her suspension, and thereafter continued to practice law without PLF coverage. *See In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or at 427.
3. Multiple offenses. There are multiple charges resulting from both similar and dissimilar conduct and instances of misconduct. *Standards* § 9.22(d).
4. Substantial experience in the practice of law. Wolf was admitted to practice in Oregon in 2003, and has practiced continuously since that time. *Standards* § 9.22(i)

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

1. Absence of a prior record of discipline. *Standards* § 9.32(a).
2. Personal or emotional problems. Wolf has expressed that she was suffering from significant stress, depression, and anxiety related to medical issues, marital issues, including two marital separations, and the death of her mother, a long-time pet, and a close friend and colleague, during the time of some the conduct at issue in these matters. *Standards* § 9.32(c).

3. Full and free disclosure or cooperative attitude toward proceedings. *Standards* § 9.33(e).
4. Physical disability. Wolf provided some medical records supporting sworn testimony that she was suffering from some serious physical health issues during the time of some the conduct at issue in these matters. *Standards* § 9.33(h).
5. Remorse. Wolf has expressed shame and regret for her actions in these matters and interest in learning better methods of managing her practice.

21.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property and causes injury or potential injury to a client. *Standards* § 4.12. Suspension also 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. A reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, 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* § 6.13. 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.

22.

Oregon cases support the imposition of a suspension for Wolf's mishandling of her trust account. *See, e.g., In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (attorney was suspended for one year when it was determined that he never reconciled his monthly trust account statements or maintained a trust account ledger to keep track of client funds and was negligent in his trust accounting practices); *see also In re Bertoni*, 26 DB Rptr 25 (2012) (attorney suspended for 150 days when, over an extended period, attorney negligently withdrew client funds from his law firm's trust account before the funds were earned, failed to maintain complete records, and periodically deposited his own funds into trust in amounts that exceeded bank service charges and minimum balance requirements); *In re Levie*, 22 DB Rptr 66 (2008) (attorney suspended for six months where he intentionally used his trust account as his own personal account, depositing his own funds and paying personal and business expenses directly from that account in order to shield those funds from creditors). The Bar does not believe that Wolf's conduct with respect to her trust account was as egregious as any of the foregoing cases.

The Court has imposed or approved substantial suspensions on lawyers for unlawful practice. *See, e.g., In re Kluge*, 332 Or 251, 27 P3d 102 (2001) (attorney suspended for three years where, contrary to statute and bar bylaw, attorney engaged in the private practice of law in Oregon without professional liability insurance coverage); *In re Koliha*, 330 Or 402, 9 P3d 102 (2000) (attorney suspended for one year who filed pleadings on behalf of a client and made an appearance in court, holding herself out as an active bar member, when in fact she was suspended from the practice of law); *see also In re Pavithran*, 16 DB Rptr 321 (2002) (one-year suspension for attorney who continued to hold herself out as eligible to practice law in litigated matter after being suspended for failure to pay her PLF assessment); *In re Ryan*, 16 DB Rptr 19 (2002) (18-month suspension for attorney who practiced law while suspended for failing to pay PLF assessment); *In re Gresham*, 10 DB Rptr 31 (1996) (one-year suspension for attorney who engaged in the unlawful practice of law by preparing and filing a dissolution modification after improperly claiming exempt status with the Professional Liability Fund).

Similarly, the Court has imposed or approved suspensions for misrepresentations to the Bar and/or misrepresentations under oath. *See, e.g., In re Gallagher*, 332 Or 173, 190, 26 P3d 131 (2001) (Court ordered two-year suspension where attorney repeatedly lied to Bar and LPRC); *In re Huffman*, 331 Or 209, 229, 13 P3d 994 (2000) (lawyer suspended for two years where made misrepresentations in filings to court and failed to respond truthfully to the Bar); *In re Staar*, 324 Or 283, 292, 924 P2d 308 (1996) (respondent who knowingly made false statements of fact under oath resulting in prejudice to administration of justice was suspended for two years); *see also In re Goff*, 352 Or 104, 280 P3d 984 (2012) (18-month suspension for attorney's false statements to the Bar when responding to a disciplinary complaint); *see also, In re Kinney*, 28 DB Rptr 59 (2014) (attorney was suspended for one year, part stayed pending probation, where he allowed his personal bankruptcy petition to be filed containing incomplete and inaccurate information and thereafter affirmed the accuracy of the information under oath, without having thoroughly reviewed the documents and without having verified that the information was correct); *In re Hudson*, 27 DB Rptr 226 (2013) (attorney was suspended for two years, part stayed pending probation, where, in connection with a bar investigation, fee arbitration, and civil proceedings brought by his former client, attorney separately submitted documents and made statements that materially misrepresented the true facts regarding the client's claims and their timing with respect to the attorney-client relationship, intending that these false statements and documentation be relied upon by the bar, the arbitrator, and the court in their respective evaluations of his former client's claims).

Under the foregoing cases, Wolf's collective misconduct warrants a substantial suspension. However, given her shortcomings in practice management and the presence of mitigating circumstances, the Bar believes a term of probation is appropriate.

23.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation

can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

24.

Consistent with the *Standards* and Oregon case law, the parties agree that Wolf shall be suspended for one (1) year for violations of RPC 1.15-1(b), RPC 5.5(a), RPC 8.4(a)(3), and ORS 9.160, with all but ninety (90) days of the suspension stayed, pending Wolf's successful completion of a two (2)-year term of probation. The sanction shall be effective February 6, 2018, or ten (10) days after this Stipulation for Discipline is approved by the Supreme Court, whichever is later ("effective date").

25.

Wolf's license to practice law shall be suspended for a period of ninety (90) days beginning the effective date, assuming all conditions have been met ("actual suspension"). Wolf understands that reinstatement is not automatic and that she cannot resume the practice of law until she has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Wolf re-attains her active membership status with the Bar, Wolf shall not practice law or represent that she is qualified to practice law; shall not hold herself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of active suspension.

26.

Probation shall commence upon the date Wolf is reinstated to active membership status and shall continue for a period of two (2) years, ending on the day prior to the second (2nd) year anniversary of the commencement date (the "period of probation"). During the period of probation, Wolf shall abide by the following conditions:

- (a) Wolf will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with her probationary terms.
- (b) Wolf shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (c) During the period of probation, Wolf shall attend not less than eight (8) MCLE accredited programs, for a total of twenty-four (24) hours, all of which shall emphasize law practice management, time management, and trust account practices. These credit hours shall be in addition to those MCLE credit hours required of Wolf for her normal MCLE reporting period. (The Ethics School

and Trust Accounting School requirements do not count towards the twenty-four (24) hours needed to comply with this condition.) Upon completion of these CLE programs, and prior to the end of her period of probation, Wolf shall submit an Affidavit of Compliance to DCO.

- (d) Prior to the end of the period of probation, Wolf shall attend Trust Accounting School, offered by the Oregon State Bar twice a year in the spring and fall. Upon completion of Trust Accounting School, and prior to the end of her period of probation, Wolf shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the term of probation, Wolf shall diligently attend to client matters and adequately communicate with clients regarding their cases. Attorney shall also ensure that she maintains her PLF coverage during all periods of active practice, including during the term of probation (i.e., at all times other than during her actual suspension).
- (f) Each month during the period of probation, Wolf 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.
- (g) Every month for the period of probation, Wolf shall:
 - (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills;
 - (2) ensure the proper handling of both lawyer and client funds, including proper documentation; and
 - (3) review her monthly trust account records and client ledgers and reconcile those records with her monthly lawyer trust account bank statements.
- (h) Christopher J. Kane (OSB No. 950863) shall serve as Wolf's probation supervisor ("Supervisor"). Wolf shall 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 Wolf's clients, the profession, the legal system, and the public.
- (i) Beginning with the first month of the period of probation, Wolf shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing her Supervisor to review the status of Wolf's law practice and her performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit

of ten (10) files or twenty percent (20%) of Wolf's caseload, whichever is greater, to determine whether Wolf is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect her clients' interests upon the termination of employment.

- (2) Permitting her Supervisor to inspect and review Wolf's accounting and record keeping systems to confirm that she is reviewing and reconciling her lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Wolf agrees that her Supervisor may contact all employees and independent contractors who assist Wolf in the review and reconciliation of her lawyer trust account records.
- (j) Wolf authorizes her Supervisor to communicate with DCO regarding her compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Wolf's compliance.
- (k) Within seven (7) days of her reinstatement date, Wolf shall contact the Professional Liability Fund (PLF) and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Wolf shall schedule the first available appointment with the PLF and notify the Bar of the time and date of the appointment.
- (l) Wolf shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of her employment. No later than thirty (30) days after recommendations are made by the PLF, Wolf shall adopt and implement those recommendations.
- (m) No later than sixty (60) days after recommendations are made by the PLF, Wolf shall provide a copy of the Office Practice Assessment from the PLF and file a report with Disciplinary Counsel's Office stating the date of her consultation(s) with the PLF; identifying the recommendations that she has adopted and implemented; and identifying the specific recommendations she has not implemented and explaining why she has not adopted and implemented those recommendations.
- (n) On a monthly basis, on dates to be established by DCO beginning no later than thirty (30) days after her reinstatement to active membership status, Wolf shall submit to DCO a written "Compliance Report," approved as to substance by

Supervisor, advising whether Wolf is in compliance with terms of this Stipulation for Discipline, including:

- (1) The dates and purpose of Wolf's meetings with her Supervisor.
 - (2) The number of Wolf's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Wolf has completed the other provisions recommended by Supervisor, if applicable.
 - (4) In the event Wolf has not complied with any term of probation in this disciplinary case, the report shall also describe the noncompliance and the reason for it, and when and what steps have been taken to correct the noncompliance.
- (o) Wolf is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (p) Wolf's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (q) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (r) The SPRB's decision to bring a formal complaint against Wolf for unethical conduct that occurred or continued during the period of her probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

27.

In addition, on or before December 31, 2018, Wolf shall pay to the Bar its reasonable and necessary costs in the amount of \$589.75, incurred for court reporter services in connection with her deposition. Should Wolf fail to pay \$589.75 in full by December 31, 2018, the Bar may thereafter, without further notice to her, obtain a judgment against Wolf for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

28.

Wolf 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, Wolf has arranged for Christopher J. Kane (OSB No. 950863), an active member of the Bar, to either take possession of or have ongoing access to Wolf's client files and serve as the contact person for clients in

need of the files during the term of her suspension. Wolf represents that Christopher J. Kane has agreed to accept this responsibility.

29.

Wolf 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. Wolf 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.

30.

Wolf 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. This requirement is in addition to any other provision of this agreement that requires Wolf to attend or obtain continuing legal education (CLE) credit hours.

31.

Wolf 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 Wolf is admitted: US District Court for the District of Oregon and the US Bankruptcy Court for the District of Oregon.

32.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 9, 2017. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 8th day of January, 2018.

/s/ Amber N. Wolf

Amber N. Wolf
OSB No. 031738

EXECUTED this 8th day of January, 2018.

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. 17-19
)
MANUEL C. HERNANDEZ,)
)
Respondent.)

Counsel for the Bar: Nik T. Chourey
Counsel for the Accused: Kent L. Hickam
Disciplinary Board: None
Disposition: Violation of RPC 1.1, RPC 1.5(a), RPC 1.7(a)(2), RPC 1.15-1(a), and RPC 1.16(a)(1). Stipulation for Discipline. 60-day suspension, all but 30 days stayed, 1-year probation.
Effective Date of Order: April 6, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Manuel C. Hernandez is suspended for sixty (60) days for violations of RPC 1.1; RPC 1.5(a); RPC 1.7(a)(2); RPC 1.15-1(a); and RPC 1.16(a)(1), with all but thirty (30) days of the suspension stayed, pending Hernandez’s successful completion of a one (1)-year term of probation. The sanction shall be effective March 15, 2018, or sixty (60) days after approval by the Disciplinary Board, whichever is later.

DATED this 5th day of February, 2018.

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

STIPULATION FOR DISCIPLINE

Manuel C. Hernandez, attorney at law (“Hernandez”), and the Oregon State Bar (“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.

Hernandez was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 27, 1987, and has been a member of the Bar continuously since that time, having his office and place of business in Coos County, Oregon.

3.

Hernandez 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 23, 2017, a Formal Complaint was filed against Hernandez pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.1 (neglect of a legal matter); RPC 1.5(a) (collection of an illegal fee); RPC 1.7(a)(2) (current-client conflict of interest); RPC 1.15-1(a) (duty to maintain property of others in trust); and RPC 1.16(a)(1) (duty to withdraw where continued representation results in a violation of the RPCs). 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.

Renate Hall (“Hall”) died intestate in April 2014. Hall’s daughter, Diana Brown (“Brown”), was her only heir. In May 2014, Brown retained Hernandez to handle the probate of her mother’s estate (“Hall Estate”). Hernandez’s retainer agreement required a \$2,500 retainer and provided for a \$200 hourly fee. In addition to similar statutory requirements for payment of attorney fees from estate funds, Hernandez’s fee agreement stated:

Attorney fees in a probate estate are submitted to the court for approval. The retainer will be applied to attorney fees/costs incurred.

6.

At their initial consultation, Brown informed Hernandez that Hall's only assets at death were \$3,805 on deposit in a checking account and a property sales contract under which Hall had received monthly payments ("Sales Contract"). Hernandez and Brown agreed that Brown would pay the \$2,500 retainer to Hernandez from Hall Estate funds after her appointment as personal representative.

7.

Hernandez filed the petition to admit the Hall Estate to probate. The court mailed instructions to Brown outlining her duties and responsibilities as personal representative. On May 14, 2014, the court granted the petition and appointed Brown personal representative.

8.

On June 2, 2014, Brown reported to Hernandez that she had opened a checking account for the Hall Estate and had deposited the funds from Hall's checking account into it.

9.

At all material times herein, ORS 113.165 required a personal representative, within 60 days after the date of appointment, to file an inventory of all the property of the estate that had come into the personal representative's possession or knowledge.

10.

At all material times herein, ORS 113.175 required a personal representative to file a supplementary inventory within 30 days after receiving possession or knowledge of property belonging to the estate that was omitted from the inventory, or to include the property in the next accounting.

11.

In mid-July 2014, Brown signed an inventory prepared by Hernandez's associate. This inventory did not disclose the \$3,805 cash Hall held at Hall's death. Instead, the inventory listed only the Sales Contract and miscellaneous personal items.

12.

Beginning in June 2014 and through November 2014, Hernandez suggested that Brown assign the Hall Estate's interest in the Sales Contract to his law firm, so he could collect the monthly payments, in an attempt to safeguard Hall Estate property.

13.

At all material times herein, ORS 116.013 set forth the requirements for seeking a partial distribution of probate assets prior to final settlement and distribution of an estate. The

statute required a petition by the personal representative or other interested person, and a court order allowing the partial distribution.

14.

On November 4, 2014, Brown informed Hernandez that she had sold the Sales Contract for a lump sum, at a discounted amount, and asked him how much he was owed in attorney fees for the Hall Estate. Hernandez responded that a total payment of \$4,919 to him was necessary to close the Hall Estate. Brown represented that all creditors had been paid and Hernandez contacted the known creditors to confirm payment.

15.

On December 1, 2014, Brown gave Hernandez a \$2,500 cashier's check she had purchased with proceeds of the sale of the Sales Contract. Hernandez deposited the \$2,500 check into his lawyer trust account. Hernandez reports that on December 12, 2014, he mailed Brown a letter informing her what needed to be completed to close the estate and listing the documents necessary to complete it. On December 17, 2014, Hernandez withdrew \$1,250 from trust as partial payment of his costs advanced and fees for representing Brown. Hernandez did not seek court approval prior to taking these funds from the Hall Estate.

16.

From on or about December 12, 2014 to July 2015, Hernandez took no further substantive action to administer or close the Hall Estate.

17.

On January 15, 2015, Brown complained to the Bar about Hernandez's representation in the probate. Brown submitted to the Bar copies of cashier's checks or cashier check receipts payable to Hernandez for over \$7,000. Hernandez denied receiving any funds other than the \$2,500 and accused Brown of committing fraud and false swearing to the Bar. Also at this time, Hernandez concluded that he would not trust Brown and would no longer be able to represent her.

18.

Hernandez's belief that, as of January 2015, Brown had committed fraud and false swearing in connection with her Bar complaint against him, and his conclusion that he could no longer trust her, created a significant risk that his representation of her in her capacity as a fiduciary would be materially limited by his personal interests.

19.

Hernandez continued to represent Brown without explaining this conflict to Brown and seeking her informed consent confirmed in writing to his continued representation. Hernandez reports that Brown was no longer communicating with him.

20.

At all material times herein, ORS 116.083 required a personal representative to make and file in the estate proceeding an account of the personal representative's administration annually within 60 days after the anniversary date of the personal representative's appointment.

21.

On April 24, 2015, the court sent Hernandez a letter ("April 2015 notice") stating the estate had been open for eleven months, and ordering him to: (A) close the estate by July 14, 2015, or submit a motion and affidavit explaining his failure to do so; and (B) timely file the annual accounting or explain that failure by motion and affidavit. The court also stated that the personal representative would be removed if the estate were not closed and such motion were not filed. Hernandez did not file the annual accounting for the estate or explain his failure to do so by motion and affidavit.

22.

In May 2015, Brown complained to Judge Bechtold about Hernandez's representation in the probate matter; Judge Bechtold responded by letter on July 9, 2015 ("July 2015 letter"), copied to Hernandez, and repeated the content of her April 2015 notice requiring Hernandez to act in the probate matter.

23.

On July 10, 2015, Hernandez filed a motion to withdraw from representation of Brown including an affidavit admitting that, in January 2015, a conflict of interest had arisen in his representation of Brown.

24.

With his July 10, 2015 motion to withdraw, Hernandez filed pleadings that inaccurately represented to the court the amount of fees he had removed from the Hall Estate prior to court approval. The court did not approve payment of any attorney fees or the proposed verified statement in lieu of final accounting.

Violations

25.

Hernandez admits that, during his representation of Brown, he failed to apply the legal skill, knowledge, thoroughness, or skill reasonably necessary to represent Brown, in violation of RPC 1.1, at least in part by failing to sufficiently advise her of or follow statutory requirements governing the handling of estate assets, including failing to timely filing an annual accounting and allowing a partial distribution of probate assets prior to final settlement and distribution.

Hernandez further admits that his failure to more timely attend to the Hall Estate constituted neglect of a legal matter, in violation of RPC 1.3; that his collection of a fee from Brown without court approval amounted to the collection of an illegal fee, in violation of RPC 1.5(a); and his premature removal of those funds from his trust account, prior to court approval, constituted a failure to maintain funds of others in trust, in violation of RPC 1.15-1(a).

Finally, Hernandez admits that his failure to withdraw from Brown's representation in January 2015, despite his recognition of a conflict of interest for which he did not obtain informed consent, violated both RPC 1.7(a)(2) (current-client conflict of interest) and RPC 1.16(a)(1) (failure to withdraw when continued representation will violate the Rules of Professional Conduct).

Sanction

26.

Hernandez 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* ("Standards"). The *Standards* require that Hernandez'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.** Hernandez's failure to appropriately handle client property violated a duty owed to his client. *Standards* § 4.1. Hernandez also violated his duty to his client to avoid a conflict of interest and provide competent representation. *Standards* §§ 4.3 & 4.5. The *Standards* presume that the most important ethical duties are those which lawyers owe to clients. *Standards* at 5. Hernandez also violated his duties to the profession to promptly withdraw when required and to avoid taking an illegal or improper fee. *Standards* § 7.0.
- b. **Mental State.** The *Standards* recognize three possible mental states: negligent, knowing, and intentional. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* Hernandez's conduct was negligent in failing to employ the knowledge and thoroughness necessary to properly complete the Hall Estate and adequately represent Brown. Given Hernandez's admitted awareness that he had not thoroughly reviewed the probate matter or current statutes and that his knowledge of probate practices was dated, portions of his conduct were knowing. Hernandez's failure to withdraw from Brown's representation was both negligent and knowing in that he knew that he had a current conflict with

his client following her submission of a Bar complaint but failed to take any steps to address it. Given the language in Hernandez’s fee agreement acknowledging the statutory requirements for court approval of probate fees, Hernandez’s removal of funds to pay his fees in the absence of court approval was knowing. Finally, Hernandez’s failure to attend to the Hall Estate was knowing.

- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 7. Given that Brown was the only heir of the Hall Estate when she removed estate assets without court approval, Hernandez’s conduct likely caused no actual harm to his client. Hernandez’s failure to provide competent probate representation, neglect, and premature taking of his advanced costs and partial fee caused unnecessary work for the court. Ultimately, the Hall Estate was properly closed by the court, Hernandez’s advanced costs and partial fee were not allowed by the court, and Hernandez was required to disgorge the amounts taken before court approval.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Multiple offenses. *Standards* § 9.22(d). There are multiple rules at issue stemming from numerous and separate conduct by Hernandez.
 2. Substantial experience in the practice of law. *Standards* § 9.22(i). Hernandez was admitted in Oregon in 1987, and had been admitted to the New Mexico Bar years prior to that.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of any prior relevant discipline. *Standards* § 9.32(a).
 2. Absence of dishonest motive. *Standards* § 9.32(b).
 3. A cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e). Hernandez was cooperative in the Bar’s investigation of his conduct, and throughout the formal proceedings.
 4. The imposition of other penalties or sanctions. *Standards* § 9.32(k). As noted above, Hernandez was required to disgorge all fees in this matter.
 5. Remorse. *Standards* § 9.32(l). Hernandez has expressed remorse for his inaction—both in timely and properly attending to the estate in a

competent manner and in failing to take action to address the conflict of interest after being alerted to it.

27.

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 suspension is also 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. 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. *Standards* § 4.42(a). A suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client; however, a reprimand is generally appropriate when a lawyer: (a) demonstrates a failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client. *Standards* §§ 4.52; 4.53. Similarly, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system; while a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system. *Standards* § 7.2; 7.3.

While a suspension is the overall presumptive sanction (and the *Standards* provide that a suspension should generally be for a period of 6 months or more), on balance, Hernandez's mitigating factors outweigh those in aggravation, both in number and in weight, and justify a downward departure from the presumptive sanction. A short-term suspension appears sufficient.

28.

Oregon case law also supports the imposition of a short-term suspension for similar types of incompetence and related behavior. *See, e.g., In re Jagger*, 357 Or 295, 348 P3d 1136 (2015) (attorney with more aggravation than mitigation was suspended for 90 days where he engaged in incompetent conduct and counseled his client in conduct known to be illegal by arranging for a phone call between his client and the client's girlfriend—who was the victim of his client's assault and had a restraining order against attorney's client); *In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (attorney who failed to render competent services during the course of representing the conservator of an estate was suspended for 60 days for incompetence and conduct prejudicial to the administration of justice); *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (court imposed a 91-day suspension for attorney's conduct in two different matters, finding that the attorney lacked the preparation and thoroughness to undertake a probate matter

and, despite court order to act, knowingly neglected matters, and thereby engaged in conduct prejudicial to the administration of justice).

Oregon cases similarly support a short suspension for neglectful behavior related to a single client or matter, including inaction for not knowing how to respond. *See, e.g., In re Redden*, 342 Or 393, 153 P3d 113 (2007) (attorney’s failure to complete a child support arrearage matter for a client for nearly two years was serious neglect that warranted a 60-day suspension); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (attorney was suspended for 60 days where, after he filed a lawsuit for a client on the last day before the statute of limitations ran, he failed to effect timely service on the defendants, resulting in the suit’s dismissal, compounded by his subsequent failure to inform his client of the dismissal for over a year); *In re Hedges*, 313 Or 618, 836 P2d 119 (1992) (respondent attorney was suspended for 63 days for his neglect in failing to act on his clients’ civil claim, resulting in dismissal of their case, and his subsequent failure to notify them of that fact; in addition, attorney failed to timely account for and return the clients’ fees). Overall, *Hedges* appears the most analogous to the types of conduct at issue here. However, *Hedges* was slightly more egregious, in that he actively hid information from his client; the Bar does not contend that that was the case here.

29.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

30.

Consistent with the *Standards* and Oregon case law, the parties agree that Hernandez shall be suspended for sixty (60) days for violations of RPC 1.1; RPC 1.5(a); RPC 1.7(a)(2); RPC 1.15-1(a); and RPC 1.16(a)(1), with all but thirty (30) days of the suspension stayed, pending Hernandez’s successful completion of a one (1)-year term of probation. The sanction shall be effective March 15, 2018, or sixty (60) days after approval by the Disciplinary Board, whichever is later (“effective date”).

31.

Hernandez’s license to practice law shall be suspended for a period of thirty (30) days beginning on the effective date, or as otherwise directed by the Disciplinary Board (“actual suspension”), assuming all conditions have been met. Hernandez understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Hernandez re-attains his active

membership status with the Bar, Hernandez shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

32.

Probation shall commence upon the date Hernandez is reinstated to active membership status and shall continue for a period of one (1) year, ending on the day prior to the first (1st) year anniversary of the commencement date (the “period of probation”). During the period of probation, Hernandez shall abide by the following conditions:

- (a) Hernandez will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Hernandez has been represented in this proceeding by Kent Hickam (“Hickam”). Hernandez and Hickam hereby authorize direct communication between Hernandez and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Hernandez’s compliance with his probationary terms.
- (c) Hernandez shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (d) During the period of probation, Hernandez shall attend not less than four (4) MCLE accredited programs, for a total of twelve (12) hours, which shall emphasize law practice management, time management, and the proper handling of probate matters. These credit hours shall be in addition to those MCLE credit hours required of Hernandez for his normal MCLE reporting period. The Ethics School requirement does not count towards the twelve (12) hours needed. Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Hernandez shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the term of probation, Hernandez shall diligently attend to client matters and adequately communicate with clients regarding their cases. Attorney shall also ensure that he is timely and properly attending to all probate matters, including any statutory and court requirements therein, and seeking proper permission from the court before taking any payment from estate funds.
- (f) Each month during the period of probation, Hernandez 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, and properly handling all probate matters and probate funds.

- (g) Each month during the period of probation, Hernandez shall:
 - (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills; and
 - (2) review his monthly trust account records and client ledgers and reconcile those records with his monthly lawyer trust account bank statements.
- (h) Frederick J. Carleton shall serve as Hernandez's probation supervisor ("Supervisor"). Hernandez shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Hernandez's clients, the profession, the legal system, and the public.
- (i) Beginning with the first month of the period of probation, Hernandez shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing his Supervisor to review the status of Hernandez's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) files or ten percent (10%) of Hernandez's active caseload, whichever is greater, to determine whether Hernandez is timely, competently, diligently, and ethically attending to client matters, and taking reasonably practicable steps to protect Hernandez's clients' interests upon the termination of employment.
 - (2) Permitting his Supervisor to inspect and review Hernandez's accounting and record-keeping systems to confirm that he is reviewing and reconciling his lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Hernandez agrees that his Supervisor may contact all employees and independent contractors who assist Hernandez in the review and reconciliation of his lawyer trust account records.
- (j) Hernandez authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Hernandez's compliance.

- (k) Within seven (7) days of his reinstatement date, Hernandez shall contact the Professional Liability Fund (“PLF”) and schedule an appointment on the soonest date available to consult with PLF’s Practice Management Advisors in order to obtain practice management advice. Hernandez shall schedule the first available appointment with the PLF’s Practice Management Advisors and notify DCO of the time and date of the appointment.
- (l) Hernandez shall attend the appointment with the PLF’s Practice Management Advisors and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF’s Practice Management Advisors, Hernandez shall adopt and implement those recommendations.
- (m) No later than sixty (60) days after recommendations are made by the PLF’s Practice Management Advisors, Hernandez shall provide a copy of the Office Practice Assessment from the PLF’s Practice Management Advisors and file a report with DCO stating the date of his consultation(s) with the PLF’s Practice Management Advisors; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (n) On a monthly basis, on dates to be established by DCO beginning no later than thirty (30) days after his reinstatement to active membership status, Hernandez shall submit to DCO a written “Compliance Report,” approved as to substance by his Supervisor, advising whether Hernandez is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Hernandez’s meetings with his Supervisor.
 - (2) The number of Hernandez’s active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Hernandez has completed the other provisions recommended by his Supervisor, if applicable.
 - (4) In the event that Hernandez has not complied with any term of this Stipulation for Discipline, a description of the noncompliance and the reason for it.
- (o) Hernandez is responsible for any costs required under the terms of this stipulation and the terms of probation.

- (p) Hernandez's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (q) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (r) The SPRB's decision to bring a formal complaint against Hernandez for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

33.

Hernandez 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, Hernandez has arranged for Frederick J. Carleton (OSB No. 771356), an active member of the Bar, to either take possession of or have ongoing access to Hernandez's client files and serve as the contact person for clients in need of the files during the term of his suspension. Hernandez represents that Frederick J. Carleton has agreed to accept this responsibility.

34.

Hernandez 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. Hernandez also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

35.

Hernandez 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. This requirement is in addition to any other provision of this agreement that requires Hernandez to attend or obtain continuing legal education (CLE) credit hours.

36.

Hernandez 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 Hernandez is admitted: New Mexico and *pro hac vice* in Massachusetts.

37.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 20, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 1st day of February, 2018.

/s/ Manuel C. Hernandez

Manuel C. Hernandez

OSB No. 874123

APPROVED AS TO FORM AND CONTENT:

/s/ Kent L. Hickam

Kent L. Hickam

OSB No. 802635

EXECUTED this 2nd day of February, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case Nos. 16-03, 17-47, 17-80,
) and 17-81
ROBERT G. KLAHN,)
)
Respondent.)

Counsel for the Bar: Nik T. Chourey
Counsel for the Accused: David J. Elkanich
Disciplinary Board: None
Disposition: Violation of RPC 4.2, RPC 4.4(a), and RPC 8.4(a)(4).
Stipulation for Discipline. 120-day suspension.
Effective Date of Order: February 18, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Robert G. Klahn is suspended for a total period of 120 days, representing 75 days as was imposed in the Trial Panel Opinion in Case No. 16-03, and an additional 45 days to be served consecutive to the 75-day period for violations of RPC 4.2 in Case No. 17-81; RPC 4.4(a) and RPC 8.4(a)(4) in Case No. 17-80, and RPC 8.4(a)(4) in Case No. 17-47, the sanction to be effective ten days after approval by the Disciplinary Board, or February 15, 2018, whichever is later.

DATED this 8th day of February, 2018.

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

STIPULATION FOR DISCIPLINE

Robert G. Klahn, attorney at law (“Klahn”), and the Oregon State Bar (“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.

Klahn 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 Umatilla County, Oregon.

3.

Klahn 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 9, 2016, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Klahn in Case No. 16-03 (Roy N. Blaine) for alleged violations of Oregon Rules of Professional Conduct (RPC) 4.4(a) and RPC 8.4(a)(4).

5.

On April 1, 2016, a Formal Complaint was filed against Klahn in Case No. 16-03 (Roy N. Blaine) pursuant to the authorization of the SPRB, alleging violation of RPC 4.4(a) and RPC 8.4(a)(4).

6.

On May 31 and June 1, 2017, Klahn proceeded to a hearing on Case No. 16-03.

7.

On July 15, 2017, the SPRB authorized formal disciplinary proceedings against Klahn in Case No. 17-47 (OSB) for alleged violations of RPC 8.4(a)(4).

8.

On September 11, 2017, the Trial Panel Opinion in Case No. 16-03 was filed with the Disciplinary Clerk finding Klahn in violation of RPC 4.4(a) and RPC 8.4(a)(4) and suspending Klahn for a period of 75 days.

9.

On October 14, 2017, the SPRB authorized formal disciplinary proceedings against Klahn in Case No. 17-80 (Roy N. Blaine) for alleged violations of RPC 4.4(a), RPC 8.4(a)(4) and RPC 8.4(a)(7). Also on October 14, 2017, the SPRB authorized formal disciplinary

proceedings against Klahn in Case No. 17-81 (Evan D. Hansen) for alleged violation of RPC 4.2.

10.

On November 13, 2017, Klahn filed his Request for Review with the Supreme Court of Oregon in Case No. 16-03 (Request for Review).

11.

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 & Violations

Case No. 16-03 (Roy N. Blaine Matter)

12.

A true and correct copy of the Trial Panel Opinion, OSB Case No. 16-03, dated September 11, 2017, is attached hereto as Ex. A. On November 13, 2017, Klahn filed a Request for Review of the Trial Panel Opinion in Case No. 16-03 with the Supreme Court.

Case No. 17-47 (OSB)

13.

In 2015 and 2016, Klahn represented defendant Jose Luis Andrade (“Andrade”) in several Umatilla County criminal matters.

14.

Klahn represented Andrade in *State v. Jose Luis Andrade*, Umatilla County Case No. CF140305, set for trial on October 27, 2015, on a three-count indictment (“Case No. CF140305”). At the October 12, 2015 Trial Readiness hearing in Case No. CF140305, Klahn appeared with Andrade, at which time Klahn reported that the defense may not be ready for trial as scheduled; but the court ordered that current trial date remain on the docket. At or shortly after this Trial Readiness hearing, the state advised Klahn that it was seeking an amended indictment against Andrade. On October 21, 2015, the state filed its requested jury instructions for the October 27, 2015 trial in Case No. CF140305. On October 22, 2015, the court emailed the state and Klahn a Notice of Pre-Trial Conference in Case No. CF140305, scheduled for November 2, 2015, the purpose of which was to set a new trial date. The court sent an email that the two-day trial on October 27, 2015 was continued and the state would be filing an amended indictment. Thereafter, Klahn advised Andrade’s wife that the October 27, 2015 trial setting in Case No. CF140305 was off, the case would be dismissed, he would advise her when a new indictment would be filed, nothing further would occur until the new indictment and case was filed, and Andrade need not appear at the November 2, 2015 hearing in Case No. CF140305.

15.

On November 2, 2015, Klahn and Andrade failed to appear (“FTA”) for the scheduled Pre-Trial Conference in Case No. CF140305; as a result, the court issued an FTA warrant and Andrade was subsequently taken into custody. On November 19, 2015 an Indictment was filed in Case No. 150683 alleging two new counts against Andrade. The arraignment occurred on November 23, 2015, with Klahn and Andrade being present. Case No. CF1400305 was dismissed January 7, 2016. On December 3, 2015, on the basis of Andrade’s FTA in Case No. CF140305, the state filed an additional criminal proceeding against Andrade (“Case No. CF150728”).

16.

On January 4, 2016, Klahn was appointed to represent Andrade on the FTA charge in Case No. CF150728. Following various appearances and proceedings, trial in Case No. CF150728 was set for December 27, 2016. On December 20, 2016, Klahn provided the state with discovery on behalf of Andrade in Case No. CF150728 and stated that he intended to call Andrade’s wife, Maria Andrade, as a witness at the December 27, 2016 trial (“Klahn discovery production”).

17.

On December 23, 2016, Klahn emailed Deputy District Attorney Monte Ludington (“DDA Ludington”) the following responsive statement related to the Klahn discovery production in Case No. CF150728:

That afterthe [*sic*] trial had been continued and while the State was submitting the matter to the Grand Jury for an admended [*sic*] indictment Mr. Klahn advised Maria Andrade in response to a telephone call call [*sic*] that nothing would be heard until the admended [*sic*] indictment was filed by the state and the November 2, 2016 hearing was off.

Given this responsive statement by Klahn, the state concluded that it could not prove that Andrade knowingly failed to appear as charged in Case No. CF150728. Therefore, on December 23, 2016, DDA Ludington filed a Motion to Dismiss Case No. CF150728 with prejudice.

18.

In 2015, 2016, and early 2017, in representing various criminal defendants, Klahn failed to appear for a number of scheduled hearings in Umatilla County. Klahn reports that during this time period he was not consistently receiving court notices of hearings by email and appointment information from Intermountain Public Defender and Blue Mountain Defender. This was due to a number of factors, including email issues with the court, inclement weather and the geographic distance between the two Umatilla County courthouses in Hermiston and Pendleton.

19.

Klahn's failures to appear caused court delays and required courts to reschedule hearings.

20.

In 2016 and 2017, Klahn failed to turn off his cell phone in the courtroom and answered incoming calls during several hearings. Klahn's conduct was disruptive and delayed the proceedings.

Violations

Case No. 17-47 (OSB)

21.

Klahn admits that his conduct in the Andrade matter, his failure to appear for a number of court appearances and his failure to refrain from using his cell phone during several court proceedings, was conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

Facts

Case No. 17-80 (Roy N. Blaine Matter)

22.

On March 28, 2017, Umatilla County Courthouse staff member Samantha Houghton ("Houghton") submitted a written complaint to the Trial Court Administrator for Umatilla and Morrow Counties concerning Klahn's courthouse conduct with Houghton ("Houghton complaint"). The Houghton complaint documented courthouse interactions with Klahn that had caused her to feel degraded and uncomfortable, resulting in delays in and disruption of her work.

23.

Klahn's courthouse conduct with Houghton caused her to feel degraded and uncomfortable; was not in aid of the representation of his clients; and Klahn's conduct delayed and disrupted Houghton's job duties in her workplace on several occasions over a one-year period.

Violations

Case No. 17-80 (Roy N. Blaine Matter)

24.

Klahn admits that, while representing his clients, his interactions with Houghton as described above had no substantial purpose other than to embarrass, delay, harass, or burden

Houghton; and constituted engaging in conduct prejudicial to the administration of justice; thereby violating RPC 4.4(a) and RPC 8.4(a)(4).

25.

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.4(a)(7) should be and, upon approval of this stipulation, dismissed.

Facts

Case No. 17-81 (Evan D. Hansen Matter)

26.

In 2016 and 2017, Klahn was the court-appointed counsel for the protected party, Ralph “Bud” Tachella, Jr., in a probate matter: *In the Matter of the Conservatorship of Ralph Tachella, Jr.*, Umatilla County Case No. PR150159 (“probate matter”). Attorneys Evan D. Hansen (“Hansen”) and Seth Hantke (“Hantke”) represented the court-appointed conservator, Beagle & Associates, Inc. (“Beagle”), in the probate matter.

27.

On November 15, 2016, Klahn was served by email and first-class mail with Hansen’s notice of representation of Beagle in the probate matter.

28.

On April 6, 2017, Hansen spoke by telephone with Klahn about the probate matter. Among other topics, Hansen and Klahn discussed matters that related to the probate matter.

29.

Beagle received a letter directly from Klahn dated May 24, 2017, regarding ongoing issues about the subject matter of Hansen’s representation of Beagle in the probate matter. Klahn sent this letter to Beagle, despite his knowledge that Beagle was represented by Hansen’s law firm in the probate matter.

Violations

Case No. 17-81 (Evan D. Hansen Matter)

30.

Klahn admits that, by communicating with a represented person about the subject matter of the representation, he violated RPC 4.2.

Sanction

31.

Klahn 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*

(“*Standards*”). The *Standards* require that Klahn’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.** Klahn violated his duties to the legal system to avoid conduct prejudicial to the administration of justice and to avoid his abuse of the legal process. *Standards* § 6.2. Klahn violated his duty to avoid improper communications with individuals in the legal system. *Standards* § 6.3.
- b. **Mental State.** A lawyer’s mental state may be viewed as negligent, knowing, or intentional. A lawyer is negligent when the lawyer fails to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Intent” is the conscious objective or purpose to accomplish a particular result. *Id.* Klahn’s conduct toward Houghton was negligent. Klahn’s conduct in the Andrade matter, in failing to appear as scheduled, and using a cell telephone in the courtroom during hearings was at least negligent. Klahn’s conduct in communicating with a person known to be represented by counsel was knowing.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 7. Klahn’s conduct toward Houghton was potentially injurious to the profession and actually harmful to Houghton. Klahn’s conduct in the Andrade matter, in failing to appear as scheduled, and using a cell telephone in the courtroom during hearings was potentially injurious to clients, the public and the legal system. Klahn’s conduct in communicating with a person known to be represented by counsel was potentially injurious to the legal system and the profession.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior disciplinary offenses. *Standards* § 9.22(a). This 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).

In 2000, Klahn received a public reprimand for his failure to timely respond to repeated inquiries from Disciplinary Counsel’s Office regarding a complaint from a court-appointed client. He also charged

and collected a clearly excessive fee when he billed and received payment from the State Court Administrator for his time spent responding to the Bar complaint. *In re Klahn I*, 14 DB Rptr 65 (2000).

In 2005, Klahn received a public reprimand for failing to deposit and maintain funds in trust and for failing to keep adequate trust account records, resulting in the overdraft of his lawyer trust account. *In re Klahn II*, 19 DB Rptr 1 (2005).

In 2008, Klahn received a 60-day suspension for violations including neglect and failing to communicate with clients as required by RPC 1.4(a). *In re Klahn III*, 22 DB Rptr 207 (2008).

In 2012, Klahn received a 90-day suspension for failing to keep his client reasonably informed or respond to requests for information, failing to explain a matter to the extent reasonably necessary to allow the client to make informed decisions, and engaging in conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4). *In re Klahn IV*, 26 DB Rptr 246 (2012).

In 2017, Klahn received a 75-day suspension in Case No. 16-03 finding Klahn in violation of RPC 4.4(a) and RPC 8.4(a)(4) for Klahn's inappropriate and disruptive conduct with court personnel. However, some of Klahn's conduct in Case No. 16-03 occurred within the same time period as the cases at issue here. To the extent that the conduct in this case predates the imposition of the prior discipline in Case No. 16-03, the prior discipline is given less weight as an aggravating factor. *In re Jones*, 326 Or at 200.

2. A pattern of misconduct. *Standards* § 9.22(c). Klahn's courthouse conduct showed a pattern of conduct prejudicial to the administration of justice.
 3. Multiple offenses. *Standards* § 9.22(d). Klahn's conduct resulted in violations in several different matters.
 4. Substantial experience in the practice of law. *Standards* § 9.22(i). Klahn was admitted to practice law in 1980.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. *Standards* § 9.32(a).
 2. Full and free disclosure to disciplinary board and a cooperative attitude toward proceedings. *Standards* § 9.32(e).

3. Interim rehabilitation. *Standards* § 9.32(j). Following the conclusion of the disciplinary trial in Case No. 16-03, the Bar has not received additional complaints regarding Klahn's courthouse conduct.

Under the ABA *Standards*, and without considering aggravating or mitigating factors, suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. *Standards* § 6.22. Reprimand is generally 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. Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. *Standards* § 6.32.

Given Klahn's prior history of discipline, the aggravating factors outweigh the mitigating factors. A suspension is warranted under the *Standards* for Klahn's collective conduct in several matters.

32.

Oregon case law also supports the imposition of a suspension in this matter.

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

The apparent lack of significant prejudicial impact on Klahn's clients (with the exception of Andrade) and on court proceedings for Klahn's courthouse conduct, including his failures to appear and cell phone use, makes it somewhat distinguishable from the following cases: *In re Foster A. Glass*, 28 DB Rptr 295 (2014) (stipulated 30-day suspension for failing to appear for scheduled court hearings in circuit court which impacted the court's ability to manage its dockets as well as the legal interest of the affected clients); *In re Rochat*, 295 Or 533 (1983) (attorney suspended for five weeks for his disruption and harassment of court staff in seeking court-appointed criminal cases causing conduct prejudicial to the administration of justice); *In re Carini*, 354 Or 47, 308 P3d 197 (2013) (30-day suspension for repeated failures to appear at court hearings when the attorney had a prior disciplinary history involving the same rule for failing to appear for a scheduled trial setting.); *In re Glass*, 309 Or 218 (1990) (attorney suspended for 91 days for a violation of the predecessor to RPC 4.4(a), misrepresentation reflecting adversely on his fitness to practice, conduct prejudicial to the administration of justice, and failing to cooperate with disciplinary authorities); *In re Thompson*, 325 Or 467, 940 P2d 912 (1997) (attorney suspended 63 days for his emotional ex parte outburst with a judge and clerk which was conduct that caused substantial harm to the administration of justice). However, Klahn's extensive prior disciplinary history, the pattern of misconduct illustrated in his interactions with Houghton, and the existence of multiple

offenses provide a basis for arguing that these same cases are not inappropriate to look to in determining the sanction to be applied.

Contact with a Represented Party: RPC 4.2

In cases involving a single isolated contact, the court has held communicating with a represented person known to be represented about a matter on which that person is represented, absent other factors, warrants a public reprimand. *See In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984). The Court has suspended lawyers for contacting represented persons on multiple occasions. *See In re Williams*, 314 Or 530, 840 P2d 1280 (1992) (63-day suspension for multiple violations, including speaking with a representative of a landlord known to be represented by an attorney).

33.

Consistent with the *Standards* and Oregon case law, the parties agree that Klahn shall be suspended for a total period of 120 days, representing 75 days as was imposed in the Trial Panel Opinion in Case No. 16-03, and an additional 45 days to be served consecutive to the 75-day period for violations of RPC 4.2 in Case No. 17-81; RPC 4.4(a) and RPC 8.4(a)(4) in Case No. 17-80, and RPC 8.4(a)(4) in Case No. 17-47, the sanction to be effective ten days after approval by the Disciplinary Board, or February 15, 2018, whichever is later.

34.

In addition, on or before February 28, 2018, Klahn shall dismiss the request for review filed with the Supreme Court (Case No. SC S065412) on November 13, 2017.

35.

In addition, on or before August 1, 2018, Klahn shall pay to the Bar its reasonable and necessary costs in the amount of \$4,481.05, incurred for trial costs in Case No. 16-03 (Deposition of Klahn and transcript; transcription fee *State v. Roe*; 2-day trial reporter and transcript fee). Should Klahn fail to pay \$4,481.05 in full by August 1, 2018, the Bar may thereafter, without further notice to him, obtain a judgment against Klahn for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

36.

Klahn 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, Klahn has arranged for Daniel E. Stephens (930 W Juniper Ave, PO Box 749, Hermiston, OR 97838) and Nicholas F. Patterson (17 SW Frazer Ave, Ste 340, Pendleton, OR 97801), active members of the Bar, to either take possession of or have ongoing access to Klahn's client files and serve as the contact persons for clients in need of the files during the term of his suspension. Klahn

represents that Daniel E. Stephens and Nicholas F. Patterson have agreed to accept this responsibility.

37.

Klahn 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. Klahn 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.

38.

Klahn 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. This requirement is in addition to any other provision of this agreement that requires Klahn to attend or obtain continuing legal education (CLE) credit hours.

39.

Klahn 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 Klahn is admitted: none.

40.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on November 13, 2017. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 2nd day of February, 2018.

/s/ Robert G. Klahn

Robert G. Klahn, OSB No. 800683

APPROVED AS TO FORM AND CONTENT:

/s/ David J. Elkanich

David J. Elkanich, OSB No. 992558

EXECUTED this 5th day of February, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey, OSB No. 060478

Assistant Disciplinary Counsel

TRIAL PANEL OPINION (Exhibit A)

The Oregon State Bar (The Bar) filed a complaint in this matter April 1, 2016. The Accused filed an Answer April 26, 2016.

Hearing was held in this matter in Hermiston on May 31, 2017 and

June 1, 2017. Mr. Nik Chourey and Ms. Amber Bevacqua-Lynott represented the Bar; Mr. David Elkanich represented the Accused.

Exhibits 1 to 5, 5A, 5B, 5C, 5D, 5E, 5F and 5G, 6 to 11, and 13 to 16 were offered and admitted without objection. Both parties filed prehearing memoranda. The prehearing memorandum filed by the Accused contained a motion to dismiss the complaint in its entirety as a violation of free speech. The Bar filed a written memorandum in response. Oral closing argument followed closure of the record on June 1, 2017.

The trial panel finds the Bar proved by clear and convincing evidence the Accused violated RPC 4.4(a) and RPC 8.4(a)(4) as it relates to what is known as the Mae West quote. A majority of the trial panel finds the Bar also proved by clear and convincing evidence the Accused also violated RPC 4.4(a) and RPC 8.4(a)(4) as it relates to what is known as the breastfeeding conversation; Ronald W. Atwood files a dissent to this conclusion and would find the Bar did not meet its burden of proof as it relates to the breastfeeding conversation.¹

The parties need to understand that the sanction the trial panel imposes would be the same if the Bar proved only violations as it relates to the Mae West quote or if the Bar proved violations with respect to both the Mae West quote and the breastfeeding conversation.

Nature of the Charges and Defenses

The Bar has alleged the Accused violated either RPC 4.4(a) or RPC 8.4(a)(4) or both. The violations arise from two episodes that occurred in January 2015. For ease of description the first will be denominated the breastfeeding conversation and the second the Mae West Quote as more fully described below.

Summary of the Facts

On January 21, 2015, the Accused appeared in Umatilla Circuit Court on a DUII matter. He was representing Ms. Icy Roe. He was there for a trial-readiness proceeding. To his surprise, Ms. Roe advised him she wanted to plead guilty. She was a new mother, was breastfeeding and was worried what would happen to her ability to breastfeed her baby if she were in jail.

¹ Ronald W. Atwood is the primary drafter of this opinion, with the exception of the majority opinion as it relates to the breastfeeding conversation, which was primarily drafted by Ronald Roome. All members of the trial panel actively discussed and debated the issues, the facts and how they matched up with the law.

The Accused first approached a clerk to get a plea form and asked her for information on breastfeeding. She told him she did not have the form and did not have his answers. He then went down to criminal court to get the form. While there, he asked another clerk about breastfeeding. She gave him the form and told him to leave her alone.

On January 27, 2015, the Accused appeared in Umatilla Circuit Court in a DUII matter; he was representing Ms. Notturmo. The matter was in the courtroom of Judge Eva Templeton.

At one of the breaks when the jury was out of the courtroom, the Accused approached the clerks who were working in the courtroom. He mentioned he anticipated testimony from the arresting officer that the defendant had put her hand on his knee and asked if there was any way to make the case go away. He said he was going to use a line from an old Mae West movie to draw the juror's attention away from what he considered to be damaging testimony. The quote in question was, and we are paraphrasing, "Is that a gun in your pocket or are you happy to see me?" The Accused was the only one who laughed and he walked away.

1. The Mae West Quote

Emily Rietmann had recently graduated from law school, had taken the bar examination, and was working as a clerk. On January 27, 2015, she was in Judge Temple's courtroom.

The parties agree Ms. Rietmann introduced herself to the Accused sometime shortly before the trial was set to begin. She let him know she was waiting for the results of the bar examination and would be taking a job with a local Pendleton firm, assuming she passed. She remembers the conversation that occurred in the courtroom was short. She testified she was surprised by the length of the handshake. The Accused remembers the conversation occurred in the hallway outside the courtroom and was lengthy. He stated he believed she was there as an observer and interested in trial practice. She testified she was there to observe the trial, but was working, researching another matter. She testified she had no interest in trial practice and intended her practice to involve business transactions.

The Accused stated he came up to Ms. Rietmann to try on a line for his closing argument and thought she might be interested. He described the context and then said "Are you just happy to see me or is that a gun in your pocket?"

Ms. Rietmann remembers the joke; it made her uncomfortable and she turned red. It interrupted her work. She felt trapped. Although she was aware of the quote, she felt it was inappropriate coming from an attorney in a courtroom. During her time working as a clerk, no other lawyer had asked her about a line to be used in closing argument. She was sitting in close proximity to two other clerks.

Maira Gonzalez was the judicial court reporter that day and had worked in that position for some three years. During breaks in the trial, she would do other work she had to do, so was interrupted when the Accused approached the clerks. Her desk is in close proximity to Ms.

Rietmann. She heard the comment and understood it related to a penis. She thought the comment was inappropriate and unprofessional. She told him to go away, that he was disrupting their work. She knew his comment made Ms. Rietmann uncomfortable. The comments he made were made to the group in general, not just Ms. Rietmann. She commented the group blew him off.

Gwen Schultz was working as the court clerk and bailiff at the time of this incident. She stated that the Accused had come up to the clerks five to six times during the trial. He sought advice on how he was doing. No one gave him any advice and tried to brush him off. She told him to leave them alone. She related the Mae West quote and likened it to a penis joke. She stated no other lawyers ask the clerks for advice. The Mae West quote was directed at all three of them.

The Accused testified that he directed the quote specifically at Ms. Rietmann. It was his belief she was there simply to observe the trial and that she was interested in trial practice. He considered himself to be a sort of mentor giving her a lesson in trial practice.

The Trial Panel does not accept the explanation of the Accused.

Ms. Rietmann did not ask for a trial practice lesson. We believe her testimony that although she introduced herself to him, she was there to work. We also credit her statement her primary focus in practice would be business transaction, not trial practice. We found no reason not to believe her and it appeared the Accused was looking for a means to justify his conduct.

The Accused stated he made the comment only to Ms. Rietmann. All three of the clerks heard the statement; they sit together. We also believe their testimony he came up multiple times to ask how he was doing and to try on a line for closing argument. The Accused did not say he did this in other cases; the staff said no other lawyer asked them for advice.

The Accused stated it was his belief he was using the quote as humorous understatement. He was loath to admit the reference was to a penis. Despite his attempts at justification, it is clear he knew the quote references a penis. He just did not want to admit it. Further, he justified his statements a zealous representation arguing that he had the right to embarrass or harass in the defense of his client. His references were all to witnesses and he could not differentiate that these women were all court personnel. The Trial Panel admit the quote is widely known and might have been something to use in closing argument, under the right set of facts. However, it was not used in closing argument, but told to clerks who were trying to do their work.

Finally, it goes without saying the Accused has not read his ethics rules recently enough to realize that zealous representation was eliminated from the rules. We recognize the lawyer needs to take action to defend the client; what is allowable in cross-examination of a witness is likely not allowable when dealing with court personnel.

2. The Breastfeeding Conversations

The Accused represented Icy Roe in a DUII matter. Her mother had worked for the Accused for sometime as a secretary. January 27, 2015 was the date for the trial-readiness proceeding. That is the date the lawyers and their clients appear before the judge to let the judge know the case is ready to go and to then set a trial date. The Deputy DA assigned to the case had offered a plea deal sometime prior to the trial-readiness date and Ms. Roe had turned it down. However, when she arrived at the courthouse, she advised the Accused she wanted to accept the plea agreement.

Ms. Roe had changed her mind, as she said impulsively, because she was a brand new mother and was breastfeeding her new child. She was worried her breast milk would dry up if she went to jail. She also stated she did not want to go through the trouble of a trial. Changing her mind at the last minute created a couple of problems. First, a plea requires certain forms that had not been filed out. Second, by not agreeing to the prior plea offer, she might have to plead guilty to all three counts, which would require extensive jail time and what was called an open sentencing. The plea offer that was made earlier included dismissal of two counts in exchange with a plea of guilty to one. The standard sentence of the drunk driving charge was 180 days of jail time, with 150 suspended; further, of the remaining 30, typically 26 would be served under electronic surveillance, but there would be at least four days in jail. It was that time in jail that worried Ms. Roe.

Amy English was working as a judicial assistant in Judge Hampton's courtroom on January 27, 2015. The Accused came in for a plea form. She told him that she did not have any, and that he needed to go to the criminal clerks to get the form. He also asked her about breastfeeding. He asked if she had kids and if she breastfed the children. He asked her if humans could be given a shot to enhance their milk if it started to dry up. She tried to end the conversation and the Accused eventually walked away. She felt his questions were too personal; he later apologized. She had been working on her computer when he approached her.

After leaving the courtroom, the Accused went down to the criminal clerk to get the form. Kristi Kelly was working the window that morning. He asked for the form and she told him she would need to print it off for him. He then asked her if she was a mother and if she had breastfed her children. He explained he had a client who was afraid of going to jail and then having her breast milk dry up. The Accused told Ms. Kelly that with cows a shot will "freshen up" the milk, if it starts to dry up. She was embarrassed and asked him to stop. She had to tell him to leave some five to six times before he left. She cried at one point during the hearing as she discussed these events.

LeighAnn Bailey was a judicial specialist at the time and observed the conversation between the Accused and Ms. Kelly. She heard the Accused ask about cows and breastfeeding. She stated that Ms. Kelly told the Accused, "I do not know", "I'm done, you're done" and "you can leave now". She stated Ms. Kelly appeared shocked and very frustrated.

The Accused does not deny he asked these two women about breastfeeding, their breastfeeding experience and if women were like cows. He admitted he asked them if a mother could be given a shot if her milk was drying up, just like they do with cows. He justified his questions on the ground he was trying to get answers for his client and that he did not know the answers. He admitted that he did not ask these women if they wanted to talk about breastfeeding. He seemed oblivious to their embarrassment.

The Accused justified his actions on the ground that he wanted to get answers for his client and he had no other way. Again, this is part of the pattern that embarrassment and harassment are justified by the tenets of zealous representation. However, this is resolved much simpler.

The testimony establishes that if the client had simply pled guilty to all charges, she would be subject to open sentencing. However, the Accused admitted he was quite sure the Assistant DA would reinstate the plea bargain that had previously been on the table and rejected. His experience paid off and that is what occurred. Thus, he only had to worry about four days in jail. Further, he also admitted people in Ms. Roe's situation would usually serve their four days in jail on successive weekends, two days at a time. Finally, the Accused also admitted that even though she was going to plead guilty, he would assert what is called the 48-hour rule. In essence, that allows the client to plead guilty, but to address sentencing a few days to a week down the road. He admitted even when he was talking to Ms. English that he had planned to assert the right. In this particular case, Icy Roe went down to the sheriff's office and was able to arrange to serve all of her jail time on electronic surveillance and did not serve a single night in jail. With his experience, the Accused certainly knew this was a strong possibility.

Since he knew he would be asserting the 48-hour rule, the client did not need immediate answers to her questions. Her mother was present and Ms. Roe discussed the issue with her. Whether you are a cattle rancher or simply a father, it is clear that once feeding stops, the milk dries up eventually. Thus, the Accused would have known that jail time would make it difficult to breastfeed and the best way to address that problem was electronic surveillance. What is the best way to arrange for electronic surveillance: assert the 48-hour rule and then go down to the sheriff's office and talk.

The primary problem here is that the Accused does not know boundaries. At least one clerk testified he stands too close. The clerks all stated he interrupts their work during breaks when the jury is out of the courtroom. The length of his handshake surprised Ms. Rietmann. At least one clerk stated "that is just Mr. Klahn." He told one clerk a story about the size of a woman's breasts as being too small to provide enough milk for her twins so they cried during a flight.

None of these events or comments are part of the issues raised by the complaint; they inform why the court staff reacted so strongly to these events. Although the facts are essentially

undisputed, the issue then arises whether they are simply another in a long line of irritating behavior or did the Accused finally cross the ethical line.

Applicable Law

RPC 4.4(a)

The Bar has alleged the Accused violated RPC 4.4(a), which provides:“(a) In representing a client or the lawyer’s own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.”

The parties acknowledge there are no cases that directly interpret this rule; thus, the parties are relying on cases that interpret the old rule, DR 7-102(A)(1) (taking actions merely to harass or maliciously injure another).

In re Hopp, 291 Or 697, 634 P2d 238 (1981) is a case in point. In that case, the accused represented the owner of an automobile that had been towed. During the representation, the accused directed his secretary to register the name of the towing company, since it was discovered the assumed business name had not been registered. After the matter was resolved, the accused demanded the towing company cease using the name it had operated under, citing the secretary’s registration of that name. The evidence established the accused was motivated by extreme dislike of the lawyer who represented the towing company.

In re Huffman, 298 Or 515, 614 P2d 586 (1980), the accused failed to timely release property of his client that secured payment of his fee. The Court noted the lawyer would have been found guilty of violating DR 7-102(A)(1), if the Bar had pled that charge.

In Hopp and *Huffman*, the lawyers were found to have acted out of personal interests rather than with the intent to benefit the clients that they had represented. *In re Glass*, 308 Or 297, 779 P2d 612 (1989) is similar. There the accused registered the assumed business name of the plaintiff in order to defeat a construction lien claim. The Court found the actions caused delay and were designed to harass the plaintiff.

In re Hockett, 303 Or 150, 734 P2d 877 (1987), is illustrative. The accused assisted his clients to fraudulently transfer property to their wives in sham divorces to prevent them from being seized to satisfy debts that were personally guaranteed. Although other violations were found, the Court concluded DR 7-102(A)(1) was not violated because the action was not merely to harass or maliciously injure the creditors. While that purpose was achieved, it was not the sole aim of the fraudulent transfers.

Finally, *In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004), is also instructive. The Court declined to find a violation of the rule. The Court stated:

“Simply stated, this court’s inquiry under DR 7-102(A)(1)—unlike an inquiry under DR 7-102(A)(2)—generally focuses upon the accused lawyer’s

motivation in taking a particular action, rather than upon the legitimacy of the legal position asserted. For example, if the Bar proves by clear and convincing evidence that an accused lawyer sought *merely* to harass or maliciously injure another in advancing a legal position, then the Bar has proved a violation of DR 7-102(A)(1), regardless of the legitimacy of the legal basis for the lawyer's action.

The focus of the cases under DR 7-102(A)(1) was the lawyer's motivation and whether the action was designed to "merely" to embarrass, burden or delay. Merely is likened to sole aim of the action.

The Bar argues the new rule is not as narrow. The Bar argues the conduct is actionable if it serves no substantial purpose other than to embarrass, delay, harass or burden. There are no cases that tell us whether the Bar is right.

RPC 8.4(a)(4)

The Bar has alleged a violation of RPC 8.4(a)(4), which provides:

"(a) It is professional misconduct for a lawyer to:

"(4) engage in conduct that is prejudicial to the administration of justice;"

This rule is a restatement of DR 1-102(A)(4). Thus, those cases may be used in our analysis.

To prove a violation of either of this rule, the Bar must show that "(1) the accused lawyer's action or inaction was improper; (2) the accused lawyer's conduct occurred during the course of a judicial proceeding ***; and (3) the accused lawyer's conduct had or could have had a prejudicial effect upon the administration of justice." *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003).

ANALYSIS

The Breastfeeding Conversations

The Majority of the Trial Panel find that Klahn was neither subjectively nor objectively credible about the breastfeeding incident. The Majority determines that Klahn violated RPC 4.4(a) because he did not have a substantial purpose to embarrass, harass and burden female court staff member Kristi Kelly about breastfeeding. The Majority also determines that Klahn's conduct violated RPC 8.4(a)(4) because his unethical harassment of Kelly was prejudicial to the administration of justice.

The entire Trial Panel agrees that Klahn's behavior with Kristi Kelly was inappropriate. But bad behavior alone does not automatically equate to an ethical violation. The difference here is the Majority found that Klahn was not subjectively credible about his stated purpose for the harassment of Kristi Kelly. The subjective determination of a witness' credibility is not something found in a written trial transcript. Rather, it comes from participating in the trial

itself, from observing the testimony of all the witnesses, and in particular from observing the testimony of the accused attorney.

The Majority also determined, objectively, that the purpose Klahn advanced for his interaction with Kelly was not credible. Klahn weakened his credibility with the Majority when he characterized his contact with Kristi Kelly as limited, and especially when he represented that he left Kelly alone when she first told him to leave. Klahn testified he asked Kelly a question about breastfeeding, cows and milk production, and then he left when she told him to:

“A. . . .Kristi did not give me a satisfactory answer. She gave me the form and *told me to leave* and I went out in the hall and met with Ms. Roe and filled out the plea petition.

“Q. Okay. How long was the conversation with Ms. Kelly?

“A. Probably a minute or two.”

(Tr. 271) (emphasis added.)

However, Klahn’s testimony was contradicted by the weight of credible evidence at trial. The Majority concluded by clear and convincing evidence that Klahn repeatedly badgered Kristi Kelly about breastfeeding and that he ignored her repeated pleas for him to leave her alone. Kristi Kelly made a powerful and convincing witness in that regard. Her testimony was that she had to request Klahn to leave five to six times, and each time he ignored her and continued his harassment of her, before he finally left. Tr. p. 140. Kelly testified that she had to keep telling Klahn: “*Bob, just go. Just leave. You need to go.*” Tr. p. 139, ll. 4–7, emphasis added. Kelly’s testimony demonstrated that Klahn was not forthcoming about the incident. While Klahn minimized the nature and extent of his interaction with Kelly, the Majority determined from the evidence that what actually occurred was Klahn insistently pestered Kelly about breastfeeding over her multiple objections. By minimizing his interaction with Kelly, Klahn hurt his credibility with the Majority.

Moreover, Kelly’s testimony about Klahn’s harassing behavior was supported by witness LeighAnn Bailey, a nearby clerk who overheard the interchange between Klahn and Kelly. Bailey testified that Kelly repeatedly told Klahn that she did not know the answer to his breastfeeding questions and that, despite Kelly’s attempts to get him to leave, Klahn continued to question Kelly, insisting that Kelly must know about breastfeeding because she was a mother. According to Bailey, Klahn demanded of Kelly: “*You’re a mother, don’t you know.*” (Tr. 155). Further, Bailey testified that Kelly was left speechless and in shock after her encounter with Klahn. (Tr. 164 to 165). Bailey’s testimony buttressed that of Kelly. It also served to undercut Klahn’s testimony about his interaction with Kelly.

Equally as important, the evidence at trial demonstrated that there was no real urgency requiring Klahn to harass Kelly about breastfeeding. It was absolutely clear that Klahn’s client,

Icy Roe, was not going to jail that day. The 48-hour rule would have kept her out of jail for two days or longer, no question. This meant that Klahn had 48 hours, at least, to contact the jail about breastfeeding and electronic monitoring requirements. He had 48 hours to use his cellphone to call a medical authority. He had 48 hours to go personally to the jail or to personally consult a medical authority.

Significantly, there was no doubt that Klahn had already told the judge's clerk, Amy English, *before he talked with Kristi Kelly*, that he would not waive the 48-hour rule and that his client would not be sentenced at the Trial Readiness Hearing with Judge Hampton:

“A.Well, I talked to Amy first, and I told Amy I was going to need to get a plea petition, and I wanted to give her a heads-up that *the sentencing would not occur then, that I would not waive the 48 hours . . .*”

(Ex 3 p. 36) (emphasis added).

Given this fact, the Majority could not accept that there was urgency sufficient to justify Klahn's mistreatment of Kelly. Klahn has handled hundreds if not thousands of similar hearings in his 37 years of criminal law practice. He is a supremely confident, experienced and skilled trial lawyer. He could easily have dealt with this situation without badgering Kelly. Klahn knew, absolutely knew, that his client was not going to jail that day. He made this decision before he confronted Kelly. Neither he nor his client had to have an immediate answer from Kelly because both of them had plenty of time to research the breastfeeding issue on their own. The contrast between Klahn's stated purpose to harass Kelly and the fact that there was no immediate justification for that harassment further weakened Klahn's credibility with the Majority.

Although this may have occurred after Klahn confronted Kelly, it is interesting to note that Klahn himself characterized Ms. Roe's breastfeeding as a “small issue” to talk with Judge Hampton about at the Trial Readiness Hearing.

(Ex. 4). Judge Hampton gave Ms. Roe a full week before formal sentencing, in order to give Ms. Roe and Mr. Klahn “time to talk with the staff at the jail and find out what the rules are about electronic surveillance and how they might apply to you.”

(Ex. 4, p. 25). Klahn's characterization of the breastfeeding concern as a “small issue” and the ease with which Judge Hampton understood and handled the issue belie Klahn's excuse of an urgent need to find a female staff person to educate him on breastfeeding.

Klahn also lost credibility with the Majority when he stubbornly refused to admit that the Mae West quote was about an erect penis. (Even though this factor relates to the Bar's other allegation against Klahn, it still bears on the Majority's overall view of Klahn's credibility.) All through pretrial proceedings, in his Trial Memorandum and throughout almost two days of trial testimony, Klahn maintained that the Mae West quote was not about a penis,

but was rather something akin to humorous understatement. For example, Klahn testified in his deposition:

“Q. So your understanding of the Mae West quote is that the pistol in your pocket is an erect penis?

No. It’s just something that you’ve got in your pocket.”

(Ex. 3, p. 62).

It was only near the end of the two-day Trial proceeding, when Klahn was questioned closely by the Trial Panel itself, that Klahn finally, but reluctantly, admitted the Mae West “innuendo” about a gun was a reference to an erect penis. (Tr. 328). Klahn’s deception about something so obvious and so widely accepted added to the Majority’s doubts about the credibility of Klahn’s testimony regarding his interaction with Kristi Kelly.

Further, Klahn’s interaction with Kelly did not come in a vacuum. Trial Court Administrator Roy N. Blaine said: “Mr. Klahn frequently makes brash and inappropriate statements while talking with court staff.” (Ex. 5E).

The Honorable Eva J. Temple, Circuit Court Judge said: “... Mr. Klahn delights in causing disruption and discomfort... [he has a] frequently demonstrated penchant for causing disruption and disturbance in courtrooms and clerks’ offices....it is not that this is Mr. Klahn’s first venture into the world of inappropriate communication.” (Ex. 5F). This history was admitted only for the purpose of giving the Trial Panel context for the Bar’s specific allegations against Klahn. It did not establish on its own that Klahn acted unethically with Kelly. But it did call for closer scrutiny of Klahn’s testimony about his confrontation with Kelly.

The Majority ultimately agreed with the Bar that the reasons Klahn advanced for his interaction with Kelly amounted to a pretext for him to unethically harass and embarrass her. Klahn defended himself by pointing repeatedly to the results he obtained for his two clients, Icy Roe and Myrna Notturmo. He did not see that the outcome of his cases had absolutely no bearing on whether he violated ethical rules when he confronted Kelly. He asserted that he was just a lawyer working his cases, doing his job zealously. But the Majority found this testimony self-serving in the context of this particular case and this particular lawyer. Klahn’s reluctance to squarely address his behavior with Kelly, falling back each time to a comfortable speech about zealousness and working the case, left the Majority questioning his motivation.

This is not to say that all harassment in the name of zealous representation is unethical. Zealous representation is expected of trial attorneys. The public expects it; most lawyers and the judiciary expect it. Zealousness is not a four-letter word. But, here, Klahn’s excuse of working the case was not credible. The Majority concluded, instead, that Klahn cornered Kelly for his own amusement without a substantial purpose.

The Majority understands that trial lawyers sometimes find themselves in tight situations demanding quick answers; it understands that zealous representation can sometimes

result in badgering a witness at trial. However, for the Majority, Klahn's encounter with Kristi Kelly was altogether something different. He crossed the line into unethical behavior. Kelly was not a trial witness. Klahn admitted she would not be called as a witness. Kelly did not have a medical background, and importantly Klahn never asked her if she did. Kelly was not an authority on breastfeeding. She certainly did not work for the jail. Kelly had to repeatedly tell Klahn she did not know the answer to his breastfeeding questions. She had to tell Klahn to leave her alone, over and over. Yet, Klahn continued to badger her about breastfeeding, women and cows.

For the Majority, the continued questioning of Kelly over her objections was significant. It was an ethical violation the first time Klahn badgered Kelly about motherhood and breastfeeding, since he did not have a substantial purpose to do so. The next four or five times he demanded responses from her, after her pleas each time for him to stop, magnified the unethical nature of his behavior and added to the harm caused by his unacceptable and unethical conduct. (Because Amy English was not addressed in the Bar's Formal Complaint, the Majority takes no position on whether or not she was harassed unethically. *See*: Formal Complaint, para. 3.)

For all of these reasons, then, the Majority concluded that Klahn lacked credibility on the issue of whether he had a substantial purpose for his confrontation with Kelly. Or, put conversely, the Majority found that the Bar proved its case by clear and convincing evidence, demonstrating that Klahn's "excuses" for his harassment of Kelly did not constitute a substantial purpose for the interaction.

Turning to the issue of prejudice to the administration of justice, an instructional case is *In re Rochat*, 295 Or 533, 668 P2d 376 (1983). *Rochat* dealt with harassment of trial court support employees. The Supreme Court found Rochat's "bullying of clerks" ethically improper and prejudicial to the administration of justice. In one instance Rochat crumpled the clerk's paper docket and yelled at her that she was a "liar." In another instance, he harassed court clerks to get criminal defense appointments. The Supreme Court found Rochat's behavior prejudicial to the administration of justice because it "unnecessarily consumed work time" and because one clerk had to take the problem up with the trial judge. Here, in the case at bar, Klahn's harassment of Kristi Kelly caused her to lose work time, it led her to seek assistance from both her supervisor and the trial court administrator, and it left her speechless, extremely uncomfortable, and in shock. Further, Kelly testified that ever since the encounter she has had to be careful with Klahn and she has had to minimize her official interactions with Klahn. This is evidence of ongoing harm as a result of Klahn's wrongful behavior. Additionally, Kelly had no choice but to miss work to testify at Klahn's disciplinary trial, and it was apparent to the Majority that reliving the incident and having to testify at trial left Kelly emotionally distraught. Just as in *Rochat*, therefore, the Majority in this case found that Klahn's misconduct caused substantial, ongoing harm to Kelly and that his misconduct....not just talking to a clerk,

but harassing and embarrassing her without a substantial purpose...was prejudicial to the administration of justice.

Another instructional case on prejudice to the administration of justice is *In re Thompson*, 325 Or 467, 940 P2d 512 (1997). There, the Supreme Court declared that, “such behavior by an officer of the Court is unacceptable and will not be tolerated by this Court.” The accused attorney in *Thompson* had an emotional outburst during an ex parte confrontation with an appellate court judge that frightened a court clerk. The Supreme Court found the ex parte contact was improper. It also determined that substantial harm occurred when court personnel were subjected to the outburst, and that Thompson’s behavior was prejudicial to the administration of justice. Here, in the Klahn case, Kelly did not claim that she was frightened. But Kelly suffered actual harm because Klahn’s confrontation left her in shock, speechless, embarrassed, frustrated and harassed; she felt that the conversation with Klahn was improper and inappropriate. Kelly was obviously offended that Klahn would pester her about breastfeeding. Despite and over her objections, however, Klahn repeatedly insisted that because Kelly was a mother she should know about breastfeeding. Kelly was reduced to tears during her testimony, as she spoke of Klahn’s harassment. She cried as she explained to the trial panel that Klahn had badgered her about something, “so personal.” Just like the Supreme Court in *Thompson*, therefore, the Majority in Klahn concluded that the improper behavior by Klahn, an officer of the Court, caused substantial harm to Kelly and prejudice to the administration of justice. The Majority also declares, just as the Supreme Court did in *Thompson*, that Klahn’s repeated harassment of Kelly about breastfeeding without a substantial purpose was unacceptable and should not be tolerated.

Another instructive case is *In re Carini*, 354 Or 47, 308 P3d 197 (2013). Carini’s conduct was determined by the Supreme Court to be prejudicial to the administration of justice because Carini “wasted court and staff time” in having to deal with his behaviors. Carini’s problem was that he didn’t show up for court appointments. Like Carini, Klahn also wasted staff time when he accosted Kelly and when Bailey stopped work to observe Klahn’s harassment of Kelly. Worse than in *Carini*, however, Klahn created a hostile work environment for Kelly (and Bailey) with sexualized comments and repeated demands for answers about women, cows and breastfeeding. Kelly suffered actual injury as a result of Klahn’s behavior for all of the reasons outlined above. Kelly’s impassioned testimony at trial about the effect of Klahn’s behavior on her constitutes further evidence of the substantial, ongoing harm caused to her.

In summary, then, the Majority did not find Klahn credible about his “urgent” need for information on breastfeeding. Nor did the Majority find him forthcoming at all about his encounter with Kelly. Klahn seized on breastfeeding as an opportunity to unethically badger a captive female staff member. Klahn used this opportunity to harass Kelly about women, cows and breastfeeding, over her repeated objections, simply because he enjoyed it and because he

thought he could get away with it. As a result, the Majority concluded that he violated both ethical rules as alleged.

The Mae West Quote

1. The Bar has proven a violation of RPC 4.4(a) by clear and convincing evidence.

Our discussion of the facts relating to this event should make it clear that the Trial Panel does not accept the version outlined by the Accused. We do not believe Ms. Rietmann had a lengthy conversation outside the courtroom with the Accused. That conversation was short and occurred in the courtroom. Nor do we believe she indicated she was interested in trial practice and wanted mentoring. While young lawyers and law school graduates do introduce themselves to practicing lawyers, they just do not expect a lawyer to take time to mentor them during the course of a trial. Finally, we do not believe the Accused when he said he directed the joke solely to Ms. Rietmann.

The Accused had interrupted the clerks numerous times during the course of the trial. While some contact is expected between the lawyers and the clerks, the Accused had a habit of unnecessary contact. Nor do we believe he went up to practice his closing argument. That does not fit the experience of the clerks in that courtroom. Rather, it is the belief of the Trial Panel that the Accused approached the three clerks to tell a joke encapsulated within the facts of the case. That is, while he may have referenced one or more facts of the case, it is the belief of the Trial Panel the primary purpose was to tell a joke. The joke was out of place and sexual in orientation. We believe the sole purpose was to embarrass the clerks. The fact the Accused worked so hard to deemphasize the sexual nature of the joke is telling; if you are going to tell a dirty joke, then admit it. He just could not admit the joke referenced an erect penis. The Trial Panel strongly believes the Accused had no other object than to embarrass the three clerks, particularly Ms. Rietmann.

2. The Bar has proven the Accused conduct was prejudicial to the administration of justice.

The question arises, is it improper to tell a sexually explicit joke to busy court clerks during a break of the proceedings? The Trial Panel will answer that question in the affirmative as it relates to the Mae West quote. The question then arises whether that event also satisfies the prejudice element.

The conduct of the Accused must cause prejudice to the administration of justice. The Standard for determining prejudice is defined as follows:

“In *In re Haws*, 310 Or. 741, 748, 801 P.2d 818 (1990), this court defined the meaning of “prejudice” as follows:

“[W]e choose to interpret the word ‘prejudice’ in the context of this rule to require either:

- “1. Repeated conduct causing some harm to the administration of justice;
or
- “2. A single act causing substantial harm to the administration of justice.”
(Emphasis in original.)”

In re Thompson, 325 Or at 475.

The Mae West quote was said one time in the presence of three individuals. Two of the individuals “blew him off”. The third was embarrassed and turned red. In this case, we are dealing with a single act. Prejudice can come from actual harm or the potential for harm. *Id.* In this case we find a violation.

Substantial harm in this case comes from actual harm and potential for harm. First, these three clerks were each busy with work. They need to take time during breaks in the trial to handle work on other cases and matters. They were interrupted both by having to listen to the ill-considered joke and the need to address the reaction of Ms. Rietmann. Two of the clerks seemed to be used to interruptions by the accused and were thus able to ignore it more easily.

Ms. Rietmann had not had that experience. Further, we are talking about a sexual joke. We will leave it to others whether it rose to the level of sexually explicit. Regardless, it clearly referenced an erect penis. While these three women were able to handle the matter professionally, it is easy to imagine someone less mentally healthy reacting very negatively. Dirty jokes have no place in a courtroom during breaks in the proceeding. We can imagine use of the quote in the appropriate setting during trial, if the facts required. However, during a break is not one of those places.

The Trial Panel concludes the Bar has proven by clear and convincing evidence that the Accused violated both RPC 4.4(a) and RPC 8.4(a)(4) in telling a sexual joke during a break in the trial in the Notturmo matter. A majority of the panel conclude the Bar proved a violation of both rules as it relates to the breastfeeding conversation by clear and convincing evidence. We proceed to sanction.

Sanction

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

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

- (1) Duty violated:

We have determined the Accused violated two separate rules. All of the violations relate to the Accused’s duty to the legal system. *Standards* § 6.3.

(2) Mental state:

A lawyer acts with intent when he acts with a conscious objective or purpose to accomplish a particular result. A lawyer acts with knowledge when the lawyer has a conscious awareness of the nature of the conduct, with or without the conscious objective or purpose to accomplish a particular result. Negligence is the failure of the lawyer to heed a substantial risk that a result will follow and that failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

We find the Accused acted with knowledge. He knew what he was doing when he approached the three women to tell them the sexual joke; however, it goes too far to say he had an express purpose to degrade or injure them. Again, his actions are inappropriate and improper without specific intent as it relates to the Mae West quote.

On the other hand, the Majority finds the Accused acted with intent when he approached Kristi Kelly to badger her over breastfeeding in humans and cows.

(3) Injury:

We find the five clerical employees suffered actual and potential injury. Their work was interrupted for an improper purpose. Three appeared to be irritated to have to deal with yet another incident of interruption by a serial interrupter, one was noticeably embarrassed and one cried as she relived the event on the stand. All five people have had to deal with the fallout of reporting the incident and coming to the hearing to testify. There was the potential that one of these women could have reacted negatively, based upon their past life experiences.

As a note, we are not sympathetic with the arguments these events lasted a short time. The amount of time is not the issue. It is the action that was wrong, regardless of how long it took.

(4) Preliminary sanction:

Suspension is generally appropriate when a lawyer improperly communicates with an individual in the legal system when the lawyers knows the communication is improper and causes interference or potential interference with the legal proceeding. *Standards* § 6.3.²

It is our preliminary determination that the appropriate sanction is suspension of some length. We now turn to any aggravating or mitigating circumstances.

² The Bar argued Section 6.2 applied to this case; however, that section requires a violation of a court order or rule. No court order is involved in this case; no court rule is cited. Thus, we find that Section 6.3 is more appropriate for this matter.

(5) Aggravating and mitigating circumstances:

The Bar asserts several aggravation circumstances apply in this matter; we will take each in turn.

A. A record of prior discipline.

The record establishes that the accused has been disciplined before. In each case the charges were resolved by stipulation. (Exs. 13, 14, 15, 16). One case involves one of the rules involved here, RPC 8.4(a)(4). (Ex. 16). However, the underlying facts in that case are not similar to those in this matter.

The record does not tell us why the Accused and the Bar entered into any of these stipulations. A number of factors go into a settlement analysis, including the need to put the matter behind even if you feel you are in the right. In any event, since each prior discipline involved a stipulation and not an order from the court, we are inclined to give them little weight. While we agree with the Bar it demonstrates a poor pattern of behavior and causes the trial panel concern, it is not the strong factor as argued by the Bar. Quite simply the Accused does have a prior record of discipline.

B. A dishonest or selfish motive.

The Bar focuses on base needs, negative attention, a desire to cause disruption and a desire to target women. We do not find this factor applies. Base needs and targeting women simply does not apply. Although his conduct was knowing and intentional, he did not have the specific aim to demean women. That may have been the result, but that was not the intent.

C. A pattern of misconduct.

We are dealing with two events. Although this is the second time he has been found to engage in conduct prejudicial to the administration of justice, the underlying conduct is not similar to the conduct outlined in exhibit 16. What concerns the trial panel as much as anything is the pattern of behavior where this lawyer believes he can take up the time of clerical staff for his purposes not related to the needs of individual cases. We do not believe this rises to an aggravating factor, we are very sympathetic with court staff and court administrators.

D. Multiple offenses.

Two events involving two separate rules are involved in this case; this factor applies.

E. Refusal to acknowledge the wrongful nature of the conduct.

The Bar acknowledges the accused is free to challenge the charges leveled against him. The Bar then argues that the facts here are admitted in all material respects, so that the failure to acknowledge the wrongful nature of the conduct is an aggravating factor.

We disagree with the Bar. The Accused provided a rationale for his conduct, that if believed would have excused his conduct. Although our findings are adverse to the Accused, the trial panel needed to sift through disputed facts to make the decisions involved here.

The Accused did state he had apologized to several of the women involved in this matter. We are not sure how effective it was, since most of the women failed to remember it. However, the Accused did admit he would not use the Mae West quote again in a criminal proceeding. We find this factor does not apply.

F. Vulnerability of the victim.

We acknowledge the five clerks were at their desks when approached by the Accused. Leaving while they are trying to work presented difficulties. However, it is our belief this factor is not designed for this factual situation. It is more akin to a situation in which a lawyer has power of some kind over the victim; a guardianship comes to mind. This factor does not apply.

G. Substantial experience in the practice of law.

This factor clearly applies. The Accused was admitted to practice in 1980 and has 37 years before the bar.

The Accused argues for a number of mitigating factors. We will address each in turn.

The Accused argues he did not act with intent or knowingly. This is not a factor listed in the *Standards*. Further, we have found the Accused acted knowingly and intentionally.

The Accused has been cooperative to the extent he participated in discovery and at the hearing without a problem. However, we did not accept his testimony in several very important matters. Further, his testimony often rambled and he often did not answer the question asked of him. He had to be brought back on topic. While we have not made a demeanor credibility finding, we did not credit much of his testimony. This is not a mitigating factor.

It is not a mitigating factor that the Accused obtained good results for each client. They did not press the charges here. They were not the victims here and were not subjected to either the Mae West quote or the breastfeeding conversations. Nor is this a factor listed in the *Standards*. This is not a mitigating factor.

The Trial Panel agrees the Accused did not have a dishonest or selfish motive.

There is evidence the Accused has apologized to some of the women involved in this matter. However, when given the opportunity to acknowledge the hurt, however unintentional, he went on a long ramble about his obligation to zealously represent his client and to harass or embarrass who ever, if that is necessary in his defense of his client. When asked, he had a hard time differentiating conduct with witnesses during trial and conduct with court staff when not on the record. This is not a mitigating factor in favor of the Accused.

When comparing the aggravating factors with the mitigating factors, they do not change our initial conclusion of the presumptive sanction. The analysis under the ABA *Standards*

leads the panel to conclude that a term of suspension is the appropriate sanction for the violations committed by the Accused. We next turn to Oregon case law for comparable cases.

Oregon Case Law:

In *In re Glass*, 308 Or 297³, the offending lawyer was suspended for 91 days. However, his conduct was deemed intentional. A lawyer was suspended for 63 days for an angry improper ex parte contact with a judge of the Court of Appeals. His conduct was also found to be intentional. In *In re Thompson*, 325 Or at 478. In *In re Rochat*, 295 Or 533, the Accused harassed court employees to give him additional court appointments; he was suspended for five weeks.

The Bar seeks enhancement of the sanction because of the Accused's history of prior discipline. We decline. As we explained when discussing this issue when looking at aggravating factors, each case involved a stipulation, not a finding by a trier of fact following a hearing. We are not inclined to go behind settlement decisions. Only one case involved the rule involved here and the conduct was different. Again, while this is not a good pattern, we do not believe it is reason to enhance the sanction.

The Bar argues against probation; the Accused has not asked for probation, so we decline to address that issue.

The Bar asks the Trial Panel to order formal reinstatement. Since we do not feel this case warrants a suspension of sufficient length to invoke the rule, formal reinstatement is not required. BR 8.1; we decline to go beyond the rule and do not believe we have the power. Nor do the cases allow for suspension longer than we have ordered.

Considering the actions involved in this matter, the rules violated, the *ABA Standards*, and our case law, we conclude a suspension of 75 days is in order.

As a final note, the Accused seeks dismissal of all charges on the grounds they violate his rights to free speech. We decline to rule on that issue, we doubt we have that authority and leave it to the Court to wrestle with it. However, it is our strong feeling that this is not a free speech issue. If we take the argument of the Accused to its logical limit, the Court would not be able to discipline a lawyer for anything a lawyer does. In looking at the cases we cited by the parties and in this opinion, the lawyer was sanctioned for something said either in writing or orally. That is what lawyers do; we speak for our clients. To then turn our work into a free speech argument would shackle the discipline system and allow any lawyer to do whatever they wanted.

³ Although the Bar cited to this case in their prehearing memorandum, they cited the subsequent decision on reconsideration. The sanction analysis is found in the initial decision and there is no comment on the sanction in the subsequent decision cited by the Bar.

We suspend the Accused from the practice of law for 75 days, the suspension to begin as provided under the applicable rules of procedure.

Dated this 11th day of September, 2017.

/s/ Ronald Roome
Ronald Roome, Trial Panel Chairperson

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

Dissent

I have joined the majority in its decision as it relates to the Mae West quote. I have also joined the majority in its decision relative to the sanction. However, because I do not believe the incident involving Kristi Kelly was as dramatic as the majority, I file this dissent. I do not believe the Accused violated either rule as it relates to that incident. Let it be said, I believe the Accused's conduct was insensitive and he should apologize to Ms. Kelly; I just do not believe it arises to unethical conduct.

1. RPC 4.4(a)

Counsel for the Defense has framed this as a free speech issue. It is not. I believe that none of the women involved in this matter would have any problem talking about breastfeeding in appropriate circumstances. However, to have their busy day interrupted by the Accused to get information outside the scope of their work was not the time or place. These two women did not work at a medical clinic or have any particular expertise in breastfeeding. Their job is to aid the court manage the cases that come before it; that does include helping busy lawyers with the necessary paperwork. Their job was not to act as experts on fact or legal issues a lawyer is wrestling with. These conversations simply interrupted their work.

On the other hand, the Bar goes a bit too far when it accuses the Accused of degrading women. While the Accused is quite clueless in his relationships with the clerical staff at the courthouse, he was not degrading women. He had a problem he thought he needed to solve and drew upon his past experience with dairy cattle. We cringe even imagining the Accused would think the comparison was appropriate. While it is obvious this comparison was not apt and was insensitive, the issue before me is whether his motivation was "merely" to harass or served "no substantial purpose" other than to harass.

The Accused arrived at the courthouse that morning to advise the judge he and his client were ready to go to trial. However, he was then surprised by his client's decision to plead guilty. At that point, he had to get the necessary paperwork. He also thought he had to address her concerns over breastfeeding in jail. Although he handled it inappropriately, I cannot say his sole or substantial purpose was to harass these two women. He got caught up in what he was doing and did not think through his approach. This seems to be a pattern. He may have

been clueless and insensitive, but his motivation was not solely to harass these women; nor was it without substantial purpose other than to harass or embarrass.

So the question arises why I do not agree with the other panel members. My reasons are numerous, particularly when they do not believe his rationale and I have already written that I do not believe his version of the events surrounding the Mae West quote.

First, I believe him when he said he was surprised by the decision of Icy Roe to plead guilty. She testified she made that decision that morning, impulsively. Thus, he would have been caught off guard. In order to be on time with the Judge, he had to hurry.

Second, his first conversation about breastfeeding occurred with Amy English. She was a clerk in the courtroom and he went to her first to get the form he needed. He asked about the form and asked her about breastfeeding. The majority correctly note that the Bar has not charged the Accused with conduct that relates to this event. It is pretty clear he went to her to get the form and asked about breastfeeding as well. Thus, he had a legitimate purpose to talk to her and asked about breastfeeding. It is worth noting Icy Roe testified she was worried about the issue and had asked her mother, who did not know the answer. Thus, while he asked the wrong people in the wrong fashion, his questions were related to an issue his client raised.

Third, if the conversation with Amy English is not actionable, then why is the conversation with Kristi Kelly actionable? The only answer lies in its length. She testified she told the Accused to leave five to six times. Her coworker confirmed her description of the event. All agree the conversation lasted just a couple of minutes. Thus, the question arises yet again. Does it make any difference she asked him to leave more times than Amy English did? I think not. If the questions were not actionable when asked of Amy English, why were they actionable when asked of Ms. Kelly. Is it unethical to ask the question 5 times, but not unethical when only asked twice? I think not.

Fourth, I think my compatriots are reacting to how Ms. Kelly acted at hearing. She cried and clearly did not want to be there. Was that due to damage caused by the encounter? Was it because she did not want to testify against a lawyer she sees all the time in the courthouse? Was it because of a power discrepancy between a clerical employee and a practicing attorney? The Majority seems to know the answer, but I do not.

As I view these events, I am mindful the Court instructs us to look at the lawyer's motivation. He was in a hurry. He needed to get certain paperwork prepared for the inspection of the judge. I just do not believe it was his intent to go downstairs to get the necessary paperwork and to "merely" harass the clerk. He was insensitive and clueless; however, his intent was not to harass. The Bar has not proven their case with respect to the breastfeeding conversation.

2. RPC 8.4(a)(4)

Given the disagreement as it relates to the breastfeeding conversation, it is important to quote the elements needed to prove a violation of this rule.

To prove a violation of either of this rule, the Bar must show that “(1) the accused lawyer’s action or inaction was improper; (2) the accused lawyer’s conduct occurred during the course of a judicial proceeding ***; and (3) the accused lawyer’s conduct had or could have had a prejudicial effect upon the administration of justice.” *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003).

There seems little dispute that both of this event occurred during the course of a judicial proceeding. The breastfeeding conversation occurred while obtaining documents needed for an upcoming plea proceeding.

The first question to answer is whether that conversation was improper. The Court has held that being combative and aggressive may have been unreasonable, but not unethical. *In re Marandas*, 351 Or 521, 270 P3d 231 (2012). Counsel for the Accused was correct to cite *In re Paulson*, 341 Or 13, 27, 136 P3d 1087 (2006), *cert den*, 549 US 1116 (2007). The Court did specifically state: “It is true that not every negligent or unprofessional act, no matter how misguided, boorish, or rude, gives rise to an ethical violation.” That was small comfort to Mr. Paulson whose cumulative conduct was sufficient to violate the rule.

Cases that have found conduct prejudicial to the administration of justice involve conduct more egregious than what we have here. *In re Thompson*, 325 Or 467, 940 P2d 512 (1997), involved improper ex parte contact with a sitting judge of the Court of Appeals. The lawyer confronted a sitting judge in the hallway outside her office and a judicial clerk had to interpose himself between the lawyer and the judge; he was afraid for her safety. Although this case is usually cited for its discussion of the prejudice element, it was the ex parte conduct that was the improper conduct. That element must be found first, before prejudice is analyzed.

In *In re Haws*, 310 Or 741, 801 P2d 818 (1990), the improper conduct was the failure to forward a wage payment to the bankruptcy trustee. In *In re Carini*, 354 Or 47, 308 P3d 197 (2013), the Accused failed to attend several scheduled hearings. That was the improper conduct.

In this case, the majority focuses on the length of the conversation with Ms. Kelly, the five to six times she told him to leave. They also paint him as more aggressive than the evidence supports. However, they need to find the conversation, in and of itself, to be improper before they address prejudice. The majority argues the action was prejudicial. However, why is it improper to talk to a clerk, particularly when she is printing out a document needed in court within the hour?

In this case, the Accused was clearly boorish and misguided in asking two clerks about breastfeeding and if people are like cattle; he was also insensitive in failing to leave when

requested by Ms. Kelly.⁴ But that is what he was, boorish, insensitive and rude. However, that does not seem to rise to the level of unethical conduct, given other cases decided by the Court. This is a straightforward decision as it relates to the questions relating to breastfeeding.

Because I do not find it improper, as a matter of law, for the Accused to talk to the clerk, even about breastfeeding, I do not find an improper act. Nor do I find prejudice. We are dealing with a single conversation. I do not find substantial impact on the administration of justice. There may be some prejudice, but not substantial prejudice from this single conversation.

For the foregoing reasons, I dissent from the decision of the majority to find violations of RPC 4.4(a) and RPC 8.4(a)(4) as it relates to the breastfeeding conversation.

It bears repeating that I concur with the decision of the entire trial panel to find violations of both rules as it relates to the Mae West quote. It also bears repeating that I concur with the sanction and would not adjust it even if the Supreme Court agrees with my opinion on the breastfeeding conversation if this matter goes on appeal. Regardless, I find the Accused should be suspended for 75 days.

Dated this 11th day of September, 2017.

/s/ Ronald Atwood

Ronald Atwood, Trial Panel Member

⁴ This event clearly had an impact on Ms. Kelly, when she broke down in tears in having to recount the circumstances. We are mindful of its effect on her. However, we are not prepared to say that the behavior of the Accused where he was asking the wrong people the wrong questions rose to the level of improper as the Court has interpreted the term.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 17-18
)
LOREN ANDREW GRAMSON,)
)
Accused.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Accused: Jason E. Thompson
Disciplinary Board: None
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b).
Stipulation for Discipline. 60-day suspension, all stayed,
2-year probation.
Effective Date of Order: February 23, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Loren Andrew Gramson is suspended for 60 days with all of the suspension stayed, pending his successful completion of a two-year term of probation, effective within 10 days after this stipulation is approved, or as otherwise directed by the Disciplinary Board for violations of RPC 1.3, RPC 1.4(a) and RPC 1.4(b).

DATED this 13th day of February, 2018.

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

STIPULATION FOR DISCIPLINE

Loren Andrew Gramson, attorney at law (“Gramson”), and the Oregon State Bar (“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.

Gramson was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 11, 2006, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On April 8, 2017, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Gramson for alleged violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), 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.

On June 22, 2017, a Formal Complaint was filed against Gramson pursuant to the authorization of the SPRB alleging violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(4). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

Sometime prior to November 17, 2014, Virginia Jacobs (“Jacobs”) retained Gramson to handle the estate of Melba Seable (“Seable”). On or about November 17, 2014, Gramson commenced the probate of Seable’s estate in Multnomah County Circuit Court. Seable’s Will left her entire estate to the Ascension Lutheran Church and designated Jacobs as the personal representative of Seable’s estate.

6.

Gramson failed to file an inventory of the estate’s assets when due. Thus, on January 20, 2015, the probate court issued an order to show cause and scheduled a hearing for Jacobs to appear on February 20, 2015, or risk removal as the personal representative. Gramson filed the inventory on February 13, 2015, and the show-cause hearing was cancelled. Gramson also failed to file an annual accounting when it was due. Therefore, on January 21, 2016, the probate

court issued a notice of a show-cause hearing and set a hearing for February 22, 2016. On February 17, 2016, Gramson filed the annual accounting and the show-cause hearing was cancelled.

7.

Beginning in March 2016 and continuing through September 2016, Jacobs contacted Gramson by telephone and email regarding the estate, but received no response. After approximately six months of no contact from Gramson, in September 2016, Jacobs terminated Gramson and retained new counsel.

8.

After retaining new counsel, Jacobs learned that Gramson had failed to publish a required notice to creditors and interested persons in the probate case. Jacobs's replacement counsel prepared the notice to creditors and interested persons that Gramson should have prepared, but the late filing delayed the distribution and closing of Seable's estate.

Violations

9.

Gramson admits that, by engaging in the conduct described in paragraphs 5 through 8, he violated RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 8.4(a)(4) should be and, upon the approval of this stipulation, is dismissed.

Sanction

10.

Gramson 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* ("*Standards*"). The *Standards* require that Gramson's conduct be analyzed by considering the following factors: (1) the ethical duties 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 that an attorney owes are to his clients. *Standards* at 5. Gramson violated his duty to his client by failing to diligently attend to her matter and by failing to communicate with her in a timely and effective manner. *Standards* § 4.4.
- b. **Mental State.** The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be

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

Gramson acted knowingly in some respects and negligently in others. Gramson negligently failed to utilize his case management systems to track estate deadlines, which resulted in his failure to file the notice to interested persons, an inventory, and an accounting. After Gramson realized his error in not filing the notice to interested persons, he knowingly failed to file that notice and knowingly failed to communicate with Jacobs about that failure and its consequences. Gramson also acted knowingly in not responding to Jacobs despite her repeated communications.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992).

Jacobs suffered actual injury through the delay of the administration of the estate and the need to retain different counsel to complete the probate that was originally handled by Gramson. There is actual injury to a client when an attorney fails to actively pursue the client's matter. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (2000). Jacobs also suffered actual injury in the form of the anxiety and frustration that she experienced as the result of the scheduling of the show-cause hearings and Gramson's failure to adequately communicate with her. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as the result of attorney neglect can constitute actual injury under the *Standards*); *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997).

The court also sustained actual injury because Gramson's failure to timely file an inventory and an accounting necessitated the scheduling of show-cause hearings to prompt those actions. In addition, Gramson's failure to publish the notice to interested persons caused delay in the administration of closing the estate. This conduct by Gramson disrupted the court's ability to efficiently manage its docket. *See In re Morris*, 326 Or 493, 505, 953 P2d 387 (1998) (attorney caused harm to the administration of justice by creating circumstances requiring an ancillary inquiry by the court).

- 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).
Gramson had practiced for ten years at the time of the misconduct.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards* § 9.32(a).

2. Absence of dishonest or selfish motive. *Standards* § 9.32(b). Gramson took on this matter pro bono to provide an in-kind donation to the church that had been attended by the decedent and his recently-deceased boss.
3. Personal or emotional problems. *Standards* § 9.32(c). Gramson described personal and behavioral issues. He has contacted the Oregon Attorney Assistance Program and the Professional Liability Fund's (PLF) practice management advisors for help with non-substance related issue which contributed to his misconduct in this matter. Gramson has also disclosed that he is in treatment for a sleep disorder that affected his ability to practice and manage stress during his work on this matter.
4. Cooperative attitude toward proceedings. *Standards* § 9.32(e).
5. Remorse. *Standards* § 9.32(1). Gramson expressed remorse in his letters to the Bar and provided copies of letters of apology that he sent to Jacobs and to the estate's devisee.

11.

Under the ABA *Standards*, suspension is generally appropriate when an attorney knowingly fails to perform services for a client and causes actual or potential injury to the client or when an attorney's pattern of neglect causes actual or potential injury to a client. *Standards* § 4.42.

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

12.

Oregon case law supports to imposition of a short suspension. Neglect of a client's legal matter typically results in a 60-day suspension. *See In re Redden*, 342 Or 393, 153 P3d 113 (2007).

Where there has been a neglect violation, but the respondent and the Bar agree that probation would be of greater benefit to the respondent and the public, the presumptive suspension may be stayed in favor of a probation aimed at better practices. *See, e.g., In re Smale*, 30 DB Rptr 51 (2016) (attorney who violated RPC 1.3, RPC 1.4(a), and RPC 1.4(b) by negligently and knowingly failing to take steps to advance her client's matter and failing to notify and communicate with her client for two years, including about an adversary proceeding and a resulting default judgment, caused actual and potential injury to her client, so received a 60-day suspension, all stayed, pending a 2-year probation); *In re Vernon*, 29 DB Rptr 12 (2015) (attorney who violated RPC 1.3 and RPC 1.4(a) by negligently and knowingly failing to file a postconviction relief petition and reinstatement after dismissal caused actual

and potential harm to her client received a 60-day suspension, all stayed, pending a 2-year probation).

13.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Gramson shall be suspended for 60 days for violations of RPC 1.3, RPC 1.4(a) and RPC 1.4(b), with all of the suspension stayed, pending Gramson's successful completion of a two-year term of probation. The sanction shall be effective within 10 days after this stipulation is approved, or as otherwise directed by the Disciplinary Board.

15.

Probation shall commence ten days after this stipulation is approved and shall continue for a period of two years, ending on the day prior to the second year anniversary of the commencement date (the "period of probation"). During the period of probation, Gramson shall abide by the following conditions:

- (a) Gramson shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (b) On or before March 1, 2018, Gramson shall contact the Professional Liability Fund (PLF) and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Gramson shall schedule the first available appointment with the PLF and notify the Disciplinary Counsel's Office (DCO) of the time and date of the appointment.
- (c) Gramson shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload, and taking reasonable steps to protect clients upon the termination of his employment. No later than 30 days after recommendations are made by the PLF, Gramson shall adopt and implement those recommendations.

- (d) No later than 60 days after recommendations are made by the PLF, Gramson shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (e) Chris Covert shall serve as Gramson's probation supervisor ("Supervisor"). Gramson shall cooperate and comply with all reasonable requests made by Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Gramson's clients, the profession, the legal system, and the public. Beginning with the first month of the period of probation, Gramson shall meet with Supervisor in person at least once a month for the purpose of reviewing the status of Gramson's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of 10% or ten of Gramson's active client files (whichever is greater) to determine whether Gramson is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
- (f) During the period of probation, Gramson shall attend not less than eight (8) MCLE accredited programs, for a total of twenty-four (24) hours, which shall emphasize law practice management, time management, and effective client communication. These credit hours shall be in addition to those MCLE credit hours required of Gramson for his normal MCLE reporting period. The Ethics School requirement does not count towards the 24 hours needed.
- (g) Each month during the period of probation, Gramson 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.
- (h) During the period of probation, Gramson shall continue to be under the care and treatment of Dr. Beenish K. Khwaja, M.D., for sleep apnea and any other sleep disorders or conditions diagnosed by either Dr. Khwaja or any other physician or medical professional. On or before March 1, 2018, Gramson will request and provide proof of request to the Bar of a current written evaluation by Dr. Khwaja describing any recommended treatment for Gramson. Once Dr. Khwaja provides that written evaluation, then Gramson will provide that evaluation. Gramson will comply with all treatment recommendations made by Dr. Khwaja or any other physician from any sleep-related conditions.

- (i) Beginning on or about April 30, 2018, and continuing every three months thereafter until the term of his probation is completed, Gramson will request from Dr. Khwaja a report signed by Dr. Khwaja confirming that Gramson is under her care and complying with all recommended treatment for Gramson's sleep disorder(s).
- (j) Gramson acknowledges that DCO will refer him to the State Lawyers Assistance Committee ("SLAC") for monitoring of his sleep disorder, not due to any substance abuse issues. Gramson will cooperate with SLAC and acknowledges that failure to cooperate with SLAC may be grounds for discipline pursuant to RPC 8.1(c).
- (k) On a quarterly basis, on dates to be established by DCO, Gramson shall submit to DCO a written "Compliance Report," approved as to substance by Supervisor, advising whether Gramson is in compliance with the terms of this agreement. In the event that Gramson has not complied with any term of the agreement, the Compliance Report shall describe the noncompliance and the reason for it.
- (l) Throughout the term of probation, Gramson shall diligently attend to client matters and adequately communicate with clients regarding their cases.
- (m) Gramson authorizes Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Gramson's compliance.
- (n) Gramson is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (o) Gramson's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (p) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (q) The SPRB's decision to bring a formal complaint against Gramson for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

16.

Gramson 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. This requirement is in addition to any other provision of this agreement that requires Gramson to attend or obtain continuing legal education (CLE credit hours).

17.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 9, 2017. Approval as to form by DCO is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 7th day of February, 2018.

/s/ Loren Andrew Gramson
Loren Andrew Gramson
OSB No. 061889

APPROVED AS TO FORM AND CONTENT:

/s/ Jason E. Thompson
Jason E. Thompson
OSB No. 014301

EXECUTED this 9th day of February, 2018.

OREGON STATE BAR
By: /s/ Courtney C. Dippel
Courtney C. Dippel
OSB No. 022916
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 17-50
)	
CORY J. LARVIK,)	
)	
Accused.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Accused:	David J. Elkanich
Disciplinary Board:	None
Disposition:	Violation of RPC 1.16(d), RPC 3.3(a)(1), RPC 5.3, RPC 8.4(a)(3), RPC 8.4(a)(4). Stipulation for Discipline. 120-day suspension, all but 30 days stayed, pending 2-year probation.
Effective Date of Order:	May 28, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Cory J. Larvik is suspended for 120 days with all but 30 days of the suspension stayed, pending his successful completion of a 2-year term of probation, effective May 25, 2018 for violations of RPC 1.16(d), RPC 3.3(a)(1), RPC 5.3, RPC 8.4(a)(3), and RPC 8.4(a)(4).

DATED this 12th day of March, 2018.

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

ORDER MODIFYING ORDER APPROVING STIPULATION FOR DISCIPLINE

Upon the petition of the respondent, Cory Larvik, the Order Approving Stipulation for Discipline was entered in the above case on March 12, 2018, by Adjudicator Mark A. Turner

(the “Order”) is modified in that the commencement of the suspension is changed to May 28, 2018. In all other respects, the Order is affirmed.

DATED this 26th day of March, 2018.

/s/ Mark A. Turner

Mark A. Turner

Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Cory J. Larvik, attorney at law (“Larvik”), and the Oregon State Bar (“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.

Larvik was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 2, 1998, and has been a member of the Bar continuously since that time, having his office and place of business in Union County, Oregon.

3.

Larvik 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 August 9, 2017, a Formal Complaint was filed against Larvik pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.16(d), RPC 3.3(a)(1), RPC 5.3, RPC 8.4(a)(3), and RPC 8.4(a)(4). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In March 2014, Marcia Shaver (“Shaver”) retained Larvik to probate her late brother’s estate, of which Shaver was the personal representative.

6.

On March 21, 2014, Shaver met Larvik at his office. On or about that date, Shaver signed three probate pleadings: (1) a Petition for Probate of Will and Appointment of Personal Representative (“Petition”); (2) an Affidavit of Compliance Regarding Search for Claims and Notice to Claimants (“Affidavit”); and (3) an Inventory.

7.

On May 20, 2014, Larvik revised the Petition that Shaver signed in March. Larvik’s secretary, who also acted as his notary (“Larvik’s notary”), a nonlawyer employee whom Larvik supervised, notarized the petition on or about May 20, 2014, and certified that Shaver had executed the document on that date even though Shaver had signed the document on March 21, 2014.

8.

On May 20, 2014, Larvik filed the Petition with the probate court with a misleading notary certificate that did not comply with Oregon law governing notarial acts.

9.

On June 10, 2014, Larvik’s notary notarized the Inventory and Affidavit and certified that Shaver had executed both documents before the notary on that date even though Shaver signed the documents on March 21, 2014.

10.

On June 11, 2014, Larvik filed the Inventory and Affidavit with the probate court with notary certificates that did not comply with Oregon law governing notarial acts.

11.

On August 18, 2014, Larvik filed a motion to withdraw from representing Shaver in the probate of her brother’s estate. Larvik did not notify Shaver that he was filing the motion to withdraw prior to filing the motion. Shaver learned that Larvik had moved to withdraw when she received her copy of the motion in the mail.

Violations

12.

Larvik admits that, by engaging in the conduct described above, he violated RPC 1.16(d), RPC 3.3(a)(1), RPC 5.3, RPC 8.4(a)(3), and RPC 8.4(a)(4).

Sanction

13.

Larvik 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*

(“*Standards*”). The *Standards* require that Larvik’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.** Larvik violated duties he owed as a professional to properly withdraw from representation. *Standards* § 7. Larvik also violated the duties he owed to the legal profession to refrain from making false statements of fact to a tribunal; to adequately supervise nonlawyers; to refrain from conduct involving dishonesty that adversely affects his fitness to practice law; and refrain from conduct prejudicial to the administration of justice. *Standards* § 6.
- b. **Mental State.** The *Standards* recognize three different mental states—intentional, knowing, and negligent.

The *Standards* define “intent” as 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.

With regards to Larvik’s motion to withdraw without any notice to Shaver, he acted knowingly.

Turning to Larvik’s filing pleadings with improper notarization, Larvik knowingly filed documents that were notarized on dates other than when they were signed, at a time when the notary public was not in the presence of the person who signed the documents. However, given Larvik’s mistaken belief that he could have the documents notarized at a later date, his filing of the improperly notarized pleadings as false statements to the court was negligent.

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

Both acts by Larvik caused injury to his former client, the legal system, and the legal profession.

Larvik’s abrupt withdrawal caused actual injury in the form of client anxiety, stress, frustration, and delay. *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*, 325 Or 421, 426–27, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).

Larvik caused actual and potential injury by filing pleadings with misleading and otherwise improper notary certifications.

- 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). Larvik has been licensed to practice in Oregon since 1998.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of Prior Discipline. *Standards* § 9.32(a). Larvik has no prior discipline.
 2. Absence of a Dishonest or Selfish Motive. *Standards* § 9.32(b). Larvik has conceded that Shaver signed the documents at the March 21, 2014 meeting and that the notaries were incorrectly done.
 3. Full and free disclosure to disciplinary board. *Standards* § 9.32(d). Larvik has been cooperative and responsive throughout the Bar's investigation and prosecution.
 4. Character and Reputation. *Standards* § 9.32(g). Larvik has a good reputation and character as a lawyer.

14.

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.

Suspension is generally appropriate when a lawyer engages in conduct prejudicial to the administration of justice 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.

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 the client, the public, or the legal system. *Standards* § 7.2.

15.

Oregon cases confirm that suspension is warranted. Sanctions in disciplinary matters are not intended to penalize the accused lawyer, but instead are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998).

Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

The Supreme Court has suspended lawyers for both wrongful withdrawals and altering pleadings after execution by their clients with misleading notary certificates. *See, e.g., In re Castanza*, 350 Or 293, 253 P3d 1057 (2011) (60-day suspension for an attorney who withdrew from representing two clients in a civil action, but failed to allow the clients sufficient time to employ other counsel, respond to pleadings, or communicate with the clients regarding the judgment and cost bill), *In re Morris*, 326 Or 493, 953 P2d 387 (1998) (120-day suspension for dishonest conduct and conduct prejudicial to the administration of justice for an attorney who knowingly altered the final account for services rendered as counsel for the personal representative after the statement had been signed and notarized and then filed it with the court. The fact that neither the court nor any party was actually misled was not relevant given the potential harm the attorney's conduct caused).

16.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

17.

Consistent with the *Standards* and Oregon case law, the parties agree that Larvik shall be suspended for 120 days for violations of RPC 1.16(d), RPC 3.3(a)(1), RPC 5.3, RPC 8.4(a)(3), and RPC 8.4(a)(4), with all but 30 days of the suspension stayed, pending Larvik's successful completion of a 2-year term of probation. The sanction shall be effective May 25, 2018 or as otherwise directed by the Disciplinary Board ("effective date").

18.

Larvik's license to practice law shall be suspended for a period of 30 days beginning on the effective date, or as otherwise directed by the Disciplinary Board ("actual suspension"), assuming all conditions have been met. Larvik understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Larvik re-attains his active membership status with the Bar, Larvik shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

19.

Probation shall commence upon the date Larvik is reinstated to active membership status and shall continue for a period of 2 years, ending on the day prior to the 2 year anniversary of the commencement date (the “period of probation”). During the period of probation, Larvik shall abide by the following conditions:

- (a) Larvik will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Larvik has been represented in this proceeding by David J. Elkanich (“Elkanich”). Larvik and Elkanich hereby authorize direct communication between Larvik and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Larvik’s compliance with his probationary terms.
- (c) Larvik shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (d) During the period of probation, Larvik shall attend not less than 8 MCLE accredited programs, for a total of 24 hours, which shall emphasize law practice management issues. These credit hours shall be in addition to those MCLE credit hours required of Larvik for his normal MCLE reporting period. The Ethics School requirement does not count towards the 24 hours needed. Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Larvik shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the term of probation, Larvik shall diligently adequately communicate with clients regarding their cases, notarize documents in accordance with Oregon law and assure that any nonlawyer under his supervision who notarizes documents does so in accordance with Oregon law.
- (f) Each month during the period of probation, Larvik 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.
- (g) Mr. James A. Schaeffer shall serve as Larvik’s probation supervisor (“Supervisor”). Larvik shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Larvik’s clients, the profession, the legal system, and the public.

- (h) Beginning with the first month of the period of probation, Larvik shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing his Supervisor to review the status of Larvik's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of 10 files or 10% of Larvik's total caseload, whichever is greater, to determine whether Larvik is timely, competently, diligently, and ethically attending to matters, taking reasonably practicable steps to protect his clients' interests upon the termination of employment, and properly notarizing documents and/or pleadings.
- (i) Larvik authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Larvik's compliance.
- (j) Within seven (7) days of his reinstatement date, Larvik shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF's Practice Management Advisors in order to obtain practice management advice. Larvik shall schedule the first available appointment with the PLF's Practice Management Advisors and notify DCO of the time and date of the appointment.
- (k) Larvik shall attend the appointment with the PLF's Practice Management Advisors and seek advice and assistance regarding procedures for communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF's Practice Management Advisors, Larvik shall adopt and implement those recommendations.
- (l) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Advisors, Larvik shall provide a copy of the Office Practice Assessment from the PLF's Practice Management Advisors and file a report with DCO stating the date of his consultation(s) with the PLF's Practice Management Advisors; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (m) On a quarterly basis, on dates to be established by DCO beginning no later than 60 days after his reinstatement to active membership status, Larvik shall submit to DCO a written "Compliance Report," approved as to substance by his

Supervisor, advising whether Larvik is in compliance with the terms of this Stipulation for Discipline, including:

- (1) The dates and purpose of Larvik's meetings with his Supervisor.
 - (2) The number of Larvik's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Larvik has completed the other provisions recommended by his Supervisor, if applicable.
 - (4) In the event that Larvik has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (n) Larvik is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (o) Larvik's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (p) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (q) The SPRB's decision to bring a formal complaint against Larvik for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

20.

In addition, on or before May 1, 2018, Larvik shall pay to the Bar its reasonable and necessary costs in the amount of \$1,059.45, incurred for depositions. Should Larvik fail to pay \$1,059.45 in full by May 1, 2018, the Bar may thereafter, without further notice to him, obtain a judgment against Larvik for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

21.

Larvik 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, Larvik has arranged for Mr. James A. Schaeffer, an active member of the Bar, to either take possession of or have ongoing access to Larvik's client files and serve as the contact person for clients in need of the files during the term of his actual suspension. Larvik represents that Mr. Schaeffer has agreed to accept this responsibility.

22.

Larvik 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. Larvik 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.

23.

Larvik 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. This requirement is in addition to any other provision of this agreement that requires Larvik to attend or obtain continuing legal education (CLE) credit hours.

24.

Larvik 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 Larvik is admitted: Washington (inactive).

25.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on February 23, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 2nd day of March, 2018.

/s/ Cory J. Larvik

Cory J. Larvik
OSB No. 982783

APPROVED AS TO FORM AND CONTENT:

/s/ David J. Elkanich

David J. Elkanich
OSB No. 992558

EXECUTED this 8th day of March, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel _____

Courtney C. Dippel

OSB No. 022916

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 17-84
) SC S065705
S. AMANDA MARSHALL,)
)
Respondent.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: Allison Martin Rhodes
Disciplinary Board: None
Disposition: Violation of RPC 8.4(a)(3). Stipulation for Discipline.
1-year suspension, all but 90 days stayed, 2-year proba-
tion.
Effective Date of Order: April 1, 2018

ORDER ACCEPTING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court accepts the Stipulation for Discipline. Effective 10 days after the date of this order, the accused is suspended from the practice of law in the State of Oregon for a period of one year, with all but 90 days stayed pending the accused's successful completion of a two-year term of probation, on the terms and conditions recited in the parties' Stipulation for Discipline.

/s/ Thomas A. Balmer
Chief Justice, Supreme Court
3/22/2018 10:41 a.m.

STIPULATION FOR DISCIPLINE

S. Amanda Marshall, attorney at law ("Marshall"), and the Oregon State Bar ("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.

Marshall 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 Bar continuously since that time, currently having her office and place of business in Yamhill County, Oregon.

3.

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

4.

On October 14, 2017, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Marshall for alleged violations of RPC 8.4(a)(2) (criminal conduct reflecting adversely on fitness to practice); and RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation) 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.

Prior to 2013, Marshall was appointed as the United States Attorney for the United States District Court for the District of Oregon (“US Attorney”). Between approximately mid-2013 and the end of 2014, Marshall engaged in a personal and sexual relationship with Scott Kerin (“Kerin”), a subordinate attorney in the US Attorney’s Office—behavior prohibited by office policy and standards of conduct.

6.

In December 2014 and January 2015, Marshall disclosed and discussed her relationship with Kerin with a senior management member of her staff; however, the senior member of her staff stated that he did not believe a report to the Executive Office for the United State Attorneys (“EOUSA”) was necessary at that time and Marshall agreed and did not report her conduct to the EOUSA.

7.

On March 4, 2015, Marshall was contacted by telephone by three EOUSA personnel, informing her that they were inquiring about texts and emails that indicated an intimate

personal relationship between her and a subordinate in the office. The EOUSA personnel proceeded to interview Marshall about the nature and extent of the alleged relationship. During that interview, Marshall admitted that she and Kerin had a romantic relationship, but initially denied that their relationship involved sexual intercourse. In addition, Marshall reported to the EOUSA investigators that the relationship had ended approximately a year earlier than it had. Kerin's conduct and perpetuation of the relationship were also discussed, however, the specific details of those are confidential. At the conclusion of the call, one of the EOUSA personnel informed Marshall that there was or would be an investigation of her conduct. Marshall was asked by the EOUSA personnel not to contact Kerin. Marshall agreed.

8.

Immediately following the March 4, 2015 call with EOUSA personnel, Marshall left her office and did not return. She resigned her position as US Attorney in late March 2015.

9.

Despite her promise not to contact Kerin, on March 5, 2015, after a subsequent call that she had with the OIG regarding a confidential matter, Marshall sent a social media message to Kerin reporting to him that she had denied everything, and that the investigators seemed to be more interested in him than in her. She also instructed Kerin not to speak with investigators, but instead to get a lawyer. Finally, she invited Kerin to call and talk to her if he wanted it, offered to help in any way she could, and requested that he do the same.

Violations

10.

Marshall admits that her statements and conduct violated 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

11.

Marshall and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the *ABA Standards for Imposing Lawyer Sanctions* ("*Standards*"). The *Standards* require that Marshall'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.** Marshall violated her duties to the public to maintain her personal integrity and maintain the public trust. *Standards* §§ 5.1; 5.2.
- b. **Mental State.** In the light most favorable to Marshall, her conduct was knowing; that is, with the conscious awareness of the nature or attendant

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

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Marshall caused actual and potential injury to the EOUSA process and the legal system, insofar as the EOUSA process was potentially delayed or hampered by her misrepresentations and obfuscations. Marshall's suggestions to Kerin that he may not want to respond to inquiries and should talk to a lawyer could have harmed their investigation, however, DOJ and OIG did not report that her statements caused any actual delay and, since Marshall indicated she would be resigning during the call, and in fact resigned, no actual delay occurred. *See In re Brandt/Griffin*, 331 Or 113, 145, 10 P3d 906 (2000) (finding misrepresentations to investigators caused injury to the legal system because they delayed the investigation process and diminished public confidence in the system). Given her position, she similarly caused actual injury to the image and reputation of the legal profession, the US Attorney's Office, and the State of Oregon.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Marshall made the misstatements at issue for her personal benefit. *Standards* § 9.22(b).
 2. Marshall has been a lawyer in Oregon since 1995. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Marshall has no prior disciplinary record. *Standards* § 9.32(a).
 2. At the time of the misconduct in these matters, Marshall was experiencing marital troubles, and was receiving treatment for depression, anxiety disorder, and symptoms of PTSD. *Standards* § 9.32(c).
 3. Marshall provided several letters from family and colleagues attesting to her good character and reputation in the legal community. *Standards* 9.32(g).
 4. Marshall was cooperative in the Bar's investigation of her conduct in this matter. *Standards* § 9.32(e).
 5. The Bar's investigation was somewhat protracted, insofar as it required eliciting cooperation from state and federal entities, prior to obtaining access to individuals and reports in these entities' custody and control. *Standards* § 9.32(j).

6. Marshall reported that she profoundly regrets her misrepresentations. *Standards* § 9.32(1).

12.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process. *Standards* § 5.22. A reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. *Standards* § 5.13. Notwithstanding that Marshall's mitigating factors outweigh those in aggravation, both in number and in weight, some period of suspension is still appropriate.

13.

Oregon cases are in accord. *See, e.g., In re Abrell*, 30 DB Rptr 289 (2016) (respondent, who is not licensed in Oregon, was suspended for one year where he properly appeared in a federal case via *pro hac vice* admission, but shortly thereafter, filed a lawsuit in state court, claiming to be applying for *pro hac vice* admission and to have associated local counsel on the matter); *In re Sanchez*, 29 DB Rptr 21 (2015) (attorney was suspended for one year where he affirmatively misrepresented to Bar that he completed CLE courses that he had not completed); *In re Kinney*, 28 DB Rptr 59 (2014) (attorney with substantial mitigation was suspended for one year, all but 60 days stayed/one-year probation, where he allowed his personal bankruptcy petition to be filed containing incomplete and inaccurate information and thereafter affirmed the accuracy of the information under oath, without having thoroughly reviewed the documents and without having verified that the information was correct); *In re Chancellor*, 22 DB Rptr 27 (2008) (prosecutor was suspended for one year after he met socially with the victim of a rape case assigned to the prosecutor and engaged in sexual contact with her; thereafter, he falsely denied to the district attorney and to the police that he had done so); *In re Mattox*, 20 DB Rptr 87 (2006) (respondent, a senior felony district attorney with no prior discipline, was suspended for one year where, in connection with his dissolution of marriage proceeding, he falsely stated in his deposition that he did not have a gambling problem and had not recently gambled but, at trial, testified truthfully, resulting in the loss of his job); *In re O'Connor*, 20 DB Rptr 42 (2006) (young attorney was suspended for one year where, weeks after her admission to the Bar, she tampered with pre-employment drug tests in effort to land a ADA job, initially lied about the reasons for the suspicious test results, and immediately recanted); *In re Strickland*, 339 Or 595 (2005) (attorney, upset about a construction project in his neighborhood, was suspended for one year where he falsely reported to police that he had been threatened and assaulted by construction workers); *In re Staar*, 324 Or 283 (1996) (two-year suspension, instead of disbarment, for false statement in petition for restraining order against live-in boyfriend where attorney suffered from mental disability or impairment).

14.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Marshall shall be suspended for one (1) year for her violations of RPC 8.4(a)(3), with all but ninety (90) days of the suspension stayed, pending Marshall's successful completion of a two (2)-year term of probation. The sanction shall be effective March 25, 2018, or ten (10) days following approval by the Supreme Court, whichever is later, or as otherwise directed by the Supreme Court ("effective date").

16.

Marshall's license to practice law shall be suspended for a period of ninety (90) days beginning on the effective date ("actual suspension"), assuming all conditions have been met. Marshall understands that reinstatement is not automatic and that she cannot resume the practice of law until she has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Marshall re-attains her active membership status with the Bar, Marshall shall not practice law or represent that she is qualified to practice law; shall not hold herself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

17.

Probation shall commence upon the date Marshall is reinstated to active membership status and shall continue for a period of two (2) years, ending on the day prior to the second (2nd) year anniversary of the commencement date (the "period of probation"). During the period of probation, Marshall shall abide by the following conditions:

- (a) Marshall will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with her probationary terms.
- (b) Marshall has been represented in this proceeding by Allison Rhodes ("Rhodes"). Marshall and Rhodes hereby authorize direct communication between Marshall and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Marshall's compliance with her probationary terms.

- (c) Marshall shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (d) A member of the State Lawyer’s Assistance Committee (“SLAC”) or such other person approved by DCO in writing shall monitor Marshall’s probation (“Monitor”), and Marshall agrees to enter into and comply with the terms of a Monitoring Agreement with SLAC. Marshall shall notify SLAC within 14 days of the effective date of:
 - (1) the existence and contents of this Stipulation for Discipline;
 - (2) the history and status of any treatment or programs in which Marshall has/is participating; and
 - (3) discuss with SLAC whether and how to modify her current treatment plan to best accomplish the objectives of Marshall’s probation.
- (e) Prior to the probationary period, Marshall shall arrange for and meet with a mental health care professional acceptable to DCO and Marshall’s Monitor, to evaluate Marshall, and develop and implement a course of treatment, if appropriate.
- (f) Marshall shall meet with her Monitor as often as recommended by SLAC, and shall comply with all reasonable requests and recommendations made by SLAC to supplement her treatment and to promote compliance with this Stipulation for Discipline, and as necessary for the purpose of reviewing Marshall’s compliance with the terms of the probation. Marshall shall cooperate and shall comply with all reasonable requests of SLAC and her Monitor that will allow SLAC and DCO to evaluate her compliance with the terms of this Stipulation for Discipline.
- (g) Marshall authorizes Monitor to communicate with DCO regarding Marshall’s compliance or noncompliance with the terms of her probation and to release to DCO any information DCO deems necessary to permit DCO to assess Marshall’s compliance.
- (h) Marshall shall continue regular treatment sessions with her current treating mental health professional (“Current Treating Professional”) or another mental health treatment provider determined by SLAC to be appropriate.
- (i) Marshall agrees that, if SLAC is alerted to facts that raise concerns regarding compliance with the terms of this Stipulation for Discipline or the objectives of probation, Marshall will participate in a further evaluation at the request and direction of SLAC.

- (j) Marshall shall continue to attend regular counseling/treatment sessions with her Current Treating Professional or other approved health care professional for the entire term of her probation. Marshall shall obtain and take and/or continue to take, as prescribed, any health-related medications.
- (k) Marshall shall not terminate her counseling/treatment or reduce the frequency of her counseling/treatment sessions without first submitting to DCO a written recommendation from her Current Treating Professional or other approved health care professional that her counseling/treatment sessions should be reduced in frequency or terminated and Marshall undergoes an independent evaluation by a second professional acceptable to DCO and Monitor, which evaluation confirms her fitness.
- (l) Marshall consents to the release of information by her Current Treating Professional, other mental health or substance abuse treatment program or provider, OAAP, AA, NA, or any designee, to SLAC and to DCO, regarding her treatment plan, her progress under that plan, and her compliance with the terms of this Stipulation for Discipline; waives any privilege or right of confidentiality to permit such disclosure; and agrees to execute such releases as may be required by such providers upon request by SLAC or DCO. Marshall acknowledges and agrees that SLAC shall promptly report to DCO any violation of the terms of this Stipulation for Discipline.
- (m) On a quarterly basis, on dates to be established by DCO beginning no later than ninety (90) days after her reinstatement to active membership status, Marshall shall submit to DCO a written "Compliance Report," approved as to substance by her Monitor, advising whether Marshall is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Marshall's meetings with her Monitor.
 - (2) The dates of appointments with Marshall's Current Treating Professional, other approved mental health treatment provider, and confirmation of attendance at those appointments.
 - (3) Whether Marshall has completed the other provisions recommended by her Monitor, if applicable.
 - (4) In the event that Marshall has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (n) Marshall is responsible for any costs required under the terms of this stipulation and the terms of probation.

- (o) Marshall's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of her Monitor or SLAC, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (p) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (q) The SPRB's decision to bring a formal complaint against Marshall for unethical conduct that occurred or continued following her execution of this Stipulation for Discipline shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

18.

Marshall 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, Marshall has arranged for Robert F. Suchy (OSB No. 850889), an active member of the Bar, to either take possession of or have ongoing access to Marshall's client files and serve as the contact person for clients in need of the files during the term of her actual suspension. Marshall represents that Robert F. Suchy has agreed to accept this responsibility.

19.

Marshall 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. Marshall also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until she is notified that her license to practice has been reinstated.

20.

Marshall acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in her suspension or the denial of her reinstatement.

21.

Marshall 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 Marshall is admitted: United States District Court for the District of Oregon.

22.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 26, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 15th day of February, 2018.

/s/ S. Amanda Marshall

S. Amanda Marshall

OSB No. 953473

APPROVED AS TO FORM AND CONTENT:

/s/ Allison Martin Rhodes

Allison Martin Rhodes

OSB No. 000817

EXECUTED this 16th day of February, 2018.

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. 17-57
)	
RODOLFO A. CAMACHO,)	
)	
Accused.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Accused:	Matthew A. Goldberg
Disciplinary Board:	None
Disposition:	Violation of RPC 3.4(c) and RPC 8.4(a)(4). Stipulation for Discipline. 6-month suspension, all but 30 days stayed, 2-year probation.
Effective Date of Order:	April 5, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Rodolfo A. Camacho is suspended for six months, with all but 30 days of the suspension stayed, pending his successful completion of a two-year term of probation effective ten days after the stipulation is approved, or as otherwise directed by the Disciplinary Board, for violations of RPC 3.4(c) and RPC 8.4(a)(4).

DATED this 26th day of March, 2018.

/s/ Mark A.
Turner

 Mark A. Turner
 Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Rodolfo A. Camacho, attorney at law (“Camacho”), and the Oregon State Bar (“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.

Camacho was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 23, 1995, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Camacho 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 August 26, 2017, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Camacho for alleged violations of the Rules of Professional Conduct (“RPC”): RPC 3.4(c) and RPC 8.4(a)(4). The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

On November 24, 2016, Salem police officers were dispatched to the home of Camacho and Camacho’s domestic partner to investigate a domestic disturbance. The police arrested Camacho on charges of domestic violence, harassment and coercion.

6.

While in custody, Camacho signed an acknowledgment that he was prohibited from having any contact with his domestic partner while in custody. Later that day, Camacho signed a release agreement that included, as a condition of his release from custody, his agreement to have no direct or indirect contact, in any manner, with his domestic partner, including at their residence and her place of employment.

7.

The following morning, Salem police were informed that Camacho was already back home. When police arrived, they discovered Camacho, and arrested him on charges of violating his release agreement and took him into custody. While in custody, Camacho spoke with his domestic partner when she answered his telephone, left by Camacho at his home,

which he called from jail expecting one of his relatives, who were present in the home when the call was made, to answer.

8.

In March 2017, Camacho entered a guilty plea to harassment and a contempt charge arising from his return to the residence he shared with his domestic partner when she was physically present on November 25, 2016. The judgment of contempt recited that, on November 25, 2016, Camacho committed contempt of court by willfully engaging in disobedience of, resistance to or obstruction of the court's authority, process, orders or judgments by violating his release agreement.

Violations

9.

Camacho admits that by returning to his residence after his arrest and speaking with his domestic partner once he realized that she, and not one of his relatives had answered his phone when he called it from jail, he knowingly disobeyed an obligation under the rules of a tribunal and engaged in conduct prejudicial to the administration of justice, in violation of RPC 3.4(c) and RPC 8.4(a)(4).

Sanction

10.

Camacho 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* (“*Standards*”). The *Standards* require that Camacho'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.** Camacho violated the duties he owed to the legal system to obey his obligations under the rules of a tribunal and to avoid conduct prejudicial to the administration of justice. *Standards* §§ 6.1, 6.2.
- b. **Mental State.** The *Standards* recognize three possible mental states: intentional, knowing, and negligent. *Standards* at 9. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. 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. Intent is the conscious objective or purpose to accomplish a particular result. *Id.*

Camacho acted with a knowing mental state, or with “conscious awareness of the nature or the attendant circumstances of his conduct but without the

conscious objective or purpose to accomplish to a particular result.” *Id.* Camacho was aware of the no-contact orders when he returned home on November 24, 2015, and knowingly spoke to his domestic partner from jail on November 25, 2016.

- c. **Injury.** For the purpose of determining an appropriate disciplinary sanction, both actual and potential injury are taken into account. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. “Injury” is harm to a client, the public, the legal system or the profession which results from a lawyer’s misconduct. *Standards* at 9.

There was both actual and potential injury to the legal system and the profession when Camacho knowingly disobeyed the court orders.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A prior history of discipline. *Standards* § 9.22(a). Camacho stipulated to a public reprimand in October 2005. *In re Camacho*, 19 DB Rptr 337 (2005).
 2. A pattern of misconduct. *Standards* § 9.22(b).
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Camacho was admitted to practice in Oregon in 1995.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Full and free disclosure to disciplinary board or cooperative attitude towards proceedings. *Standards* § 9.32(e). Camacho cooperated with the Bar throughout its investigation.
 2. Imposition of other penalties or sanctions. *Standards* § 9.32(k). In his criminal case, Camacho was placed under court supervision for 24 months, completed a parenting class, ordered to complete a batterer prevention program, fined \$100 for each conviction, and assessed probation fees of \$140, for a total financial penalty of \$340.
 3. Remorse. *Standards*, § 9.32(l). Camacho regrets that he violated the court orders, but acted at all times out of concern for the physical safety and welfare of the three minor children who resided in his home with his domestic partner.

4. Remoteness of prior offenses. *Standards* § 9.32(m). Camacho’s prior discipline is more than ten years old and that age mitigates against his prior discipline as an aggravating factor.

11.

Under the *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 party, or interference or potential interference with a legal proceeding. *Standards* § 6.22.

12.

Oregon cases also support the imposition of some term of suspension for Camacho’s misconduct. *See In re Chase*, 339 Or 452, 121 P3d 1160 (2005) (30-day suspension for attorney found in contempt for failing to comply with discovery orders and to pay child support); *In re Arsanjani*, 20 DB Rptr 23 (2006) (stipulated 30-day suspension for attorney found in willful contempt of a restraining order and in violation of the terms of a deferred sentencing agreement).

13.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Camacho shall be suspended for six months for violations of RPC 3.4(c) and RPC 8.4(a)(4), with all but 30 days of the suspension stayed, pending Camacho’s successful completion of a two-year term of probation. The sanction shall be effective ten days after the stipulation is approved, or as otherwise directed by the Disciplinary Board (“effective date”).

15.

Camacho’s license to practice law shall be suspended for a period of 30 days beginning on the effective date, or as otherwise directed by the Disciplinary Board (“actual suspension”), assuming all conditions have been met. Camacho understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Camacho re-attains his active membership status with the Bar, Camacho shall not practice law or represent that he is qualified to practice law; shall

not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

16.

Probation shall commence upon the date Camacho is reinstated to active membership status and shall continue for a period of two years, ending on the day prior to the second year anniversary of the commencement date (the “period of probation”). During the period of probation, Camacho shall abide by the following conditions:

- (a) Camacho will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Camacho shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (c) Camacho shall comply with the terms of his criminal probation in Marion County Circuit Court Case No. 16CR74847 (“criminal probation”) and promptly report any violation or termination of his criminal probation to Disciplinary Counsel’s Office.
- (d) Michael B. Dye shall serve as Camacho’s probation supervisor (“Supervisor”). Camacho shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation, the profession, the legal system, and the public.
- (e) Beginning with the first month of the period of probation, Camacho shall meet with Supervisor in person at least once every sixty (60) days for the purpose of allowing his Supervisor to review the status of Camacho’s law practice.
- (f) Camacho authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Camacho’s compliance.
- (g) On a quarterly basis, on dates to be established by DCO beginning no later than 60 days after his reinstatement to active membership status, Camacho shall submit to DCO a written “Compliance Report,” approved as to substance by his Supervisor, addressing the preceding period of time not yet covered by a report, ending with the last day of the month prior to the month in which the report is made, advising whether Camacho is in compliance with the terms of this Stipulation for Discipline, including:

- (1) The date of each meeting with his Supervisor, a summary of the substance of the meeting, and a description of any recommendations made by the Supervisor.
 - (2) An affirmative statement that Camacho is in compliance with every term of his criminal probation.
 - (3) In the event that Camacho has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (h) Camacho is responsible for any costs required under the terms of this stipulation and the terms of probation.
 - (i) Camacho's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
 - (j) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
 - (k) The SPRB's decision to bring a formal complaint against Camacho for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

17.

Camacho 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, Camacho has arranged for Kirk W. Knutson, Law Offices of Camacho & Knutson, 1795 Capitol Street NE, Salem, OR 97301, an active member of the Bar, to either take possession of or have ongoing access to Camacho's client files and serve as the contact person for clients in need of the files during the term of his actual suspension. Camacho represents that Kirk W. Knutson has agreed to accept this responsibility.

18.

Camacho 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. Camacho also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

19.

Camacho 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. This requirement is in addition to any other provision of this agreement that requires Camacho to attend or obtain continuing legal education (CLE) credit hours.

20.

Camacho 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 Camacho is admitted: none.

21.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 9, 2017. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 16th day of March, 2018.

/s/ Rodolfo A. Camacho

Rodolfo A. Camacho
OSB No. 955203

APPROVED AS TO FORM AND CONTENT:

/s/ Matthew A. Goldberg

Matthew A. Goldberg
OSB No. 052655

EXECUTED this 19th day of March, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel
OSB No. 022916
Assistant Disciplinary Counsel

Cite full opinion as 362 Or 667 (2018)

In re:)
)
Complaint as to the Conduct of)
)
SCOTT W. McGRAW,)
)
Accused.)

(OSB 15-21; SC S064091)

On review of the decision of a trial panel of the Disciplinary Board. Theodore W. Reuter, Assistant Disciplinary Counsel, Tualatin, argued the cause and filed the brief for the Oregon State Bar. Scott W. McGraw, the accused, pro se, argued the cause and filed the brief. Before Balmer, Chief Justice, and Kistler, Walters, Nakamoto, Flynn, and Duncan, Justices, and Landau, Senior Justice pro tempore.*

* Nelson, J., did not participate in the consideration or decision of this case.

PER CURIAM.

In this lawyer disciplinary proceeding, the Oregon State Bar charged Scott W. McGraw (the accused) with multiple violations of the Oregon Rules of Professional Conduct (RPC) arising out of his actions as a conservator for Dr. Carol A. Saslow, now deceased. A trial panel of the Disciplinary Board conducted a hearing, found that the accused had violated those rules, and determined that the appropriate sanction was suspension from the practice of law for a period of 18 months. The accused seeks review of the trial panel's finding that he committed the alleged violations. For the reasons that follow, we conclude that the Bar proved some but not all of the alleged violations, and we suspend the accused from the practice of law for a period of 18 months.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-04
)	
MILAN ROBERT HANSON,)	
)	
Respondent.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Respondent:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.1, RPC 1.2, RPC 1.5(a), RPC 8.4(a)(4). Stipulation for Discipline. 30-day suspension, all stayed, 1-year probation.
Effective Date of Order:	April 16, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Milan Robert Hanson is suspended for 30 days, with all 30 days stayed pending his successful completion of a one-year term of probation, effective 10 days after the Stipulation is approved by the Disciplinary Board for violation of RPC 1.1, RPC 1.2, RPC 1.5(a), and RPC 8.4(a)(4).

DATED this 6th day of April, 2018.

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

STIPULATION FOR DISCIPLINE

Milan Robert Hanson, attorney at law (“Hanson”), and the Oregon State Bar (“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.

Hanson was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 16, 2013, and has been a member of the Bar continuously since that time, having his office and place of business in Jackson County, Oregon.

3.

Hanson 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 20, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Hanson for alleged violations of RPC 1.1, RPC 1.2, RPC 1.5(a) and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

On October 10, 2016, Hanson met with Charlene Duryea (“Duryea”) regarding criminal Class A misdemeanors that Duryea had been charged with. Duryea had an arraignment on October 18, 2016, that she could not attend due to a trial in Florida. Duryea proposed to hire Hanson to appear at her arraignment and enter a not guilty plea. Hanson agreed to represent Duryea at the arraignment for a flat fee of \$270.

6.

On October 18, 2016, Hanson appeared in court, but took no steps to enter Duryea’s plea even though ORS 130.030(2) allowed Duryea to appear at her arraignment through counsel. Due to Hanson’s failure to enter a plea, the court issued a bench warrant for Duryea. When the court asked Hanson whether he was representing Duryea, he made it clear that he would not be representing her after that day, and asked that he not be entered as attorney of record after the court issued the bench warrant.

Violations

7.

Hanson admits that, by engaging in the conduct described above, he failed to provide competent representation, failed to abide by his client's decisions regarding the objectives of the representation, charged and collected an excessive fee, and engaged in conduct prejudicial to the administration of justice, thereby violating RPC 1.1, RPC 1.2, RPC 1.5(a), and RPC 8.4(a)(4).

Sanction

8.

Hanson 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* ("Standards"). The *Standards* require that Hanson's conduct be analyzed by considering the following factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

- a. **Duty Violated.** The most important duties a lawyer owes are to his clients. *Standards* at 5. Hanson violated the duties that he owed to his client to provide competent representation and to abide by his client's decisions concerning the objectives of the representation. *Standards* §§ 4.4, 4.5, and 4.6. Hanson violated the duty he owed to the legal system to refrain from engaging in conduct prejudicial to the administration of justice. *Standards* § 6.2. Hanson also violated the duty he owed as a professional to refrain from charging or collecting excessive fees. *Standards* § 7.0.
- b. **Mental State.** The *Standards* recognize three possible mental states: negligent, knowing, and intentional. *Standards* at 9. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. 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. Intent is the conscious objective or purpose to accomplish a particular result. *Id.*

Hanson acted with a knowing mental state in agreeing to appear for Duryea at her arraignment and enter a not guilty plea on her behalf, but then appeared without entering her plea due to his unfamiliarity with criminal defense practice.

- c. **Injury.** Duryea sustained actual injuries as a result of Hanson's conduct. A bench warrant was issued and she had to hire a second attorney to deal with the warrant that never should have issued had Hanson appeared on her behalf and

entered her plea. Duryea sustained financial injury as she paid Hanson for a specific task that he failed to perform.

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

1. Multiple offenses. *Standards* § 9.22(d).

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

1. Absence of a prior record of discipline. *Standards* § 9.32(a).

2. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards* § 9.32(e).

3. Inexperience in the practice of law. *Standards* § 9.32(f). Hanson was admitted to practice in Oregon in 2013.

9.

Under the *ABA Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury to the client. *Standards* § 4.42. Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury to a client. *Standards* § 4.52. Suspension is appropriate when a lawyer causes interference or potential interference with a legal proceeding. *Standards* § 6.22. Finally, suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury to a client or the legal system.

10.

Oregon cases also support the imposition of a term of suspension. *See In re Bettis*, 342 Or 232, 149 P3d 1194 (2006) (30-day suspension for attorney found incompetent for obtaining his client's waiver of a jury trial without reviewing discovery or conducting any factual or legal investigation into the issues in the case).

11.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Hanson shall be suspended for 30 days for violations of RPC 1.1, RPC 1.2, RPC 1.5(a), and RPC 8.4(a)(4), with all 30 days of the suspension stayed, pending Hanson's successful completion of a one-

year term of probation. The sanction shall be effective 10 days after this Stipulation is approved, or as otherwise directed by the Disciplinary Board (“effective date”).

13.

Probation shall commence upon the effective date and shall continue for a period of one year, ending on the day prior to the one year anniversary of the commencement date (the “period of probation”). During the period of probation, Hanson shall abide by the following conditions:

- (a) Hanson will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Hanson shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (c) During the period of probation, Hanson shall attend not less than 4 MCLE accredited programs, for a total of 12 hours, which shall emphasize law practice management, time management, and better client communication. These credit hours shall be in addition to those MCLE credit hours required of Hanson for his normal MCLE reporting period. The Ethics School requirement does not count towards the 12 hours needed. Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Hanson shall submit an Affidavit of Compliance to DCO.
- (d) Throughout the term of probation, Hanson shall diligently attend to client matters and adequately communicate with clients regarding their cases.
- (e) Each month during the period of probation, Hanson 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, and abiding by his client’s objectives regarding the scope of representation.
- (f) Kenneth M. Tharp shall serve as Hanson’s probation supervisor (“Supervisor”). Hanson shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Hanson’s clients, the profession, the legal system, and the public.
- (g) Beginning with the first month of the period of probation, Hanson shall meet with Supervisor in person at least once a month for the purpose of
 - (1) Allowing his Supervisor to review the status of Hanson’s law practice and his performance of legal services on the behalf of clients. Each

month during the period of probation, Supervisor shall conduct a random audit of 10 files or 10% of Hanson's total caseload, whichever is greater, to determine whether Hanson is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests.

- (h) Hanson authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Hanson's compliance.
- (i) Within seven (7) days of the effective date, Hanson shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Hanson shall schedule the first available appointment with the PLF and notify DCO of the time and date of the appointment.
- (j) Hanson shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF, Hanson shall adopt and implement those recommendations.
- (k) No later than sixty (60) days after recommendations are made by the PLF, Hanson shall provide a copy of the Office Practice Assessment from the PLF and file a report with DCO stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (l) On a quarterly basis, on dates to be established by DCO beginning no later than 60 days after the effective date, Hanson shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Hanson is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Hanson's meetings with his Supervisor.
 - (2) The number of Hanson's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Hanson has completed the other provisions, if any, recommended by his Supervisor.

- (4) In the event that Hanson has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (m) Hanson is responsible for any costs required under the terms of this Stipulation and the terms of probation.
- (n) Hanson's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (o) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (p) The SPRB's decision to bring a formal complaint against Hanson for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

14.

Hanson 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. This requirement is in addition to any other provision of this agreement that requires Hanson to attend or obtain continuing legal education (CLE) credit hours.

15.

Hanson 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 Hanson is admitted: none.

16.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 20, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re Hanson*, 32 DB Rptr 159 (2018)

EXECUTED this 3rd day of April, 2018.

/s/ Milan Robert Hanson

Milan Robert Hanson

OSB No. 131082

APPROVED AS TO FORM AND CONTENT:

/s/ Christopher R. Hardman

Christopher R. Hardman

OSB No. 792567

EXECUTED this 5th day of April, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case Nos. 16-113, 16-116, and 16-135
)
MARK O. GRIFFITH,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Accused: None
Disciplinary Board: Andrew M. Cole, Chairperson
Tom Kranovich
Eugene L. Bentley, Public Member
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC
1.5(a), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(4).
Trial Panel Opinion. 18-month suspension.
Effective Date of Opinion: April 17, 2018

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 three cases to consider the sanctions sought by the Bar against the Accused.

In each case, *Reyna* (Case No. 16-113), *Pemberton* (Case No. 16-135), and *Scheid* (Case No. 16-116) after notice from the Bar’s Disciplinary Counsel’s Office (“DCO”) investigating the Bar Complaints filed by the Accused’s former clients, the Accused failed to respond to the DCO’s inquiry. The DCO petitioned the Disciplinary Board State Chair to administratively suspend Griffith for failure to respond to DCO’s inquiries, and the Accused was administratively suspended from the practice of law.¹

¹ In *Reyna*, the suspension was on or about August 31, 2016, in *Scheid*, on or about September 8, 2016, in *Pemberton*, on or about October 26, 2016.

In addition, in the *Scheid* matter, the Accused is charged with six additional violations of the Rules of Professional Conduct in the Bar's Formal Complaint. The Accused failed to answer resulting in an Order of Default against the Accused dated August 11, 2017.

BURDEN OF PROOF/EVIDENTIARY STANDARD

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 this case the Accused's failure to respond to the Formal Complaint served upon him by the Bar and the entry of a default results in the necessary finding that 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). Nevertheless, the Bar must still meet the burden of establishing that the conclusively established facts constitute a violation of the disciplinary rules for which the accused has been charged and that its recommended sanction of an 18-month suspension is appropriate.

FINDINGS AND CONCLUSIONS

At all material times the Accused Mark O. Griffith was an attorney at law duly admitted by the Supreme Court of the State of Oregon to practice law in the state, and was a member of the Oregon State Bar maintaining an office and place of business in Clackamas County, Oregon.

As explained below, the Trial Panel finds that an appropriate sanction is a suspension for a period of eighteen months and that if the Accused elects to return to the practice of law following his suspension, he must seek formal reinstatement. The Trial Panel's opinion is based upon the allegations of the Bar's Formal Complaint, the Order of Default and the Oregon State Bar's Memorandum regarding Sanctions dated November 21, 2017. The Trial Panel notes that the allegations in all three matters describe the Accused's inattention to pending client matters during an overlapping period in 2016 which, in theory, could be explained by a single mitigating cause. However, the Accused has not submitted any materials for consideration nor attempted to defend his conduct either upon inquiry by the DCO which led to his administrative suspension, nor by way of Answer to the Formal Complaint. Therefore, the facts alleged in the Formal Complaint are deemed to have been conclusively established. We summarize the facts in the Formal Complaint, and draw the following conclusions and findings, as follows:

REYNA MATTER, CASE NO. 16-113

After losing at trial, Reyna filed a Bar Complaint against the Accused on or about July 18, 2016 alleging that the Accused failed to adequately communicate with her while he represented her in civil litigation and that he disappeared after they lost at trial. The merit of Reyna's Bar Complaint is unknown and is not before the Panel. The DCO contacted the

Accused several times by regular mail, certified mail, and email, but the Accused never responded, even after being notified that the Bar would seek a suspension for his failure to respond. The first DCO letter dated July 19, 2016 was sent via first-class mail to the Accused at the address he had given to the Bar as his record address, and also sent to the email address on record with the Bar. The letter was not returned undelivered and the email was not rejected. Even though the DCO specifically advised the Accused that “failing to respond to this inquiry may constitute a violation of RPC 8.1(a)(2)”, the Accused did not respond.

The second letter from the DCO was dated August 10, 2016 and was also sent via first-class and certified mail, return receipt requested, to the Accused’s record address. As with the first letter, it was also sent to Griffith’s record email address and the letter again alerted the Accused to the consequences of a violation of RPC 8.1(a)(2). The certified mail copy was returned unclaimed, but neither the email nor the first-class mail letter were returned undelivered and the Accused did not respond to any of the notices.

On August 18, 2016 the DCO petitioned the Disciplinary Board Chair to administratively suspend the Accused for failure to respond to the July 19th and August 10th, 2016 letters. The Accused was served with the DCO’s Petition and a Notice to respond to both by first-class mail and to the email address the Accused had given to the Bar. Neither Notice was returned undelivered and the email was not rejected. As a result, and because the Accused did not respond, he was suspended on or about August 31, 2016 pursuant to BR 7.1.

Oregon lawyers have a duty to cooperate with the Bar in the investigation of disciplinary matters. RPC 8.1(a)(2) provides:

“An applicant for admission to the Bar or a lawyer in connection with a Bar admission application or in connection with a disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6”.

The Bar, through the DCO, made two written requests of the Accused for information in response to the Reyna Complaint. Under the Bar rules as interpreted by Oregon courts, the Accused’s failure to respond to the DCO’s inquiry is a knowing failure in violation of RPC 8.1(a)(2). *See In Re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Obert*, 352 Or 231, 282 P3d 825 (2012); *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to as modified on recons.* 347 Or 529, 225 P3d 41 (2010).

PEMBERTON MATTER, CASE NO. 16-135

Pemberton filed a Bar Complaint against the Accused on or about September 13, 2016 alleging that after retaining the Accused, the Accused failed to further communicate with client

or work on his case.² The Bar's DCO requested the Accused's response to the *Pemberton* Complaint in a letter dated September 14, 2016 sent to the Accused at his record post office address and record email address. As in *Reyna*, the Accused failed to respond, the correspondence was not returned undelivered or undeliverable, and the Accused was alerted that his failure to respond was a violation of RPC 8.1(a)(2).

The DCO sent a second letter to the Accused on or about October 6, 2016 which for all intents and purposes was identical to the first. Again the Accused did not respond. On October 14, 2016, the DCO petitioned the Disciplinary State Chair to administratively suspend the Accused for his failure to respond to the DCO's inquiries regarding *Pemberton*. The Accused was served with a Petition and Notice to Respond via first-class mail and email at his record addresses but, as with the other notices, the mail was not returned undelivered and the email was not rejected. The Accused did not respond and therefore was administratively suspended on or about October 26, 2016.

The Panel finds that the Accused violated RPC 8.1(a)(2) by knowingly failing to respond to a lawful demand for information from the Oregon Disciplinary Authority in connection with a disciplinary matter.

***SCHEID* MATTER, CASE NO. 16-116**

As in *Reyna* and *Pemberton* above, the Accused is charged with a violation of RPC 8.1(a)(2) in failing to respond to the Bar's inquiries about his conduct while representing client Heather Scheid. In addition, the Accused is charged with violating six other Rules of Professional Conduct arising out of his representation of Ms. Scheid during civil litigation. These include: neglect of a legal matter; failing to keep a client reasonably informed about the status of a matter; failure to explain a matter to permit a client to make an informed decision regarding the representation; charging or collecting an excessive fee; failure to return client property at the termination of representation; and conduct prejudicial to the administration of justice.

The facts in the *Scheid* matter now deemed conclusively established are as follows: In December, 2015 Ms. Scheid retained the Accused to defend her in a civil lawsuit that had been filed against her company. Ms. Scheid paid the Accused a \$1,500 retainer. Lawyer Steven Naito ("Naito") represented the Plaintiff.

On or about December 17, 2015, the Accused appeared for Ms. Scheid at a preliminary injunction hearing. The Accused filed an Answer and Counterclaims on or about January 4,

² The Bar's materials in support of its Memorandum for Sanctions makes reference to a Fee Agreement and Retainer. Because the Bar's fourth cause of complaint against the Accused in the *Pemberton* matter charges him only with a violation of RPC 8.1(a)(2), any issues in connection with the impropriety of the retainer or its application are not before us.

2016. In or around February and early March, 2016 Ms. Scheid and the Accused interacted a few times in connection with responding to discovery requests. The last time that Ms. Scheid heard from the Accused was via email on or about March 9, 2016.

Between approximately mid-March and June, 2016 Ms. Scheid made numerous attempts to contact the Accused by email, voice mail and letter to request information and updates about her case. The Accused did not respond to her contact attempts.

Between approximately mid-May and July, 2016 Plaintiff's counsel Mr. Naito made numerous unsuccessful attempts to contact the Accused to set a time for Ms. Scheid's deposition, to discuss possible settlement, and to confer on trial dates. The Accused did not respond to Mr. Naito's communications. The Accused did not inform Ms. Scheid of Naito's attempts to schedule her deposition, nor did the Accused inform her of Mr. Naito's interest in discussing settlement.

On or about June 21, 2016 Ms. Scheid sent the Accused a certified letter in which she terminated the representation. At that time the Accused had provided one invoice to Ms. Scheid reflecting that he had billed \$525 for his work. The Accused had provided no other documentation to Ms. Scheid to demonstrate he had earned more than \$525 of her retainer. In her letter, Ms. Scheid asked the Accused to refund the remaining \$975 of her retainer and she requested that the Accused return her file. The Accused did not respond to Ms. Scheid nor did he return her file or refund her money.

When Ms. Naito did not receive a response to his attempts to schedule Ms. Scheid's deposition, he noticed the deposition for July 12, 2016. The Accused did not forward the Notice of Deposition to Ms. Scheid. Neither the Accused nor Ms. Scheid appeared for the deposition and the Accused failed to inform Mr. Naito that they would not attend. On or about July 19, 2016 Mr. Naito filed Plaintiff's Motion to Compel Attendance at Deposition.

Ms. Scheid filed a Bar Complaint against the Accused on or about August 2, 2016. On or about August 9, 2016 the Bar requested the Accused's response to Ms. Scheid's Complaint. The Bar's request for response was sent via first-class mail to the Accused at his record address and by email to his record email address. The Accused was cautioned that "Failing to respond to this inquiry may constitute a violation of RPC 8.1(a)(2)" but, nevertheless, the Accused did not respond nor was the letter or email returned undelivered.

The Bar's DCO sent a second letter to the Accused dated on or about August 31, 2016. The second letter was sent both via first-class and certified mail, return receipt requested to the Accused at his record address. The letter was also sent to the Accused at his record email address and specifically directed the Accused's attention to RPC 8.1(a)(2). Neither the first-class mail nor the email copy of this letter were returned or rejected. The certified copy was return unclaimed and, in any event, the Accused did not respond to either letter.

On or about September 8, 2016 the DCO petitioned the Disciplinary Board State Chair to administratively suspend the Accused due to his failure to respond to the DCO's inquiries. The Accused was served with the Petition and a Notice to Respond via first-class mail at his record address and via email to his record email address. The mail was not returned undelivered and the email was not rejected. The Accused did not respond and was therefore suspended on or about September 20, 2016, pursuant to BR 7.1.

The Panel finds that the Accused violated RPC 8.1(a)(2) by knowingly failing to respond to a lawful demand for information from the Oregon Disciplinary Authority in connection with a disciplinary matter. In addition, the Panel finds that the following conclusively established facts provide clear and convincing proof of the allegations that constitute the following six separate violations of the Rules of Professional Conduct:

1. Neglect of a Legal Matter in Violation of RPC 1.3.

RPC 1.3 provides that: "A lawyer shall not neglect a legal matter entrusted to the lawyer." Unexplained inaction on the part of an attorney is sufficient to find neglect. *In re Purvis*, 306 Or 522, 760 P2d 254 (1988); *In re Dixson*, 305 Or 83, 750 P2d 157 (1988). Ms. Scheid hired the Accused for a litigation matter. Failing to communicate with opposing counsel about depositions and trial dates is the neglect of a legal matter. So too is the Accused's failure to engage in settlement discussions with opposing counsel, and to keep the client informed about case status, discovery matters and a trial date. These lapses are a violation of RPC 1.3. See *In re Jackson*, 347 Or 426, 223 P3d 387 (2009), *In re Koch*, 345 Or 444, 198 P3d 910 (2008).

2. Violation of RPC 1.4(a) and (b). Failure to Keep Client Reasonably Informed About the Status of a Matter.

RPC 1.4(a) provides "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Factors considered in determining whether this duty is met include the length of time a lawyer failed to communicate with his client, whether the lawyer failed to properly respond to a reasonable request for information from the client, and whether the lawyer knew, or reasonably should have known, that a delay in communication would prejudice the client. *In re Groom*, 350 Or 113, 124, 249 P3d 976 (2011). Ms. Scheid's requests for information were reasonable. They included matters for which the Court required that the Accused confer with his client and were matters which any reasonable lawyer knows that inaction would prejudice his client and the court system. In *Scheid* there was not merely a delay in discharging these duties, the Accused failed to discharge them at all and then disappeared without explanation. The Accused violated RPC 1.4(a) and (b).

3. Collecting an Excessive Fee in Violation of RPC 1.5(a).

RPC 1.5(a) provides that “A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.” A lawyer collects an excessive fee when he collects up front for services, does not complete the professional services for which the fee was paid, and fails to promptly remit the unearned portion of the fee to the client. *In re Gastineau*, 317 Or 545, 857 P2d 136 (1993).

The Accused failed to refund \$975, the unaccounted-for portion of the \$1,500 retainer collected from Ms. Scheid. Although the Bar does not describe the Accused’s fee arrangement with Ms. Scheid, nor his hourly rate, the Accused’s failure to account for \$975 of a \$1,500 retainer to his client, and his failure to justify his retention of the deposit after inquiry by the Bar, is a failure to promptly remit the unearned portion of a fee to his client in violation of RPC 1.5(a). Retaining this fee knowing he had not completed the representation and instead abandoning his client in the midst of litigation, is the taking of an excessive fee in violation of RPC 1.5(a). See *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007), *In re Balocca*, 342 Or 279, 151 P3d 154 (2007).

4. Failing to Return Client File and Funds in Violation of RPC 1.16(d).

RPC 1.16(d) provides in pertinent part:

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client’s interest 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.”

Ms. Scheid terminated the Accused and requested return of her file and a refund of the unexpended portion of her retainer. The Accused failed to do either, in violation of RPC 1.16(d).

5. Conduct Prejudicial to the Administration of Justice in Violation of RPC 8.4(a)(4).

A lawyer violates RPC 8.4(a)(4) when he does something he should not do or fails to do something that he should do, and causes actual or potential harm either to the procedural functioning of a judicial proceeding or to the substantive interest of a party to that proceeding. To establish a violation of RPC 8.4(a)(4), the Bar must prove that 1) the Accused lawyer’s action or inaction was improper; 2) the Accused lawyer’s conduct occurred during the course of a judicial proceeding; and 3) the Accused lawyer’s conduct did have or could have, a prejudicial effect upon the administration of justice. *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003). The impropriety of the Accused’s actions are demonstrated by the foregoing violations in the *Scheid* matter, all of which occurred during a judicial proceeding. The Accused’s actions had a prejudicial effect upon the administration of justice because the Accused failed to perform the acts reasonably necessary to discharge a lawyer’s duties in litigation delegated to

the lawyer by the court rules and the Oregon Rules of Civil Procedure. As a consequence, it created unnecessary work and expense for opposing counsel and his client, and unnecessary work for the court by requiring the court to preside over the disruption caused by the Accused's unexplained disappearance. See *In re Carini*, 354 Or 47, 308 P3d 197 (2013); *In re Hartfield*, 349 Or 108, 239 P3d 992 (2010).

In sum, the Trial Panel finds the Accused violated all seven charged violations of the RPC.

SANCTIONS

A. ABA STANDARDS.

The ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “Standards”) in Oregon case law are considered in determining the appropriate sanction. *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). The *Standards* require that the Accused's conduct be analyzed by the following factors:

1. The ethical duty violated;
2. The attorney's mental state;
3. The actual or potential injury; and
4. The existence of aggravating and mitigating circumstances.

Standards § 3.0.

B. GENERAL DUTIES VIOLATED.

The Accused's violations 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).

The Accused's violation of duties set forth in RPC 1.3 (Diligence/Neglect) and RPC 1.4(a) (Duty to Communicate with 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 1.16(d) (Failing to Return Client's File and Funds), and his failure to take proper steps upon termination of representation violated the Accused's duty to preserve and return client property. (*Standards* § 4.1).

C. MENTAL STATE.

“Intent” is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without conscious objective to accomplish a particular result. (*Standards* at 9). A lawyer's failure to act over a significant

period time despite the client’s urgings to act, and the lawyer’s knowledge of his professional duty to act, can be characterized as “intentional”. See *In re Sousa*, 323 Or 137, 144, 915 P2d 408 (1996); *In re Loew*, 292 Or 806, 810–11, 642 P2d 1171 (1982).

It is unknown why the Accused failed to acknowledge or respond to any of the myriad communications from the Bar in these three matters. As one admitted to the practice of law in Oregon, the Accused knew of his professional duty to act, including his duty to communicate with the Bar in connection with the investigation of disciplinary matters. Additionally, the Accused, as a lawyer licensed to practice, knows of his duty to communicate with his client and with opposing counsel during a pending litigation matter. His failure to discharge any of these duties demonstrates his knowledge of his duties and of his intent not to act, if not his intent to cause the consequences of his inaction.

D. EXTENT OF ACTUAL OR POTENTIAL INJURY.

For the purposes of determining the appropriate disciplinary sanction, the Trial Panel takes into account both actual and potential injury. (*Standards* at 6); *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Injury” is defined as “harm to the client, the public, the legal system, or the profession which results from the lawyer’s conduct.” “Potential Injury” is harm to the client, the public, the legal system, and the professional that is reasonably foreseeable at the time of the lawyer’s conduct. (*Standards* at 7). In *Scheid*, the Accused caused actual injury to Ms. Scheid, to the legal system and the profession. The conduct caused unnecessary delay, expense and frustration to his client, the court, opposing counsel, and opposing counsel’s client. The Accused’s failure to return fees, documents and files caused injury and expense to Ms. Scheid’s ability to continue the litigation with another lawyer.

The *Standards* define “potential injury” as 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* at 7). In all three cases, the Accused failed to communicate at all with the Bar in connection with the Bar Complaints against him. See *In re Gastineau*, 317 Or at 558. Noncooperation with a Bar investigation, 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 in response to a client’s complaints, is “injury” under the *Standards*.

E. PRESUMED SANCTION.

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 also 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 further 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).

F. AGGRAVATING AND MITIGATING CIRCUMSTANCES.

The following aggravating factors were proven in this case:

- (1) A dishonest and selfish motive. (*Standards* § 9.22(b)). The Accused's unexplained failure to refund the unexpended portion of Ms. Scheid retainer may only reasonably be construed as the conversion of client funds for his benefit.
- (2) Pattern of misconduct. (*Standards* § 9.22(c)). Although the circumstances of this case suggest an event or series of events in the spring of 2016 may have been responsible for or contributed to the Accused's violations, the fact remains that the Accused's neglect of matters, failure to communicate, failure to return Scheid's funds and avoidance of Bar inquiries in three separate simultaneous cases demonstrate a pattern of neglect and avoidance, as well as a disregard for client matters and professional obligations. See *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).
- (3) Multiple Offenses. (*Standards* § 9.22(d)).
- (4) Indifference to making restitution. (*Standards* § 9.22(j)). As a practicing lawyer, the Accused is aware that the unexpended portion of the client retainer held in his client trust account must be accounted for or reimbursed to the client.

Mitigating factors in this case include the absence of a prior disciplinary record and inexperience in the practice of law.

G. OREGON CASE LAW.

- (1) Neglect and failure to communicate. For a single, serious act of neglect, a sixty day suspension is appropriate for a lawyer with no prior record of discipline. *In re Redden*, 342 Or 393, 153 P3d 113 (2007). However, where there are multiple acts of neglect and the lawyer fails to cooperate with the Bar, a suspension of at least sixty days for each act may be appropriate. *In re Schaffner*, 325 Or 421. Oregon courts have imposed a sixty day suspension for a lawyer's knowing neglect of a client matter and his failure to communicate with his client. *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003).
- (2) Excessive fee. In *In re Balocca*, 342 Or 279, an attorney agreed to perform a matter for a client, failed to complete the work, and then attempted to justify

the fee on a basis other than that specified in the fee agreement. In *In re Obert*, 352 Or 231, an attorney failed to refund the fee despite not performing any substantial work on the project, and was suspended for six months. In both *Balocca* and *Obert* the lawyer was proven to consciously craft a basis to keep unearned fees. In this case, the Accused in the *Scheid* matter agreed to perform a specified legal service, undertook that representation, then disappeared without notice to his client and in doing so failed to account for or refund \$975 of Ms. Scheid's \$1,500 retainer. There is no evidence in the record of an attempt to justify an excessive fee. However, the fact remains that the unexpended portion of the retainer was not returned and not accounted for. Therefore, the Accused took an excessive fee.

- (3) Failure to return client property. Of the Bar's citations, *In re Chandler*, 303 Or 290, 735 P2d 1220 (1987) is most directly on point. (63-day suspension for knowing failure to return client's retainer following termination and demand). The Trial Panel finds that the Accused's charging of an excessive fee and failing to account for the retainer and failing to return client property warrant a sanction of a six-month suspension.
- (4) Failure to respond to disciplinary authority. Lawyers who fail to cooperate with disciplinary authorities are a threat to the profession and the public, and suspension is appropriate. *In re Bourcier*, 325 Or at 436. The case is analogous to the case of *In re Miles*, 324 Or at 222–23, in which the court imposed a 120-day suspension and required formal reinstatement where Miles (as in this case) failed to respond to inquiries from the DCO, failed to respond to the Bar's Formal Complaint, and allowed a default to be entered against her even though no other substantive charges were brought. A 120-day suspension is appropriate here in each of the three consolidated cases. The Accused's failure to cooperate with the Bar disciplinary investigation in the case involving his failure to refund a client retainer warrants a more serious sanction than that imposed in *Miles*.
- (5) Conduct prejudicial to the administration of justice. The Trial Panel finds that a suspension of two months is appropriate.

CONCLUSION

For the reasons given and upon the facts found herein, the Trial Panel unanimously concludes that the Accused should be suspended from the practice of law for a period of eighteen months. As provided by the rules, should the Accused elect to pursue the practice of law in Oregon after his suspension, the Accused shall be subject to formal reinstatement under BR 8.1.

ORDER

IT IS HEREBY ORDERED that the Accused, Mark O. Griffith, be and upon the effective date of this order is, suspended from the practice of law for eighteen months and subject to formal reinstatement under BR 8.1 at such time as he elects to return to active status following any suspension.

Dated this 29 day of January, 2018.

/s/ Andrew M. Cole

Andrew M. Cole, OSB #890346
Trial Panel Chairperson

/s/ Tom Kranovich

Tom Kranovich, OSB #824497
Trial Panel Member

/s/ Eugene Bentley

Eugene Bentley
Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 14-64
)
MATTHEW A. WILSON,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Accused: Frederic E. Cann
Disciplinary Board: Kathy Proctor, Chairperson
Matthew C. McKean
Fadd E. Beyrouty, Public Member
Disposition: Violation of RPC 8.1(a)(2) and RPC 8.4(a)(3). Trial
Panel Opinion. Disbarment.
Effective Date of Opinion: April 17, 2018

TRIAL PANEL OPINION

This matter came before a Trial Panel of the Region 4 Disciplinary Board for a hearing on November 6 and 8, 2017 to hear evidence on a Formal Complaint against the Respondent and to consider the sanctions sought by the Bar against the Respondent in connection with business dealings the Respondent had with an acquaintance. The Trial Panel consisted of Kathy Proctor, Chair; Matthew McKean, Attorney Member; and Fadd Beyrouty, Public Member (Region 6). Courtney Dippel represented the Oregon State Bar (the “Bar”). Frederic Cann represented Matthew A. Wilson (the “Respondent” or “Wilson”).

The Trial Panel considered the factual allegations in the Formal Complaint and the Amended Formal Complaint, the Respondent’s Answer to Amended Formal Complaint and the Respondent’s First Amended Answer to Amended Formal Complaint, the Bar’s Trial Memorandum, the Respondent’s Trial Memorandum, and the testimony and evidence presented at trial. The Trial Panel also considered the Respondent’s lack of any prior disciplinary history, and his personal problems. Based on the findings and conclusions below, we find that the Respondent violated the Oregon Rules of Professional Conduct (“RPC”) 8.4(a)(3) and RPC 8.1(a)(2). The Trial Panel, Fadd Beyrouty, public member dissenting, determines that the Respondent shall be disbarred.

INTRODUCTION

The Respondent was alleged to be, at all times relevant to the allegations in the matter, an attorney at law, duly admitted by the Supreme Court of Oregon to practice law in this state, and was a member of the Oregon State Bar. The Respondent maintained an office in Multnomah County, Oregon until July 2012. Thereafter, effective August 27, 2012, the Respondent updated his contact information with the Bar to a primary address for his firm, SideBar Legal; that address was a postal annex mailing address maintained in the County of Washington, State of Oregon.

The Bar filed a Formal Complaint against the Respondent on August 27, 2014 alleging violations of RPC 8.1(a)(2). The Bar filed an Amended Formal Complaint against the Respondent on February 15, 2017 alleging violations of RPC 8.4(a)(3) and RPC 8.1(a)(2).

In its First Cause of Complaint the Bar alleged that in or about early March 2012 Respondent met with Thomas Lasota (“Lasota”). The Respondent and Lasota discussed Lasota making a short-term loan in the amount of \$30,000 to Group Hive LLC (“Group Hive”), a company in which Respondent was a principal. In addition to being a principal in Group Hive, the Respondent was the owner and sole attorney in his law firm SideBar Legal. The Respondent drew up proposed loan documents and sent them to Lasota in order to finalize the loan.

On or about March 18, 2012, Lasota insisted that the loan be collateralized with real estate that had more than \$30,000 in equity (the “Collateral”), as assurance that he would receive at least his initial investment back.

The Bar alleges that on March 21, 2012, Lasota funded the \$30,000 loan to Group Hive in return for a Promissory Note (the “Note”), Security Agreement and Personal Guarantee of the Respondent. The Note was signed by Lasota and the Respondent on March 21, 2012.

The Respondent was to deliver to Lasota a Deed of Trust on real property and improvements located at 10987 SW Adele Drive, Portland, Oregon 97225. The Respondent had drafted and provided both the Note and the Deed of Trust in inducement of the loan by Lasota.

The respondent obtained the \$30,000 from Lasota, but the Deed of Trust he drafted on the Adele property to secure the loan could not be recorded because of defects to the document including a lack of notarization and legal property description. Despite Lasota’s notice to the Respondent that the Deed was defective, and following many promises to do so, the Respondent never corrected the Deed.

The Bar alleges that at the time the Respondent induced the loan from Lasota by using the Deed of Trust and the personal guarantee, the Respondent knew that the Adele property was nearing foreclosure, and he further knew that there was not sufficient equity in the home to secure the loan. In addition, the Respondent had already put forth the Adele property as collateral for another Group Hive loan from Aaron Delatorre.

The Bar alleges that the Respondent knowingly and intentionally induced the loan from Lasota by promising the Adele home as sufficient security for the loan to Group Hive, even while knowing the Adele home provided no security for the loan.

After obtaining the loan the Respondent failed to correct deficiencies in the Deed of Trust which could not be recorded due to its deficiencies. After obtaining the loan and defaulting on the loan, the Bar alleges that the Respondent made multiple false promises to correct the deficiencies to the Deed of Trust. The Respondent also made what appeared to be empty promises and stories about his efforts to raise funds to repay the loan. These promises were designed to delay Lasota's commencement of collection efforts.

For its Second Cause of Complaint the Bar alleges that on or about April 25, 2014 the Disciplinary Counsel's Office ("DCO") received a complaint from Lasota about the Respondent's conduct. The DCO sent a letter to the Respondent at his address that was on record with the Bar. The letter requested the Respondent's response and was sent by first-class mail.

By letter dated June 13, 2014, the DCO again requested the Respondent's response to Lasota's complaint. The letter was addressed to the Respondent at the address then on record with the Bar. The letter was sent by both first-class and certified mail, return receipt requested.

On or about July 10, 2014, the Respondent was copied on a letter from DCO to the Disciplinary Board State Chair enclosing a petition requesting that the Respondent be suspended pursuant to BR 7.1 and until such time as he responded to DCO's inquiries. The Respondent did not file a response to DCO's petition. Thereafter, despite being copied on letters informing him of the progress of the investigation, the Respondent did not respond to DCO's letters or inquiries for over three months.

The Bar alleged that the Respondent's failure to respond to a lawful demand for information from a disciplinary authority was in violation of RPC 8.1(a)(2).

The Respondent's Answer to First Formal Complaint was dated March 20, 2017; this was later amended by First Amended Answer to Amended Formal Complaint on October 11, 2017. The Respondent admitted to paragraphs 1, 3, 5, and 11; he denied paragraphs 13, 17, 21, 24, 29; he did not respond to paragraph 25 alleging that it required no answer. For all other paragraphs the Respondent provided explanation and made two affirmative defenses.

First Affirmative Defense to First Cause of Complaint:

The Respondent admitted that he was, at all times material, an attorney at law duly admitted by the Supreme Court of the State of Oregon to practice law in the state and that he was a member of the Oregon State Bar. He then alleged that until July 15, 2012 he had an office located in Multnomah county. While transitioning to move to California, the Respondent obtained a Washington County mailing address; he denied having a physical office located in Washington County. The Respondent alleges that from July 15, 2012 through October 31, 2013

he had no office for the practice of law. Thereafter, effective November 1, 2013, his office was located in Redding, California.

In response to the Bar's First Cause of Complaint the Respondent alleges that the negotiations leading up to the loan between Lasota and Respondent were arms-length commercial negotiations, "aggressive at times, especially by Lasota." The respondent admitted that RPC 8.4(a)(3) applies to the personal conduct of attorneys, and that conduct which is improper for nonlawyers is also improper for lawyers acting in a nonlegal capacity, with the potential for additional consequences to a lawyer, specifically attorney discipline. He further states that:

"At the same time, conduct which would be proper in business negotiations between non-lawyers is also proper for business negotiations where a lawyer is a participant (other than as a lawyer for a counterparty). In other words, lawyers (including Wilson) are not disabled from participation in business on an equal footing with non-lawyers simply because they are lawyers."

Respondent's First Amended Answer to Amended Formal Complaint, page 8.

The Respondent's counsel argued that the Respondent's conduct with Lasota was not improper and that he did not violate RPC 8.4(a)(3).

First Affirmative Defense to Second Cause of Complaint:

The Bar alleged that the Respondent failed to respond to its lawful demand for information from a disciplinary authority in violation of RPC 8.1(a)(2). In defense of his initial failure to respond the Respondent cites the Oregon State Bar Disciplinary Board Rule ("BR") 1.11 regarding the designation of contact information. This rule requires all attorneys admitted to practice law in Oregon to provide a current business address and telephone number, "or in the absence thereof, a current residence address and telephone number." BR 1.11(a). Furthermore, a "post office address must be accompanied by a street address." *Id.* In addition, subject to some exceptions not relevant in this matter, "all attorneys must also designate an e-mail address for receipt of bar notices and correspondence. . ." BR 1.11(b).

The Respondent admits that for the period January 2014 until October 2014 he failed to check his post office box. Further he concedes he failed to comply with BR 1.11 as to his physical location from November 2013 to October 2014. He alleges that he had always complied with the requirement to provide an email address and phone number.

FINDINGS OF FACT

FIRST CAUSE OF COMPLAINT:

The Trial Panel finds that the Respondent, who was one of three principals of Group Hive, a software startup company, sought funding for the company from Lasota shortly after being introduced to Lasota by another lawyer named Kevin Clayville. The evidence shows that

the Respondent first met Lasota on March 2, 2012. Lasota testified that he was interested in finding an attorney who could provide him with day-to-day advice and to walk him through the process of starting a new business he was involved in with some friends.

The same day after Lasota and the Respondent had their initial meeting, the Respondent sent an email to Lasota providing him with information to review about Group Hive. The email was clearly soliciting a potential loan from Lasota. The email noted terms of “\$30k for 90 days.”

On Sunday, March 18, 2012, Lasota emailed the Respondent and informed him that if there was real estate that had more than \$30,000 in equity, that would be best. Otherwise, Lasota did not believe Group Hive was a good fit. This communicated that he did not want to make a short-term loan without sufficient and real collateral. In response, the Respondent made two “deal points” to induce Lasota into making a \$30,000 loan. The first point outlined the time line for repayment of the loan, the second point promised to secure the Group Hive’s performance, i.e. the repayment of the loan, with the Respondent’s home located on the Westside. On Tuesday, March 20, 2012, the Respondent emailed Lasota confirming they had met that morning and that Respondent had just revised the loan documents to add the personal guarantee. He asked Lasota to meet at his office the next morning to sign and fund the loan.

Just a few hours after receiving Respondent’s email on March 20, 2012, Lasota informed the Respondent via email that he had a problem with the documents. It was his intent that the Deed of Trust would be executed at the time of the loan, not at a later time. He also asked the Respondent how many encumbrances were on the property and equity. The Respondent did not answer the questions, but instead responded with a promise to revise the documents. The next morning Lasota went to the Respondent’s SideBar Law office to sign the documents and then the Respondent immediately went with Lasota to the bank to obtain the money.

On July 25, 2012 Lasota informed the Respondent via email that he could not record the Deed of Trust because of deficiencies with the document that the Respondent drafted. On July 30, 2012 the Respondent promised to “print, sign and notarize the Trust Deed.” He did not follow through with that promise.

In the later part of 2012 the Respondent offered to assist Lasota with drafting some LLC documents for Lasota at no charge. The Respondent did not advise Lasota of any conflicts of interest that may arise from this type of transaction. There was no evidence that Respondent ever drafted or assisted with drafting the LLC documents for Lasota.

In his response to the Bar’s investigation, on October 19, 2016, the Respondent sent the bar a copy of the Adele lease agreement and then stated that “Mr. Lasota rejected my offer to pay from rental income.” There are several problems with this statement. The first problem is that the Respondent testified that at the time the lease was made, he did not actually sign it; it was an electronic signature that he allowed his friend to use. He also testified that he did not

expect his friend to pay any money until his friend got on his feet. Finally, contrary to the Respondent's statement, there is evidence that Lasota did accept the offer to receive payment from lease proceeds. The Respondent's response to the Bar and his testimony regarding the lease and Lasota's alleged rejection of the offer to pay him from rental income was false.

The Trial Panel agrees with the Respondent's argument that "lawyers (including Wilson) are not disabled from participation in business on an equal footing with non-lawyers simply because they are lawyers." However, that does not mean that lawyers are excused from their ethical duties when participating in business. The preface to the ABA *Standards* notes that "[t]he community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice . . ." *ABA Standards for Imposing Lawyer Sanctions* (2005).

The Respondent's testimony, including his deposition testimony, was replete with evasive and inconsistent responses to questions from the Bar. Based on the totality of the evidence and his inconsistent statements, Respondent's testimony is not credible.

The Trial Panel finds that the Respondent knowingly made the following material misrepresentations to Lasota in order to induce a loan from him of \$30,000:

- (1) The Adele home had at least \$30,000 in equity. The Respondent knew this was a misrepresentation because he had not made a payment on his mortgage for two years, and he had already pledged the house as collateral to another investor. His later inaction to save the house from foreclosure shows he knew there was little to no equity to save.
- (2) He failed to disclose to Lasota that because he had not made a mortgage payment in two years, the last payment being in January 2010, the Adele house was likely to go into foreclosure. His testimony both at trial and at deposition shows that he understood that a foreclosure sale would likely eliminate any equity there might have been in the Adele home.

After obtaining the loan from Lasota, the Respondent:

- (1) Misrepresented to Lasota that he would correct the Trust Deed so that it could be recorded.
- (2) Misrepresented to Lasota that he would rent the Adele property and pay part of the rental proceeds to Lasota.
- (3) Assisted a friend by providing that friend with a lease agreement that was not accurate knowing the friend and client could use it for other legal purposes including getting insurance, getting a job, and potentially to mislead someone in order to positively impact custody of the friend's children.

- (4) The Respondent intentionally did not respond fully and truthfully to the Bar on October 19, 2016 when he provided the lease agreement and then told the Bar that Lasota rejected his offer to pay him from the rental income. This was clearly intended to create the impression that Lasota rejected an offer of repayment, and that the lease money was available from which the Respondent could have begun to repay Lasota.
- (5) The respondent testified falsely at his trial that Lasota rejected his offer to pay him from the rental income.
- (6) It is less clear that the Respondent's response to the Bar as to when he received the notice of foreclosure was intentionally false.
- (7) At no time did the Respondent take any actual steps to repay the loan i.e., he did not start a repayment fund, he did not tender actual payment, he did not sell any assets, and he did not try to save the one asset he had from foreclosure. He only made verbal offers and promises which could not be considered valid considering the overall circumstances.
- (8) He promised free legal services to Lasota in forming an LLC in order to continue to string Lasota along.

SECOND CAUSE OF COMPLAINT

The Trial Panel makes the following factual findings:

- (1) The Respondent did not have proper mail forwarding for his Washington County Postal Annex address.
- (2) The Respondent was negligent in not checking his mail in Washington County.
- (3) The Respondent's email address was likely entered incorrectly by Postal Annex preventing the Respondent from getting email notices.
- (4) Once the Respondent was formally served with the Bar's complaint, he cooperated with the Bar to the extent that he actually responded, however as noted above he did not fully and truthfully respond.

The Bar met its burden to prove by clear and convincing evidence that the Respondent violated his duties to the legal system by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law in violation of in violation of RPC 8.4(a)(3).

ANALYSIS

The Bar established by clear and convincing evidence that the Respondent's misrepresentations to Lasota were knowing, false and material. *In re Eadie*, 333 Or 42, 36 P3d 468 (2001); *In re Kluge*, 332 Or 251, 255, 27 P3d 102 (2001). The Bar need not prove actual

reliance. *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000). Here, the Trial Panel finds that there was actual reliance by Lasota based on the Respondent's misrepresentations to him. This evidence is found in the email exchanges between Lasota and the Respondent between March 18, 2012 and March 20, 2012 along with the check from Lasota dated March 21, 2012 to Group Hive LLC and the deposit that same day into Bank of America where Group Hive's account was located. It is also corroborated by Mr. Lasota's testimony.

The Respondent convinced Lasota to make what was supposed to be a short-term loan for \$30,000 by mispresenting to him that he had property that had at least \$30,000 in equity and that he would give Lasota a Deed of Trust for the Adele home to secure the loan. The Respondent knew, and had reason to know, that the Deed of Trust securing an interest in the Adele home was a condition to the loan and that it was further misrepresented that the Adele home had at least \$30,000 in equity.

The Respondent's conduct after obtaining the loan from Lasota was reckless and selfish. He transferred money back and forth between SideBar Legal and Group Hive. His own witness and business partner Jack Phan ("Phan") testified that he trusted the Respondent. Phan testified that he had experience being involved with more than one entrepreneurial activity at a time. Phan testified that he would not transfer money between separate ventures because each company is separate and would have its own profit and liability statement. Phan had no knowledge of the finances of Group Hive, therefore he did not know that the Respondent was transferring money to and from Group Hive and SideBar Legal.

The Respondent intentionally did not fully and truthfully respond to the Bar. His testimony at trial about Lasota allegedly refusing repayment from the lease was untrue. His testimony was not credible as there were too many other inconsistencies.

When the Respondent moved to California and provided the Bar with an Oregon address, he was negligent in either forwarding his mail to his California address or checking his mail. While the evidence suggests that the Respondent's lack of attentiveness to his Postal Annex box was irresponsible and unprofessional, the Trial Panel is not convinced to a clear and convincing degree that he intentionally, knowingly or willfully avoided the Bar's communications. The problem with the email address lends some doubt as to whether he would have received some of the notices from the Postal Annex. The Bar was able to serve him personally in California because he provided a physical location in addition to his Postal Annex address.

SANCTION

In fashioning a sanction, the Oregon Supreme Court refers to the ABA Standards for Imposing Lawyer Sanctions (2005 ed) ("*Standards*") and Oregon case law. *In re Eakin*, 334 Or 238, 257, 48 P3d 147 (2002); *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994).

A. ABA Standards

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

(1) Duty Violated

The Respondent violated his duty to the public to maintain his personal integrity and knowingly engaged in conduct involving misrepresentation that adversely reflects on the lawyer’s fitness to practice law and his duty to the profession to cooperate with disciplinary investigations. *Standards* §§ 5.1, 7.0.

(2) The Lawyer’s Mental State

The ABA *Standards* recognize three mental states: intentional, knowing, and negligent. *Standards* at 9. The Trial Panel finds that the Respondent acted intentionally in his communications with Lasota in making affirmative misrepresentations and omitting material information from Lasota. The Trial panel finds that the Respondent acted negligently in failing to respond to the Bar’s initial inquiries. However, he intentionally misled the Bar when he provided the Bar with a copy of the lease and when he represented that Lasota had refused the offer to receive a portion of the proceeds from the lease agreement knowing that payment on the lease would not be forthcoming. He intentionally testified falsely that Lasota had refused his offer to receive a portion of the proceeds from the lease.

The Respondent’s use of an Oregon address after he had moved to California was negligent and Respondent’s failure to either have his mail forwarded or to frequently check his mailbox was negligent.

(3) Actual or Potential Injury Caused by the Conduct

For the purposes of determining an appropriate disciplinary sanction, the trial panel may take into account both actual and potential injury. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The standards define “injury” as harm to the client, the public, the legal system or the profession that results from a lawyer’s conduct. *Standards* at 9.

The Trial Panel finds that The Respondent caused actual harm when he induced Lasota’s loan under false pretenses. He furthered that harm by failing to follow through with providing a valid Trust Deed thereby preventing even the remote possibility of Lasota recovering anything at all from the collateral.

The Respondent's conduct caused actual harm to the legal profession because the profession is judged by the conduct of its members. *In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993).

B. Preliminary Sanction

Absent aggravating or mitigating circumstances the following *Standards* apply:

Disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. *Standards* § 5.11(b).

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

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

C. Aggravating and Mitigating Circumstances

Aggravating factors increase the degree of discipline to be imposed. *Standards* § 9.22.

The following aggravating factors under the *Standards* exist in this case:

1. A dishonest or selfish motive. *Standards* § 9.22(b). The Respondent acted with a selfish motive -personal gain and a dishonest motive to conceal and mislead. *See generally In re Davenport*, 334 Or 298, 320–21, 49 P3d 91, *modified on recons*, 335 Or 67, 57 P3d 897 (2002) (citing *In re Dinerman*, 314 Or 308, 318, 840 P2d 50 (1992)).
2. A pattern of misconduct. *Standards* § 9.22(c). Over the course of a year, the Respondent engaged in a series of misrepresentations to Lasota.
3. Multiple offenses. *Standards* § 9.22(d). There are both multiple rules implicated by the Respondent's conduct and multiple instances of misconduct.
4. Bad faith obstruction of the disciplinary proceeding. *Standards* § 9.22(e). The Respondent provided demonstrably false information to the Bar.
5. Deceptive practices during the disciplinary process. *Standards* § 9.22(e). Purposeful misrepresentation was made when the Respondent provided the lease agreement to the Bar and then claimed that Lasota rejected his offer to pay him from rental income. The Respondent repeated a false statement in his testimony about this.

6. Refusal to acknowledge wrongful nature of conduct. *Standards* § 9.22(g). The Respondent's deposition testimony shows that he does not acknowledge misleading Lasota regarding the equity in the Adele house. He did however express regret about not giving Lasota the full amount of information he was entitled to.
7. Indifference to making restitution. *Standards* § 9.22(j). The Respondent stated that he wanted to repay Lasota, but he made no substantial efforts to do so.
8. Mitigating Factor. *Standards* § 9.32(a), (c). In considering the appropriate sanction, the Trial Panel considered the Respondent's lack of a prior disciplinary history. In addition, the Trial Panel acknowledges the Respondent's personal problems that surrounded his actions with Lasota.

Testimonial evidence was presented by the Respondent to show that soon after he quit his employment with Lane Powell and started SideBar Legal, his Wife tried to take her own life and was under several weeks of full-time hospital care. Thereafter, the Respondent's Mother, who was age 71, and his Wife were involved in a serious motor vehicle accident. His family brought in Visiting Angels to help with the two young children so that the Respondent could work. The at-fault driver in the motor vehicle accident was uninsured and there was not enough uninsured motorist protection to cover all the expenses. It is apparent that at the time he entered into the transaction with Lasota, the Respondent's personal life, business and financial life, were in stress. The Respondent's behavior and poor judgment seem to be intertwined with the personal problems he was experiencing at the time. He moved his family to California and finally ended up getting divorced from his Wife.

The aggravating factors outweigh the mitigating factors and the Trial Panel finds that the Respondent should be disbarred.

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 discharge their professional duties to clients, the public, the legal system, and the legal profession. "*Standards* § 1.1; *In re Huffman*, 328 Or 567, 587, 983 P2d 534 (1999).

The Bar has asked the Trial Panel to disbar the Respondent.

After evaluating the ABA *Standards*, the factors in this case, and Oregon case law, and when the violations committed by the Accused are taken as a whole, factoring the appropriate aggravating and mitigating circumstances, the Trial Panel, Fadd Beyrouthy, public member dissenting, concludes that disbarment is appropriate.

ORDER

IT IS HEREBY ORDERED that the Respondent, Matthew A. Wilson, be, and upon the effective date of this Order shall be disbarred from the practice of law.

Dated this 12th day of February, 2018.

/s/Kathy Proctor

Kathy Proctor, Trial Panel Chairperson

/s/ Matthew McKean

Matthew McKean, Trial Panel Member

Dissenting Opinion

Fadd Beyrouthy, public member, dissents only as to the sanction imposed because he weighed the Respondent's mitigating factors more heavily than the other panel members, and he considered the Respondent's previous volunteer activities with various Bar organizations. Mr. Beyrouthy believes that instead of disbarment, the Respondent should be suspended from the practice of law for 24 months, in addition, (1) the Respondent shall be subject to formal reinstatement pursuant to BR 8.1, (2) he shall be required to pay full restitution to Lasota in the amount of any money judgment Lasota obtained relevant to the \$30,000 short-term loan, 3) he shall be required to successfully complete an Oregon State Bar ethics program.

/s/ Fadd Beyrouthy

Fadd Beyrouthy, Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 17-120
)	
SCOTT S. KANG,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 1.16(a)(1), and RPC 5.1(b). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	May 1, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Scott S. Kang is suspended for 60 days, effective May 1, 2018, or upon approval by the Disciplinary Board, whichever is later, for violations of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 1.16(a)(1), and RPC 5.1(b).

DATED this 16th day of April, 2018.

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

STIPULATION FOR DISCIPLINE

Scott S. Kang, attorney at law (“Kang”), and the Oregon State Bar (“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.

Kang was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1997, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Kang 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 9, 2017, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Kang for the following alleged violations of the Oregon Rules of Professional Conduct: RPC 1.2 (failure to abide by client objectives); RPC 1.4(a) (failure to keep a client informed about the status of a matter); RPC 1.4(b) (failure to explain a matter to the extent needed to permit a client to make informed decisions regarding the representation); RPC 1.7(a)(2) (personal-interest conflict of interest); RPC 1.16(a)(1) (failure to withdraw from representation of a client when continued representation will violate the RPCs); and RPC 5.1(b) (supervisory responsibility for another lawyer’s violation of RPCs where consequences could be avoided through remedial action). The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding. 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 December 2014, BJ Hollowell (“Hollowell”) hired the Scott Kang PC law firm (“Kang Firm”) to represent him in connection with a personal injury claim (“Hollowell Claim”). In late September or early October 2015, attorney Andrew Schlesinger (“Schlesinger”) joined the Kang Firm as an associate and was assigned to the Hollowell Claim. Schlesinger was supervised by Kang.

6.

In late October 2015, without making any effort to contact Hollowell or obtain his approval, Schlesinger prepared and sent a demand letter to the opposing party’s insurance

company, offering to settle the case for \$10,000. It is disputed whether or not Hollowell was provided a copy of this demand when Schlesinger sent it, however, there is no dispute that Schlesinger failed to obtain Hollowell's approval prior to sending it. Kang did not review the settlement letter before it went out.

7.

In December 2015, after the insurance company accepted Schlesinger's offer, Hollowell was contacted by the Kang Firm to come in and sign the relevant paper work. Hollowell promptly objected to the amount of the settlement, as most of it would go to paying off his outstanding medical bills and attorney's fees.

8.

When Hollowell objected to the settlement offer, Schlesinger's actions in having sent the unauthorized settlement offer created a conflict of interest between the Kang Firm and Hollowell. Schlesinger had negligently misrepresented to the opposing party that Hollowell valued his claim at \$10,000 and made an offer to settle his case for that amount. This potentially limited Hollowell's ability to prosecute his claim.

9.

Notwithstanding the conflict, however, the Kang Firm continued to represent Hollowell over the next five months, seeking to negotiate bills with medical providers and, in communications with Hollowell, either advocating that he accept the agreement that Schlesinger had negotiated without client authority or inquiring whether Hollowell had found other counsel. No one from the Kang Firm, including Kang, informed Hollowell of the conflict of interest or discussed with him the possibility of unwinding the settlement.

Violations

10.

Kang admits that, by failing to ensure that Schlesinger had consulted with Hollowell before sending a demand letter to the insurer, Kang failed to abide by his clients objectives, in violation of RPC 1.2(a); failed to keep Hollowell adequately informed about the status of his legal matter, in violation of RPC 1.4(a); and failed to provide Hollowell with sufficient information to make informed decisions about his legal matter, in violation of RPC 1.4(b). Kang also violated his own duties to adequately supervise Schlesinger in violation of RPC 5.1(b).

Kang further admits by continuing to represent Hollowell without first disclosing the conflict created by settling his case and obtaining informed consent, he violated RPC 1.7(a)(2); RPC 1.16(a)(1); and RPC 5.1(b).

Sanction

11.

Kang 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* (“Standards”). The *Standards* require that Kang’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.** Kang violated his duties to his client to avoid conflicts of interest, and to diligently attend to the client’s legal matter (which includes both the duty to timely and adequately communicate with the client, as well as the duty to abide by the client’s objective in so doing). *Standards* §§ 4.3; 4.4. The *Standards* provide that the most important ethical obligations are those which lawyers owe to their clients. *Standards* at 5. In addition, Kang violated his duties to the profession to timely and properly withdraw from his client’s matter when required to do so, as well as to properly supervisor subordinate attorneys. *Standards* § 7.0.
- b. **Mental State.** There are three types of mental state recognized under the *Standards*: “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* at 9.

Kang’s inadequate communication and conduct contrary to his client’s wishes (through Schlesinger) was initially negligent. However, the RPC 1.2(a) violation became knowing when the client objected and he took no corrective measures. Rather, Kang attempted to convince Hollowell to accept the arrangement. Similarly, the conflict of interest and failure to withdraw were both knowing, as was his failure to remedy his subordinate lawyer’s misconduct.

- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 9.

There was significant potential injury to Hollowell, insofar as he may have lost the ability to recover anything above the amount proffered by Schlesinger, and the confusion may have diminished his chances to recover anything at all. However, it is unclear whether there was any actual injury beyond the anxiety and frustration caused to Hollowell. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Kang failed to promptly take corrective measures out of his own self-interest. *Standards* § 9.22(b).
 2. There are multiple offenses over a period of time. *Standards* § 9.22(d).
 3. Kang has been admitted in Oregon since 1997 and has substantial experience in the practice of law. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Kang has no prior disciplinary record. *Standards* § 9.33(a).
 2. Kang’s conduct was not dishonestly motive. *Standards* § 9.33(b).
 3. Kang fully and freely cooperated in the Bar’s investigation of his conduct and in this formal proceeding. *Standards* § 9.32(e).
 4. Kang has expressed remorse for his conduct. *Standards* § 9.32(l).

12.

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. Similarly, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, and 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. 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.

13.

Oregon cases also hold that a suspension is appropriate where attorneys fail to adequately supervise subordinates, abide by client directives, adequately communicate or explain matters to a client, and engage in conflicts of interest. *See, e.g., In re Smale*, 30 DB Rptr 51 (2016) (attorney was suspended for 60 days, stayed pending probation for her failure to keep her bankruptcy client informed of a scheduled adversary proceeding and upcoming hearing; not consulting with her client to determine how the client wished to proceed; not

explaining the significance of the adversary proceeding and how it would affect her case; and not discuss resolving the matter with the trustee); *In re Cottle*, 29 DB Rptr 79 (2015) (managing shareholder was suspended for 60 days, stayed, pending probation, where he had direct supervisory authority over the nonlawyer staff employed by the firm, who failed to follow his instructions regarding the deposit of client funds in trust, resulting in subsequent transactions drawing on the funds of other clients, and items being returned); *In re Gatti*, 356 Or 32, 333 P3d 994 (2014) (respondent suspended for 90 days where he failed to apprise his multiple clients how a lump sum settlement offer would be allocated among them, and failed provide them with the disclosures required by RPC 1.7(a)(2) and RPC 1.8(j) for such an allocation); *In re Spencer*, 24 DB Rptr 209 (2010) (attorney was suspended for 90 days where he neglected to pursue a step-parent adoption for clients who had requested completion of the work by a time-sensitive date); *In re Karlin*, 24 DB Rptr 31 (2010) (attorney suspended for 60 days where, prior to trial in a litigated matter, attorney agreed with opposing counsel to dismiss one of his client's claims without notifying the client that he had done so or explaining the potential significance of the dismissal); *In re Clarke*, 22 DB Rptr 320 (2008) (attorney was suspended for 60 days, after deciding that a client's appeal had no merit, attorney decided not to file a brief, did not withdraw, allowed the appeal to be dismissed and thereafter failed to disclose the dismissal to the client. When the client discovered the dismissal, attorney agreed to reevaluate the merits of the appeal when her own potential liability to the client was affecting her judgment on the client's behalf).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Kang shall be suspended for 60 days for violations of RPC 1.2(a); RPC 1.4(a); RPC 1.4(b); RPC 1.7(a)(2); RPC 1.16(a)(1); and RPC 5.1(b), the sanction to be effective May 1, 2018, or upon approval by the Disciplinary Board, whichever is later.

15.

Kang 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, Kang has arranged for Natasha Dallas Cobb, OSB No. 175677, an active member of the Bar, to either take possession of or have ongoing access to Kang's client files and serve as the contact person for clients in need of the files during the term of his suspension. Kang represents that Ms. Cobb has agreed to accept this responsibility.

16.

Kang 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. Kang 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.

Kang 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.

Kang 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 Kang is admitted: none.

19.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 10, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 6th day of April, 2018.

/s/ Scott S. Kang
Scott S. Kang
OSB No. 974502

APPROVED AS TO FORM AND CONTENT:

/s/ Christopher R. Hardman
Christopher R. Hardman
OSB No. 792567

EXECUTED this 12th day of April, 2018.

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. 17-122
)
ANDREW SCHLESINGER,)
)
Respondent.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: Mark J. Fucile
Disciplinary Board: None
Disposition: Violation of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 1.16(a)(1). Stipulation for Discipline. 30-day suspension, all stayed, 1-year probation.
Effective Date of Order: April 16, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Andrew Schlesinger is suspended for 30 days for violations of RPC 1.2(a), RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), and RPC 1.16(a)(1), all stayed, pending successful completion of a 1-year term of probation. The suspension shall be effective upon approval by the Disciplinary Board.

DATED this 16th day of April, 2018.

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

STIPULATION FOR DISCIPLINE

Andrew Schlesinger, attorney at law (“Schlesinger”), and the Oregon State Bar (“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.

Schlesinger 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 Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Schlesinger 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 9, 2017, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Schlesinger for alleged violations of RPC 1.2(a) (failure to abide by client objectives); RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter); RPC 1.4(b) (failure to explain a matter sufficient to allow a client to make informed decisions regarding the representation); RPC 1.7(a)(2) (personal-interest conflict of interest); and RPC 1.16(a)(1) (failure to withdraw when continued representation will violate the Rules of Professional Conduct) 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 December 2014, BJ Hollowell (“Hollowell”) hired the Scott Kang PC law firm (“Kang Firm”) to represent him in connection with a personal injury claim (“Hollowell Claim”). In late September or early October 2015, Schlesinger joined the Kang Firm as an associate and was assigned to the Hollowell Claim. Schlesinger was supervised by attorney Scott Kang (“Kang”).

6.

In late October 2015, without making any effort to contact Hollowell or obtain his approval, Schlesinger prepared and sent a demand letter to the opposing party’s insurance company, offering to settle the case for \$10,000. It is disputed whether or not Hollowell was provided a copy of this demand when Schlesinger sent it, however, there is no dispute that Schlesinger failed to obtain Hollowell’s approval prior to sending it.

7.

In December 2015, after the insurance company accepted Schlesinger's offer, Hollowell was contacted by the Kang Firm to come in and sign the relevant paper work. Hollowell promptly objected to the amount of the settlement, as most of it would go to paying off his outstanding medical bills and attorney's fees.

8.

When Hollowell objected to the settlement offer, Schlesinger's actions in having sent the unauthorized settlement offer created a conflict of interest with Hollowell. Schlesinger had negligently misrepresented to the opposing party that Hollowell valued his claim at \$10,000 and made an offer to settle his case for that amount. This potentially limited Hollowell's ability to prosecute his claim.

9.

Notwithstanding the conflict, however, the Kang Firm continued to represent Hollowell over the next five months, seeking to negotiate bills with medical providers and, in communications with Hollowell, either advocating that he accept the agreement that Schlesinger had negotiated without client authority or inquiring whether Hollowell had found other counsel. No one from the Kang Firm, including Schlesinger, informed Hollowell of the conflict of interest.

Violations

10.

Schlesinger admits that, by failing to consult with Hollowell before sending a demand letter to the insurer, Schlesinger failed to abide by his clients objectives, in violation of RPC 1.2(a); failed to keep Hollowell adequately informed about the status of his legal matter, in violation of RPC 1.4(a); and failed to provide Hollowell with sufficient information to make informed decisions about his legal matter, in violation of RPC 1.4(b).

Schlesinger further admits that, by continuing to represent Hollowell without disclosing the conflict created by settling his case and obtaining informed consent, he violated RPC 1.7(a)(2) and RPC 1.16(a)(1).

Sanction

11.

Schlesinger 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* ("Standards"). The *Standards* require that Schlesinger'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.** Schlesinger violated his duties to his client to avoid conflicts of interest, and to diligently attend to the client’s legal matter (which includes both the duty to timely and adequately communicate with the client, as well as the duty to abide by the client’s objective in so doing). *Standards* §§ 4.3; 4.4. The *Standards* provide that the most important ethical obligations are those which lawyers owe to their clients. *Standards* at 5. In addition, Schlesinger violated his duty to the profession to timely and properly withdraw from his client’s matter when required to do so. *Standards* § 7.0.
- b. **Mental State.** There are three types of mental state recognized under the *Standards*: “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* at 9.

Schlesinger’s inadequate communication and conduct contrary to his client’s wishes was initially negligent. However, the RPC 1.2(a) violation became knowing when the client objected and he took no corrective measures. Similarly, the conflict of interest and failure to withdraw were both knowing.

- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 9.

There was significant potential injury to Hollowell, insofar as he may have lost the ability to recover anything above the amount proffered by Schlesinger, and the confusion may have diminished his chances to recover anything at all. However, it is unclear whether there was any actual injury beyond the anxiety and frustration caused to Hollowell. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Schlesinger failed to promptly take corrective measures out of his own self-interest. *Standards* § 9.22(b).
 2. There are multiple offenses over a period of time. *Standards* § 9.22(d).

3. Notwithstanding that Schlesinger was only at the Kang Firm for a very short time when the conduct at issue occurred, he has substantial experience in the practice of law, having been a solo practitioner and contract lawyer for nearly 10 years at the time. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Schlesinger has no prior history of discipline. *Standards* § 9.32(a).
 2. Schlesinger's conduct was not dishonestly motivated. *Standards* § 9.32(b).
 3. Schlesinger fully and freely cooperated in the Bar's investigation of his conduct and in this formal proceeding. *Standards* § 9.32(e).
 4. Schlesinger has expressed remorse for his conduct. *Standards* § 9.32(l).

12.

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. Similarly, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, and 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. 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.

13.

Oregon cases also hold that a suspension is appropriate where attorneys fail to abide by client directives, fail to adequately communicate or explain matters to a client, and engage in conflicts of interest. *See, e.g., In re Erm*, 30 DB Rptr 1 (2016) (respondent who represented a wife who lived in Utah with her three children in a dissolution and custody determination filed by husband in Oregon, was suspended 30 days when he made an initial court appearance and moved to sever the custody matter from the dissolution proceeding but did not file a response to the husband's petition for dissolution; did not contest Oregon's jurisdiction in the dissolution; and did not notify the court of his withdrawal. When husband moved for a default in the dissolution, Respondent did not respond or object to the motion, or forward the motion or subsequent order of default and proposed general judgment to wife or to her Utah attorney); *In re Billman*, 27 DB Rptr 126 (2013) (attorney was suspended for 30 days where he agreed to settlement of a domestic relations matter and recited terms into the record without having confirmed with his client whether she was agreeable to the terms and conditions, and allowed a judgment to be entered to that effect); *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (attorney's failure to respond to his personal injury client's status inquiries, failure to inform

the client of communications with the adverse party and with the client's own insurer, and failure to explain the strategy attorney decided upon regarding settlement negotiations, were not just poor client relations; attorney was suspended for 30 days because he kept from the client precisely the kind of information that the client needed to know to make informed decisions about the case); *In re Ainsworth*, 20 DB Rptr 65 (2006) (attorney was suspended for 30 days when he allowed a client's civil claim to become time-barred, and did not communicate with the court, an arbitrator, opposing counsel, or his client. Attorney failed to withdraw when the opposing party moved for summary judgment and sought prevailing party fees and costs from the client, at a time when attorney's judgment on behalf of the client was likely to be affected by his own interests arising from his lack of diligence); *In re Cherry*, 20 DB Rptr 59 (2006) (attorney who represented her sister in becoming guardian and conservator over the sister's granddaughter, despite attorney's reservations concerning the sister's suitability, was suspended for 30 days when she thereafter encouraged other family members to intervene and seek the sister's removal as guardian and conservator, contrary to the sister's wishes and objectives); *In re Wilkerson*, 17 DB Rptr 79 (2003) (attorney was suspended for 30 days when he failed to serve defendants within applicable statute of limitations, resulting in the dismissal of the clients' claim and an award of fees and costs against the clients. Attorney then prepared an agreement for the clients' signature to settle any malpractice claim against attorney, without disclosing his self-interest conflict).

14.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Schlesinger shall be suspended for thirty (30) days for his violations of RPC 1.2(a); RPC 1.4(a); RPC 1.4(b); RPC 1.7(a)(2); and RPC 1.16(a)(1). However, all of the suspension shall be stayed, pending Schlesinger's successful completion of a one (1)-year term of probation. The sanction shall be effective upon approval by the Disciplinary Board ("effective date").

16.

Probation shall commence upon the effective date and shall continue for a period of one year, ending on the day prior to the first (1st) year anniversary of the effective date (the "period of probation"). During the period of probation, Schlesinger shall abide by the following conditions:

- (a) Schlesinger will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Schlesinger has been represented in this proceeding by Mark J. Fucile ("Fucile"). Schlesinger and Fucile hereby authorize direct communication between Schlesinger and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Schlesinger's compliance with his probationary terms.
- (c) Schlesinger shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (d) During the period of probation, Schlesinger shall attend not less than four (4) MCLE accredited programs, for a total of twelve (12) hours, which shall emphasize law practice management, time management, effective client communications, and recognizing conflicts of interest. These credit hours shall be in addition to those MCLE credit hours required of Schlesinger for his normal MCLE reporting period. (The Ethics School requirement does not count towards the twelve (12) hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Schlesinger shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the period of probation, Schlesinger shall diligently attend to client matters and adequately communicate with clients regarding their cases. Schlesinger shall also be diligent about recognizing and avoiding conflicts of interest, including obtaining necessary informed consent, following full disclosure, where required.
- (f) Each month during the period of probation, Schlesinger 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, and properly spotting and addressing potential conflicts of interest.
- (g) Jeffrey Paul Thayer (OSB No. 983592) shall serve as Schlesinger's probation supervisor ("Supervisor"). Schlesinger shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Schlesinger's clients, the profession, the legal system, and the public. Schlesinger agrees that, if Supervisor ceases to be his Supervisor for any reason, Schlesinger will immediately notify DCO and engage a new Supervisor, approved by DCO, within thirty (30) days.

- (h) Beginning with the first month of the period of probation, Schlesinger shall meet with Supervisor in person at least once a month for the purpose of allowing his Supervisor to review the status of Schlesinger's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) active client files or ten percent (10%) of Schlesinger's active case load, whichever is greater, to determine whether Schlesinger is timely, competently, diligently, and ethically attending to matters, including taking reasonably practicable steps to protect his clients' interests upon the termination of employment, and properly spotting and addressing potential conflicts of interest.
- (i) Schlesinger authorizes his Supervisor to communicate with DCO regarding his compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Schlesinger's compliance.
- (j) Within seven (7) days of the effective date, Schlesinger shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF's Practice Management Advisors in order to obtain practice management advice. Schlesinger shall notify DCO of the time and date of the appointment.
- (k) Schlesinger shall attend the appointment with the PLF's Practice Management Advisors and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF's Practice Management Advisors, Schlesinger shall adopt and implement those recommendations.
- (l) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Advisors, Schlesinger shall provide a copy of the Office Practice Assessment from the PLF's Practice Management Advisors and file a report with DCO stating the date of his consultation(s) with the PLF's Practice Management Advisors; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (m) On a monthly basis, on dates to be established by DCO beginning no later than thirty (30) days after the effective date, Schlesinger shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor,

advising whether Schlesinger is in compliance with the terms of this Stipulation for Discipline, including:

- (1) The dates and purpose of Schlesinger's meetings with his Supervisor.
 - (2) The number of Schlesinger's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Schlesinger has completed the other provisions recommended by his Supervisor, if applicable.
 - (4) In the event that Schlesinger has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (n) Schlesinger is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (o) Schlesinger's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (p) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (q) The SPRB's decision to bring a formal complaint against Schlesinger for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

17.

Schlesinger 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 his suspension, if any stayed period of suspension is actually imposed. In this regard, if any stayed period of suspension is actually imposed, Schlesinger has arranged for Jeffrey Paul Thayer (OSB No. 983592), an active member of the Bar, to either take possession of or have ongoing access to Schlesinger's client files and serve as the contact person for clients in need of the files during the term of his actual suspension. Schlesinger represents that Mr. Thayer has agreed to accept this responsibility.

18.

Schlesinger 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 noncompliance 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.

Schlesinger 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.

19.

Schlesinger 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, if a suspension is imposed. This requirement is in addition to any other provision of this agreement that requires Schlesinger to attend or obtain continuing legal education (CLE) credit hours.

20.

Schlesinger 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 Schlesinger is admitted: Washington, Federal District Court for Oregon and the Federal Western District of Washington.

21.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 23, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 2nd day of April, 2018.

/s/ Andrew Schlesinger

Andrew Schlesinger
OSB No. 065008

APPROVED AS TO FORM AND CONTENT:

/s/ Mark J. Fucile

Mark J. Fucile
OSB No. 822625

EXECUTED this 12th day of April, 2018.

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. 18-45
)	
JOSHUA RANDALL TRIGSTED,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	April 18, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Joshua Randall Trigsted is publically reprimanded for violation of RPC 4.2.

DATED this 18th day of April, 2018.

/s/ Mark A. Turner

 Mark A. Turner
 Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Joshua Randall Trigsted, attorney at law (“Trigsted”), and the Oregon State Bar (“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.

Trigsted 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 Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Trigsted 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 10, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Trigsted for alleged violation of RPC 4.2 (unauthorized communication with a represented party) 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.

Prior to May 8, 2017, Trigsted undertook to represent Julie Taylor-Shelton (“Taylor-Shelton”) and Maria Kounalis (“Kounalis”) in separate alleged Federal Fair Debt Collection Practices Act claims against Credit Associates, Inc. (“CAI”). Wesley Fisher (“Fisher”) was CAI’s president. Attorney Lawrence Erwin (“Erwin”) represented CAI.

6.

On May 8, 2017, Erwin notified Trigsted that he represented CAI with respect to the Taylor-Shelton dispute.

7.

In mid-May, Erwin sent Trigsted an email relating to the Taylor-Shelton claim. Erwin copied Fisher and CAI employee Nick on his email. Trigsted replied to Erwin, and copied Fisher and Nick. Over the next several weeks, when Erwin emailed Trigsted and copied Fisher and Nick, Trigsted replied solely to Erwin.

8.

On July 6, 2017, in response to a demand letter Trigsted sent to CAI on the Kounalis claim, Fisher notified Trigsted that Erwin represented CAI on the Kounalis matter and asked Trigsted to direct all communication to Erwin. After acknowledging notice of the representation, Trigsted “replied all” to an email from Erwin on August 30, 2017, copying Fisher on that communication.

Violations

9.

Trigsted admits that his inadvertent communications to CAI representatives Fisher and Nick in his responses to Erwin's emails in May and June regarding the Taylor-Shelton claim, and in August regarding the Kounalis claim, constituted improper communications with a represented party, in violation of RPC 4.2.

Sanction

10.

Trigsted 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* ("Standards"). The *Standards* require that Trigsted'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.** Trigsted violated his duty to the legal system to refrain from improper communications with represented parties. *Standards* § 6.3.
- b. **Mental State.** Trigsted acted negligently. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9.
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury can be considered. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). While there was no actual injury, Trigsted's direct communication with CAI agents, particularly Fisher, had the potential to interfere with Fisher's relationship with CAI, and created the risk that Fisher may have act without advice of counsel.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. In 2011, Trigsted was admonished for a violation of RPC 4.2 for an email he sent to a represented party. *Standards* § 9.22(a); *Standards* § 8.3(b).
 2. Trigsted has substantial experience in the practice of law, having been admitted in Oregon in 2006. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
 2. Full and free disclosure and cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).

11.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. *Standards* § 6.33.

12.

Oregon case law favors reprimand under similar circumstances. *See, e.g., In re Newell*, 348 Or 396, 234 P3d 967 (2010) (reprimand for communication with a represented party on the subject of the representation, even though not precisely the same case); *In re Knappenberger*, 338 Or 341, 360, 108 P3d 1161 (2005) (but for other conduct by respondent, court agreed that reprimand may have been sufficient for his communication with a represented party); *In re Lewelling*, 296 Or 702, 706–07, 678 P2d 1229 (1984) (noting three prior cases imposing reprimands for lawyers who communicated with represented persons, but there imposing suspension because of additional violations).

13.

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

14.

Trigsted 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. This requirement is in addition to any other provision of this agreement that requires Trigsted to attend or obtain continuing legal education (CLE) credit hours.

15.

Trigsted 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 Trigsted is admitted: Washington and Utah.

16.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 10, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re Trigsted*, 32 DB Rptr 208 (2018)

EXECUTED this 12th day of April, 2018.

/s/ Joshua Randall Trigsted

Joshua Randall Trigsted

OSB No. 065316

EXECUTED this 16th day of April, 2018.

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. 18-03 and 18-44
)	
ALLEN R. PETERS,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Respondent:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c), and RPC 8.4(a)(4). Stipulation for Discipline. 8-month suspension, all but 30 days stayed, 2-year probation.
Effective Date of Order:	May 21, 2018

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 eight months, with all but 30 days stayed subject to Peters successfully completing two years of probation, effective May 21, 2018.

/s/ Thomas A. Balmer
 Thomas A. Balmer
 Chief Justice, Supreme Court
 5/3/2018 9:21 a.m.

STIPULATION FOR DISCIPLINE

Allen R. Peters, attorney at law (“Peters”), and the Oregon State Bar (“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.

Peters was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 27, 1994, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Peters 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 29, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Peters (Case No. 18-03) for alleged violations of RPC 1.15-1(a) (duty to hold client and third-party funds separate from a lawyer’s own funds); RPC 1.15-1(b) (deposit of a lawyer’s own funds into trust for reasons other than bank service fees or minimum balance requirements); and RPC 1.15-1(c) (duty to deposit and maintain client funds in trust until earned or costs incurred) of the Oregon Rules of Professional Conduct.

5.

On March 10, 2018, the SPRB authorized formal disciplinary proceedings against Peters (Case No. 18-44) for alleged violations of RPC 1.3 (neglect of a legal matter); and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

6.

The parties intend that this stipulation set forth all relevant facts, violations and that the agreed-upon sanction act as a final disposition of this proceeding.

Trust Account Matter

(Case No. 18-03)

Facts

7.

On September 27, 2017, Peters wrote a check for \$400 from his lawyer trust account against a balance of \$110.56. Peters thought his trust account held approximately \$1,126 at the time. The bank did not honor the check or assess a return item fee against Peters’ trust account.

8.

After receiving notice of the overdraft, Peters and his legal assistant reviewed his trust account ledgers and determined that there was a \$1,015.50 deficit in the trust account. To address it, Peters transferred that amount from his personal funds into his trust account, bringing the account back to the \$1,126 amount he believed should have been on deposit in his trust account. Peters then reviewed his client ledgers and trust account statements to attempt to determine the source of the \$1,015 trust account deficit.

9.

Peters and his legal assistant have since identified five transactions for four separate clients that were either misrecorded in his ledgers and/or removed from the trust account in error. Several of the transactions were drafts accidentally made from the trust account that should have been paid through his general account, such a medical records request, service fees, and translation fees. In some cases, the transaction was recorded in the business account, but a trust account check was printed and submitted to the vendor. Through his audit, Peters located and corrected the bookkeeping errors, and was eventually able to determine the source of the various funds.

Violations

10.

Peters admits that his premature removal of \$1,015.50 in unearned client money from his trust account and use of it for other clients' vendor payments over, at minimum, a 6-month period of time constituted a failure to properly safeguard client property, in violation of RPC 1.15-1(a).

Peters further admits that his deposit of \$1,015.50 of his own funds into trust to correct his miscalculated trust account balance violated RPC 1.15-1(b), in that the deposit was not made to cover a bank fee nor did it represent a minimum balance requirement.

Finally, Peters admits that his mistaken removal of \$1,015.50 in trust account funds belonging to other clients to make payments pertaining to someone else constituted a failure to maintain client funds in trust until earned or costs incurred, in violation of RPC 1.15-1(c).

West Linn Municipal Court Matter

(Case No. 18-44)

Facts

11.

Prior to April 20, 2016, Peters undertook to represent Macie Reynolds ("Reynolds") in connection with a municipal speeding citation in West Linn.

12.

On April 20, 2016, the West Linn prosecutor, Amy Lindgren (“Lindgren”), sent an email to Peters offering to settle Reynolds’ case. Peters did not respond. On May 18, 2016, Lindgren sent a follow-up email, indicating her assumption that Reynolds had rejected the offer. On May 24, 2016, Peters emailed Lindgren that he would advise his client to accept and that he would confirm within the day.

13.

On or about May 24, 2016, Peters discussed the offer with Reynolds. Reynolds rejected the offer and Peters informed Reynolds that, as a result, a trial would be scheduled. Peters made no effort to follow up with Lindgren regarding his client’s decision to reject the offer.

14.

On June 30, 2016, having heard nothing further from Peters, West Linn municipal staff emailed Peters a notice of trial set for August 11, 2016. Peters received the June 30 trial notice but failed to put it on his calendar, respond to the court, or notify his client. Neither Peters nor Reynolds appeared at trial on August 11, 2016, and a default judgment was entered against Reynolds.

Violations

15.

Peters admits that he engaged in a course of neglectful conduct throughout his representation of Reynolds that violated RPC 1.3. He failed to discuss West Linn’s offer with his client until he received the second request from Lindgren; failed to communicate that his client had rejected the offer; failed to respond to the trial notice; failed to inform his client of the trial date; failed to put the date on his calendar; and Peters failed to appear at trial.

Peters also admits that these failures caused prejudice to the administration of justice in violation of RPC 8.4(a)(4).

Sanction

16.

Peters and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (“Standards”). The *Standards* require that Peters’ 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.** Peters violated his duties to clients to safeguard and preserve client property and to diligently attend to client matters. *Standards* §§ 4.1; 4.4. The *Standards* presume that the most important ethical duties are those which

lawyers owe to their clients. *Standards* at 5. Peters also violated a duty he owed to the legal system to avoid conduct prejudicial to the administration of justice. *Standards* § 6.0.

- b. **Mental State.** Peters acted negligently and knowingly. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.*

Peters knew that he was not adequately monitoring his trust account. Peters knowingly failed to inform the court of his client’s decision to reject settlement and then he negligently failed to monitor his email, which resulted in his failure to be aware of the trial date and to notify his client.

- c. **Injury.** Injury can be actual or potential. *Standards* § 3.0. With respect to his trust account issues, Peters’ clients were actually injured to the extent that their funds were improperly removed from trust and used for other clients’ matters or for purposes unrelated to their legal matters. These clients were potentially injured to the extent that Peters may not have had the funds to replenish the account and make them whole.

With respect to the West Linn Municipal Court matter, Reynolds suffered actual injury through Peters’ lack of action, which resulted in the default judgment against her. The Oregon Supreme Court has held that there is actual injury to a client when an attorney fails to actively pursue the client’s matter. *See, e.g., In re Parker*, 330 Or 541, 9 P3d 107 (2000). The court sustained actual injury because of Peters’s failure to appear at trial, which wasted judicial time and resources.

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

1. A prior history of discipline. *Standards* § 9.22(a). In 2003, Peters was admonished for a violation of DR 9-101(A) (*current* RPC 1.15-1(a) & (c)) for mismanaging his lawyer trust account. *See In re Cohen*, 330 Or 489, 8 P3d 953 (2000) (a letter of admonition is 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 the case at bar).
2. A pattern of misconduct. *Standards* § 9.22(c). The separate but multiple transactions that led to the violations in this matter, taken together with Peters’ prior misconduct, show a pattern of mishandling of client funds,

as well as his lawyer trust account. See *In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *In re Schaffner*, 325 Or 421, 427, 939 P2d 39 (1997).

3. Multiple offenses. *Standards* § 9.22(d).
 4. Substantial experience in the practice of law. *Standards* § 9.22(i). Peters has been admitted in Oregon since 1994.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest motive. *Standards* § 9.32 (b).
 2. Personal or emotional problems. *Standards* § 9.32(c). Peters' son was hospitalized during part of the time period at issue in the West Linn Municipal matter.
 2. Timely good-faith efforts to rectify the consequences of his misconduct. *Standards* § 9.32(d).
 3. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e). Peters has been cooperative throughout the Bar's investigation and in these formal proceedings.

17.

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. Similarly, 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 engages in a pattern of neglect and causes injury or potential injury to a client. *Standards* § 4.42. A reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards* § 7.3.

Even if Peters' aggravating and mitigating factors are determined to be in equipoise, some period of suspension is warranted.

18.

Oregon cases reach a similar result with respect to both types of matters at issue. Serious trust account mismanagement results in significant suspensions. See, e.g., *In re Peterson*, 32 DB Rptr __ (2018) (respondent was suspended for 6 months, all but 30 days stayed, with a 2-year probation for failing to properly track and account for client funds over several months, resulting in the mishandling of funds and the overdraft of her lawyer trust account, which she immediately rectified with personal funds); *In re Kmetic*, 30 DB Rptr 250 (2016) (respondent was suspended for 6 months, all but 30 days stayed, with a 2-year probation when, for convenience reasons, she purportedly deposited two clients' advance cash payments

into her personal account, writing a personal check to her trust account that was dishonored and reversed, leaving a negative trust balance. When two more checks were presented for payment on the trust account against a near-zero balance, the bank honored the checks and charged overdraft fees, exhausting all remaining client funds in trust); *In re Krueger*, 29 DB Rptr 273 (2015) (respondent was suspended for 6 months, 90 days stayed, with a 2-year probation where he prematurely removed settlement funds from trust representing his anticipated fee which the rule required be maintained in trust prior to court approval, and removed a portion of his clients' settlement proceeds from trust months before his associate obtained signed releases from the clients—a prerequisite to respondent being allowed to take the money per the insurance company's instructions); *In re Bertoni*, 26 DB Rptr 25 (2012) (attorney suspended for 150 days when, over an extended period, attorney negligently withdrew client funds from his law firm's trust account before the funds were earned, failed to maintain complete trust account records as required by the rule, and periodically deposited his own funds into the firm trust account in amounts that exceeded bank service charges and minimum balance requirements).

Similarly, neglect of legal matters also typically results in at least a short period of suspension. *See, e.g., In re Smale*, 30 DB Rptr 51 (2016) (attorney who negligently and knowingly failed to take steps to advance her client's matter and failed to notify and communicate with her client for two years, including about an adversary proceeding and a resulting default judgment, caused actual and potential injury to her client, received a 60-day suspension, all stayed, pending a 2-year probation); *In re Noren*, 29 DB Rptr 294 (2015) (suspended attorney for 30 days for agreeing to act as a hearing officer and taking no further action, except for sending a scheduling letter, which resulted in violations of RPC 1.3 and RPC 8.4(a)(4)); *In re Vernon*, 29 DB Rptr 12 (2015) (attorney who negligently and knowingly failed to file a postconviction relief petition and reinstatement after dismissal caused actual and potential harm to her client received a 60-day suspension, all stayed, pending a 2-year probation); *In re Hughes*, 22 DB Rptr 313 (2008) (attorney with prior disciplinary offenses suspended for 120 days for failing to diligently pursue two probate matters, which also amounted to conduct prejudicial to the administration of justice); *In re Redden*, 342 Or 393 (2007) (respondent given a 60-day suspension where he failed to diligently pursue his client's case and also failed to adequately communicate with his client); *In re Obert*, 335 Or 640 (2004) (attorney suspended for 30 days when he failed to pursue a client's adoption matter when he could not locate the birth father and did not know how to proceed); *In re Dugger*, 299 Or 21 (1985) (attorney suspended for 63 days for neglecting a legal matter and misrepresenting the status to his client).

19.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which

may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

20.

Consistent with the *Standards* and Oregon case law, the parties agree that Peters shall be suspended for eight (8) months for violations of RPC 1.3; RPC 1.15-1(a); RPC 1.15-1(b); RPC 1.15-1(c); and RPC 8.4(a)(4), with all but thirty (30) days of the suspension stayed, pending Peters' successful completion of a two (2)-year term of probation. The sanction shall be effective April 23, 2018, or ten (10) days after approval by the Oregon Supreme Court, whichever is later ("effective date").

21.

Peters' license to practice law shall be suspended for a period of thirty (30) days beginning on the effective date ("actual suspension"), assuming all conditions have been met. Peters understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Peters re-attains his active membership status with the Bar, Peters shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

22.

Probation shall commence upon the date Peters is reinstated to active membership status and shall continue for a period of two (2) years, ending on the day prior to the second (2nd) year anniversary of the commencement date (the "period of probation"). During the period of probation, Peters shall abide by the following conditions:

- (a) Peters will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Peters has been represented in this proceeding by Christopher Hardman ("Hardman"). Peters and Hardman hereby authorize direct communication between Peters and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Peters' compliance with his probationary terms.
- (c) Peters shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.

- (d) During the period of probation, Peters shall attend not less than eight (8) MCLE accredited programs, for a total of twenty-four (24) hours, which shall emphasize law practice management, time management, and proper handling of lawyer trust accounts. These credit hours shall be in addition to those MCLE credit hours required of Peters for his normal MCLE reporting period. (The Ethics School and Trust Accounting School requirements do not count toward the twenty-four (24) hours needed to comply with this condition.) Upon completion of the MCLE programs described in this paragraph, and prior to the end of his period of probation, Peters shall submit an Affidavit of Compliance to DCO.
- (e) Prior to the end of the period of probation, Peters shall attend Trust Accounting School, offered by the Oregon State Bar twice a year in the spring and fall. Upon completion of Trust Accounting School, and prior to the end of his period of probation, Peters shall submit an Affidavit of Compliance to DCO.
- (f) Throughout the term of probation, Peters shall diligently attend to client matters and adequately communicate with clients regarding their cases. Peters shall also regularly monitor and reconcile his business and trust bank accounts.
- (g) Each month during the period of probation, Peters 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, and properly handling and accounting for client funds.
- (h) Each month during the period of probation, Peters shall:
 - (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills;
 - (2) review his monthly trust account records and client ledgers and reconcile those records with his monthly lawyer trust account bank statements; and
 - (3) ensure that checks drawn on his lawyer trust account are properly recorded as having come from that account and that the cost or expense which they cover is a legitimate use of trust funds.
- (i) For the period of probation, Peters will employ a bookkeeper approved by DCO to assist in the monthly reconciliation of his lawyer trust account records and client ledger cards.
- (j) On or before the day prior to the first (1st) and second (2nd) year anniversary of the commencement date, Peters shall arrange for an accountant to conduct

an audit of his lawyer trust account and to prepare a report of the audit for submission to DCO within thirty (30) days thereafter.

- (k) Jeffrey S. Seymour (OSB No. 793881) shall serve as Peters' probation supervisor ("Supervisor"). Peters shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Peters' clients, the profession, the legal system, and the public.
- (l) Beginning with the first month of the period of probation, Peters shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing his Supervisor to review the status of Peters' law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) active files or ten percent (10%) of active files, whichever is greater, to determine whether Peters is timely, competently, diligently, and ethically attending to matters, including adequately communicating with his clients and the court.
 - (2) Permitting his Supervisor to inspect and review Peters' accounting and record keeping systems to confirm that he is reviewing and reconciling his lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Peters agrees that his Supervisor may contact all employees and independent contractors who assist Peters in the review and reconciliation of his lawyer trust account records.
- (m) Peters authorizes his Supervisor to communicate with DCO regarding his compliance or non-compliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Peters' compliance.
- (n) Within seven (7) days of his reinstatement date, Peters shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF's Practice Management Advisors in order to obtain practice management advice. Peters shall schedule the first available appointment with the PLF's Practice Management Advisors and notify DCO of the time and date of the appointment.
- (o) Peters shall attend the appointment with the PLF's Practice Management Advisors and seek advice and assistance regarding procedures for diligently pursuing client matters; communicating with clients, opposing parties/counsel, and the court; effectively managing a client caseload; and procedures for handling his lawyer trust account. No later than thirty (30) days after

recommendations are made by the PLF's Practice Management Advisors, Peters shall adopt and implement those recommendations.

- (p) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Advisors, Peters shall provide a copy of the Office Practice Assessment from the PLF's Practice Management Advisors and file a report with DCO stating the date of his consultation(s) with the PLF's Practice Management Advisors; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (q) On a quarterly basis, on dates to be established by DCO beginning no later than ninety (90) days after his reinstatement to active membership status, Peters shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor and his bookkeeper, advising whether Peters is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Peters' meetings with his Supervisor.
 - (2) The number of Peters' active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) The dates and results of Peters' reconciliations of his business and trust accounts.
 - (4) The dates Peters' bookkeeper assisted in the monthly reconciliation of his lawyer trust account records and client ledger cards, as well as confirmation of Peters' results thereof.
 - (5) Whether Peters has completed the other provisions recommended by his Supervisor, if applicable.
 - (6) In the event that Peters has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (r) Peters is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (s) Peters' failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (t) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.

- (u) The SPRB's decision to bring a formal complaint against Peters for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

23.

Peters 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 actual suspension. In this regard, Peters has arranged for Jeffrey S. Seymour (OSB No. 793881), an active member of the Bar, to either take possession of or have ongoing access to Peters' client files and serve as the contact person for clients in need of the files during the term of his actual suspension. Peters represents that Jeffrey S. Seymour has agreed to accept this responsibility.

24.

Peters 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. Peters 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.

Peters 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. This requirement is in addition to any other provision of this agreement that requires Peters to attend or obtain continuing legal education (CLE) credit hours.

26.

Peters 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 Peters is admitted: Washington.

27.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 10, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 16th day of March, 2018.

/s/ Allen R. Peters

Allen R. Peters

OSB No. 941686

APPROVED AS TO FORM AND CONTENT:

/s/ Christopher R. Hardman

Christopher R. Hardman

OSB No. 792567

EXECUTED this 26th day of March, 2018.

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. 17-55
)
SAMUEL E. CHAMPER,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: Peter R. Jarvis
Disciplinary Board: None
Disposition: Violation of RPC 8.4(a)(2) and ORS 9.527(2). Stipulation for Discipline. Six-month suspension.
Effective Date of Order: May 28, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Samuel E. Champer is suspended for six (6) months, effective ten (10) days after approval by the Disciplinary Board, for violations of RPC 8.4(a)(2) and ORS 9.527(2).

DATED this 18th day of May, 2018.

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

STIPULATION FOR DISCIPLINE

Samuel E. Champer, attorney at law (“Champer”), and the Oregon State Bar (“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.

Champer was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 2, 2014, and has been a member of the Bar continuously since that time, having his office and place of business in Lane County, Oregon.

3.

Champer 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 August 26, 2017, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Champer for alleged violations of RPC 8.4(a)(2) (criminal conduct reflecting adversely on fitness to practice law) and ORS 9.527(2) (criminal conviction involving moral turpitude) 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.

At all relevant times herein, ORS 163.700(1) provided, in part:

[A] person commits the crime of invasion of personal privacy if:

(a)(A) The person knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the person being recorded; and

(B) At the time the visual recording is made or recorded the person being recorded is in a place and circumstances where the person has a reasonable expectation of personal privacy.

6.

At all relevant times herein, ORS 163.700(2)(b) defined nudity as any part of the uncovered or less than opaquely covered: genitals; pubic area; or female breast below a point immediately above the top of the areola.

7.

At all times relevant herein, ORS 161.405(2)(e) provided that a person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.

8.

Prior to May 2016, Champer, his long-time girlfriend, and his girlfriend's sister ("Sister") rented a house in Eugene together. Champer and his girlfriend shared a bathroom on the ground floor; Sister used the bathroom upstairs.

9.

On or prior to May 23, 2016, Champer placed a camera in the upstairs bathroom fan. Sister, who had not consented to being filmed, located the camera, and upon reviewing its memory card, found footage of Champer installing the camera, and placing it so that it would capture images of the shower and toilet areas of the bathroom.

10.

When confronted by police, Champer admitted to having placed the camera in the upstairs bathroom fan. Champer was subsequently convicted of an attempt to invade a person's privacy, a Class B Misdemeanor.

Violations

11.

Champer admits that he committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness in other respects, in violation of RPC 8.4(a)(2). Champer further admits that his conviction was for a misdemeanor involving moral turpitude, in violation of ORS 9.527(2).

Sanction

12.

Champer 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* ("Standards"). The *Standards* require that Champer'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.** Champer's criminal conduct violated his duty to the public to maintain his personal integrity. *Standards* § 5.1.
- b. **Mental State.** An element of the criminal conduct at issue requires a knowing mental state and the facts also support that Champer acted with "the conscious

awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Standards* p 9.

- c. **Injury.** There was both actual and potential injury to Sister, the victim of his criminal conduct.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 - 1. Dishonest and selfish motive. *Standards* § 9.22(b).
 - 2. A vulnerable victim. *Standards* § 9.22(h).
 - 3. Illegal conduct. *Standards* § 9.22(k).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 - 1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 - 2. Full and free disclosure in these disciplinary proceedings, including cooperation in the Bar’s investigation of his conduct. *Standards* § 9.32(e).
 - 3. Imposition of other penalties or sanctions in the form of fines and other sentencing requirements related to Champer’s criminal case, including a 24-month term of probation. *Standards* § 9.32(k).
 - 4. Champer expressed that he is extremely remorseful for his conduct and for the harm it caused. He is dismayed at his behavior and the poor judgment he displayed. *Standards* § 9.32(l).

13.

Under the ABA *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on the lawyer’s fitness to practice law. *Standard* § 5.12.

14.

Oregon cases are in accord that a substantial suspension is appropriate. *See, e.g., In re Chase*, 30 DB Rptr 384 (2016) (6-month suspension, stayed pending probation, for respondent whose verbal altercation in bar escalated to two counts of unlawful use of a weapon with a firearm, a felony, and two counts of menacing, a misdemeanor); *In re Light*, 29 DB Rptr 263 (2015) (7-month suspension, all but 30 days stayed, 3-year probation where attorney placed a camera in his minor step-daughter’s bedroom with the intention of filming her without her knowledge or consent. When the step-daughter located the camera, it contained footage of her that constituted invasion of personal privacy, resulting in the attorney’s misdemeanor conviction); *In re Millar*, 29 DB Rptr 197 (2015) (attorney suspended for 6 months for failing to make proper filings for or pay employee taxes and withholdings to the government each

quarter for many years, in violation of federal law); *In re O'Connor*, 20 DB Rptr 42 (2006) (concerned about possibly failing a pre-employment drug test for a job as a deputy district attorney because of prior marijuana use, attorney diluted her urine samples during the test and consumed a detoxifier (Class B misdemeanor). When confronted by her prospective employer, attorney initially denied any drug use or test tampering. Collective misconduct resulted in a 1-year suspension); *In re Kimmel*, 332 Or 480 (2001) (6-month suspension for shoplifting violation); *In re Allen*, 326 Or 107 (1997) (1-year suspension for misdemeanor attempted possession of a controlled substance in assisting known addict in the purchase of narcotics); *In re Gudger*, 11 DB Rptr 171 (1997) (7-month suspension for felony possession and use of cocaine).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Champer shall be suspended for six (6) months for his violations of RPC 8.4(a)(2) and ORS 9.527(2), effective ten (10) days after approval by the Disciplinary Board.

16.

Champer 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, Champer represents that he is not currently practicing law and therefore has no active client files requiring a custodian during the period of his suspension.

17.

Champer 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. Champer 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.

Champer 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.

Champer 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 Champer is admitted: none.

20.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 30, 2018. Approval as to form by Disciplinary Counsel is evidenced below. 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 April, 2018.

/s/ Samuel E. Champer

Samuel E. Champer
OSB No. 142924

APPROVED AS TO FORM AND CONTENT:

/s/ Peter R. Jarvis

Peter R. Jarvis
OSB No. 761868

EXECUTED this 9th day of May, 2018.

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. 17-44
)
MARK G. OBERT,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: David J. Elkanich
Disciplinary Board: None
Disposition: Violation of RPC 1.7(a)(2), RPC 1.9(a), RPC 1.16(a)(1),
RPC 1.16(a)(3), and RPC 1.16(d). Stipulation for
Discipline. 30-day suspension, all stayed, one-year
probation.
Effective Date of Order: May 21, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Mark G. Obert is suspended for 30 days, all stayed, pending successful completion of a one (1)-year term of probation, effective upon approval by the Disciplinary Board, for violation of RPC 1.7(a)(2); RPC 1.9(a); RPC 1.16(a)(1); RPC 1.16(a)(3); and RPC 1.16(d).

DATED this 21st day of May, 2018.

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

STIPULATION FOR DISCIPLINE

Mark G. Obert, attorney at law (“Obert”), and the Oregon State Bar (“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.

Obert 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 Bar continuously since that time, having his office and place of business in Yamhill County, Oregon.

3.

Obert 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, 2017, a Formal Complaint was filed against Obert pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of the following Rules of Professional Conduct: RPC 1.7(a)(2) (accepting representation of a current client when the representation was materially limited by responsibilities to a past client); RPC 1.9(a) (former-client conflict of interest); RPC 1.15-1(d) (duty to promptly account for and return client property); RPC 1.16(a)(1) (duty to withdraw from representation of a client when the representation would result in violation of Rules of Professional Conduct or other law); RPC 1.16(a)(3) (duty to withdraw from representation following discharge); and RPC 1.16(d) (duty to return client property at the termination of representation). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In March 2010, Obert was appointed to represent Jennifer Healon (“Healon”) on third degree theft and a probation violation. The alleged theft occurred when Healon visited a Safeway with Rick White Eagle Weaver (“Weaver”).

6.

On May 10, 2010, a man assaulted a business owner with a claw hammer, making off with approximately \$700 and various other items (“May 10 robbery”). The man was caught on video and identified by multiple witnesses as Weaver.

7.

On May 12, 2010, Weaver and Healon were found by police in a Motel 6. Healon made statements to police that were self-incriminating as to her own drug use that day (“May 12 drug use”) and that implicated Weaver in the May 10 robbery.

8.

On May 12, 2010, Weaver was arraigned on multiple felony charges including, but not limited to, the May 10 robbery. On that same day, Scott Howell (“Howell”) was appointed as Weaver’s counsel.

9.

On May 26, 2010, Healon was arraigned on new probation violations stemming from her May 12 drug use with Weaver and her use of funds obtained in Weaver’s May 10 robbery to rent the hotel room and purchase the meth that was on hand when the police appeared. Obert was listed as Healon’s attorney of record for that appearance.

10.

On May 28, 2010, Obert represented Healon in a hearing at which a judgment and a sentence were entered into the record on her theft charge, as well as the probation violation from that charge, and the probation violation in connection with her May 12 drug use with Weaver.

11.

In late-July 2011, Howell withdrew from representing Weaver and Obert was appointed to represent Weaver.

12.

During Obert’s representation, Healon testified in front of a grand jury concerning the May 10 robbery and her May 12 drug use with Weaver, including the purchase of a hotel room with money from Weaver. Obert has reported that he was not aware she was testifying before the grand jury. He did not represent her in connection with her testimony.

13.

Healon’s status as a central witness to Weaver’s crime created a potential conflict of interest for Obert in his representing Weaver after having represented Healon in charges stemming from the same series of events. To the extent that written consent following full disclosure of this former conflict was available to ameliorate the conflict, Obert failed to provide such disclosure to either Healon or Weaver or obtain their written consent to his continued representation of Weaver. Failing obtaining consent, Obert failed to withdraw from Weaver’s representation.

14.

Weaver became dissatisfied with Obert's representation and attempted to fire him on more than one occasion during the representation. After Obert spoke with Weaver regarding his concerns, he believed that Weaver was comfortable with him continuing as his counsel. Accordingly, Obert did not seek to withdraw or present the matter to the Court.

15.

On October 24, 2011, represented by Obert, Weaver pled guilty to the May 10 robbery and was sentenced to 300 months.

16.

Two days after the court sentenced Weaver, Weaver requested a copy of his file to facilitate his appeal, and later his post-conviction case. Obert did not provide it, or explain why he could not provide it.

17.

In April 2012, Weaver filed a motion to compel production of the file. In May 2012, Obert provided Weaver a copy of his file.

Violations

18.

Obert admits that his continued representation of Weaver constituted a former client conflict of interest that, without obtaining informed consent, violated RPC 1.7(a)(2), RPC 1.9(a) and RPC 1.16(a)(1).

19.

Obert further admits his failure to withdraw or take other steps in response to Weaver's requests that he be removed violated RPC 1.16(a)(3).

20.

Finally, Obert admits that his failure to more timely provide Weaver's file following the conclusion of the representation amounted to a failure to take reasonable steps upon withdrawal to protect his client's interests, including the return of client property, in violation of RPC 1.16(d).

21.

Upon further factual inquiry, the parties agree that the charge of Obert's alleged violation of RPC 1.15-1(d) should be and, upon the approval of this stipulation, is dismissed.

Sanction

22.

Obert 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* (“Standards”). The *Standards* require that Obert’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.** Obert’s failure to sooner provide Weaver with his client file violated his duty to his client to properly handle client property. *Standards* § 4.1. Similarly, Obert’s representation of Weaver without informed consent violated his duty to his clients to avoid conflicts of interest. *Standards* § 4.3. Obert’s failure to properly withdraw from Weaver’s representation (either due to the conflict or Weaver’s request) violated Obert’s duty as a professional. *Standards* § 7.0.
- b. **Mental State.** “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* It appears that Obert primarily acted negligently.
- c. **Injury.** Injury can be actual or potential. *Standards* § 3.0. Although it does not appear that there was any actual injury to either Weaver or Healon, both had the potential to be injured by information Obert had regarding their respective representations.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior disciplinary offenses. *Standards* § 9.22(a).¹ *In re Obert III*, 29 DB Rptr 151 (2015) (9-month suspension for violation of RPC 1.7(a)(2), RPC 1.16(c) and RPC 1.16(d), with all but 90 days of the suspension stayed pending Obert’s successful completion of a 3-year term of probation). *In re Obert II*, 352 Or 231, 282 P3d 825 (2012) (6-month

¹ In determining the weight of prior disciplinary offenses, the court considers: (1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offenses; and (5) the timing of the current offense in relation to the prior offense and resulting sanction and whether the lawyer was 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).

suspension for misconduct in two matters, in violation of RPC 1.1 (competence); RPC 1.5(a) (excessive fee); RPC 1.15-1(a), (c) & (d) (improper handling of client funds or property); RPC 3.1 (pursuit of claim without basis in law or fact); and RPC 8.1(a)(2) (failure to respond to a disciplinary authority); *In re Obert I*, 336 Or 640, 89 P3d 1173 (2004) (30-day suspension for misconduct in three matters, in violation of former DR 6-101(B) (neglect); DR 5-105(E) (current-client conflict of interest); DR 1-102(A)(3) (conduct involving misrepresentation); and DR 9-101(C)(4) (failure to provide client property upon request).

Although Obert's conduct in the matters at issue is similar to his most-recent discipline, it also occurred about the same time as the matters that gave rise to that prior discipline (i.e., prior to the imposition of that discipline). Accordingly, under the *Jones* factors, Obert's most-recent discipline cannot be given much weight. Moreover, it is likely that—had this matter been brought to the Bar's attention at the time of the prior discipline—it would have added little to the overall disposition of that matter. In addition, some of the conduct in *Obert III* occurred prior to the sanction in *Obert II*. The offenses in *Obert I* are not recent.

2. Substantial experience in the practice of law. *Standards* § 9.22(i).

e. Mitigating Circumstances. Mitigating circumstances include:

1. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
2. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).
3. Remorse. *Standards* § 9.32(l).
4. Remoteness of prior offense. *Standards* § 9.32(m). As noted previously, the conduct that led to the respondent's discipline in *Obert I* occurred more than 15 years ago.

23.

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 in determining whether the representation of a client may be materially affected by the lawyer's own interests, or will adversely affect another client, and causes injury or potential injury to a client. *Standards* § 4.33. Reprimand is also generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system. *Standards* § 7.3.

24.

Oregon cases hold that, in the absence of prior discipline, reprimands or short suspensions are generally sufficient for conflicts or failures to timely provide client property. *See e.g., In re O'Rourke*, 28 DB Rptr 3 (2014) (respondent with no prior discipline was reprimanded after—having represented spouses in preparing and executing wills and estate plans—he subsequently represented husband in transferring certain parcels of real property out of wife's estate, contrary to the terms of wife's trust, and in violation of RPC 1.9(a)); *In re Bowker*, 20 DB Rptr 16 (2006) (attorney was suspended for 30 days when she represented both lender and borrowers in a loan transaction and thereafter, when the loan was delinquent, represented the lender to collect the debt from the borrowers); *In re Eichelberger*, 19 DB Rptr 329 (2005) (attorney who represented a contractor and engaged in construction projects with the contractor without sufficient disclosure or consent then asserted claims against the contractor when the representation ended on behalf of other clients that related to his prior representation of the contractor; despite no prior discipline, attorney was suspended for 60 days). Had the conduct at issue in this case followed the prior discipline for similar conduct, a more substantial suspension would be appropriate.

25.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also, Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system. The Bar believes that the respondent's current probation has aided his practice and would like to continue to encourage his practice in that regard.

26.

Consistent with the *Standards* and Oregon case law, the parties agree that Obert shall be suspended for thirty (30) days for his violations of RPC 1.7(a)(2); RPC 1.9(a); RPC 1.16(a)(1); RPC 1.16(a)(3); and RPC 1.16(d). However, all of the suspension is to be stayed, pending Obert's successful completion of a one (1)-year term of probation. The sanction shall be effective May 15, 2018, or upon approval by the Disciplinary Board, whichever is later ("effective date").

27.

Probation shall commence upon the effective date and shall continue for a period of one (1) year, ending on the day prior to the first (1st) year anniversary of the effective date (the "period of probation"). During the period of probation, Obert shall abide by the following conditions:

- (a) Obert will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Obert has been represented in this proceeding by David Elkanich ("Elkanich"). Obert and Elkanich hereby authorize direct communication between Obert and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Obert's compliance with his probationary terms.
- (c) Obert shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (d) During the period of probation, Obert shall attend not less than three (3) MCLE accredited programs, for a total of nine (9) hours, which shall emphasize law practice management, time management, identifying and properly addressing conflicts of interests, and duties upon withdrawal of legal matters. These credit hours shall be in addition to those MCLE credit hours required of Obert for his normal MCLE reporting period. (The Ethics School requirement does not count towards the nine (9) hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Obert shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the term of probation, Obert shall diligently attend to client matters and adequately communicate with clients regarding their cases. Obert shall also be diligent about recognizing and avoiding conflicts of interest, including obtaining necessary informed consent, following full disclosure, where required, and withdrawing from matters when required by the Rules of Professional Conduct.
- (f) Each month during the period of probation, Obert 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, properly spotting and addressing potential conflicts of interest, and withdrawing when necessary or required.
- (g) Zachary Stern shall serve as Obert's probation supervisor ("Supervisor"). Obert shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his or her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Obert's clients, the profession, the legal system, and the public.

- (h) Beginning with the first month of the period of probation, Obert shall meet with Supervisor in person at least once a quarter for the purpose of allowing his Supervisor to review the status of Obert's law practice and his performance of legal services on the behalf of clients. Each quarter during the period of probation, Supervisor shall conduct a random audit of ten (10) active files or ten percent (10%) of Obert's active caseload, whichever is greater, to determine whether Obert is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment and properly spotting and addressing potential conflicts of interest.
- (i) Obert authorizes his Supervisor to communicate with DCO regarding his compliance or non-compliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Obert's compliance.
- (j) On a quarterly basis, on dates to be established by DCO beginning no later than ninety (90) days after the effective date, Obert shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Obert is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Obert's meetings with his Supervisor.
 - (2) The number of Obert's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Obert has completed the other provisions recommended by his Supervisor, if applicable.
 - (4) In the event that Obert has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the non-compliance and the reason for it.
- (k) Obert is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (l) Obert's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.

- (n) The SPRB's decision to bring a formal complaint against Obert for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

28.

In addition, on or before December 31, 2018, Obert shall pay to the Bar its reasonable and necessary costs in the amount of \$212.25, incurred for service and deposition costs, part of which were necessitated by Obert's last-minute request for a setover. Should Obert fail to pay \$212.25 in full by December 31, 2018, the Bar may thereafter, without further notice to him, obtain a judgment against Obert for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

29.

Obert 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 his suspension, if any stayed period of suspension is actually imposed. In this regard, if any stayed period of suspension is actually imposed Obert has arranged for Zachary Stern (OSB 134967), an active member of the Bar, to either take possession of or have ongoing access to Obert's client files and serve as the contact person for clients in need of the files during the term of his actual suspension. Obert represents that Zachary Stern has agreed to accept this responsibility.

30.

Obert 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. Obert 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.

31.

Obert 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, if a suspension is imposed. This requirement is in addition to any other provision of this agreement that requires Obert to attend or obtain continuing legal education (CLE) credit hours.

32.

Obert 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 Obert is admitted: Washington.

33.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 30, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of May, 2018.

/s/ Mark G. Obert

Mark G. Obert
OSB No. 963800

APPROVED AS TO FORM AND CONTENT:

/s/ David J. Elkanich

David J. Elkanich
OSB No. 992558

EXECUTED this 18th day of May, 2018.

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. 18-58
)	
TODD S. BARAN,)	
)	
Respondent.)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	May 23, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and publicly reprimanded for violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).

DATED this 23rd day of May, 2018.

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

STIPULATION FOR DISCIPLINE

Todd S. Baran, attorney at law (“Baran”), and the Oregon State Bar (“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.

Baran was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 27, 1991, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Baran 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 April 28, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Baran for alleged violations of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

Upon his move out of Oregon in January 2018, Baran transferred his Oregon Bar membership to inactive and closed down his law firm. In the transition, Baran’s business account checks became commingled with his lawyer trust account (“IOLTA”) checks. At the end of February 2018, Baran wrote a check each to the City of Portland and the State of Oregon for corporate taxes, but he did not verify that he was using the checks from his business account and instead wrote checks from his IOLTA. At this time, Baran’s IOLTA held a balance of approximately \$1,047.

6.

Baran’s \$150 corporate taxes check to the State of Oregon was paid on March 1, 2018. The second corporate taxes check to the City of Portland for \$3,028 was presented for payment on March 9, 2018, and denied for insufficient funds by the bank (“March 9 IOLTA overdraft”). That same day, having discovered his error, Baran transferred \$150 from the business account to IOLTA to cover the \$150 check to the State of Oregon that had already been paid, and he transferred an additional \$3,028 from the business account. When the bank returned his corporate taxes IOLTA check to the City of Portland unpaid on March 12, 2018, Baran transferred the \$3,028 back into his business account.

7.

On March 12, 2018, Baran reported his March 9 IOLTA overdraft to Disciplinary Counsel’s Office.

8.

The March 9 IOLTA overdraft prompted Baran to review his IOLTA records for inconsistencies and to reconcile his ledgers. Baran determined that there were six IOLTA recordkeeping errors beginning in 2009 that caused either a client's overpayment or underpayment.

9.

In total, Baran discovered a \$1,430 shortage in his IOLTA over a period of approximately 8 years. Baran transferred that amount into his IOLTA from his own funds. He has been able to contact all of the clients who were owed funds and received further instruction from them about their IOLTA balances. Baran will have the remaining balance disbursed as soon as possible so that he can close his IOLTA and fully wind-down his Oregon practice.

Violations

10.

Baran admits that on two occasions he inadvertently paid himself with client funds from IOLTA before he had earned those funds, or utilized a different client's unearned funds to pay himself more than he had earned, and his incorrect bookkeeping commingled clients' unearned funds with his own earned funds in his business account, in violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).

Sanction

11.

Baran 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* ("Standards"). The *Standards* require that Baran'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.** Baran violated his duty owed to clients in not safeguarding clients' funds appropriately over a period of years. *Standards* § 4.1.
- b. **Mental State.** A lawyer's mental state may be viewed as negligent, knowing, or intentional. A lawyer is negligent when the lawyer fails to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Intent" is the conscious objective or purpose to accomplish a particular result. *Id.* Baran was negligent over a period of years in the handling of his IOLTA. Baran admits

that his bookkeeping and IOLTA record management was lax for many years. By disconnecting several IOLTA checks from their corresponding checkbook, and putting them with checks from other bank accounts, Baran should have known that more care and scrutiny needed to be taken when using checks from that commingled stack. Baran also should have known the risk of accurately paying himself from his IOLTA when he had not performed monthly reconciliations of his IOLTA.

- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 7. There was potential injury to any client whose funds were improperly used to pay Baran or for other purposes as a result of mathematical or other errors and, as to those clients identified in his audit, there was actual injury in the identified amounts.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Pattern of misconduct. *Standards* § 9.22(c). Baran admits he did not take steps to reconcile his trust account between 2009 and 2017.
 2. Multiple offenses. *Standards* § 9.22(d).
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Baran was admitted in Oregon in 1991 and Washington in 2004.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 2. Absence of dishonest motive. *Standards* § 9.32(b).
 3. Timely good faith efforts to rectify consequences of misconduct. *Standards* § 9.32(d). In completing the audit of his IOLTA, Baran contacted those clients owed funds for further instruction from them. Baran will have the remaining balance disbursed so that he can close his IOLTA and fully wind down his Oregon practice.
 4. Full and free disclosure to disciplinary board and cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e). Baran self-reported the March 9 IOLTA overdraft. Baran then completed an audit of his IOLTA records, and further reported the other trust account

discrepancies he discovered when he attempted to reconcile and close the trust account.

5. Remorse. *Standards* § 9.32(1).

12.

Under the ABA *Standards*, public reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards* § 4.13. Here, Baran was aware over a period of years that he was risking problems and errors by not regularly reconciling his trust account; however, he was not in fact knowledgeable of the extent of the errors until he reconciled the account in the wake of his March 9, 2018 IOLTA overdraft.

13.

Oregon case law also supports the imposition of a public reprimand in this matter. As an initial matter, this case is factually distinguishable from cases involving knowing or intentional conversion of client funds, such as *In re Martin*, 328 Or 177, 970 P2d 638 (1998); *In re Holman*, 297 Or 36, 57-58 (1984), or *In re Phelps*, 306 Or 508, 760 P2d 1331 (1988), *disagreed with on other grounds*, *In re Starr*, 326 Or 328, 952 P2d 1017 (1998); or *In re Holman*, 297 Or 36, 57-58, 682 P2d 243 (1984). Baran's conduct is most similar to stipulations for public reprimands and a reciprocal reprimand. *See, e.g., In re Kolstoe*, 29 DB Rptr 128 (2015) (Attorney reprimanded after he correctly deposited \$500 in earned fees into his business account, but mistakenly recorded the transaction as a deposit into his IOLTA. Forgetting that he had already collected the earned fees, the attorney mistakenly collected \$500 from his IOLTA as fees earned for his efforts on behalf of the client. Since the client did not have funds in the IOLTA, that \$500 was paid from the funds of other clients. Because the attorney was not reconciling his accounts on a monthly basis, he was not aware of the mistake until another IOLTA check was dishonored.); *In re McElroy*, 25 DB Rptr 224 (2011) (Attorney reprimanded after he mistakenly believed it was permissible to deposit retainers paid by credit card into his general office account and then transfer the funds to his IOLTA. Attorney failed to make such a transfer for one client, but thereafter issued IOLTA checks on behalf of that client when the client had no funds in IOLTA, thereby drawing on the funds of other clients in IOLTA.); and *In re Levenson*, 17 DB Rptr 98 (2003) (Attorney received a reciprocal reprimand after receiving an overdraft notice, the Arizona Bar's examiner found multiple problems with IOLTA transactions. On multiple occasions, the attorney disbursed more funds to or on behalf of clients than they had in trust. The attorney also paid himself earned fees but noted an inaccurate amount on client ledgers, leaving a discrepancy. The attorney's IOLTA became overdrawn and numerous errors in his records from the previous five years prevented reconciliation.). A public reprimand is also warranted because Baran's mitigating factors greatly outweigh those in aggravation.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Baran shall be publicly reprimanded for violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c), the sanction to be effective upon approval by the Disciplinary Board.

15.

Baran 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. This requirement is in addition to any other provision of this agreement that requires Baran to attend or obtain continuing legal education (CLE) credit hours.

16.

Baran 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 Baran is admitted: Washington.

17.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 28, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 15th day of May, 2018.

/s/ Todd S. Baran
Todd S. Baran
OSB No. 912036

EXECUTED this 17th day of May, 2018.

OREGON STATE BAR
By: /s/ Nik T. Chourey
Nik T. Chourey
OSB No. 060478
Assistant Disciplinary Counsel

Cite full opinion as 363 Or 62 (2018)

In re:)
)
Complaint as to the Conduct of)
)
LISA D. T. KLEMP,)
)
Respondent.)

(OSB 141-28, 15-01; SC S064893)

En Banc

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

Nathan G. Steele, The Steele Law Firm, Bend, argued the cause and filed the briefs for respondent.

Theodore W. Reuter, Assistant Disciplinary Counsel, Oregon State Bar, Tigard, argued the cause and filed the brief for Oregon State Bar.

PER CURIAM

In two separate lawyer discipline matters, the Oregon State Bar charged respondent with violating various Rules of Professional Conduct (RPC) in her dealings with two different clients, Boyce and Andrach. In the first matter, the Bar alleged that respondent failed to protect Boyce's interests upon terminating her representation of Boyce, RPC 1.16(d), by refusing to surrender documents belonging to the client until her fees were paid. In the second matter, the Bar alleged that, in taking certain actions, respondent assisted Andrach in diverting money from his incapacitated wife's trust account, thereby violating RPC 1.2(c) (assisting client in conduct the lawyer knows to be illegal or fraudulent); RPC 4.1(b) (failing to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client); and RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Bar also alleged that, in her efforts to obtain the wife's signature on a document giving Andrach power of attorney to manage the wife's financial affairs, respondent violated RPC 4.3 (failing to correct unrepresented person's misunderstanding about lawyer's role in a matter).

After hearing evidence and argument on the two matters, the trial panel issued a divided decision. A two-member majority concluded that respondent had violated RPC 1.16(d), RPC 1.2(c), RPC 4.3, and RPC 8.4(a)(3), and that the appropriate sanction was disbarment. The single dissenting member opined that the Bar had failed to prove any of the charges and that the complaint should be dismissed. On *de novo* review, we conclude that the Bar proved a

Cite as *In re Klemp*, 32 DB Rptr 249 (2018)

violation of RPC 4.3 (failing to correct unrepresented person's misunderstanding about lawyer's role in a matter) but failed to prove the other charged violations by the requisite clear and convincing evidence standard. We further conclude that the appropriate sanction for the violation of RPC 4.3 is a public reprimand.

Cite full opinion as 363 Or 42 (2018)

In re:)
)
Complaint as to the Conduct of)
)
SANDY N. WEBB,)
)
Respondent.)

(OSB No. 1609, 1610, 1611, 1612, 1618; SC S064798)

On review of the decision of a trial panel of the Disciplinary Board, dated January 20, 2017.

Kevin Keaney, Portland, argued the cause and filed the briefs on behalf of Respondent.

Susan R. Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the briefs on behalf of the Oregon State Bar.

Before Balmer, Chief Justice, and Kistler, Walters, Nakamoto, Flynn, Duncan, and Nelson, Justices.*

* Landau, J., retired December 31, 2017, and did not participate in the decision of this case.

PER CURIAM

In this lawyer discipline proceeding, the Oregon State Bar charged respondent with multiple violations of the Rules of Professional Conduct (RPC) based on her mishandling of client funds, including violating RPC 8.4(a)(3) (conduct involving dishonesty) by knowingly converting client funds. A trial panel of the Disciplinary Board conducted a hearing and determined that respondent had committed all of the charged violations. Although this court has repeatedly imposed disbarment as the presumptive sanction for a lawyer who converts client funds, the trial panel determined that mitigating factors, in particular respondent's mental disabilities, supported imposing a two-year suspension from the practice of law.

The Bar seeks review of the trial panel's sanction determination, urging this court to impose a sanction of disbarment. Respondent, for her part, does not challenge the trial panel's determinations that she committed the charged violations in the ways alleged, but she urges this court to affirm the trial panel's decision that suspension is the appropriate sanction in this case. For the reasons that follow, we affirm the trial panel's determination that the respondent committed all of the charged violations, and we conclude that the appropriate sanction is disbarment.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-60
)	
HAFEZ DARAEE,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Respondent:	Wayne Mackeson
Disciplinary Board:	None
Disposition:	Violation of RPC 1.4(a), RPC 1.4(b), RPC 1.16(a)(3), RPC 1.16(c), and RPC 1.16(d). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	June 4, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Hafez Daraee is publicly reprimanded for violation of RPC 1.4(a), RPC 1.4(b), RPC 1.16(a)(3), RPC 1.16(c) and RPC 1.16(d).

DATED this 4th day of June, 2018.

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

STIPULATION FOR DISCIPLINE

Hafez Daraee, attorney at law (“Daraee”), and the Oregon State Bar (“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.

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

3.

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

4.

On April 28, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Daraee for alleged violations of: RPC 1.4(a) (duty to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); RPC 1.4(b) (duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 1.16(a)(3) (duty to withdraw upon termination); RPC 1.16(c) (duty to seek court permission to withdraw); and RPC 1.16(d) (duty to protect client interests upon withdrawal, including refund of unearned fee) 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 2014, defendant (“Client”) was charged criminally with stabbing a man (“Victim”). In April 2015, Victim brought civil claims against Client, also arising from the stabbing. Client retained Daraee to defend him in the civil matter, advancing a \$15,000 retainer for his costs and fees. Daraee did not defend Client in the criminal case.

6.

In 2016, Client pleaded guilty in the criminal case and was sentenced to pay \$50,000 to Victim in restitution and serve a term of imprisonment. Client paid the restitution.

7.

In a February 2017 letter, Client notified Daraee that he no longer required his services, asked for an accounting, and directed that the remainder of the \$15,000 retainer he had paid be

sent to a person in Washington. Daraee was initially concerned that Client would be left unrepresented in a pending civil case seeking more than \$750,000 in economic and non-economic damages. And, although nothing substantive had occurred in the case for some time, Daraee was also concerned that his notice of withdrawal would draw attention to the proceeding and renew interest in the case. Unsure how to proceed, Daraee did not respond to Client's letter or otherwise notify client of his concerns.

8.

After a second letter from Client, in April 2017, Daraee informed Client that he was having some computer difficulties but would follow up. Again, Daraee did not disclose his concerns about withdrawing to Client.

9.

Client wrote three more times without any response. Client's criminal lawyer, who had referred Client to Daraee, also contacted Daraee but was unsuccessful in getting him to respond. In December 2017, Client complained to the Bar.

10.

On January 6, 2018, after receiving notification of the bar complaint, Daraee provided an accounting to Client and mailed the remaining unearned funds (\$6,881.50) to the person Client had designated. Daraee also apologized to Client for admittedly having "dropp[ed] the ball—plain and simple."

Violations

11.

Daraee admits that, by failing to respond to multiple inquiries from Client, he violated RPC 1.4(a). Daraee also admits that his failure to seek court permission and withdraw, as requested, violated RPC 1.16(a)(3) and RPC 1.16(c), while his failure to explain to Client his rationale for not withdrawing, violated RPC 1.4(b). Finally, Daraee admits that his failure to more timely provide Client with the unearned portion of his retainer following termination violated RPC 1.16(d).

Sanction

12.

Daraee 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* ("Standards"). The *Standards* require that Daraee'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.** Daraee violated his duties to his client to properly handle client property and to diligently handle his client’s matter (including the duty to adequately communicate). *Standards* §§ 4.1; 4.3. The *Standards* presume that the most important ethical duties are those which lawyers owe to their clients. *Standards* at 5. Daraee also violated his duty as a professional to properly withdraw from legal matters. *Standards* § 7.0.
- b. **Mental State.** Daraee’s violations were a combination of negligent and knowing. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards* at 9. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Daraee was aware of Client’s instruction to withdraw, and both his failure to do so, or explain to Client why he was hesitant to do so. To the extent that the delay in accounting for and returning funds was attributable to the computer issues discussed in Daraee’s April 2017 letter, that portion of the delay in providing Client’s refund was negligent.
- c. **Injury.** The only potential or actual injury suffered was by Client in terms of anxiety and frustration caused by the delay of the return of his funds. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000); *In re Schaffner*, 325 Or 421, 426–27, 939 P2d 39 (1997). However, at Client’s request, Daraee refunded an additional \$2,000 of the earned fee and Client has since stated his belief that he has been adequately compensated for any injury.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Substantial experience in the practice of law. *Standards* § 9.32(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of prior discipline. *Standards* § 9.33(a).
 2. Absence of dishonest or selfish motive. *Standards* § 9.32(b). Although Daraee failed to explain his inaction to Client, his continued failure to withdraw was an attempt to shield his former client from attention that may renew interest in civil litigation against Client.
 3. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e). Daraee was forthcoming in the Bar’s investigation and this formal proceeding.

4. Remorse. *Standards* § 9.32(1). In addition to paying Client more than he was required, Daraee sent him an unsolicited apology to him for his delay in this matter.

13.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client, where as a reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards* §§ 4.12; 4.13. Similarly, 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, whereas 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* §§ 4.42(a); RPC 4.43. Finally, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, whereas a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards* §§ 7.2; 7.3. Although a suspension is contemplated as a possible disposition for Daraee's knowing conduct, in light of the low level of injury and the fact that Daraee's mitigating factors substantially outweigh the single aggravating factor in both number and weight, a reprimand appears sufficient to address this misconduct in this instance.

14.

Oregon cases are in accord that a reprimand is sufficient. *See, e.g., In re Seligson*, 27 DB Rptr 314 (2013) (attorney was reprimanded by a trial panel for his ten-month delay in withdrawing following client's termination of his services); *In re Kleen*, 27 DB Rptr 213 (2013) (attorney reprimanded after he determined that client's case would be difficult to prove, he did not inform the client of his concerns, respond to the client's inquiries, or take any further action her behalf, including notifying the client of claims by medical creditors, until after the client contacted the Bar; in addition, attorney took nearly eight months after the end of the attorney-client relationship to return funds that the client had paid him to obtain an expert opinion that he never sought); *In re May*, 27 DB Rptr 200 (2013) (attorney was reprimanded who failed to respond to client's attempts to reach her for a number of months and failed to notify client that her law office had moved, until after her client contacted the Bar); *In re Dames*, 23 DB Rptr 105 (2009) (attorney reprimanded when, after concluding that his client's medical malpractice case lacked merit, attorney failed to respond to repeated inquiries from opposing counsel and ultimately conceded a defense motion for summary judgment and dismissal of the case without notice to his client); *In re Bottoms*, 23 DB Rptr 13 (2009) (attorney reprimanded where he failed to appear for court hearings related to his client's criminal case, did not notify the court or his client in advance about his intent or inability to appear, did not fully explain the district attorney's settlement offer to his client and failed to

otherwise keep the client reasonably informed about the status of the case); *In re Angel*, 22 DB Rptr 351 (2008) (attorney reprimanded where he failed to refund the client's unearned funds until about seven months after withdrawing from the case); *In re Karlin*, 21 DB Rptr 75 (2007) (attorney reprimanded when he failed to communicate any substantive information about his client's domestic relations case to the client, or explain that respondent had other more pressing legal matters to address; attorney also failed to explain the reasons why the modification might not be able to go forward).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Daraee shall be publicly reprimanded for violations of RPC 1.4(a) & (b); RPC 1.16(a)(3); and RPC 1.16(c) & (d), the sanction to be effective upon approval by the Disciplinary Board.

16.

Daraee acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

17.

Daraee 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 Daraee is admitted: Washington and Alaska.

18.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 28, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 16th day of May, 2018.

/s/ Hafez Daraee

Hafez Daraee
OSB No. 932484

APPROVED AS TO FORM AND CONTENT:

/s/ Wayne Mackeson

Wayne Mackeson
OSB No. 823269

Cite as *In re Daraee*, 32 DB Rptr 252 (2018)

EXECUTED this 29th day of May, 2018.

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. 18-49
)	
FOSTER A. GLASS,)	
)	
Respondent.)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 8.4(a)(4). Stipulation for Discipline. 60-day suspension, all stayed, one-year probation.
Effective Date of Order:	June 14, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Foster A. Glass is suspended for 60 days, with all of the suspension stayed, pending his successful completion of a one-year term of probation, effective ten days after the stipulation is approved, or as otherwise directed by the Disciplinary Board for violation of RPC 8.4(a)(4).

DATED this 4th day of June, 2018.

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

STIPULATION FOR DISCIPLINE

Foster A. Glass, attorney at law (“Glass”), and the Oregon State Bar (“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 March 10, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Glass for alleged violation of RPC 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.

On May 20, 2016, Glass failed to appear before Deschutes County Circuit Court Judge Alta Brady for his client’s morning sentencing hearing as scheduled in *State v. Stiers*, Case No. 15FE0504. Because the client was from out of town and told Judge Brady that it would be a significant problem for him to return on another date, Judge Brady rescheduled the sentencing hearing for that afternoon.

6.

On June 13, 2016, Glass failed to appear before Deschutes County Circuit Court Judge Michael Adler for his client’s motion hearing as scheduled in *Munoz v. Perry*, Case No. 15CV16180. The client, two attorneys for the defense, and a subpoenaed witness appeared for the hearing.

7.

On July 28, 2016, Glass and his client failed to appear before Deschutes County Circuit Court Judge Alta Brady for his client’s trial readiness hearing as scheduled in *State v. McKay*, Case No. MI141689. A bench warrant was issued for the arrest of Glass’s client.

Violations

8.

Glass admits that his failures to appear for scheduled court appearances was conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

Sanction

9.

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* (“Standards”). The *Standards* require that Glass’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.** 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.** A lawyer’s mental state may be viewed as negligent, knowing, or intentional. A lawyer is negligent when the lawyer fails to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Intent” is the conscious objective or purpose to accomplish a particular result. Glass acted negligently in all respects. He negligently failed to monitor his court calendar, which resulted in his failure to attend three court hearings.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 7. The court sustained actual injury because of Glass’s failure to appear at hearings, which wasted judicial time and resources. Glass caused actual injury in the form of wasted time and anxiety when he missed his client’s sentencing hearing. Glass caused actual injury in the civil case where his absence wasted court time as well as that of the defense counsel and witness. Glass’s absence at the third hearing caused actual injury to his client and wasted some court time.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Prior disciplinary offenses. *Standards* § 9.22(a). Glass stipulated to a 30-day suspension in 2014 for the same conduct and rule violations as are found here. *In re Glass*, 28 DB Rptr 295 (2014). Glass was also disciplined in 1989 for charges unrelated to those here. In that matter, Glass was suspended 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).
 2. A pattern of misconduct. *Standards* § 9.22(c). Glass's failure to appear for court dates in three different clients' matters demonstrates a pattern of misconduct.
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Glass has been licensed to practice in Oregon since 1975.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of dishonest or selfish motive. *Standards* § 9.32(b).
 2. Timely good faith effort to rectify consequences of misconduct. *Standards* § 9.32(d).
 3. Cooperative attitude toward proceedings. *Standards* § 9.32(e). In addition to cooperating by fully disclosing information to the Bar, Glass also detailed numerous actions that he has taken to improve his practice.
 4. Remorse. *Standards* § 9.32(l). Glass has expressed remorse and demonstrated it by making efforts to fix the issues that caused him to miss court dates.

10.

Under the ABA *Standards*, reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes actual or potential injury to a client or a party, or causes actual or potential interference with a legal proceeding. *Standards* § 6.23. A suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes actual or potential injury to a client or a party, or causes actual or potential interference with a legal proceeding. *Standards* § 6.22.

11.

Oregon case law also supports the imposition of a reprimand or a suspension for conduct prejudicial to the administration of justice, depending on the severity of the conduct and the harm caused. *See, e.g., In re Hartfield*, 349 Or 108, 239 P3d 992 (2010) (attorney for conservator reprimanded after he repeatedly failed to appear in court for scheduled hearings

and failed to file an inventory or an accounting, resulting in the court removing the conservator and attorney from the case and the estate incurring unexpected attorney fees); *In re Carini*, 354 Or 47 (2013) (attorney received 30-day suspension for his negligent, repeated failure to appear at court hearings); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (attorney suspended for 120 days where, in a dissolution of marriage proceeding, attorney was not prepared for a settlement conference he had requested, failed to send his calendar to an arbitrator, failed to respond to messages from the arbitrator's office, and failed to take steps to pursue the arbitration after a second referral by the court).

Glass's conduct falls closest to that in *Carini* (30-day suspension), before accounting for aggravating and mitigating circumstances. Although Glass has more mitigating than aggravating factors, the aggravating effect of his prior, similar discipline in 2014 typically requires an upward departure in the sanction. *Standards* § 8.2. Glass's mitigation does not outweigh his aggravation. A short-term suspension stayed pending probation is sufficient.

12.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Glass shall be suspended for 60 days for violation of RPC 8.4(a)(4), with all of the suspension stayed, pending Glass's successful completion of a one-year term of probation. The sanction shall be effective ten days after this stipulation is approved, or as otherwise directed by the Disciplinary Board ("effective date").

14.

Probation shall commence upon the effective date and shall continue for a period of one year, ending on the day prior to the first year anniversary of the effective date (the "period of probation"). During the period of probation, Glass shall abide by the following conditions:

- (a) Glass will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Glass shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.

- (c) During the period of probation, Glass shall attend not less than four MCLE accredited programs, for a total of twelve hours, which shall emphasize law practice management, utilizing technology in his practice and increasing his proficiency with e-courts. These credit hours shall be in addition to those MCLE credit hours required of Glass for his normal MCLE reporting period. (The Ethics School requirement does not count towards the twelve hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Glass shall submit an Affidavit of Compliance to DCO.
- (d) Glass shall conference with the PLF practice management advisors to address his practice management and technology issues.
- (e) Throughout the period of probation, Glass shall diligently attend to client matters and make timely scheduled appearances in court.
- (f) Each month during the period of probation, Glass shall review all client files to ensure that he is timely appearing in court as scheduled, attending to the clients' matters and maintaining adequate communication with clients, the court, and opposing counsel.
- (g) Mikel R. Miller shall serve as Glass's probation supervisor ("Supervisor"). Glass shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in his sole discretion, determines are designed to achieve the purpose of the probation and the protection of Glass's clients, the profession, the legal system, and the public. Glass agrees that, if Supervisor ceases to be his Supervisor for any reason, Glass will immediately notify DCO and engage a new Supervisor, approved by DCO, within one month.
- (h) Beginning with the first month of the period of probation, Glass shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing his Supervisor to review the status of Glass's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) client files or ten percent (10%) of Glass's active caseload, whichever is greater, to determine whether Glass is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment.
- (i) Glass authorizes his Supervisor to communicate with DCO regarding his compliance or non-compliance with the terms of this agreement, and to release

to DCO any information necessary to permit DCO to assess Glass's compliance.

- (j) Within seven (7) days of the effective date, Glass shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF's Practice Management Advisors in order to obtain practice management advice. Glass shall notify DCO of the time and date of the appointment.
- (k) Glass shall attend the appointment with the PLF's Practice Management Advisors and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a client caseload, and taking reasonable steps to protect clients upon the termination of his employment. No later than thirty (30) days after recommendations are made by the PLF's Practice Management Advisors, Glass shall adopt and implement those recommendations.
- (l) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Advisors, Glass shall provide a copy of the Office Practice Assessment from the PLF's Practice Management Advisors and file a report with DCO stating the date of his consultation(s) with the PLF's Practice Management Advisors; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.

Glass shall implement all recommended changes, to the extent reasonably possible, and participate in at least one follow-up review with PLF Practice Management Advisors on or before November 1, 2018.

- (m) On a quarterly basis, on dates to be established by DCO beginning no later than 30 days after the effective date, Glass shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Glass is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Glass's meetings with his Supervisor.
 - (2) The number of Glass's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Glass has completed the other provisions recommended by his Supervisor, if applicable.

- (4) In the event that Glass has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the non-compliance and the reason for it.
- (n) Glass is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (o) Glass's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (p) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (q) The SPRB's decision to bring a formal complaint against Glass for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

15.

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, if a suspension is imposed. This requirement is in addition to any other provision of this agreement that requires Glass to attend or obtain continuing legal education (CLE) credit hours.

16.

Glass 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 Glass is admitted: none.

17.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 10, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of May, 2018.

/s/ Foster A. Glass

Foster A. Glass

OSB No. 751334

EXECUTED this 25th day of May, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 17-92
)
JONATHAN STUART,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Respondent: Calon Nye Russell
Disciplinary Board: None
Disposition: Violation of RPC 8.4(a)(2) and ORS 9.527(2). Stipulation for Discipline. Seven-month suspension, all stayed, three-year probation.
Effective Date of Order: June 17, 2018

ORDER ACCEPTING STIUPULATION FOR DISCIPLINE

Upon consideration by the court.

The court accepts the Stipulation for Discipline. Effective ten days from the date of this order, the respondent is suspended from the practice of law in the State of Oregon for a period of seven months. That suspension shall be stayed pending the respondent's successful completion of a three-year period of probation, on the terms and conditions recited in the parties' Stipulation for Discipline.

/s/ Thomas A. Balmer
Thomas A. Balmer
Chief Justice, Supreme Court
6/7/2018 8:02 a.m.

STIPULATION FOR DISCIPLINE

Jonathan Stuart, attorney at law ("Stuart"), and the Oregon State Bar ("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.

Stuart was admitted by the Oregon Supreme Court to the practice of law in Oregon on December 29, 2005, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Stuart 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 18, 2018, a Formal Complaint was filed against Stuart pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 8.4(a)(2) (committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer) and ORS 9.527(2) (conviction of an offense which is a misdemeanor involving moral turpitude). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

From 2006 to December 2015, Stuart was the Woodburn Assistant City Attorney with his office located at Woodburn City Hall. In the fall of 2015, Stuart was accused of masturbating in his office in two separate incidents witnessed by passersby outside of Stuart’s office. Stuart was indicted and on April 6, 2017, Stuart was convicted of two misdemeanor counts of the crime of public indecency in violation of ORS 163.465(2)(a).

Violations

6.

Stuart admits that the foregoing convictions constitute criminal conduct that reflects adversely on his honesty, trustworthiness or fitness in violation of RPC 8.4(a)(2), and violation of ORS 9.527(2) for misdemeanor offenses involving moral turpitude.

Sanction

7.

Stuart and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (“*Standards*”). The *Standards* require that Stuart’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.** Stuart violated his duty to maintain his personal integrity. *Standards*, § 5.1.
- b. **Mental State.** The *Standards* recognize three possible mental states: intentional, knowing, and negligent. *Standards* at 9. Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. 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. Intent is the conscious objective or purpose to accomplish a particular result. *Id.*

Stuart acted with a knowing mental state, or with “conscious awareness of the nature or the attendant circumstances of his conduct but without the conscious objective or purpose to accomplish to a particular result.” *Id.* Stuart engaged in the conduct in his office while employed by the City of Woodburn during standard working hours. While Stuart disputes that he intended for persons outside of his office to see him, he recognizes that he should have known that people could potentially see him outside of his window or otherwise discover him committing the act(s).

- c. **Injury.** For the purpose of determining an appropriate disciplinary sanction, both actual and potential injury are taken into account. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. “Injury” is harm to a client, the public, the legal system or the profession which results from a lawyer’s misconduct. *Standards* at 9.

Stuart caused actual injury to the people who witnessed his acts, including a minor, his employer, the City of Woodburn, and his work colleagues who sustained embarrassment as a result of Stuart’s actions. Stuart also violated the public trust placed in him.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Selfish or dishonest motive. *Standards* § 9.22. Stuart engaged in his misconduct for his own sexual gratification.
 2. Vulnerability of victim. *Standards* § 9.22(h). One of the victims who testified against Stuart was a minor, age fifteen, at the time of Stuart's acts.
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Stuart was admitted to practice in Oregon in 2005.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of prior discipline. *Standards* § 9.32(a).
 2. Personal or emotional problems. *Standards* § 9.32(c). Stuart's misconduct was the result of a long-term addiction to pornography.
 3. Full and free disclosure to disciplinary board or cooperative attitude towards proceedings. *Standards* § 9.32(e).
 4. Mental disability. *Standards* § 9.32(i). Stuart has been treated for sexually compulsive behaviors, and has suffered from compulsive use of pornography.
 5. Imposition of other penalties or sanctions. *Standards* § 9.32(k). As a result of his criminal convictions, Stuart spent 26 days in jail, is subject to 60 months (i.e. 5 years) of probation on each count (to run concurrently), and has to comply with additional probationary terms.
 6. Remorse. *Standards* § 9.32(l). Stuart has expressed remorse and has sought treatment to ensure that he does not repeat his behavior.

8.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on the lawyer's fitness to practice law. *Standards* § 5.12.

9.

The following Oregon cases support the imposition of some term of suspension for Stuart's misconduct.

- *In re Chase*, 30 DB Rptr 384 (2016) (6-month stipulated suspension, all stayed, pending 18 months of probation for deputy district attorney who pulled a gun and held the gun against the victim's head following a bar dispute; attorney pled guilty to two felonies and two misdemeanors);

- *In re Fehlman*, 21 DB Rptr 177 (2007) (1-year suspension imposed by trial panel for two public indecency convictions based on the lawyer masturbating while driving in two separate incidents; the second arrest occurred when the attorney was already on probation for the first criminal charge);
- *In re Hight*, 26 DB Rptr 8 (2012) (stipulated 1-year suspension with all but 90 days stayed, pending three years of probation for attorney who pled guilty to a felony for possessing cocaine, two misdemeanors, and entered diversion for driving under the influence, all stemming from an arrest when the attorney was with her two minor children, aged 6 and 11);
- *In re Light*, 29 DB Rptr 263 (2015) (7-month stipulated suspension, all but 30 days stayed pending a 3-year probation for attorney who was convicted of invasion of privacy after he placed a camera in his minor step-daughter's bedroom to film her without her knowledge or consent);
- *In re Millar*, 29 DB Rptr 197 (2015) (6-month stipulated suspension for attorney who failed to pay withholding taxes for his employees);
- *In re O'Connor*, 20 DB Rptr 42 (2006) (1-year stipulated suspension for lawyer who was offered job as deputy district attorney conditioned upon a pre-employment drug test. She diluted two samples and then used a detoxifier on a third sample, but initially lied when asked about it. When she was told to show up for another drug test, she told the truth. The attorney admitted to engaging in criminal conduct in violation of RPC 8.4(a)(2) and misrepresentation per RPC 8.4(a)(3)); and
- *In re Overton*, 25 DB Rptr 184 (2011) (60-day stipulated suspension for assistant district attorney who was convicted of a misdemeanor after he made sexually inappropriate comments to a defendant whose probation the attorney was supervising).

10.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also, Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Stuart shall be suspended for 7 months for violations of RPC 8.4(a)(2) and ORS 9.527(2), with all 7 months of the suspension stayed, pending Stuart's successful completion of a 3-year term of probation.

The sanction shall be effective ten days after this stipulation is approved, or as otherwise directed by the Supreme Court (“effective date”).

12.

Probation shall commence upon the effective date of this stipulation and shall continue for a period of 3 years, ending on the day prior to the 3 year anniversary of the commencement date (the “period of probation”). During the period of probation, Stuart shall abide by the following conditions:

- (a) Stuart will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Stuart shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (c) During the period of probation, Stuart shall attend not less than 12 MCLE accredited programs, for a total of 36 hours, which shall emphasize one or more of the following: lawyer ethics, professionalism, stress management, impairment issues, and effective client communication. These credit hours shall be in addition to those MCLE credit hours required of Stuart for his normal MCLE reporting period. The Ethics School requirement does not count towards the 36 hours needed. Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Stuart shall submit an Affidavit of Compliance to DCO.
- (d) Throughout the term of probation, Stuart shall comply with all of the terms of his criminal probation in *State of Oregon v. Jonathan Lind Stuart*, Marion County Court Case No. 16CR14258.
- (e) During the period of probation, Stuart shall continue to be under the care and treatment of medical providers and/or counselors for pornography addiction or conditions previously diagnosed that may impact Stuart’s ability to practice law. On or before June 1, 2018, Stuart will request and provide proof of request to the Bar of a current written evaluation by a current treating professional describing any recommended treatment for Stuart. Once the treating professional provides that written evaluation, then Stuart will provide that evaluation to the Bar. Stuart will comply with all treatment recommendations made by any physician, counselor, or medical professional regarding Stuart’s pornography addiction.
- (f) Beginning on or about June 1, 2018, and continuing every three months thereafter until the term of his probation is completed, Stuart will request from

his current treating professional a writing signed by the current treating professional confirming that Stuart is under his care and complying with all recommended treatment for Stuart and will sign any releases or authorizations requested of him by his current treating professional to facilitate this requirement. Stuart shall see that the writing is submitted by his current treating professional not later than the 15th day of the month following the last day of third month of the period covered by that writing.

- (g) Stuart acknowledges that DCO will refer him to the State Lawyers Assistance Committee (“SLAC”) for monitoring of his pornography addiction, not due to any substance abuse issues. Stuart will cooperate with SLAC and acknowledges that failure to cooperate with SLAC may be grounds for discipline pursuant to RPC 8.1(c).
- (h) A member of SLAC or such other person approved by DCO in writing shall monitor Stuart’s probation (“Monitor”), and Stuart agrees to enter into and comply with the terms of a Monitoring Agreement with SLAC. Stuart shall notify SLAC within 14 days of the effective date of:
 - (1) the existence and contents of this Stipulation for Discipline; and
 - (2) discuss with SLAC whether and how to modify his current treatment plan to best accomplish the objectives of Stuart’s probation.
- (i) Stuart shall meet with Monitor as often as recommended by SLAC, and shall comply with all reasonable requests and recommendations made by SLAC to supplement his treatment and to promote compliance with this Stipulation for Discipline, and as necessary for the purpose of reviewing Stuart’s compliance with the terms of the probation. Stuart shall cooperate and shall comply with all reasonable requests of SLAC that will allow SLAC and DCO to evaluate his compliance with the terms of this Stipulation for Discipline.
- (j) Stuart authorizes Monitor to communicate with DCO regarding Stuart’s compliance or noncompliance with the terms of his probation and to release to DCO any information DCO deems necessary to permit it to assess Stuart’s compliance.
- (k) Stuart shall continue regular treatment sessions with his current treatment provider (“Current Treating Professional”) or another mental health treatment provider determined by SLAC to be appropriate.
- (l) Stuart agrees that, if SLAC is alerted to facts that raise concerns regarding compliance with the terms of this Stipulation for Discipline or the objectives of probation, Stuart will participate in a further evaluation at the request and direction of SLAC.

- (m) Stuart shall arrange for and meet with his Current Treating Professional or another health care professional acceptable to DCO and Monitor to develop and implement a course of treatment that will address any identifiable concerns.
- (n) Stuart shall continue to attend regular counseling/treatment sessions with the approved health care professional for the entire term of his probation. Stuart shall obtain and take and/or continue to take, as prescribed, any health-related medications.
- (o) Stuart shall not terminate his counseling/treatment or reduce the frequency of his counseling/treatment sessions without first submitting to DCO a written recommendation from his Current Treating Professional or other approved health care professional that his counseling/treatment sessions should be reduced in frequency or terminated and Stuart undergoes an independent evaluation by a second professional acceptable to DCO and Monitor, which evaluation confirms his fitness.
- (p) Stuart consents to the release of information by his Current Treating Professional, other mental health or substance abuse treatment program or provider to SLAC and to DCO, regarding his treatment plan, his progress under that plan, and his compliance with the terms of this Stipulation for Discipline, waives any privilege or right of confidentiality to permit such disclosure, and agrees to execute such releases as may be required by such providers upon request by SLAC or DCO. Stuart acknowledges and agrees that SLAC shall promptly report to DCO any violation of the terms of this Stipulation for Discipline.
- (q) On a quarterly basis, on dates to be established by DCO beginning no later than 60 days after the effective date of this Stipulation, Stuart shall submit to DCO a written "Compliance Report," approved as to substance by his Monitor, if appointed, advising whether Stuart is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Stuart's meetings with his Monitor.
 - (2) Whether Stuart has completed the other provisions recommended by his Monitor, if applicable.
 - (3) In the event that Stuart has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the non-compliance and the reason for it.
- (r) Stuart is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (s) Stuart's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his

Monitor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.

- (t) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (u) The SPRB's decision to bring a formal complaint against Stuart for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

13.

Stuart 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 that may be imposed under this Stipulation. In this regard, however, Stuart represents that he is not practicing law and has no current or former client files in his possession.

14.

Stuart 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.

15.

Stuart 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. This requirement is in addition to any other provision of this agreement that requires Stuart to attend or obtain continuing legal education (CLE) credit hours.

16.

Stuart 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 Stuart is admitted: none.

17.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 10, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 11th day of April, 2018.

/s/ Jonathan Stuart

Jonathan Stuart
OSB No. 055598

APPROVED AS TO FORM AND CONTENT:

/s/ Calon Nye Russell

Calon Nye Russell
OSB No. 094910

EXECUTED this 16th day of April, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel
OSB No. 022916
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-36
)	
THOMAS W. CRAWFORD,)	
)	
Respondent.)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.16(d). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	June 8, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Crawford is publicly reprimanded for violation of RPC 1.16(d).

DATED this 8th day of June, 2018.

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

STIPULATION FOR DISCIPLINE

Thomas Crawford, attorney at law (“Crawford”), and the Oregon State Bar (“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.

Crawford 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 Bar continuously since that time, having his office and place of business in Douglas County, Oregon.

3.

Crawford 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 10, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Crawford for alleged violations of 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.

Facts

5.

In or around January 2016, Barbara Keller-Templeton (“Keller-Templeton”) contacted Crawford seeking help probating her brother’s estate. Crawford accepted the client’s original documents and reviewed them.

6.

After he reviewed Keller-Templeton’s documents, Crawford determined that the estate at issue was too small to warrant his fees to probate and he instructed his staff to return the materials received to the client. Crawford believed that this was done. However, he admits that he was mistaken in that belief.

7.

Keller-Templeton called Crawford several times thereafter and, in July 2016, wrote a letter to Crawford requesting that he return the documents to her if he was not going to take her case. More than a year later, Keller-Templeton filed a complaint with the Bar. Less than a month from the time the Bar contacted Crawford, he returned the documents to Keller-Templeton.

Violations

8.

Crawford admits that, by failing to take steps to ensure that Keller-Templeton received her requested client file after his election to withdraw, Crawford admits that he violated RPC 1.16(d).

Sanction

9.

Crawford 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* (“*Standards*”). The *Standards* require that Crawford’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.** Crawford violated his duty to his client to preserve his client’s property, specifically the duty to promptly return documents to which his client was entitled upon termination of the representation. *Standards* § 4.1. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards* at 5.
- b. **Mental State.** A lawyer’s mental state may be viewed as negligent, knowing, or intentional. A lawyer is negligent when the lawyer fails to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Intent” is the conscious objective or purpose to accomplish a particular result. *Id.* Crawford did not act intentionally, rather Crawford’s conduct in this matter was negligent. Crawford admits that he was mistaken in his belief that he had instructed his staff to return Keller-Templeton’s documents. Accordingly, his mental state can be viewed as negligent.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 7. Here, the delayed return of Keller-Templeton’s documents was frustrating to her and made it difficult for her to submit an insurance claim regarding her deceased brother’s truck. Although Crawford asserts that the limited assets of the estate would not have justified the costs of proceeding through probate, his failure to communicate that information or to assure that his staff did harm his client by causing her frustration and harmed the profession by exemplifying to a member of the public non-responsiveness and a perceived lack of diligence.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A prior record of discipline. *Standards* § 9.22(a). In 2000, Crawford was publicly reprimanded for violations of DR 1-102(A)(4) (*current* RPC 8.4(a)(4)), DR 5-105(E) (*current* RPC 1.7(a)), and DR 6-101(B) (*current* RPC 1.3) when in the course of representing the personal representative in a probate matter a dispute arose concerning the estate's real property and the real property of another one of Crawford's clients. The parties agreed to resolve this dispute, the terms of which Crawford memorialized in writing for each of his clients when their interests were in actual conflict. Crawford also failed to timely file an annual accounting for the estate, despite receiving multiple notices from the court to do so. As a result, the court served Crawford with an order requiring him to appear and show cause why the personal representative should not be removed.
 2. Substantial experience in the practice of law. *Standards* § 9.22(i). Crawford was admitted in Oregon in 1979.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a selfish or dishonest motive. *Standards* § 9.32(b).
 2. Cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).
 3. Remorse. *Standards* § 9.32(l). Specifically, Crawford has expressed a willingness to acknowledge responsibility for his violation and he has apologized to his client.
 4. Remoteness of prior offense. *Standards* § 9.32(m).

10.

Under the ABA *Standards*, public reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards* § 3.13.

11.

Oregon case law also supports the imposition of a public reprimand in this matter. *See, e.g., In re Alexander Gregory*, 19 DB Rptr 150 (2005) (attorney reprimanded after he ignored requests from his former client and her new counsel for the client's file and the unearned portion of her retainer, until the client filed a complaint with the bar); *In re Kleen*, 27 DB Rptr 213 (2013) (attorney reprimanded after he took eight months after the end of the attorney-client relationship to return funds that the client had paid him to obtain an expert opinion that he never sought); and *In re Witte*, 24 DB Rptr 10 (2010) (attorney reprimanded after she withdrew

from representing a client without returning her file materials to the client so that he could represent himself).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that Crawford shall be publicly reprimanded for violation of RPC 1.16(d), the sanction to be effective upon approval by the Disciplinary Board.

13.

Crawford 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. This requirement is in addition to any other provision of this agreement that requires Crawford to attend or obtain continuing legal education (CLE) credit hours.

14.

Crawford 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 Crawford is admitted: none.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 28, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 29th day of May, 2018.

/s/ Thomas Crawford

Thomas Crawford

OSB No. 791987

EXECUTED this 6th day of June, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-63
)	
ERIC M. BOSSE,)	
)	
Respondent.)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 8.4(a)(2). Stipulation for Discipline. Six-month suspension.
Effective Date of Order:	November 22, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Eric M. Bosse is suspended for six months, with the suspension to commence on November 22, 2018 (effective date), consecutively to Eric M. Bosse’s present disciplinary suspension in *In re Eric M. Bosse*, 30 DB Rptr 311 (2016), for violation of RPC 8.4(a)(2).

DATED this 15th day of June, 2018.

/s/ Mark A. Turner

 Mark A. Turner
 Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Eric M. Bosse, attorney at law (“Bosse”), and the Oregon State Bar (“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.

Bosse was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 17, 1987, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Bosse 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 April 28, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Bosse for alleged violations of RPC 8.4(a)(2) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

In or around January 1998, Bosse was arrested for driving while under the influence of intoxicants (“DUII”), a Class A misdemeanor. Bosse was charged with two subsequent driving while suspended (DWS) charges (one each in April and May 1998), both misdemeanors. In May 1998, Bosse entered into a plea deal which involved all three charges; Bosse entered into a diversion agreement for the DUII and plead guilty to the two DWS charges. Bosse successfully completed the diversion program, and the DUII was dismissed in or around June of 1999.

6.

In or around January 2009, Bosse pled guilty and was convicted of DUII, a Class A misdemeanor.

7.

In or around August 2014, Bosse was cited for operating a vehicle without driving privileges and failure to carry proof of insurance, Class B violations.

8.

In or around early June 2017, Bosse pled guilty to DUII, a Class A misdemeanor, and a reckless driving charge.

9.

In or around late June 2017, Bosse pled guilty to a DUII charge, a Class A misdemeanor.

Violations

10.

Bosse admits that, by engaging in criminal acts that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects, he violated RPC 8.4(a)(2).

Sanction

11.

Bosse 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* (“Standards”). The *Standards* require that Bosse’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.** Bosse violated his duty to the public to maintain his personal integrity. *Standards* § 5.1.
- 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* at 9. Bosse acted knowingly. When he chose to drive while under the influence of intoxicants, he knew that his conduct was illegal as he had been convicted of the same crime in the past. *See In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1988) (lawyer’s mental state can be inferred from the facts).
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, the trial panel may take into account both actual and potential injury. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Bosse’s acts of driving while under the influence of intoxicants involved actual and potential harm. Each time Bosse drove under the influence, he risked serious bodily to himself and others. *In re McDonough*, 336 Or 36, 42, 77 P3d 306 (2003). His repeat

criminal conduct caused actual injury to the legal system by demonstrating an indifference to the law and caused actual injury to the integrity of the profession by damaging the public's confidence in lawyers. *Id.*

- d. **Aggravating Circumstances.** Aggravating factors include:
1. Prior disciplinary offenses. *Standards* § 9.22(a). In November 2016, Bosse was suspended for two years for violating 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); RPC 1.5(a) (charging or collecting an excessive fee); RPC 1.15-1(d) (failure to account for and return client property); RPC 8.1(a)(1) (knowingly make a false statement of material fact in connection with a disciplinary matter); RPC 8.1(a)(2) (failure to respond to DCO inquiries); and, RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). *In re Bosse*, 30 DB Rptr 311 (2016). Although these disciplinary offenses are not the same or similar type of conduct as in this case, their recency would enhance their relevance but for the fact that the criminal conduct at issue here occurred within an overlapping timeframe. Accordingly, this factor is not assigned substantial weight in aggravation as the conduct in this matter does not represent failing to learn from prior disciplinary experience.
 2. A pattern of misconduct. *Standards* § 9.22(c). Bosse engaged in repeated criminal conduct.
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Bosse was admitted to practice in 1987.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Full and free disclosure and cooperative attitude toward proceedings. *Standards* § 9.32(e). Bosse was cooperative in the Bar's investigation of his conduct.
 2. Imposition of other penalties or sanctions. *Standards* § 9.32(k). Bosse served over 90 days' incarceration total for the two 2017 DUI's. He was also assessed fines and loss of driving privileges. Bosse received 36 months' probation in Clackamas County, and his license was suspended for 12 months. He is presently on two years' probation in Washington County and required to undergo an alcohol evaluation, which he attended in or around February 2018. He was connected to an alcohol detection device for several months and daily alcohol breath analysis and retina scan analysis. Bosse also submitted to random urinalysis testing during his incarceration in Washington County. He submitted to

a chemical dependency assessment, and attended an evaluation for treatment on April 4, 2018.

3. Remorse. *Standards* § 9.32(1). After his jail periods, Bosse has acknowledged he needs treatment for his alcohol abuse and began voluntary attendance at AA and DDA meetings. He expressed great remorse for his illegal conduct.

12.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects 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. *Standards* § 5.12.

13.

Oregon case law also supports the imposition of a suspension in this matter. Lawyers who have engaged in repeated criminal conduct of this nature (i.e. driving offenses) have typically been suspended. *See, e.g., In re McDonough*, 336 Or 36 (the court imposed an 18-month suspension upon an attorney who had four acts of DUII, five acts of driving while suspended, three acts of reckless driving, one act of fourth-degree assault, and one act of recklessly endangering another person. By the time of the adjudication, McDonough admitted he needed treatment for his alcoholism, but had not established any meaningful and sustained recovery from his alcohol dependency).

Suspensions for similar driving-related offenses have also been imposed by a trial panel and by stipulation. *See e.g., In Ettinger*, 27 DB Rptr 76 (2013) (trial panel suspended attorney for two years where, in a one-year period, attorney was arrested for numerous crimes including two instances of DUII, reckless driving, failing to perform the duties of a driver, failure to appear, providing false information to a police officer, criminal trespass, initiating a false police report, and resisting arrest; she was also found in violation of a diversion agreement and to have failed to obey a court order); and *In re Chancellor*, 22 DB Rptr 27 (2008) (attorney stipulated to a one-year suspension after committing a series of alcohol-related offenses, and thereafter failed to comply with diversion and probation orders in three counties); *In re Bowman*, 28 DB Rptr 308 (2015) (attorney with prior, remote DUII diversion who was convicted of two DUIIs and two DWSs in approximately a one-year time span stipulated to a 180-day suspension, with all but 30 days stayed, pending completion of a two-year probation, where he also had prior discipline for tax-related criminal conduct).

Taking into account the *Standards*, Bosse's knowing mental state, the fact that the aggravating and mitigating factors are in equipoise and do not affect the presumptive discipline to be imposed, and prior Oregon cases, a six month suspension is an appropriate and consistent sanction for Bosse's conduct in this matter.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Bosse shall be suspended for six months, with the suspension to commence on November 22, 2018, consecutively to Bosse's present disciplinary suspension in *In re Bosse*, 30 DB Rptr 311 (2016), for violation of RPC 8.4(a)(2).

15.

Bosse 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 that may be imposed under this Stipulation. In this regard, however, Bosse represents that he is not practicing law and has no current or former client files in his possession.

16.

Bosse 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. Bosse 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.

Bosse 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. This requirement is in addition to any other provision of this agreement that requires Bosse to attend or obtain continuing legal education (CLE) credit hours.

18.

Bosse 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 Bosse is admitted: none.

19.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 28, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 6th day of June, 2018.

/s/ Eric M. Bosse

Eric M. Bosse

OSB No. 870260

EXECUTED this 12th day of June, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 18-65
)
SUZANNE MARIE BRUCE,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Respondent: None
Disciplinary Board: None
Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Stipulation for Discipline. Public Reprimand.
Effective Date of Order: July 6, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Suzanne Marie Bruce is publicly reprimanded for violations of RPC 1.1, RPC 1.3, RPC 1.4(a) and RPC 1.4(b).

DATED this 6th day of July, 2018.

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

STIPULATION FOR DISCIPLINE

Suzanne Marie Bruce, attorney at law (“Bruce”), and the Oregon State Bar (“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.

Bruce was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 10, 2012, and has been a member of the Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

Bruce 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 April 28, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Bruce for alleged violations of RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 1.4(b) 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 January 2016, Kimberly Forrest (“Forrest”) retained Bruce to file a guardianship proceeding over Forrest’s two minor grandchildren. Bruce had no prior experience handling guardianships, but was encouraged by her supervisor, to take on the matter. At the time, Bruce was working at a legal aid clinic that required attorneys to retain a high volume of cases with minimal staff assistance. Forrest had previously filed *pro se* a guardianship proceeding over one of the grandchildren that the court dismissed due to Forrest’s failure to provide proof of service or file a limited judgment appointing herself as guardian.

6.

In March 2016, Bruce filed a petition requesting that the court appoint Forrest as guardian of one of the grandchildren, not both. In May, the court sent Bruce a notice that it would close the case if she did not submit a Limited Judgment Appointing Guardian within 30 days. Several days after the 30-day deadline expired, Bruce submitted a limited judgment with a certificate of service showing the ward’s mother had been served, but not the father. The following day, the court notified Bruce that she needed to file a proof of personal service on both parents pursuant to the guardianship statutes.

7.

Approximately 25 days later, Bruce filed an affidavit that affirmed mother had been personally served. A little over a month later, the court gave notice to Bruce that it would dismiss the case if she did not provide proof of personal service on father. Bruce did not file a proof of personal service on father, request an alternative mode of service, or request additional time. The court dismissed the case in late September 2016.

8.

In November 2016, Bruce filed a motion to reopen the guardianship proceeding, alleging in her affidavit that the case was dismissed in November 2015 for want of presentation of a limited judgment, when, in fact, it had been dismissed in September of 2016. The court reopened the case and requested that Bruce file proof that the ward's father had been served. When Bruce filed a proof of service on the father, but not proof of personal service, the court again requested that she file a proof of personal service. Due to the difficulty of finding the father, it was not until January 2017 that Bruce filed proof of personal service on the ward's father.

9.

Bruce also filed a motion and affidavit to reinstate the other grandchild's guardianship proceedings in November 2016 (the one that Forrest originally filed prior to engaging Bruce). Bruce decided not to reopen that case at the time so as to handle one guardianship at a time. The court rejected Bruce's order, asking her to refile it once the deferred filing fee had been paid. Bruce filed the application for a fee deferral waiver, which was granted, but did not refile the order. Bruce could not file the order at the time because she could not locate information needed for service to the legal parents of the minor child.

10.

Throughout her representation, Bruce did not keep Forrest apprised on the progress of the guardianships. Bruce emailed Forrest once in May 2016 and then gave her no further information about the case until September 29, 2016. Bruce did not inform Forrest of the difficulties that she had getting the case filed and served, the fact that she had elected not to reopen the first case in order to handle the guardianships one at a time, or the fact that the guardianship that she did open in March 2016 case had been dismissed for Bruce's failure to prosecute the matter.

Violations

11.

Bruce admits that, by engaging in the conduct described above, she failed to provide competent representation, neglected a legal matter, failed to keep her client reasonably informed about the status of the matter, and failed to explain a matter to the extent reasonably

necessary to permit the client to make informed decisions regarding the representation in violation of RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

Sanction

12.

Bruce 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* (“*Standards*”). The *Standards* require that Bruce’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.** Bruce violated the duties she owed to her client in not acting with reasonable diligence and promptness, including the duty to timely communicate with her client, and not providing competent representation. *Standards* §§ 4.4 and 4.5.
- b. **Mental State.** The *Standards* recognize three mental states. The most culpable mental state is that of “intent,” when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Negligence” is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Bruce was negligent in preparing herself to competently handle the guardianship proceedings and communicating with her client.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). An attorney who fails to actively pursue a client’s case has caused actual harm to that client. *See In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). Forrest sustained actual injury due to Bruce’s delay in moving the guardianship proceedings forward, thereby prolonging the period of time that Forrest had to wait to be able to act as the guardian for her minor grandchildren.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Multiple offenses. *Standards* § 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 2. Absence of dishonest motive. *Standards* § 9.32(b).

3. Inexperience in the practice of law. *Standards* § 9.32(f).
4. Remorse. *Standards* § 9.32(l).

13.

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. A reprimand is also appropriate when a lawyer demonstrates a failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client. *Standards* §§ 4.43, 4.53.

14.

The Bar has stipulated to a reprimand in similar circumstances. *See e.g., In re May*, 27 DB Rptr 200 (2013) (attorney reprimanded for violations of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.5(a) for filing a divorce in the wrong county, failing to properly serve the opposing party, failing to respond to client inquiries, failing to notify the client of the change in the location of their office, and charging the client for services that were of no benefit to her); *In re O'Rourke*, 24 DB Rptr 227 (2010) (attorney unfamiliar with the proper method of representing an incapacitated person in a personal injury case was reprimanded for preparing documents for and allowing client's mother to sign as *guardian ad litem*, when she had not been so appointed); *In re McDonough*, 21 DB Rptr 289 (2007) (attorney appointed to represent client in two criminal matters over a two-year period was reprimanded for failing to pursue the defense of the matters, and making little or no efforts to investigate the matters); *In re Stevens*, 20 DB Rptr 53 (2006) (attorney reprimanded for repeatedly failing to submit timely reports to the court in conservatorship and for filing documents which were deficient in substance and format); *In re Breckon*, 18 DB Rptr 220 (2004) (attorney without previous experience in dissolutions involving significant real property issues was reprimanded when he failed to obtain an appraisal for trial or elicit evidence in support of client's position regarding property value); *In re Maloney*, 24 DB Rptr 194 (2010) (although attorney took some action on behalf of her criminal appellate client, she was reprimanded for failing to communicate with the client despite numerous inquiries asking about the status of his legal matter and actual decisions being made in the case).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Bruce shall be publicly reprimanded for violations of RPC 1.1, RPC 1.3, RPC 1.4(a) and RPC 1.4(b).

16.

Bruce 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. This requirement is in addition to any other provision of this agreement that requires Bruce to attend or obtain continuing legal education (CLE) credit hours.

17.

Bruce 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 Bruce is admitted: none.

18.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 28, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 29th day of June, 2018.

/s/ Suzanne Marie Bruce

Suzanne Marie Bruce

OSB No. 120714

EXECUTED this 29th day of June, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-96
)	
MATTHEW SWIHART,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Respondent:	Mark J. Fucile
Disciplinary Board:	None
Disposition:	Violation of RPC 1.5(a). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	July 16, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Swihart is publicly reprimanded for violation of RPC 1.5(a).

DATED this 16th day of July, 2018.

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

STIPULATION FOR DISCIPLINE

Matthew Swihart, attorney at law (“Swihart”), and the Oregon State Bar (“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.

Swihart was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 12, 2013, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Swihart 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 16, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Swihart for his alleged violation of RPC 1.5(a) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

In 2014, Lorraine Lang (“Lang”) executed a power of attorney (“POA”) in favor of Sheral Caswell (“Caswell”) that granted Caswell broad authority to act on Lang’s behalf. The POA stated:

“I grant my attorney-in-fact the maximum power under law to perform any act on my behalf that I could do personally, including but not limited to, all acts relating to any and all of my financial transactions and/or business affairs including all banking and financial transactions, all real estate or personal property transactions, all insurance or annuity transactions, all claims and litigation, and any and all business transactions.”

6.

In or prior to December 2015, Swihart met with Caswell, who was seeking to be appointed as guardian and conservator for Lang. Caswell provided Swihart with the POA referenced above and told him that she had been paying for the protective proceeding with Lang’s funds. Using the POA, Caswell paid the initial retainer with a debit card in Caswell’s name that was drawn on Lang’s checking account, and later wrote Swihart several checks totaling approximately \$5,000 from Lang’s checking account.

7.

When the guardianship was created in May 2016, the judgment did not terminate the POA. Instead, the judgment signed by the court specifically deleted language in the proposed judgment which stated that any POAs were revoked.

8.

In several payments over a period of months, Caswell used Lang's funds to pay Swihart's firm a total of \$8,000. Swihart did not obtain prior court approval before accepting the payments.

9.

Swihart twice petitioned the court for payment of attorney fees pursuant to ORS 125.095 and his requests were denied without explanation.

10.

After nearly two years, Swihart was replaced as Caswell's counsel by attorney Sara Kearsley ("Kearsley").

11.

After replacing Swihart, Kearsley helped Caswell to file the final accounting for the conservatorship. The accounting notified the court of the payments to Swihart's firm and asked the court to order the firm to return those funds to the conservatorship account. In an order signed May 3, 2018, the court noted the lack of prior approval pursuant to ORS 125.095, and ordered Swihart's law firm to repay \$8,000 in attorney fees to the conservatorship account.

Violation

12.

By accepting fees from a protected person's assets without court approval, Swihart collected an illegal fee, in violation of RPC 1.5(a).

Sanction

13.

Swihart 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* ("Standards"). The *Standards* require that Swihart'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.** Swihart violated his duty owed as a legal professional to avoid charging or collecting improper fees. *Standards* § 7.0.
- b. **Mental State.** Swihart's mental state was negligent; that is, he failed to be aware of a substantial risk that circumstances existed or that a result would follow and which deviated from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. Swihart researched the interplay between the POA and ORS 125.095 and did not find any authority suggesting

that Caswell could not use the POA to pay his attorney fees. Although he reached the incorrect conclusion, Swihart had a good faith belief that ORS 125.095 did not preclude his client from utilizing the POA to make several payments to his firm with funds of a protected person.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Here, the protected person suffered actual injury when her funds were taken from her account without the statutorily-required prior court approval. Even if her conservator believed that the payment of attorney's fees for the work done on the conservatorship was reasonable, the court was not first permitted to scrutinize the amount charged for the work.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Vulnerability of victim. *Standards* § 9.22(h). The victim was the protected person, whose funds were taken from her account without prior court approval.
 2. Substantial experience in the practice of law. *Standards* § 9.22(i). Prior to his admission in Oregon in 2013, Swihart was admitted to the Florida bar in 2007.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 2. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
 3. Full and free disclosure and cooperative attitude toward these disciplinary proceedings. *Standards* § 9.32(e).
 4. Imposition of other penalties or sanctions. *Standards* § 9.32(k). The court ordered Swihart's firm to reimburse the conservatorship the legal fees paid to the firm.

14.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards* § 7.3.

15.

Oregon cases reach the same result. *See, e.g., In re Vanagas*, 27 DB Rptr 255 (2013) (attorney reprimanded by trial panel for accepting payment from conservatorship funds without obtaining court approval as required by statute, even though attorney provided a credible explanation of why he believed the taking was permitted notwithstanding his obligations under

ORS 125.095); *In re Hammond*, 24 DB Rptr 187 (2010) (attorney reprimanded when, in a federal workers' compensation matter, attorney collected two fees from a client without obtaining the agency approval required by statute); *In re Mitchell*, 17 DB Rptr 26 (2003) (attorney reprimanded for collecting an illegal fee from the estate of a disabled person because he did not first obtain court approval); *In re Jacobson*, 12 DB Rptr 99 (1998) (attorney reprimanded for failing to file an annual accounting and collecting legal fees from an estate without first obtaining court approval).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that Swihart shall be publicly reprimanded for his violation of RPC 1.5(a).

17.

Swihart 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.

Swihart 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 Swihart is admitted: Florida.

19.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 16, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 9th day of July, 2018.

/s/ Matthew Swihart

Matthew Swihart

OSB No. 132533

APPROVED AS TO FORM AND CONTENT:

/s/ Mark J. Fucile

Mark J. Fucile

OSB No. 822625

EXECUTED this 9th day of July, 2018.

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. 18-73
)	
WILLIAM REDDEN,)	
)	
Respondent.)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Respondent:	David J. Elkanich
Disciplinary Board:	None
Disposition:	Violation of RPC 1.15-1(d) and RPC 1.16(d). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	October 1, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and William Redden is suspended for thirty (30) days, effective October 1, 2018, for violation of RPC 1.15-1(d) and RPC 1.16(d).

DATED this 23rd day of July, 2018.

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

STIPULATION FOR DISCIPLINE

William Redden, attorney at law (“Redden”), and the Oregon State Bar (“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.

Redden was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 20, 2002, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Redden 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 April 28, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Redden for alleged violations 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.

Facts

5.

On April 23, 2015, the Washington County Circuit Court entered an order appointing Redden as trial counsel for defendant David Wayne Brooker (“Brooker”) in *State v. Brooker*, Case No. C142532CR. On June 15, 2016, a judgment of conviction was entered against Brooker, he was sentenced to several years in prison, and Redden’s representation was effectively terminated.

6.

On June 27, 2016, attorney Meredith Allen timely filed a Notice of Appeal on behalf of Brooker.

7.

Beginning in September 2016, Brooker sent Redden several requests for his client file for purposes of bringing a post-conviction relief action. Brooker also called Redden and left messages requesting his client file. In December 2016, after Redden had not responded or provided Brooker with his client file, Brooker submitted a Bar complaint against Redden. At that time, Redden incorrectly responded that he had provided Brooker with his client file.

8.

In January 2017, Brooker again complained to the Bar that Redden had failed to provide him with his complete client file. During the next year, Redden reported that he and his staff made failed efforts to provide Brooker with his complete client file.

9.

In January 2018, Redden reported to the Bar that he had been remiss in not sending Brooker's file to him and explained that his office had staffing issues and that he had a large caseload over the past year. Redden provided Brooker with his complete client file in March 2018.

Violations

10.

Redden admits that, by failing to promptly provide Brooker with his requested client file, which was property that his former client was entitled to receive, he violated RPC 1.15-1(d) and RPC 1.16(d).

Sanction

11.

Redden 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* ("Standards"). The *Standards* require that Redden'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.** Redden failed to comply with his duty to his client to properly handle client property. *Standards* § 4.0. Redden failed to comply with his duty to the profession to follow proper procedures upon termination of the representation. *Standards* § 7.0.
- b. **Mental State.** "Intent" is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. Redden acted knowingly; he acknowledged his client's request for the file and his obligation to provide it, and he did not deliver it for more than a year.

- c. **Injury.** Redden caused actual and potential injury. Brooker wanted his file for purposes of bringing a post-conviction relief action. Redden's delay had the potential to prejudice, but did not actually prejudice, Brooker's interests in that matter. Redden's delay did cause actual injury to his client in the form of anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of attorney inaction can constitute actual injury under the *Standards*). Redden's failure to timely deliver Brooker's file also caused actual injury to the profession as it reflected poorly on the profession.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. A history of prior discipline. *Standards* § 9.22(a). Redden was suspended for 60 days in 2007 for his neglect of a client's legal matter.
 2. A vulnerable victim. *Standards* § 9.22(h). Brooker was vulnerable as he was incarcerated and needed Redden's cooperation to obtain his client file.
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Redden was admitted to practice in Oregon in 2002.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a dishonest or selfish motive. *Standards* § 9.32(e).
 2. Remorse. *Standards* § 9.32(l). Redden has expressed remorse for his conduct in this matter. Redden appreciates the seriousness of his conduct and the impact upon his client.
 3. Remoteness of prior offense. *Standards* § 9.32(m). Redden's prior discipline was ordered in 2007.

12.

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 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.

13.

Oregon case law also supports the imposition of a suspension in this matter. *See, e.g., In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (30-day suspension imposed for attorney's violations of RPC 1.4(a), RPC 1.4(b), and RPC 1.15-1(d) where attorney failed to return a personal injury client's file materials, including medical records, despite numerous requests from the client, and failed to adequately communicate with client; attorney acted knowingly in

failing to deliver the file, had no prior discipline, and his mitigating factors outweighed those in aggravation). *See also In re Simms*, 29 DB Rptr 133 (2015) (trial panel imposed 120-day suspension where, in one matter, attorney received settlement funds to which his client was entitled, yet failed to forward those funds to his client until months later and only after bar involvement, and in a second matter, failed to account for the funds that his client had advanced for costs. Taking into account the *Standards*, Redden's knowing mental state, the fact that the aggravating factors do not outweigh those in mitigation, and prior Oregon cases, a short suspension is an appropriate and consistent sanction for Redden's conduct in this matter.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Redden shall be suspended for thirty (30) days for violation of RPC 1.15-1(d) and RPC 1.16(d), the sanction to be effective October 1, 2018.

15.

Redden 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, Redden has arranged for Christopher Colburn, an active member of the Bar, to either take possession of or have ongoing access to Redden's client files and serve as the contact person for clients in need of the files during the term of his suspension. Redden represents that Christopher Colburn has agreed to accept this responsibility.

16.

Redden 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. Redden 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.

Redden 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. This requirement is in addition to any other provision of this agreement that requires Redden to attend or obtain continuing legal education (CLE) credit hours.

18.

Redden 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 Redden is admitted: none.

19.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 28, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 12th day of July, 2018.

/s/ William Redden
William Redden
OSB No. 024351

APPROVED AS TO FORM AND CONTENT:

/s/ David J. Elkanich
David J. Elkanich
OSB No. 992558

EXECUTED this 20th day of July, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey
Nik T. Chourey
OSB No. 060478
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 17-51
)
BRIAN A. BUCHANAN,)
)
Accused.)

Counsel for the Bar: Nik T. Chourey
Counsel for the Accused: None
Disciplinary Board: John T. Bagg, Chairperson
Yvonne Ana Tamayo
Dorothy A. Fallon, Public Member
Disposition: Violation of RPC 1.5(a). Trial Panel Opinion. Public
Reprimand.
Effective Date of Opinion: July 24, 2018

TRIAL PANEL OPINION

PROCEDURAL HISTORY

This is a disciplinary proceeding in which Brian A. Buchanan is accused of a violation of the Rules of Professional Conduct (RPC) arising from his representation of Karen K. Davenport in a wage claim matter against her former employer. The bar alleges the contingent fee agreement provided by Mr. Buchanan and signed by Ms. Davenport provided for a 49% contingency fee and included an escalation provision allowing Buchanan to increase his fee from 49% of any recovery he achieved for Davenport, to 59% of that recovery, in the event that Davenport did not pay his fees or costs promptly upon his request. First Amended Formal Complaint at 1. The bar asserts Mr. Buchanan’s conduct, as expressed in “his 49% contingency fee and/or his 59% escalation provision, constituted entering into an agreement for an excessive fee” in violation of paragraph 1.5(a) of the Rules of Professional Conduct (RPC). *Ibid.* at 2. The rule cited provides:

A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

The bar, in its trial memorandum, asks that Mr. Buchanan be ordered to make restitution to the client and be suspended from practice for at least 90 days.

Mr. Buchanan's answer does not deny that his agreement with his client included the 49% contingency fee and the 10% escalation clause. However, his answer claims his agreement provided the attorney (Mr. Buchanan), upon a client failure to adhere to financial obligations set out in the agreement, would theoretically have a choice as to whether to rescind the Agreement and then either withdraw from the case as client's attorney, or prospectively revise the Agreement and continue to represent the client in the case at a slightly increased percentage of recovery, for amounts potentially recovered thereafter. Amended Answer at 1–2. We understand Mr. Buchanan to argue the escalation clause works as a potential benefit to the client should the client fail to adhere to the terms of the base fee agreement. The attorney could quit the case, or the client, desiring continued representation, could agree to an additional 10% fee to the attorney of any recovery from the (former) employer. Importantly for our purposes, Mr. Buchanan adds that none of the conditions precedent in the agreement ever occurred. That is, the fee agreement provision providing for a 10% increase in fee or, alternatively, the resignation of the attorney, was never employed in his representation of Ms. Davenport.

ASSERTION OF MISCONDUCT

Allegation of violation of RPC 1.5(a)

RPC 1.5 provides:

- (a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.
- (b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;

- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

The Bar advises the question of whether a fee is excessive is answered by a reasonableness standard including the criteria set out in RPC 1.5(b). It calls for an examination of the circumstances at the time the representation commences or “a look back at what the lawyer actually did for the payment received.” Trial Memorandum at 6. The Bar then points to Mr. Buchanan’s petition to the Linn County Circuit Court asking \$1,000 for attorney fees in his representation of Ms. Davenport’s claim as evidence of his own view of the reasonableness of his contingency fee. As we understand the argument, the Bar regards Mr. Buchanan’s request for \$1,000 in attorney fees from the court to be reflective of the amount he believes is reasonable compensation for his work representing the wage claimant. Because Mr. Buchanan, through his contingent fee agreement, charged a percentage of the recovery amounting to considerably more than the fee claimed before the court, Mr. Buchanan knowingly charged his client an unreasonable and excessive fee, according to the Bar.

We will consider this portion of the controversy first as we regard it independent of the question of whether Mr. Buchanan’s former contingent fee agreement bespeaks an excessive fee structure.

The Bar cites no authority in support of its position that a statutorily allowed petition for attorney fees in an unpaid wage and penalty proceeding under ORS 652.200(2) must be reflective of, and not substantially different from, whatever contingent fee agreement the attorney may have with his or her client. The Bar’s witness, Sonia Montalbano, an attorney with considerable experience in wage claim matters, testified that her firm does not include in petitions to the court for attorney fees, “an explanation to the court of what our fee arrangement is with our client beyond the fact of whether or not the nature of the case is one of a contingent nature or whether it’s hourly.” Tr. 77. Indeed, the Bar provided no evidence to show disclosure of the terms of a contingent fee agreement in a petition or proceeding for attorney fees is even a common practice.

In part because of the scarcity of evidence about attorney fees and fee agreements in similar cases, the trial panel asked for a copy of the Bar *Fee Agreement Compendium* (ed. 2007). Review of the *Compendium* reveals nothing addressing or supporting the position the Bar takes in this proceeding. The *Compendium* is silent on the relationship between fee agreements with a client and fee petitions to a court. Absent some evidence supporting or even illustrating that the apparent Bar position on the matter is understood or followed in Oregon practice, we decline the invitation to set out guidelines addressing the question of the relationship between attorney and client contingent fee agreements and attorney fee petitions to a court. If guidelines addressing this issue are necessary or advisable, we urge the Bar to develop and publish such guidelines.

The Bar's principle argument addresses Mr. Buchanan's 49% fee and inclusion of the additional 10% should the client fail in his or her financial responsibilities to the attorney. The Bar asserts the 49% fee is excessive "on its face because it is 15% to 20% more than the industry standard for contingency fees [*sic*] agreements for comparable wage claims." The Bar's witness, Ms. Montalbano did testify that her firm's base contingency fee for similar wage claim services begins at 33 and 1/3%. Tr. 62-3. That base fee, however, goes up to 40% if the matter goes to arbitration or trial, and to 50% after the filing of an appeal. Such escalation for trial and appeal is common, as we understand the testimony. *Id.* The total possible fee, as we understand the testimony, is 50% if the matter involves an appeal. *See* Bar Ex. 36. The Bar's *Fee Agreement Compendium* makes no statement on what percentages of recovery a contingent fee arrangement should utilize, but does give an example showing a similar 33% to 40% fee structure. Significantly, however, should the matter go to appeal, the sample agreement in the Bar publication provides "[t]his agreement does not cover my attorney fees if the case is appealed or if a new trial is ordered." *See, Fee Agreement Compendium generally* at Ch. 8.

We consider the base fee of 49% first. The Bar, its exhibits and its witness do not present convincing evidence showing a contingency fee of 49% is *per se* excessive for representing a wage claimant. Ms. Montalbano said she reviewed fee arrangements of two Salem, Oregon attorneys and concluded her base contingent fee of 33% was comparable to those reviewed. She opined the 49% fee set out in Mr. Buchanan's fee agreement was high. Tr. 84.¹

We agree the evidence presented *suggests* 33% as a base rate for representations not requiring trial or arbitration is common for such matters. That somewhat thin evidence does not establish a rule or standard. It does not even illustrate what is the commonly used fee in such representations, whether in Oregon or elsewhere. We decline to accept the Bar's apparent invitation to declare a standard maximum fee for such representations on the basis of the evidence (or lack of it) and arguments presented in this case. In sum, we find the evidence presented, that is, Ms. Montalbano's testimony about her firm's fee structure and others of which she may be aware, the *Compendium* and Bar counsel's assertions, is insufficient to illustrate an "industry standard" regarding contingent fees for wage claims. Our finding about the base contingent fee of 49% of the client's recovery, however, does not dispose of the Bar's claim that Mr. Buchanan's fee agreement, in its entirety, is excessive "on its face."

¹ She added: "I've never seen anything like it. So in my opinion for a contingency fee agreement, it is high. It is higher than in the community that I've reviewed, it is higher than I've seen in the materials I've reviewed." When asked about the 59 percent escalation, she opined it was "clearly, most clearly a violation of the rules of professional conduct" as an excessive fee.

Mr. Buchanan's fee agreement begins at 49% but the agreement sets out no fee increase should the matter go to a trial or arbitration.² The agreement does provide, however, that the base 49% fee does not include fees for appeal related work. As suggested by the example given in the Bar's *Fee Agreement Compendium*, any such appeal would appear to be a matter for a separate negotiation between the attorney and the client. *See* Resp. Ex. 1. The challenged 10% increase to Mr. Buchanan's base fee comes into play only in the event of a failure by the client to pay the attorney, within 30 days of request, any fee due for representation under the agreement, or failure to pay any expenses Mr. Buchanan expended on behalf of the client. *Id.* Mr. Buchanan testified the provision has been in his agreements for "probably" 10 years (Tr 121), but he has never enforced it. Tr. 120-21. He says he removed the provision prior to the complaint to the Bar initiating this proceeding. Tr. at 121. Mr. Buchanan advises he regarded the 10% contingency add-on as useless. *Id.*

Notwithstanding his present view the prior fee structure was useless, Mr. Buchanan argued that it did not create an unethical fee arrangement because it protected the client from attorney resignation should the client fail to live up to his or her financial obligations to the attorney. We regard this view as novel and mistaken.

Mr. Buchanan's amended answer, his trial memorandum and his argument at the hearing claimed the challenged fee provision was an attempt to benefit the client. The alleged benefit exists, allegedly, in providing an incentive to the attorney to continue representing the client even after the client fails to abide by the fee provisions (or other provisions) of the attorney/client agreement. According to the argument, were an attorney to withdraw from representing a client who fails to pay or reimburse the attorney as required, the "client would almost certainly suffer the devastating negative consequences of having [the] lawsuit dismissed (since the likelihood that client could find another attorney to substitute as their attorney in the case, on a contingency fee basis, is very remote" Amended Answer at 3. Mr. Buchanan's argument bespeaks a failure to understand the significance of his inclusion of the 10% add-on to his compensation. As we understand the Bar's argument and the import of the Supreme Court's opinion in *In re Paulson*, 335 Or 436, 71 P3d 60 (2003), a lawyer may not charge a fee for work not in the client's interest. The court in *Paulson* held that a lawyer could not charge the client for the lawyer's response to the client's complaint to the Bar. The lawyer's act of responding to the complaint was not an act in furtherance of the client's interest, it was in furtherance of the lawyer's interest. As such, any fee charged to the client for such work or

² Mr. Buchanan advises he arrived at the percentages in his contingent fee agreement after concluding he could not maintain his practice if he were to charge a lesser amount. He does not offer statistical, actuarial or other factual support for his conclusion, but we are not cited to any other evidence showing Mr. Buchanan's conclusion to be mistaken. We take it as his opinion. We do not regard his base 49% fee as indicative of an intent, as claimed, that he intended "to extract as much money from his clients' recoveries as he could in spite of the Rules of Professional Conduct." *Bar Trial Memorandum* at 10.

act was excessive in that it was of no benefit to the client. An argument between a lawyer and his or her client over payment of client obligations is an argument about a benefit to the lawyer, not the client. We agree with the Bar in so far as it argues Mr. Buchanan's past contingent fee structure is inherently excessive in that it includes provision for his personal benefit outside of his fee for client representation.

Our view is supported further by the nature of the fixed percentage charged the client in the event of client failure to perform financial obligations to the attorney. The 10% charge is akin to liquidated damages in that it may or may not result in the recovery of the exact amount of money owed by the client. Arguably, the attorney could be short changed under the fixed percentage. Equally possible is an unjust enrichment to the attorney.³ In any case, as in *Paulson, supra*, the attorney is the beneficiary of such a provision. Whether the attorney is owed money or not, the fact the fee agreement included such a provision is evidence on its face that the contingent fee agreement incorporates an "excessive" fee because it exists for the attorney's benefit, not the client's. An attorney may have legitimate claims against a client or former client, but such matters need be resolved in a separate negotiation or proceeding, not provided for as part of the fee agreement for representation.

We should add that RPC 1.5(a) prohibits not simply collecting an excessive fee, but entering into agreements for and charging an excessive fee. By its terms, the rule has three separate categories of prohibited conduct: agreements for, charging and collecting an illegal or clearly excessive fee. Were the prohibition to be confined to a fee collected, there would seem no need to include the reference to a fee agreement or a charge. *See, State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We conclude Mr. Buchanan's former contingent fee agreement set out a fee structure in violation of RPC 1.5(a).

Having found a violation of RPC 1.5(a), we next proceed to consider whether a sanction for the violation is appropriate and, if so, what sanction is appropriate. In doing so, we are mindful of Mr. Buchanan's testimony that he no longer uses the offensive fee escalation provision. We are also mindful, however, that he appears to adhere to the view that the provision was of benefit to the client in that it allowed continued representation by the attorney even after the client failed to perform client financial obligations under the agreement. The escalation provision was not of benefit to the client. The benefit only accrues if the client pays an increased portion of any recovery to the attorney. If the client fails or refuses, the attorney is free to abandon the representation. Mr. Buchanan's former contingent fee arrangement may provide an incentive to him to continue representation, but it does little more than provide an

³ One might also address the 10% add-on as a coercive tool to move the client into staying with the attorney. A 10% increase in the total attorney share of recovery might be more attractive than having to seek out and hire a new attorney.

extraction of funds from the client to permit the attorney to agree to continued representation. The better choice for the attorney as well as the client might be the Bar's fee arbitration service.

STANDARDS FOR SANCTION

We are to consider four factors in determining appropriate sanctions for violation of the rules of conduct: (1) the nature of the duty violated, (2) the mental state of the accused, (3) the actual or potential injury resulting from the conduct and (4) the existence of aggravating and mitigating circumstances. *See, American Bar Association's Standards for Imposing Lawyer Sanctions*, sec. 3 (hereafter *Standards*) (1992) and *In re Miles*, 324 Or 218, 221, 923 P2d 1219 (1996).

We discussed the duty violated in the text above. Mr. Buchanan's mental state is evident from his conduct. We find nothing in the record to show Mr. Buchanan had a desire to treat his client(s) unfairly or wrongfully charge them for legal services.⁴ We do find, however, he was clearly mistaken in his view the former agreement structure was of benefit to the client.

The injury, whether actual or potential is to the client, the Bar, the legal profession and the public. *See, In re Parker*, 330 Or 541, 9 P3d 107 (2000) and *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996). We discussed the injury, or lack of one, above. In the instant case, we find no injury to the client. Arguably, however, the prohibited fee conduct constitutes an injury to the Bar and the public, but because the portion of the fee agreement we find offensive to RPC 1.5(a) was never put into effect, any such injury is in theory, not in practice. That is, there was a potential for injury inherent in Mr. Buchanan's contingent fee agreement. *See, In re Williams*, 314 Or 530, 574, 840 P2d 1280 (1992). We discuss this matter further under "SANCTION," *infra*.

Under the fourth of the American Bar Standards, aggravating and mitigating circumstances, the Bar asserts aggravating circumstances existed in several respects. The first aggravation asserted is in Mr. Buchanan's record of prior discipline. In 2003, he stipulated to imposition of a public reprimand for disregarding the ruling of a tribunal. *Disciplinary Rule 7-106(A)*. Mr. Buchanan entered his wife's residence in disregard of a court order prohibiting such entry. The Bar asserts his disregard of a restraining order was dishonest and relevant to the matter at issue here in that his petition for \$1,000 in attorney fees was at odds with the sums received or to be received under the contingent fee arrangement. The Bar asserts the attorney fee claim was dishonest "when he fully intended to (and did) take more than \$6,000 in attorney fees" under his fee agreement with the client.

We have already dealt with the relationship between the attorney fee request before the court and the contingent fee agreement. We do not find the prior disregard of a restraining

⁴ We note in passing that Mr. Buchanan testified that he shares court ordered attorney fees with his clients. Tr. at 58.

order particularly relevant here, and we find no disregard or disrespect for law in filing the attorney fee petition asking for a different amount than provided under the fee agreement. We reject the Bar's assertions to the contrary.

We conclude Mr. Buchanan lacked a dark or otherwise improper motive in his view that his automatic fee increase provision provided for continued representation of a non-compliant (in part) client. In the abstract, we might characterize his provision as a reflection of a sincere but chowder-headed attempt to resolve a dispute before it arose. Our finding no improper motive is also, in part, in response to his never having enforced the provision and his abandonment of it sometime in the last year. *See* Tr. 121.

The remaining assertions regarding the vulnerability of the victim, Mr. Buchanan's tenure and experience in law practice and his failure to offer to reduce or otherwise address the claimed overpayments to him are not applicable. While a client in circumstances similar to those of Mr. Buchanan's client in the instant matter may be considered vulnerable, we do not conclude Mr. Buchanan's conduct took advantage or used that vulnerability. Similarly, we do not find a reason to order restitution of all or a portion of Mr. Buchanan's fee. We note we are cited to no request for restitution other than that prayed for in the Bar's complaint.

APPLICATION OF STANDARDS

In the proceeding before us, Mr. Buchanan continued to argue his prior contingent fee structure was of benefit to the client. The alleged benefit was continuing representation on behalf of the client, albeit at an increased fee, after what amounts to client misconduct in failing to live up to financial obligations to the lawyer. Mr. Buchanan's view is misguided. He has resolved not to use such structures, but the fact remains he adhered to the objectionable fee structure for some 10 years. Tr 121. As explained above, his contingent fee structure was in violation of RPC 1.5(a), and his use of that fee structure, even without exercising the 10% add-on, constituted a continuing violation of the rule. We believe a reprimand is appropriate, and we trust such reprimand will serve as notice to Mr. Buchanan and a warning to members of the Bar who may use or consider using fee structures that incorporate similar "fixes" antithetical to client interests for client failure to live up to financial obligations to the attorney. We disagree with the Bar's insistence on imposing suspension or other sanction. We regard advising the Bar and the public that the old fee structure constitutes a violation of an ethical rule as necessary, but we regard additional penalties as not necessary and inappropriate under the facts of this case.

This opinion will serve as a reprimand under Oregon State Bar *Rules of Procedure* 6.1(a)(ii).

Cite as *In re Buchanan*, 32 DB Rptr 308 (2018)

IT IS SO ORDERED.

Dated this 18 day of May, 2018

/s/ John T. Bagg

John T. Bagg
Trial Panel Chairperson

/s/ Yvonne Tamayo

Yvonne Tamayo
Trial Panel Member

/s/ Dorothy Fallon

Dorothy Fallon
Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-95
)	
JANE B. STEWART,)	
)	
Respondent.)	

Counsel for the Bar:	Susan R. Cournoyer
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3 and RPC 1.15-1(d). Stipulation for discipline. 30-day suspension.
Effective Date of Order:	August 27, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Jane B. Stewart is suspended for 30 days, effective ten days after approval by the Disciplinary Board, for violation of RPC 1.3 and RPC 1.15-1(d).

DATED this 17th day of August, 2018.

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

STIPULATION FOR DISCIPLINE

Jane B. Stewart, attorney at law (Stewart), and the Oregon State Bar (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.

Stewart 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 her office and place of business in Lane County, Oregon.

3.

Stewart 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 June 16, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Stewart for alleged violations of RPC 1.3 (neglect of a legal matter) and RPC 1.15-1(d) (failure to promptly deliver to a third party funds the party is entitled to receive) 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 her capacity as attorney for the successor trustee of the Morse Trust (the trust), Stewart received \$77,882 in proceeds of a real property sale in July 2012. The Oregon Department of Human Services (DHS), which had a claim against assets of the trust (for recoverable medical assistance given to the beneficiary, now deceased), agreed to allow Stewart to hold the proceeds in her IOLTA account until the successor trustee had ascertained the remaining trust assets and debts. Stewart later received and deposited into her IOLTA account an additional \$16,184 belonging to the trust.

By December 2013, the successor trustee had died, and the trust assets and debts had been determined. DHS was undisputedly entitled to receive the \$99,406 Stewart held in her IOLTA account. However, Stewart forgot to remit the trust proceeds to DHS and did not do so for several years.

Beginning in May 2013, Stewart and her husband experienced serious ongoing health problems; Stewart underwent multiple surgical procedures between April 2014 and January 2017, each of which required significant recovery periods. DHS attempted to contact Stewart about the funds several times in 2016 and 2017, but Stewart was away from her office and

personally unaware of the attempted contacts. She did not respond to DHS's inquiries, and did not remit the funds to DHS until May 2017, after DHS reported her conduct to the Bar.

Violations

6.

Stewart admits that, by failing for a period of several years to forward to DHS the funds in her trust account that DHS was entitled to receive, she violated RPC 1.3 and RPC 1.15-1(d).

Sanction

7.

Stewart 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* ("Standards"). The *Standards* require that Stewart'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 neglecting to disburse funds her client was obligated to pay to DHS, Stewart violated duties owed to her client to properly handle client property and to act with reasonable diligence.
- b. **Mental State.** Stewart acted with negligence, which the *Standards* defines as the failure to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care a reasonable lawyer would exercise in the situation.
- c. **Injury.** Stewart's delay in paying funds to DHS resulted in actual harm to DHS, and potential harm to the trust, which was exposed to liability for failing to pay DHS's undisputed claim.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Substantial experience in the practice of law. Stewart has practiced law since 1975. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of prior relevant discipline. *Standards* § 9.32(a).
 2. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
 3. Personal (medical) problems. *Standards* § 9.32(c).
 4. Full and free disclosure *Standards* § 9.32(e).
 5. Remorse. *Standards* § 9.32(l).

8.

Under the *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. When an attorney knows or should know that she is dealing improperly with client property, and causes injury or potential injury to a client, suspension is generally appropriate. *Standards* § 4.12. Because Stewart should have realized at some point during the four and a half years she improperly held funds payable to DHS, suspension is appropriate here.

9.

Oregon case law is in accord. *In re Krueger*, 29 DB Rptr 273 (2015) (6-month suspension with 90 days stayed pending a two-year probation; Respondent failed to notify his clients of his receipt of personal-injury settlement proceeds for nearly a year). *In re Fjelstad*, 27 DB Rptr 68 (2013) (30-day suspension; Respondent failed for a period of four years to forward to a client settlement checks or proceeds he had received, even after client demanded them). *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (30-day suspension; Respondent failed to return a personal-injury client's file materials, including medical records, despite numerous requests from the client). *In re DeBlasio*, 22 DB Rptr 133 (2008) (30-day suspension and restitution; Respondent accepted a portfolio of collection claims from a client, collected some funds, but thereafter failed to notify the client of receipt or to timely remit funds to the client).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that Stewart shall be suspended for 30 days for violation of RPC 1.3 and RPC 1.15-1(d), the sanction to be effective ten days after approval by the Disciplinary Board.

11.

Stewart 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, Stewart has arranged for John C. Fisher, an active member of the Bar, to either take possession of or have ongoing access to Stewart's client files and serve as the contact person for clients in need of the files during the term of her suspension. Stewart represents that John C. Fisher has agreed to accept this responsibility.

12.

Stewart 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. Stewart 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.

13.

Stewart 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. This requirement is in addition to any other provision of this agreement that requires Stewart to attend or obtain continuing legal education (CLE) credit hours.

14.

Stewart 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 Stewart is admitted: None.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 16, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 15th day of August, 2018.

/s/ Jane B. Stewart

Jane B. Stewart
OSB No. 753561

EXECUTED this 16th day of August, 2018.

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. 17-111
)
JASON A. STEEN,)
)
Respondent.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: Allison Martin Rhodes
Disciplinary Board: None.
Disposition: Violation of RPC 1.6(a). Stipulation for Discipline.
Public Reprimand.
Effective Date of Order: August 27, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Jason A. Steen is publicly reprimanded for violation of RPC 1.6(a).

DATED this 27th day of August, 2018.

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

STIPULATION FOR DISCIPLINE

Jason A. Steen, attorney at law (“Steen”), and the Oregon State Bar (“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.

Steen 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 his office and place of business in Multnomah County, Oregon.

3.

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

4.

On March 13, 2018, a Formal Complaint was filed against Steen pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging his violation of RPC 1.6(a) (revelation of information relating to the representation of a client without the client’s informed consent) 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 late April 2015, Steen assumed the court-appointed representation of a client (“Client”) in connection with felony identity theft and related charges (“Theft Case”). Client entered a guilty plea to some of the charges against her on in early February 2016, and, after at least one setover, sentencing was eventually set for late April 2016.

6.

Three days before her sentencing hearing, Client emailed both Steen and the DA handling the Theft Case, claimed that her father was seriously ill, and requested that sentencing be again set over.

7.

Client failed to appear for the scheduled sentencing hearing in her Theft Case, resulting in an additional charge and a bench warrant for her arrest (“FTA Case”).

8.

Shortly after the missed April 2016 sentencing appearance, Client’s brother telephoned Steen’s office and indicated that their father had not had a medical emergency.

9.

Following Client’s arrest a few months later, Steen was also appointed to represent her in connection with the FTA Case.

10.

A little more than a week following her arrest, Client pled guilty to charges in connection with both the Theft Case and FTA Case, and was sentenced.

11.

On the day of the sentencing hearing, Client informed Steen that she had witnessed a robbery unrelated to either her Theft Case or her FTA Case (“Robbery Case”), and that she was not excited about testifying for the government on a federal case.

12.

A few weeks later, Steen was notified by Assistant US Attorney, Jeff Sweet (“AUSA Sweet”), that Client had been subpoenaed to testify in the Robbery Case. AUSA Sweet requested that Steen notify him whether he still represented Client in any criminal matters, and sought Steen’s assistance in communicating with Client regarding certain requests she had made to AUSA Sweet, including a request that she serve the jail time ordered in her Theft Case and FTA Case in Medford instead of Multnomah County.

13.

Steen did not believe that his client would want to assist the US Attorney’s office, and did not believe Client would object if he disclosed unfavorable information about her to facilitate such non-cooperation; however, he did not confirm either of these beliefs with Client before responding to AUSA Sweet. Instead, in response to AUSA Sweet’s email, Steen replied that Client’s case was “done, finite, fini,” and that she had been a “less than excellent witness” in another case. Steen reported that Client was manipulative, dishonest, and had lied about her father being ill in order to obtain a postponement of sentencing. Finally, Steen indicated that Client had shown herself to be “unscrupulous and far from dependable.”

Violations

14.

Steen admits that, by failing to obtain his client’s permission to disclose information related to representation prior to disclosing the same to the US Attorney’s Office, he violated RPC 1.6(a).

Sanction

15.

Steen 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* (“Standards”). The *Standards* require that Steen’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.** Steen violated his duty to protect information related to the representation of a client. *Standards* § 4.2. The *Standards* presume that the most important ethical duties are those which lawyers owe to their clients. *Standards* at 5.
- b. **Mental State.** Steen acted negligently in failing to be aware of a substantial risk that his conduct in disclosing the type and amount of information that he did would deviate from the standard of care to be exercised in such situations. *Standards* at 9.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). There is no evidence of an actual injury to Client as the result of Steen’s disclosure, and his client did not initiate the Bar complaint, or otherwise complain to the Bar. However, there was the potential for injury to Client by Steen’s informing federal prosecutors that she had lied and had a reputation for being unscrupulous.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Substantial experience in the practice of law. *Standards* § 9.22(i). Steen was licensed in Oregon in 1999 and in Alaska in 1993.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 2. Absence of dishonest motive. *Standards* § 9.32(b).
 3. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards* § 9.32(e).

16.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer negligently reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client. *Standards* § 4.23.

17.

Oregon cases involving negligent revelation of information relating to the representation of a client have similarly resulted in public reprimand. *See, e.g., In re Vandergaw*, 31 DB Rptr 9 (2017) (attorney reprimanded where he negligently revealed information related to the representation of a client, namely his inability to maintain contact with his client, at a court status hearing); *In re Langford*, 19 DB 211 (2005) (attorney reprimanded where, in a motion to withdraw from representation, attorney revealed her own judgments as to the client’s honesty and the merits of the case, as well as client confidential communications); *In re*

Scannell, 8 DB Rptr 99 (1994) (attorney reprimanded for negligently revealing to opposing counsel and the court a letter including legal analysis and strategy).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Steen shall be publicly reprimanded for his violation of RPC 1.6(a), the sanction to be effective upon approval by the Disciplinary Board.

19.

Steen 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

Steen 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 Steen is admitted: Alaska.

21.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 9, 2017. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 10th day of August, 2018.

/s/ Jason A. Steen

Jason A. Steen
OSB No. 993675

APPROVED AS TO FORM AND CONTENT:

/s/ Allison Martin Rhodes

Allison Martin Rhodes
OSB No. 000817

EXECUTED this 17th day of August, 2018.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott
OSB No. 990280
Chief Assistant Disciplinary Counsel

Cite full opinion as 363 Or 614 (2018)

In re:)
)
Complaint as to the Conduct of)
)
GARY B. BERTONI,)
)
Respondent.)

(OSB 1516, 1559, 1617; SC S064820)

En Banc

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

Kevin Sali, Kevin Sali LLC, Portland, argued the cause and filed the briefs on behalf of the accused.

Susan R. Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief on behalf of the Oregon State Bar.

PER CURIAM

The Oregon State Bar charged respondent with multiple violations of the Oregon Rules of Professional Conduct (RPC), which he allegedly committed while representing three clients: Prado-Hernandez, Monroy, and Lyons. A trial panel of the Disciplinary Board found that respondent had committed most but not all the charged violations. Essentially, the trial panel found that respondent had improperly handled his client’s funds, failed to adequately communicate with his clients, and improperly retained client funds. Based on those violations, the trial panel suspended respondent from the practice of law for a year.

On review, respondent concedes some violations but challenges others. He also argues that his misconduct warrants a reprimand or, at most, a brief suspension. The Bar, for its part, argues that the trial panel should have found that respondent committed additional violations and that a two-year suspension is appropriate. We review the trial panel’s findings *de novo*. ORS 9.536(2); Bar Rule of Procedure (BR) 10.6. The Bar has the burden of proving misconduct by clear and convincing evidence. BR 5.2. As explained below, we agree with most of the trial panel’s findings but conclude that respondent should be suspended from the practice of law for 18 months. We address the charged violations regarding each client separately.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-05
)	
MARTIN E. THOMPSON,)	
)	
Respondent.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.15-1(a). Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	September 24, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Martin E. Thompson is publicly reprimanded, effective ten days after approval by the Disciplinary Board for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b) and RPC 1.15-1(a).

DATED this 14th day of September, 2018.

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

STIPULATION FOR DISCIPLINE

Martin E. Thompson, attorney at law (“Thompson”), and the Oregon State Bar (“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.

Thompson was admitted by the Oregon Supreme Court to the practice of law in Oregon on February 2, 2009, and has been a member of the Bar continuously since that time, having his office and place of business in Crook County, Oregon.

3.

Thompson 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 8, 2018, the Bar filed a Formal Complaint against Thompson pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b) and RPC 1.15-1(a) 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 May 2016, Roberta Bodewig (“Bodewig”) contacted Thompson to probate her late brother’s estate. Bodewig believed that there was some urgency in filing the probate because there was no will and there were other family members who appeared poised to claim her brother’s property.

6.

After their initial conversation, Bodewig provided Thompson with \$259 for the filing fee to open the probate and a copy of the death certificate. Thompson deposited Bodewig’s \$259 into his business account, not his trust account, but took no action to open the probate. Thereafter, Bodewig repeatedly telephoned Thompson’s office to request progress updates and convey her sense of urgency that the probate be filed promptly. Despite her repeated phone calls, Bodewig never spoke with Thompson, only his staff, and Thompson’s office never provided Bodewig with any status updates and did not respond to her concern regarding the timeliness of opening the probate. Thompson did not file the probate nor did he ever respond to any of Bodewig’s communications.

Violations

7.

Thompson admits that, by failing to file the probate and to respond to any of Bodewig's telephone calls or messages, he neglected a legal matter entrusted to him; failed to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Thompson further admits that, by depositing Bodewig's check for a filing fee that had not yet been incurred into his business account, and not his trust account, he failed to hold client property separate from his own property in violation of RPC 1.15-1(a).

Sanction

8.

Thompson 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* ("Standards"). The *Standards* require that Thompson'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.** Thompson violated the duties he owed his client in not acting with reasonable diligence and promptness, including the duty to respond to reasonable requests for information, and in not safeguarding client property. *Standards* §§ 4.1, 4.4.
- b. **Mental State.** The *Standards* recognize three mental states. The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Thompson was negligent in depositing his client's funds into his business account, in neglecting to take any action on the probate matter, and in not communicating with his client.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). An attorney who fails to actively pursue a client's case has caused actual harm to that client. *See In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). Bodewig sustained actual injury due to Thompson's inaction on the probate, prolonging the period of time it

took to file the probate when Bodewig communicated she wanted the proceeding to commence quickly. Bodewig also experienced frustration and concern when Thompson and his office failed to return her telephone calls or provide any status updates regarding the probate.

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

1. Multiple offenses. *Standards* § 9.22(d).

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

1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
2. Absence of dishonest motive. *Standards* § 9.32(b).
3. Remorse. *Standards* § 9.32(l).

9.

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. A reprimand is also appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client. *Standards* §§ 4.13, 4.43.

10.

Oregon case law supports a reprimand for Thompson's violations. *See e.g., In re May*, 27 DB Rptr 200 (2013) (attorney reprimanded for violations of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b) and RPC 1.5(a) for filing a divorce in the wrong county, failing to properly serve the opposing party, failing to respond to client inquires, failing to notify the client of the change in the location of their office and charging the client for services that were of no benefit to her); *In re McDonough*, 21 DB Rptr 289 (2007) (attorney appointed to represent client in two criminal matters over a two-year period was reprimanded for failing to pursue the defense of the matters, and making little or no efforts to investigate the matters); *In re Stevens*, 20 DB Rptr 53 (2006) (attorney reprimanded for repeatedly failing to submit timely reports to the court in conservatorship and for filing documents which were deficient); *In re Breckon*, 18 DB Rptr 220 (2004) (attorney was reprimanded when he failed to obtain an appraisal for trial or elicit evidence in support of client's position regarding property value); *In re Maloney*, 24 DB Rptr 194 (2010) (although attorney took some action on behalf of her criminal appellate client, she was reprimanded for failing to communicate with the client despite numerous inquiries asking about the status of his legal matter and actual decisions being made in the case).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Thompson shall be publicly reprimanded for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b) and RPC 1.15-1(a), the sanction to be effective ten days after approval by the Disciplinary Board.

12.

Thompson 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. This requirement is in addition to any other provision of this agreement that requires Thompson to attend or obtain continuing legal education (CLE) credit hours.

13.

Thompson 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 Thompson is admitted: none.

14.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 16, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 6th day of September, 2018.

/s/ Martin E. Thompson

Martin E. Thompson

OSB No. 090289

EXECUTED this 10th day of September, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-99
)	
ANN BERRYHILL WITTE,)	
)	
Respondent.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.15-1(a) and RPC 1.15-1(b). Stipulation for Discipline. 30-day suspension, all stayed, two-year probation.
Effective Date of Order:	September 29, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Ann Berryhill Witte is suspended thirty (30) days, all stayed, pending successful completion of a two-year probation that focuses on trust account monitoring and management, for violation of RPC 1.15-1(a) and RPC 1.15-1(b), effective ten days after approval by the Disciplinary Board.

DATED this 19th day of September, 2018.

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

STIPULATION FOR DISCIPLINE

Ann Berryhill Witte, attorney at law (“Witte”), and the Oregon State Bar (“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.

Witte was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 21, 1977, and has been a member of the Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

Witte 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 June 16, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Witte for alleged violations of RPC 1.15-1(a) (failure to safeguard client property) and RPC 1.15-1(b) (depositing more than amount necessary in trust account from lawyer’s own funds for bank service charges or to meet minimum balance requirements) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

In February 2018, Witte received a \$1,000 settlement check for a client. Because the settlement check was made out to Witte, she had to first deposit the check into her trust account and then remit the funds to her client by separate check. On February 22, 2018, Witte’s client picked up his check before Witte had deposited the settlement check into her trust account and presented the settlement check to Witte’s bank for payment that same day. At that time, Witte’s trust account had a balance of \$323. Witte’s bank honored the check to the client which overdrew Witte’s account by \$676. Witte corrected the negative balance the next day by depositing the settlement check from opposing counsel into her trust account.

Regarding the \$323 in Witte’s trust account as of February 22, 2018, those funds represented payment for work Witte had completed but not yet disbursed to herself. Ms. Witte allowed the \$323 to remain in her trust account after it was earned. By depositing the entire \$1,000 settlement check to cure the overdraft, Witte deposited \$323 of her own funds into her trust account. The \$323 remained in Witte’s trust account until the beginning of March 2018.

Violations

6.

Witte admits that by writing a check to her client prior to depositing the settlement check into her trust account and causing her trust account to be overdrawn, she failed to properly safeguard client property in violation of RPC 1.15-1(a). Witte further admits that by leaving earned funds in her trust account and re-depositing \$323 of those earned funds into her trust account, she deposited funds into her trust account for reasons other than to cover bank service charges or to satisfy minimum balance requirements in violation of RPC 1.15-1(b).

Sanction

7.

Witte 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* (“*Standards*”). The *Standards* require that Witte’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.** Witte violated her duties to her client to safeguard and protect client property. *Standards*, § 4.1.
- b. **Mental State.** The *Standards* recognize three mental states. The most culpable mental state is that of “intent,” when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Negligence” is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Witte acted negligently in not first depositing the settlement check in her trust account before remitting the funds to her client, in failing to remove earned fees from her trust account, and in re-depositing those earned fees into her trust account to cover the overdraft.

- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Witte’s client was potentially injured to the extent that Witte’s bank could have potentially not honored Witte’s check to the client.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. **Prior Disciplinary Offenses.** *Standards*, § 9.22(a). In 1996, Witte was admonished for a violation of DR 9-101(A) (*current* RPC 1.15-1(a)) for failing to safeguard and keep separate client property. *See In re Cohen*,

330 Or 489, 8 P3d 953 (2000) (a letter of admonition is considered as evidence of past misconduct if the misconduct that gave rise to the letter was of the same or similar type as the misconduct at issue). Witte was publicly reprimanded in 2001 for neglecting a matter entrusted to her. *In re Witte*, 15 DB Rptr 67 (2001). Witte was also publicly reprimanded in 2010 for neglecting a matter, failing to keep her client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, failing to withdraw from representation when she knew she could no longer effectively communicate or represent her client, and for failing to return the client's file after termination of representation. *In re Witte*, 24 DB Rptr 10 (2010).

2. Substantial experience in the practice of law. *Standards*, § 9.22(i). Witte has been practicing law in Oregon since 1977.

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

1. Absence of a dishonest or selfish motive. *Standards* § 9.32(b). Witte overdrew her trust account in an effort to promptly remit the funds to the client, not due to any dishonest or selfish motives.
2. Timely good faith effort to rectify consequences of misconduct. *Standards*, § 9.32(d). Witte cured the overdraft the day after it occurred.
3. Full and free disclosure to disciplinary board. *Standards* § 9.32(e). Witte promptly responded to Disciplinary Counsel's Office's requests for information.

8.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property and causes injury or potential injury to a client. *Standards*, § 4.12. A reprimand is generally appropriate for trust account violations that involve negligent conduct and some actual or potential injury. *Standards* § 4.13. However, because Witte was previously admonished for poor trust account management, and has several prior disciplinary matters that resulted in a reprimand, her conduct herein warrants some period of suspension.

9.

Oregon case law supports a term of suspension for Witte's trust account violations. See *In re Obert*, 352 Or 231, 262, 282 P3d 825 (2012) (court held that the usual sanction for violation of RPC 1.15-1 is a suspension between 30 and 60 days); *In re Eakin*, 334 Or 238, 253-54, 48 P3d 147 (2002) (experienced attorney's single, unintentional mishandling of client

trust account warranted 60-day suspension);¹ *In re Peterson*, 32 DB Rptr __ (2018) (respondent was suspended for 6 months, all but 30 days stayed, with a 2-year probation for failing to properly track and account for clients funds over several months, resulting in the mishandling of funds and the overdraft of her lawyer trust account, which she immediately rectified with personal funds); *In re Kmetec*, 30 DB Rptr 250 (2016) (respondent was suspended for 6 months, all but 30 days stayed, with a 2-year probation when, for convenience reasons, she purportedly deposited two clients' advance cash payments into her personal account, writing a personal check to her trust account that was dishonored and reversed, leaving a negative trust balance. When two more checks were presented for payment on the trust account against a near-zero balance, the bank honored the checks and charged overdraft fees, exhausting all remaining client funds in trust).

10.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Witte shall be suspended for thirty (30) days, with all of the suspension stayed, pending Witte's successful completion of a two-year probation that focuses on trust account monitoring and management, for violations of RPC 1.15-1(a) and RPC 1.15-1(b). The sanction shall be effective ten days after approval by the Disciplinary Board, or as otherwise directed by the Disciplinary Board ("effective date").

12.

Probation shall commence upon the effective date and shall continue for a period of two years, ending on the day prior to the second year anniversary of the effective date (the "period of probation"). During the period of probation, Witte shall abide by the following conditions:

¹ In *Eakin*, the Court cited *In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) for the proposition that a reprimand is an appropriate sanction for "unintentional mistakes in trust account management." However, in *Eakin*, the Court required the 60-day suspension due to the respondent's experience in handling trust account matters and concluded that the attorney "should have known" she was dealing improperly with her trust account. *Id.* at 258-59. Similarly, Witte has been practicing since 1977.

- (a) Witte will communicate with Disciplinary Counsel’s Office (“DCO”) and allow DCO access to information, as DCO deems necessary, to monitor compliance with her probationary terms.
- (b) Witte shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (c) During the period of probation, Witte shall attend not less than 8 MCLE accredited programs, for a total of 24 hours, which shall emphasize law practice management, time management, and proper handling of lawyer trust accounts. These credit hours shall be in addition to those MCLE credit hours required of Witte for her normal MCLE reporting period. (The Ethics School and Trust Accounting School requirements do not count towards the 24 hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of her period of probation, Witte shall submit an Affidavit of Compliance to DCO.
- (d) Prior to the end of the period of probation, Witte shall attend Trust Accounting School, offered by the Oregon State Bar twice a year in the spring and fall. Upon completion of Trust Accounting School, and prior to the end of her period of probation, Witte shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the period of probation, Witte shall regularly monitor and reconcile her business and trust bank accounts.
- (f) Each month during the period of probation, Witte shall:
 - (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills;
 - (2) review her monthly trust account records and client ledgers and reconcile those records with her monthly lawyer trust account bank statements; and
 - (3) ensure that checks drawn on his lawyer trust account are properly recorded.
- (g) For the period of probation, Witte will employ a bookkeeper approved by DCO, to assist in the monthly reconciliation of her lawyer trust account records and client ledger cards.
- (h) On or before the day prior to the first (1st) and second (2nd) year anniversary of the commencement date, Witte shall arrange for an accountant to conduct an

audit of her lawyer trust account and to prepare a report of the audit for submission to DCO within 30 days thereafter.

- (i) Susan T. Alterman shall serve as Witte’s probation supervisor (“Supervisor”). Witte shall cooperate and comply with all reasonable requests made by her Supervisor that Supervisor, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Witte’s clients, the profession, the legal system, and the public. Witte agrees that, if Supervisor ceases to be her Supervisor for any reason, Witte will immediately notify DCO and engage a new Supervisor, approved by DCO, within one month.
- (j) Beginning with the first month of the period of probation, Witte shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing her Supervisor to review the status of Witte’s law practice and her performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) client files or ten percent (10%) of Witte’s active caseload, whichever is greater, to determine whether Witte is timely, competently, diligently, and ethically attending to matters.
 - (2) Permitting her Supervisor to inspect and review Witte’s accounting and record keeping systems to confirm that she is reviewing and reconciling her lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Witte agrees that her Supervisor may contact all employees and independent contractors who assist Witte in the review and reconciliation of her lawyer trust account records.
- (k) Witte authorizes her Supervisor to communicate with DCO regarding her compliance or noncompliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Witte’s compliance.
- (l) Within seven (7) days of the effective date, Witte shall contact the Professional Liability Fund (“PLF”) and schedule an appointment on the soonest date available to consult with PLF’s Practice Management Advisors in order to obtain practice management advice. Witte shall notify DCO of the time and date of the appointment.
- (m) Witte shall attend the appointment with the PLF’s Practice Management Advisors and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, effectively managing a

client caseload and taking reasonable steps to protect clients upon the termination of her employment. No later than thirty (30) days after recommendations are made by the PLF's Practice Management Advisors, Witte shall adopt and implement those recommendations.

- (n) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Advisors, Witte shall provide a copy of the Office Practice Assessment from the PLF's Practice Management Advisors and file a report with DCO stating the date of her consultation(s) with the PLF's Practice Management Advisors; identifying the recommendations that she has adopted and implemented; and identifying the specific recommendations she has not implemented and explaining why she has not adopted and implemented those recommendations.
- (o) Witte shall implement all recommended changes, to the extent reasonably possible, and participate in at least one follow-up review with PLF Practice Management Advisors approximately 6 months after her first meeting with PLF.
- (p) On a quarterly basis, on dates to be established by DCO beginning no later than 30 days after the effective date, Witte shall submit to DCO a written "Compliance Report," approved as to substance by her Supervisor, advising whether Witte is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Witte's meetings with her Supervisor.
 - (2) The number of Witte's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Witte has completed the other provisions recommended by her Supervisor, if applicable.
 - (4) In the event that Witte has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the noncompliance and the reason for it.
- (q) Witte is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (r) Witte's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of her Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (s) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.

- (t) The SPRB's decision to bring a formal complaint against Witte for unethical conduct that occurred or continued during the period of her probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

13.

Witte 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. Witte 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.

14.

Witte 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, if a suspension is imposed. This requirement is in addition to any other provision of this agreement that requires Witte to attend or obtain continuing legal education (CLE) credit hours.

15.

Witte 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 Witte is admitted: Washington.

16.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 16, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of September, 2018.

/s/ Ann Berryhill Witte

Ann Berryhill Witte

OSB No. 770776

Cite as *In re Witte*, 32 DB Rptr 333 (2018)

EXECUTED this 14th day of September, 2018.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel

OSB No. 022916

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-98
)	
GEORDIE DUCKLER,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	September 24, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Geordie Duckler is publicly reprimanded for violation of RPC 4.2.

DATED this 24th day of September, 2018.

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

STIPULATION FOR DISCIPLINE

Geordie Duckler, attorney at law (“Duckler”), and the Oregon State Bar (“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.

Duckler was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 28, 1987, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Duckler 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 June 16, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Duckler for alleged violations of RPC 4.2 (communication with a represented party) 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 early September 2017, Duckler contacted Amanda Tuski (“Tuski”), as an agent of Bell Realty (“Bell”), to discuss a potential claim on behalf of his daughter, Ilia Duckler (“Ilia”) and her then roommate, Marilyn Fleener (“Fleener”), regarding the return of their security deposit from their rental of a Bell property on 14th Avenue.

6.

Following this and subsequent discussions with Bell representatives over the following week, Duckler filed a lawsuit against Bell, in which Duckler represented his daughter and Fleener. Immediately thereafter (on September 6, 2017), Duckler was contacted by attorney Brian Cox (“Cox”), who informed him that he represented Bell in the proceeding and to direct all correspondence to him. Duckler complied.

7.

In early- to mid-November 2017, the parties agreed to a settlement. On November 15, 2017, Cox sent Duckler a letter confirming the settlement and closing with the following paragraph:

“Should you [sic] daughter/Ms. Fleener experience any future issues or difficulties compelling you to intervene, please ensure that you first communicate with me/my office before issue [sic] litigation demands or filing suit within only business day after that. A reasoned and considered approach to future issues or cases with my client will be appreciated.”

8.

Shortly thereafter, a stipulated judgment was entered in *Duckler & Fleener v. Bell Real Estate Inc.*, and it was dismissed.

9.

On February 22, 2018, Duckler sent an email directly to Tuski in which he inquired why his daughter, Ilia, and her new roommate, Olivia Peek (“Peek”), were being denied a new lease at Bell’s property at Piper Landing. This email was not copied to Cox, nor was Cox consulted prior to Duckler sending it.

10.

In response, Tuski responded to Duckler’s inquiry, and sent a second email reminding Duckler that Bell was represented by Cox and asking Duckler to communicate with him directly. Upon receiving that second email, Duckler had no further contact with Tuski.

Violations

11.

Duckler admits that, by communicating directly with Tuski on a lease matter between his daughter and Bell following the November 15, 2017 letter from Cox, he communicated with a represented party, in violation of RPC 4.2.

Sanction

12.

Duckler 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* (“*Standards*”). The *Standards* require that Duckler’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.** Duckler violated his duty to the legal system to refrain from improper communications with represented parties. *Standards* § 6.3.
- b. **Mental State.** Duckler acted with the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Standards* at 9.
- c. **Injury.** For the purposes of determining an appropriate disciplinary sanction, both actual and potential injury can be considered. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). While there was no actual injury, Duckler’s direct communication with Tuski created the risk that Tuski (on behalf of Bell) may have acted without the advice of counsel.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Substantial experience in the practice of law. *Standards* § 9.22(i). Duckler has been a lawyer in Oregon and California for 30 years.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of prior relevant discipline. *Standards* § 9.32(a).
 2. Timely good faith effort to make restitution or to rectify consequences of misconduct. *Standards* § 9.32(d). Duckler ceased communications with Tuski as soon as he was reminded of her representation.
 3. Full and free disclosure and cooperative attitude toward disciplinary proceedings. *Standards* § 9.32(e).

13.

Under the *ABA Standards*, a suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. *Standards* § 6.32. However, in light of the absence of actual injury, as well as the fact that Duckler's mitigating factors outweigh his aggravating factor in both number and weight, a reprimand appears appropriate.

14.

Oregon case law is in accord that a reprimand is sufficient. *See, e.g., In re Newell*, 348 Or 396, 234 P3d 967 (2010) (attorney reprimanded for subpoenaing an accountant for deposition in a civil proceeding related to the accountant's alleged embezzlement from business, without notice to the accountant's criminal attorney, and even though the accountant had not retained an attorney for the civil matter); *In re Schenck*, 320 Or 94, 879 P2d 863 (1994) (attorney reprimanded where he mailed a notice to produce to the adverse party immediately after commencing litigation rather than sending it to the lawyer with whom he had been negotiating; despite the fact that the notice could have been served with a summons and complaint, mailing it instead was an improper communication with a person known to be represented by counsel); *In re Smith*, 318 Or 47, 861 P2d 1013 (1993), *cert den*, 513 US 866 (1994) (an inactive attorney was reprimanded for his contact with an adverse party represented by counsel regarding attorney's own case).

15.

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

16.

Duckler acknowledges that he is subject to the Ethics School requirement set forth in BR 6.4 and that a failure to complete the requirement timely under that rule may result in his suspension.

17.

Duckler 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 Duckler is admitted: California.

18.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 16, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 13th day of September, 2018.

/s/ Geordie Duckler

Geordie Duckler

OSB No. 873780

EXECUTED this 19th day of September, 2018.

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. 18-29 and 18-59
)
JAMES G. BREATHOUWER,)
)
Respondent.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Respondent: Peter R. Jarvis
Disciplinary Board: None
Disposition: Violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 8.1(a)(2). Stipulation for Discipline. Public Reprimand.
Effective Date of Order: October 17, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and James G. Breathouwer is publicly reprimanded for violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 8.1(a)(2).

DATED this 17th day of October, 2018.

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

STIPULATION FOR DISCIPLINE

James G. Breathouwer, attorney at law (“Breathouwer”), and the Oregon State Bar (“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.

Breathouwer was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 13, 1962, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon, through and including when he changed his status from “active” to “retired” on or about January 1, 2018.

3.

Breathouwer 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 5, 2018, a Formal Complaint was filed against Breathouwer pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.15-1(a) (failure to hold client funds in his possession separate from his own property and properly maintained in a separate lawyer trust account); RPC 1.15-1(b) (the deposit of his own funds into his lawyer trust account for reasons other than bank service fees or minimum balance requirements); and RPC 8.1(a)(2) (failure to respond to a lawful demand from a disciplinary authority) 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.

At all times relevant herein, Breathouwer maintained a lawyer trust account as specified and required by the Oregon Rules of Professional Conduct for the deposit and maintenance of client funds in the course of his practice of law at First Interstate Bank, formerly Bank of the Cascades, account ending 6681 (“Lawyer Trust Account”).

6.

Breathouwer stopped taking new cases in 2017, and by the fall had only one unresolved matter. On September 13, 2017, an arbitrator awarded his last client \$29,390 (the “Award”). Shortly thereafter, Breathouwer calculated that under the terms of their fee agreement, his client would receive \$16,244.45 from the Award, and he would receive \$13,165.55 in attorney fees from the Award.

7.

Prior to November 1, 2017, Breathouwer received from Farmers Insurance Company checks totaling \$25,155.96 in settlement of his final client's personal injury claims ("Settlement Funds"). The difference between the Award and the Settlement Funds represented funds paid from the Award to his client's PIP lien.

8.

On November 1, 2017, Breathouwer deposited the Settlement Funds into his Lawyer Trust Account, resulting in a total balance of \$25,324.33 in the Lawyer Trust Account.

9.

Given the actual amount of the Settlement Funds received, Breathouwer was entitled to retain approximately \$11,471.93 from the Settlement Funds for his attorney fees and costs, and his client was entitled to receive \$13,684.03.

10.

On November 11, 2017, Breathouwer wrote two checks from his Lawyer Trust Account: one to his client for \$16,244.45 (No. 1067) and one to himself for \$13,165.55 (No. 1069). The amount of each check was based on his September calculations, which inadvertently did not account for the deduction of the PIP lien from the original Award amount.

11.

On or about November 11, 2017, Breathouwer mailed check No. 1067 to his client. On that same day, he deposited check No. 1069 into his own account. On November 13, 2017, check No. 1069 cleared, leaving a balance in the Lawyer Trust Account of \$12,158.78 (i.e., there were insufficient funds remaining in the Lawyer Trust Account to cover the amount of the check sent to Breathouwer's client (\$16,244.45)).

12.

On or about November 15, 2017, Breathouwer's client deposited check No. 1067. First Interstate Bank did not honor check No. 1067; rather, it returned it for nonsufficient funds ("NSF").

13.

On November 17, 2017, the client's bank notified her that the check was returned NSF. When the client then notified Breathouwer, Breathouwer reviewed his accounting, identified that he had failed to recalculate the distribution of the Award after the PIP lien had been deducted, and informed his client that he would issue her a new check in the correct amount.

14.

On November 17, 2017, Breathouwer requested a stop payment on check No. 1067. The bank complied and charged Breathouwer's Lawyer Trust Account a \$32 stop payment fee. On November 17, 2017, Breathouwer also deposited \$2,000 of his personal funds into the Lawyer Trust Account, which he calculated to be roughly the amount of attorney fees that were overpaid as a result of his accounting error.

15.

On November 17, 2017, Breathouwer wrote a check from the Lawyer Trust Account to his client (No. 1070) for \$13,684.03. On or about November 28, 2017, check No. 1070 cleared, leaving a balance in the Lawyer Trust Account of \$442.75.

16.

On November 27, 2017, First Interstate Bank notified Disciplinary Counsel's Office ("DCO") that Breathouwer had issued an NSF check (No. 1067) on his Lawyer Trust Account on November 15, 2017 ("November 15 Overdraft"). In a November 28, 2017 letter, sent by first-class mail to Breathouwer at his address of record on file with the Bar ("record address"), DCO enclosed the trust account overdraft notice and asked Breathouwer for an explanation of the November 15 Overdraft and specific supporting documentation on or before December 19, 2017.

17.

In a letter dated December 19, 2017, but not received by DCO until December 21, 2017, Breathouwer provided a brief explanation of events responsive to DCO's November 27 letter of inquiry, but did not provide any of the requested supporting documentation. Instead, Breathouwer instructed DCO's paralegal to "Cool your jets," and that she should contact his client if further information was needed.

18.

On December 21, 2017, DCO again wrote to Breathouwer requesting supporting documentation related to the November 15 Overdraft that the client would not be able to provide, including his Lawyer Trust Account bank statements, client ledgers, and three-way account reconciliation records. DCO sent this letter by first-class mail to Breathouwer at his record address and sought the requested documentation on or before January 5, 2018. The letter was not returned as undeliverable. Breathouwer did not respond. Breathouwer later claimed that he subjectively believed that, notwithstanding his receipt of a specific request for information from DCO, he had already provided all of the information he was required to provide. However, Breathouwer did not convey this belief to DCO, seek confirmation of his belief from DCO, assert a privilege, or otherwise communicate to DCO why he would not or could not respond to DCO's December 21, 2017 request for information. He simply elected not to respond.

19.

On January 11, 2018, DCO again wrote to Breathouwer requesting supporting documentation related to the November 15 Overdraft. DCO sent this letter by first-class and certified mail to Breathouwer at his record address and sought the requested documentation on or before December [sic January] 18, 2018. Breathouwer signed for the certified letter, and the first-class letter was not returned as undeliverable. Breathouwer did not respond. Breathouwer later claimed that he again subjectively believed that, notwithstanding DCO's subsequent request for the information, he had already provided all the information that he was required to provide. However, Breathouwer did not convey this belief to DCO, seek confirmation of his belief from DCO, assert a privilege, or otherwise communicate to DCO why he would not or could not respond to DCO's January 11, 2018 request for information. He simply elected not to respond.

20.

On January 12, 2018, Breathouwer wrote a check from his Lawyer Trust Account to himself (No. 1071) for \$443.10. First Interstate Bank honored check No. 1071, resulting in a negative balance in the Lawyer Trust Account. Over the next several weeks, the bank charged approximately \$100 in overdraft fees to the account. When Breathouwer later spoke to the bank about the overdraft, it used the funds in his general account to satisfy the negative balance in the Lawyer Trust Account at his request. Both accounts were then closed.

21.

On January 26, 2018, DCO wrote to Breathouwer's client and copied Breathouwer with correspondence regarding the November 15 Overdraft by first-class mail to his record address. The letter was not returned as undeliverable. Breathouwer did not respond. Breathouwer later claimed that he still subjectively believed that he had provided all information he was required to provide. However, Breathouwer did not convey this belief to DCO, seek confirmation of his belief from DCO, assert a privilege, or otherwise communicate to DCO why he would not or could not respond to DCO's requests for information. He simply elected not to respond.

22.

On or about January 26, 2018, First Interstate Bank sent a notification to DCO that Breathouwer's account had a balance of \$-100.35 ("January 26 Overdraft").

23.

In a February 2, 2018 letter, sent by first-class mail to Breathouwer at his record address, DCO enclosed the trust account overdraft notice and asked Breathouwer for an explanation of the January 26 Overdraft and specific supporting documentation on or before February 23, 2018. The letter was not returned as undeliverable. Breathouwer did not respond.

24.

On February 26, 2018, DCO again wrote to Breathouwer requesting supporting documentation related to the January 26 Overdraft. DCO sent this letter by first-class and certified mail to Breathouwer at his record address and sought the requested documentation on or before March 5, 2018. It appears that Breathouwer signed for the certified letter, and the first-class letter was not returned as undeliverable.

25.

On February 28, 2018, Breathouwer emailed DCO, stating that, in his opinion, he had provided a complete explanation and that he expected “the ‘no harm, no foul’ rule” would be taken into account. He went on to say that, “So far as I am concerned, that puts an end to this whole ‘mountain out of a molehill’ affair, and I don’t intend to devote any more time or energy to it.” He concluded by suggesting to DCO that they “direct their attention to something a little more meaningful.” He provided none of the requested supporting documentation.

26.

On March 1, 2018, DCO sent an email to Breathouwer, again providing him with a list of the information sought in connection with November 15 Overdraft and the January 26 Overdraft, including bank statements for the relevant months, client ledgers, and three-way reconciliation records. Breathouwer responded later that day that he would be “happy to comply” with DCO’s investigation, but was “disinclined to rummage back through those” [his records].

27.

On March 8, 2018, Breathouwer signed an Acceptance of Service of the Bar’s Subpoena for his bank records.

Violations

28.

Breathouwer admits that his miscalculations related to the Settlement Funds caused him to fail to hold client funds in his possession separate from his own property and properly maintain them in a separate lawyer trust account in violation of RPC 1.15-1(a).

20.

Breathouwer also admits that the deposit of his own funds into his lawyer trust account to correct the overdraft and replace the amount erroneously taken meant that he deposited his own funds for reasons other than bank service fees or minimum balance requirements, which violated RPC 1.15-1(b).

30.

Breathouwer further admits that his failure to more timely or completely respond to DCO's requests for information on his trust account activities violated RPC 8.1(a)(2).

Sanction

31.

Breathouwer 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* ("Standards"). The *Standards* require that Breathouwer'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.** Breathouwer violated his duty to his client to preserve client property. *Standards* § 4.1. The *Standards* presume that the most important ethical duties are those which lawyers owe to clients. *Standards* at 5. Breathouwer also violated his duty as a professional to timely and fully respond to inquiries from a disciplinary authority. *Standards* § 7.0.
- b. **Mental State.** The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Breathouwer's actions in accounting for his trust account were negligent. However, his elections to not more timely or fully cooperate with DCO were knowing in the sense that he received the communications and elected not to respond or follow up further on any belief regarding the need for or scope of addition information.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Although there is no evidence of actual injury to Breathouwer's final client, and the client did not complain, she was potentially injured to the extent that she may have incurred fees or other expenses as a result of the dishonored check and anguish from the tie-up of her settlement funds. In addition, Breathouwer'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*, 325 Or 421, 426-27, 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. Multiple offenses. *Standards* § 9.22(d).
 2. Substantial experience in the practice of law. Breathouwer was admitted in Oregon in 1962. *Standards* § 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record in his 55 years as an active lawyer. *Standards* § 9.32(a).
 2. Absence of a dishonest motive. *Standards* § 9.32(b).

32.

Under the ABA *Standards*, a 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. 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; and a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards* §§ 7.2; 7.3. Even though the *Standards* contemplate a possible suspension, given Breathouwer's years of practice without prior discipline, his mitigation weighs in favor of a reprimand.

33.

Oregon cases are in accord that a reprimand is sufficient under these circumstances. *See, e.g., In re Bowman*, 30 DB Rptr 157 (2016) (after his client complained to the Bar, DCO requested information from respondent in two separate letters; respondent was reprimanded when he knowingly failed to reply to the requests, claiming that he misunderstood that DCO was requesting a response); *In re Kolstoe*, 29 DB Rptr 128 (2015) (respondent reprimanded when he mistakenly recorded the transaction as a deposit into his pooled lawyer trust account, and thereafter mistakenly collected the fees, forgetting that he had already collected the earned fees from the client; because respondent was not reconciling his accounts on a monthly basis, he was not aware of the mistake until he was later notified that the funds in the pooled trust account were insufficient to pay another check he issued on that account); *In re Burt*, 25 DB Rptr 238 (2011) (respondent's client complained to the Bar but he failed to respond to inquiries until after the matter was transferred to the LPRC; even though respondent cooperated with

the LPRC, respondent was reprimanded for his failure to respond to DCO's initial requests); *In re McElroy*, 25 DB Rptr 224 (2011) (attorney mistakenly believed it was permissible to deposit retainers paid by credit card into his general office account and then transfer the funds to his trust account; attorney was reprimanded when he failed to make such a transfer for one client, but thereafter issued trust account checks on behalf of that client when the client had no funds in trust); *In re Sugarman*, 21 DB Rptr 188 (2007) (although attorney had some communication with Disciplinary Counsel's Office, he was reprimanded when he did not substantively respond to DCO's initial inquiry for nearly four months and thereafter failed to respond to subsequent inquiries, necessitating referral to the LPRC); *In re Gudger*, 21 DB Rptr 160 (2007) (respondent properly deposited retainer into his lawyer trust account but was reprimanded when, after performing some work on the case, he inadvertently withdrew more of the retainer than he had earned); *In re Hunt*, 21 DB Rptr 29 (2007) (attorney was reprimanded when, believing he had already provided information responsive to the stated complaint, he did not respond to follow-up inquiries from the bar requesting additional details on two specific issues, despite additional correspondence requesting that he do so).

34.

Consistent with the *Standards* and Oregon case law, the parties agree that Breathouwer shall be publicly reprimanded for violation of RPC 1.15-1(a); RPC 1.15-1(b); and RPC 8.1(a)(2), the sanction to be effective upon approval by the Disciplinary Board.

35.

Breathouwer 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.³⁶

Breathouwer 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 Breathouwer is admitted: none.

37.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 30, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 12th day of October, 2018.

/s/ James G. Breathouwer

James G. Breathouwer

OSB No. 620145

APPROVED AS TO FORM AND CONTENT:

/s/ Peter R. Jarvis

Peter R. Jarvis

OSB No. 761868

EXECUTED this 12th day of October, 2018.

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. 18-02
)	
DAVID H. LEONARD,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Respondent:	Nellie Q. Barnard
Disciplinary Board:	None
Disposition:	Violation of RPC 1.7(a)(2), RPC 1.8(a), RPC 1.9(a), and RPC 1.9(c). Stipulation for Discipline. 90-day suspen- sion, all but 30 days stayed, two-year probation.
Effective Date of Order:	December 1, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and David H. Leonard is suspended for 90 days, all but 30 days stayed, pending successful completion of a 2-year probation, effective December 1, 2018 or 10 days after approval by the Adjudicator, whichever is later, for violation of RPC 1.7(a)(2), RPC 1.8(a), RPC 1.9(a), and RPC 1.9(c).

DATED this 5th day of November, 2018.

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

STIPULATION FOR DISCIPLINE

David H. Leonard, attorney at law (“Leonard”), and the Oregon State Bar (“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.

Leonard 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 Marion County, Oregon.

3.

Leonard 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 16, 2018, a Formal Complaint was filed against Leonard pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of DR 5-104(A) (improper business transaction with a client); RPC 1.9(a) (former-client conflict of interest); RPC 1.9(c)(1) (using information relating to the representation of a client to the disadvantage of a former client); RPC 4.3 (dealings with unrepresented parties); 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.

At all times material during which the law firm of Churchill, Leonard, Lodine & Hendrie, LLP (“CLL”), existed, Leonard was a named partner. At all times material during which the law firm of Churchill Leonard Lawyers (“Churchill Leonard law firm”) existed or exists, Leonard was a named partner. At all times material during which any lawyer with either CLL or the Churchill Leonard law firm performed any legal work for or on behalf of Loyal W. Kuenzi and Rochelle M. Kuenzi (“the Kuenzis”), the Kuenzis believed that Leonard was their lawyer.

6.

On or about April 30, 1999, the Kuenzis executed a promissory note in the amount of \$170,440, payable to D. L. Phillips (“Phillips”), individually and as trustee (“Phillips Note”), and secured by a mortgage on farm property located in Marion County, Oregon (“Phillips Mortgage”).

7.

During 2000, Leonard and CLL represented the Kuenzis in various matters relating to their Marion County farm property. At a point when the Kuenzis were unable to pay the Phillips Note, Loyal Kuenzi's brother and sister-in-law, Neal Kuenzi ("Neal") and Teresa Kuenzi ("Teresa"), paid the Kuenzis \$150,000 so that they could pay off the Phillips Note. Having received payment, Phillips made the following notation on the Phillips Note, "This loan and mortgage has been paid in full 6/23/00."

8.

After further discussions between the Kuenzis, Neal, and Theresa, in which additional funding was discussed, the Kuenzis requested that Leonard and CLL prepare for Phillips's signature an assignment of the Phillips Note and the Phillips Mortgage to Neal and Teresa. On February 27, 2001, Phillips executed the assignment of the Phillips Note and the Phillips Mortgage to Neal and Teresa (the "Phillips Assignment").

9.

By January 2001, the Kuenzis were defendants in a lawsuit brought by Simplot for breach of contract and had incurred attorney's fees with CLL that remained unpaid.

10.

As of on or about July 26, 2001, CLL was owed approximately \$36,400, after crediting two payments during 2001 totaling approximately \$1,200.

11.

On or about July 26, 2001, the Kuenzis executed a note in the amount of \$40,000 made payable to CLL ("CLL Note"), secured by a trust deed purporting to convey a portion of the same property as was described in the Phillips Mortgage ("CLL Trust Deed"). Both the CLL Note and the CLL Trust Deed were prepared by lawyers at CLL, whom the Kuenzis believed were representing them. There is no recitation in either the CLL Note or the CLL Trust Deed of what the debt represents. The CLL Note was due and payable on August 1, 2002. Prior to the Kuenzis' execution of the CLL Note and the CLL Trust Deed, Leonard did not provide the Kuenzis with an explanation sufficient to apprise them of the potential adverse impact on them of signing the CLL Note and the CLL Trust Deed, including a recommendation that they seek independent legal advice to determine if consent should be given. Leonard knew at the time the CLL Note and CLL Trust Deed were prepared for the Kuenzis' execution that the Kuenzis were contemplating filing bankruptcy and anticipated that the Kuenzis could have the deed set aside as within the 180-day preference period, if they had wanted to do so. However, after learning that the Kuenzis' first bankruptcy had been dismissed, Leonard did not communicate with the Kuenzis as to their intentions with respect to the CCL Note and Trust Deed, or otherwise confirm his assumption that the dismissal was an indication of their desire or ability to pay the CCL Note.

12.

No payments were made by the Kuenzis on the CLL note prior to August 1, 2002.

13.

In or around June 2014, Leonard was hired by Neal to foreclose on his former clients, the Kuenzis, based upon the Phillips Assignment that Leonard had prepared for the Kuenzis when CLL and Leonard were representing them. Leonard took no steps to secure the Kuenzis' consent to his representation of Neal in seeking to foreclose based upon the document that Leonard had drafted for the Kuenzis as his clients. As a separate matter, given the existence of the CLL Note and the CLL Trust Deed, which established a security in a portion of the same real property that was described in the Phillips Assignment, Leonard had a personal interest conflict in representing Neal in seeking to foreclose on the same property in which CLL had a security interest. To the extent that this conflict was capable of being waived, Leonard did not obtain Neal's informed consent, confirmed in writing.

14.

On behalf of Neal, Leonard took steps to create or directed others within the Churchill Leonard law firm to create Pacific Property Acquisitions LLC ("PPA") as an entity to which the CLL Trust Deed and CLL Note as well as the Phillips Note and Phillips Mortgage (which had been transferred to Neal and Teresa by the Phillips Assignment) could be assigned. By creating an entity to which Neal and CLL would transfer their respective interests in the Kuenzis' property, Leonard was entering into a business transaction with his client. Leonard did not advise Neal in writing of the desirability of seeking independent legal counsel regarding the transaction, or obtain Neal's informed consent, confirmed in writing.

15.

On or about November 19, 2014, Leonard wrote to the Kuenzis, who were unrepresented at the time, seeking to prompt them to commence making payments on the CLL note, as no payment had been made in the more than ten years that had elapsed since the maturity date.

16.

On or about May 7, 2015, Leonard, acting on behalf of the Churchill Leonard law firm, brought a foreclosure lawsuit on behalf of PPA against the Kuenzis (the "PPA Suit") and various other parties identified as having a claim to some right, title or interest in the property the lawsuit sought to foreclose, which includes the property described in the CLL Trust Deed. The petition filed in the PPA Suit predicates PPA's ability to sue based upon an assignment of the CLL Note and CLL Trust Deed executed by Leonard on behalf of the Churchill Leonard law firm on May 6, 2014, in favor of PPA; notes that the Kuenzis failed to make a final payment on the CLL Note on August 1, 2002; and makes no mention of any of the various bankruptcies filed by the Kuenzis. At the time that Leonard filed the PPA Suit, although he lacked legal

notice of one or more of the four bankruptcies filed by the Kuenzis, Leonard's communications with counsel associated with those proceedings provided Leonard with actual knowledge of the proceedings. At the time that Leonard filed the PPA Suit, Leonard knew that no payments had been made on the CLL Note for more than ten years after it matured.

17.

The Kuenzis counterclaimed against the Churchill Leonard law firm in response to the PPA Suit, and raised the statute of limitations, and the argument that CLL Trust Deed had been voided in bankruptcy. They further challenged that any remedy seeking to void the Chapter 12 discharge should have been brought in bankruptcy court, and filing suit to foreclose the property described in the CLL Trust Deed violated the bankruptcy stay.

18.

The Kuenzis' lawyer raised a conflict of interest issue based upon the Churchill Leonard law firm's failure to obtain a waiver from the Kuenzis before representing Neal in seeking to foreclose based upon the Phillips assignment the law firm had prepared at the behest of their client, the Kuenzis. At that point, Leonard discontinued his representation PPA and Neal, hired outside counsel to represent CLL's interests in the litigation and, soon thereafter, dismissed CLL's claim. As a part of the mediated settlement, the parties agreed that all claims other than foreclosure of the Phillips Mortgage would be dismissed with prejudice.

Violations

19.

Leonard admits that, by failing to take steps to secure the Kuenzis' consent to his representation of Neal in seeking to foreclose based upon the document that Leonard had drafted for the Kuenzis as his clients, he engaged in a former-client conflict of interest that violated RPC 1.9(a).

20.

Leonard further admits that, by failing to obtain informed consent, confirmed in writing, to his representation of Neal in seeking to foreclose on a portion of the same farm property in which CLL had a security interest, he engaged in a personal-interest conflict that violated RPC 1.7(a)(2).

21.

Leonard admits that the creation of PPA, without advising Neal in writing of the desirability of seeking independent legal counsel regarding the transaction, or obtaining Neal's informed consent, confirmed in writing, was an improper business transaction with a client that violated RPC 1.8(a).

22.

Leonard also admits that, to the extent that PPA's ability to sue was predicated on the Phillips Assignment, Leonard's representation of PPA in the PPA Suit was a former-client conflict of interest and the use of information related to a former representation that violated RPC 1.9(a) and RPC 1.9(c).

23.

Finally, Leonard admits that, in purporting to represent the interests of both Neal and CLL as to their perspective interests in PPA, Leonard had a personal interest conflict, which violated RPC 1.7(a)(2).

24.

Upon further factual inquiry, the parties agree that the charges of alleged violations of DR 5-104(A), RPC 4.3, and RPC 8.4(a)(4) should be and, upon the approval of this stipulation, are dismissed.

Sanction

25.

Leonard 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* ("Standards"). The *Standards* require that Leonard'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.** Leonard violated his duties to his clients to preserve client confidences and to avoid conflicts of interest. *Standards* §§ 4.2; 4.3. The *Standards* presume that the most important ethical obligations are those which lawyers owe to their clients. *Standards* at 5.
- b. **Mental State.** There are three types of mental state recognized under the *Standards*:

"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 at 9. Leonard's conduct was both knowing and negligent.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). The Kuenzis were actually injured by Leonard's conflicts of interest, while Neal was potentially injured by them.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior disciplinary offenses. *Standards* § 9.22(a). In 1989, the Oregon Supreme Court suspended Leonard for 35 days for violation of DR 1-102(A)(3) (*current* RPC 8.4(a)(3)) where, after he interlined a lease to include language favorable to his lessee client, Leonard instructed the lessors that there was no need to consult with their attorney about the changes. *In re Leonard*, 308 Or 560, 784 P2d 95 (1989).
 2. Selfish motivation. *Standards* § 9.22(b). A number of the conflicts occurred in the course of Leonard's pursuit of his unpaid fees.
 3. A pattern of misconduct. *Standards* § 9.22(c). Separate but related conflicts occurred over the course of many years.
 4. Multiple offenses. *Standards* § 9.22(d).
 5. Substantial experience in the practice of law. *Standards* § 9.22(i). Leonard was admitted in Oregon in 1973, and specializes in commercial and agricultural business transactions of the type at issue in these proceedings.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Cooperation in the disciplinary investigation and formal proceedings. *Standards* § 9.32(e).
 2. Remoteness of prior offenses. *Standards* § 9.32(m).

26.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client, while a reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client. *Standards* §§ 4.22; 4.23. Suspension is also 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, while 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* §§ 4.32; 4.33. Overall, a suspension is the presumptive sanction. The application of aggravating and mitigating factors arrive at the same result.

27.

Similarly, Oregon cases also hold that a suspension is appropriate. *See, e.g., In re Simon*, 30 DB Rptr 214 (2016) (respondent suspended for 185 days where he represented a trust entity, through its trustee, in civil litigation, and thereafter, represented a number of creditors in an involuntary bankruptcy petition filed against the trust entity, without informed consent, confirmed in writing, from either client); *In re Lafky*, 25 DB Rptr 134 (2011) (attorney who engaged in business transactions with a client friend without obtaining the client's informed consent was suspended for four months where there was prior discipline for somewhat similar misconduct); *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010) (respondent suspended for 150 days for former-client conflict where, after representing the borrower in a series of loan transactions and drafting the documentation to evidence and secure the loans, attorney subsequently represented the lender in asserting a probate claim and initiating litigation to collect the loans from the borrower's estate); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons*, 345 Or 652, 202 P3d 165 (2009) (attorney suspended for one year for conduct including self-interest conflict in assisting a client in collecting a debt from a third party while contemporaneously renegotiating with the client attorney's own debt owed to the client); *In re Levie*, 342 Or 462, 154 P3d 113 (2007) (attorney 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 Balocca*, 342 Or 279, 151 P3d 154 (2007) (respondent engaged in a former-client conflict of interest and was suspended for 90 days when he represented a client in a paternity action after previously representing the opposing party in a bankruptcy); *In re Eichelberger*, 19 DB Rptr 329 (2005) (attorney was suspended for 60 days where he represented a contractor and engaged in construction projects with the contractor without sufficient disclosure or consent and, later, attorney negotiated a settlement of a claim for the contractor solely as a means of obtaining funds to apply toward the contractor's outstanding legal fees); *In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999) (attorney suspended for four months for self-interest conflicts when he represented both himself and a client as co-lenders, and also was counsel for the borrower in a loan transaction, and when he subsequently undertook efforts to collect the loan on behalf of himself and the co-lender client); *In re Jans*, 295 Or 289, 666 P2d 830 (1983) (attorney was suspended for 30 days for conflict of interest present when attorney, after drafting employment agreement on behalf of both corporation and principal, filed suit on behalf of the corporation to enforce the agreement after the principal left the company). There

were additional violations in *Simon*, *Schenck* and *Levie* that are not present here, including excessive fees, failing to cooperate with the Bar, and misrepresentations. Accordingly, the cases do not support that a long-term suspension is warranted.

28.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

29.

Consistent with the *Standards* and Oregon case law, the parties agree that Leonard shall be suspended for 90 days for violations of RPC 1.7(a)(2); RPC 1.8(a); RPC 1.9(a); and RPC 1.9(c), with all but 30 days of the suspension stayed, pending Leonard's successful completion of a 2-year term of probation. The sanction shall be effective December 1, 2018, or ten (10) days after approval by the Disciplinary Board, whichever is later ("effective date").

30.

Leonard's license to practice law shall be suspended for a period of thirty (30) days beginning on the effective date ("actual suspension"), assuming all conditions have been met. Leonard understands that reinstatement is not automatic and that he cannot resume the practice of law until he has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Leonard re-attains his active membership status with the Bar, Leonard shall not practice law or represent that he is qualified to practice law; shall not hold himself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

31.

Probation shall commence upon the date Leonard is reinstated to active membership status ("commencement date") and shall continue for a period of two (2) years, ending on the day prior to the second (2nd) year anniversary of the commencement date (the "period of probation"). During the period of probation, Leonard shall abide by the following conditions:

- (a) Leonard will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Leonard has been represented in this proceeding by Nellie Q. Barnard ("Barnard"). Leonard and Barnard hereby authorize direct communication

between Leonard and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Leonard's compliance with his probationary terms.

- (c) Leonard shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (d) During the period of probation, Leonard shall attend not less than eight (8) MCLE accredited programs, for a total of twenty-four (24) hours, which shall emphasize law practice management, time management, and recognizing and addressing potential and actual conflicts of interest. These credit hours shall be in addition to those MCLE credit hours required of Leonard for his normal MCLE reporting period. (The Ethics School requirement does not count towards either the number of programs or hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of his period of probation, Leonard shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the period of probation, Leonard shall diligently attend to client matters and adequately communicate with clients regarding their cases. Attorney shall also regularly review his matters for the existence or development of possible conflicts of interest.
- (f) Each month during the period of probation, Leonard 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, and that no conflicts of interest are present that require disclosure and informed consent to continue with the representation.
- (g) Jill Foster, OSB No. 943115, shall serve as Leonard's probation supervisor ("Supervisor"). Leonard shall cooperate and comply with all reasonable requests made by his Supervisor that Supervisor, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Leonard's clients, the profession, the legal system, and the public. Leonard agrees that, if Supervisor ceases to be his Supervisor for any reason, Leonard will immediately notify DCO and engage a new Supervisor, approved by DCO, within one month.
- (h) Beginning with the first month of the period of probation, Leonard shall meet with his Supervisor in person at least once a month for the purpose of allowing his Supervisor to review the status of Leonard's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Leonard's Supervisor shall conduct a random audit of ten

- (10) client files or ten percent (10%) of Leonard's active caseload, whichever is greater, to determine whether Leonard is timely, competently, diligently, and ethically attending to matters, and taking reasonably practicable steps to protect his clients' interests upon the termination of employment and whether Leonard has identified and properly handled any conflicts that have developed.
- (i) Leonard authorizes his Supervisor to communicate with DCO regarding his compliance or non-compliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Leonard's compliance.
 - (j) On a quarterly basis, on dates to be established by DCO beginning no later than ninety (90) days after the commencement date, Leonard shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Leonard is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Leonard's meetings with his Supervisor.
 - (2) The number of Leonard's active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Leonard has completed the other provisions recommended by his Supervisor, if applicable.
 - (4) In the event that Leonard has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the non-compliance and the reason for it.
 - (k) Leonard is responsible for any costs required under the terms of this stipulation and the terms of probation.
 - (l) Leonard's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of his Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
 - (m) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
 - (n) The SPRB's decision to bring a formal complaint against Leonard for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

32.

Leonard 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, Leonard has arranged for Jill Foster, OSB No. 943115, an active member of the Bar, to either take possession of or have ongoing access to Leonard's client files and serve as the contact person for clients in need of the files during the term of his actual suspension, or if his probation is revoked and the stayed period of suspension is actually imposed. Leonard represents that Jill Foster has agreed to accept this responsibility.

33.

Leonard 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. Leonard 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.

Leonard 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. This requirement is in addition to any other provision of this agreement that requires Leonard to attend continuing legal education (CLE) courses.

35.

Leonard 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 Leonard is admitted: Oregon US District Court and US Ninth Circuit Court.

36.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 20, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 29th day of October, 2018.

/s/ David H. Leonard

David H. Leonard

OSB No. 731803

APPROVED AS TO FORM AND CONTENT:

/s/ Nellie Q. Barnard

Nellie Q. Barnard

OSB No. 122775

EXECUTED this 29th day of October, 2018.

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. 18-146, 18-147, and 18-148
)	
ROBERT C. MYERS,)	
)	
Respondent.)	

Counsel for the Bar:	Courtney C. Dippel
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 8.2(a), RPC 8.2(b), RPC 8.4(a)(3). Disciplinary Board Order Imposing Reciprocal Discipline. Disbarment.
Effective Date of Order:	November 16, 2018

ORDER IMPOSING RECIPROCAL DISCIPLINE

Pursuant to BR 3.5(a), the Oregon State Bar (“Bar”) has filed a petition seeking reciprocal discipline against respondent Robert C. Myers. Respondent has failed to answer the petition within the time allowed. Respondent has been disciplined by the State of Montana on a variety of matters, the most serious of which resulted in the sanction of disbarment. The Bar has asked that disbarment be imposed as the sanction here. Pursuant to BR 3.5(b), there is a rebuttable presumption that the sanction to be imposed shall be equivalent, to the extent reasonably practicable, to the sanction imposed in the other jurisdiction. Accordingly, I accept the recommendation of the Bar, and respondent is disbarred effective as of the date of this order. Respondent is ordered to comply with the provisions of BR (BR) 6.3(a), (b) and (c). Disciplinary Counsel may seek a contempt proceeding and appropriate sanctions before the Supreme Court for failure to comply. BR 6.3(d).

Dated this 12th day of October, 2018.

/s/ Mark A. Turner

 Mark A. Turner
 Adjudicator

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 17-94
) SC S066209
LEWIS IRWIN LANDERHOLM,)
)
Accused.)

Counsel for the Bar: Amber Bevacqua-Lynott
Counsel for the Accused: Christopher R. Hardman
Disciplinary Board: None
Disposition: Violation of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c), and RPC 5.3(a). Stipulation for Discipline. One-year suspension, all stayed, three-year probation.
Effective Date of Order: December 7, 2018

ORDER ACCEPTING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court accepts the Stipulation for Discipline. The respondent is suspended from the practice of law in the State of Oregon for a period of one year, effective ten (10) days from the date of this order. The entire one-year period is stayed, pending respondent's successful completion of a three-year term of probation, on the terms and conditions recited in the parties' Stipulation for Discipline.

/s/ Martha L. Walters
Martha L. Walters
Chief Justice, Supreme Court
11/27/2018 8:06 a.m.

STIPULATION FOR DISCIPLINE

Lewis Irwin Landerholm, attorney at law ("Landerholm"), and the Oregon State Bar ("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.

Landerholm was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 6, 2010, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

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

4.

On October 31, 2017, a Formal Complaint was filed against Landerholm pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.15-1(a) (failure to safeguard and keep separate client property); RPC 1.15-1(b) (deposit of lawyer funds into trust for reasons other than service charges or minimum balance requirements); RPC 1.15-1(c) (the withdrawal of client funds from trust before earned); and RPC 5.3(a) (failure to make reasonable efforts to ensure a supervised nonlawyer’s conduct is compatible with the lawyer’s professional obligations). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

At all times relevant herein, Landerholm was the owner and managing partner of Landerholm Law, LLC (“the firm”).

6.

In June 2016, Landerholm hired a law office administrator to assist with the financial management of the firm. As such, the law office administrator was immediately given full access to the trust account and check-signing authority on all the firm’s accounts. In or around July 2016, Landerholm also hired a bookkeeper. Landerholm met monthly with the law office administrator and the bookkeeper to review the firm’s financial records.

7.

In August 2016, the law office administrator informed Landerholm that his own audit of the account identified a significant discrepancy in the trust account. In response, Landerholm

instructed the law office administrator to conduct a further audit of the trust account to determine the cause of the discrepancy.

8.

Although Landerholm began to meet more frequently to review reports the law office administrator provided, Landerholm relied entirely on the accuracy of the reports and information provided by the law office administrator. Based upon that information, neither the law office administrator nor Landerholm were unable to identify what, if anything, had caused the discrepancy in the trust account.

9.

Between June 2016, and December 2016, the law office administrator undertook his best efforts to determine the cause of the discrepancy. As part of that process, the law office administrator made transfers to and from the trust account to try to reconcile the entries with information listed in other reporting documents and accounts. This resulted in some client funds being removed before they were earned or otherwise due. It now appears that the efforts of the law office administrator exacerbated, rather than remedied the discrepancy.

10.

In late November 2016, when the cause of the discrepancy in the trust account still had not been identified, but at the urging of his staff, Landerholm reported the discrepancy to the Bar's General Counsel's Office.

11.

In mid-December 2016, the law office administrator resigned, followed shortly by the firm bookkeeper.

12.

In or around January 2017, Landerholm obtained a personal loan and placed \$50,000 in loan proceeds into his lawyer trust account to help replace a portion of the unaccounted funds, and stated an intent to continue to make incremental deposits of his own funds into trust to repay the discrepancy.

Violations

13.

Landerholm admits that, by failing to maintain client funds in trust, he violated RPC 1.15-1(a).

Landerholm also admits that, by depositing his own funds into his lawyer trust account for purposes other than bank service charges or to meet minimum balance requirements, he violated RPC 1.15-1(b).

Landerholm further admits that, by withdrawing client funds from his lawyer trust account at a time other than when fees were earned, he violated RPC 1.15-1(c).

Finally, Landerholm admits that, by failing to supervise a nonlawyer employee's management of the lawyer trust account, he violated RPC 5.3(a).

Sanction

14.

Landerholm and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the *ABA Standards for Imposing Lawyer Sanctions* ("*Standards*"). The *Standards* require that Landerholm'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.** Landerholm's improper use of his trust account violated his duty to his clients to appropriately safeguard and handle their funds. *Standards* § 4.1. Landerholm's failure to properly supervise his nonlawyer employee violated his duty to the profession to comply with rules regulating the practice of law. *Standards* § 7.0.

b. **Mental State.** There are three types of mental state recognized under the *Standards*:

"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 at 9.

Landerholm's misuse of his lawyer trust account was knowing in the sense that he either knew or should have known that turning over management of the trust account to a nonlawyer employee whom he did not adequately supervise put client funds at risk. He was aware that the loan funds he deposited into trust were not client funds, and is presumed to know the ethics rules (in this instance that personal funds are not appropriate to place in trust). Finally, his failure to appropriately supervise his nonlawyer employee to ensure that his conduct was compatible with Landerholm's professional duties as a lawyer was knowing.

- c. **Injury.** The Court may take into account both actual and potential injury. *Standards* at 9; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Id.*

It does not appear that there was any actual injury to clients as a result of Landerholm’s conduct; however, there was potential injury to the extent that client funds may have been impacted by his failure to properly manage or oversee management of the trust account. Additionally, by failing to comply with the trust account rules, Landerholm “caused actual harm to the legal profession.” *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012) (quoting *In re Peterson*, 348 Or 325, 343, 232 P3d 940 (2010)).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. A pattern of misconduct. *Standards* § 9.22(c). Landerholm knew or should have known that his trust account was being misused or mismanaged for a significant time and, even after he was aware of the discrepancies in the trust account, delayed taking steps to identify and rectify the discrepancies for a significant period of time.
 2. Multiple offenses. *Standards* § 9.22(d). There are multiple charges resulting from both similar and dissimilar conduct and instances of misconduct.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior record of discipline. *Standards* § 9.32(a).
 2. Remorse. *Standards* § 9.32(1). Landerholm has expressed shame and regret for his actions in these matters and interest in learning better methods of managing his trust account.

15.

Under the ABA *Standards*, suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Suspension is reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. *Standards* § 4.12. 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.

16.

Oregon cases support the imposition of a suspension for Landerholm's mishandling of his trust account. *See, e.g., In re Skagen*, 342 Or 183, 149 P3d 1171 (2006) (attorney was suspended for one year when it was determined that he never reconciled his monthly trust account statements or maintained a trust account ledger to keep track of client funds and was negligent in his trust accounting practices); *see also In re Bertoni*, 26 DB Rptr 25 (2012) (attorney suspended for 150 days when, over an extended period, attorney negligently withdrew client funds from his law firm's trust account before the funds were earned, failed to maintain complete records, and periodically deposited his own funds into trust in amounts that exceeded bank service charges and minimum balance requirements); *In re Levie*, 22 DB Rptr 66 (2008) (attorney suspended for six months where he intentionally used his trust account as his own personal account, depositing his own funds and paying personal and business expenses directly from that account in order to shield those funds from creditors). The Bar does not believe that Landerholm's conduct with respect to his trust account was as egregious as any of the foregoing cases.

Under the foregoing cases, Landerholm's misconduct warrants a substantial suspension. However, given the presence of mitigating circumstances, the Bar believes a term of probation is appropriate.

17.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Landerholm shall be suspended for one (1) year for violations of RPC 1.15-1(a), RPC 1.15-1(b), RPC 1.15-1(c); and RPC 5.3(a), with the suspension fully stayed, pending Landerholm's successful completion of a three (3)-year term of probation. The sanction shall be effective October 1, 2018, or ten (10) days after this Stipulation for Discipline is approved by the Supreme Court, whichever is later ("effective date").

19.

Probation shall commence upon the effective date and shall continue for a period of three (3) years, ending on the day prior to the third (3rd) year anniversary of the commencement date (the "period of probation"). During the period of probation, Landerholm shall abide by the following conditions:

- (a) Landerholm will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with his probationary terms.
- (b) Landerholm has been represented in this proceeding by Christopher R. Hardman ("Hardman") and Hardman hereby authorizes direct communication between Landerholm and DCO after the date that this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Landerholm's compliance with his probationary terms.
- (c) Landerholm shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (d) During the period of probation, Landerholm shall attend not less than twelve (12) MCLE accredited programs, for a total of thirty-six (36) hours, which shall emphasize law practice management and trust account practices. These credit hours shall be in addition to those MCLE credit hours required of Landerholm for his normal MCLE reporting period. The Ethics School requirement does not count towards the thirty-six (36) hours needed to comply with this condition. Upon completion of these CLE programs, and prior to the end of his period of probation, Landerholm shall submit an Affidavit of Compliance to DCO.
- (e) Prior to the end of the period of probation, Landerholm shall attend Trust Accounting School, offered by the Oregon State Bar twice a year in the spring and fall. Upon completion of Trust Accounting School, and prior to the end of his period of probation, Landerholm shall submit an Affidavit of Compliance to DCO.
- (f) Every month for the period of probation, Landerholm shall:
 - (1) maintain complete records, including individual client ledgers, of the receipt and disbursement of client funds and payments on outstanding bills;
 - (2) ensure the proper handling of both lawyer and client funds, including proper documentation; and
 - (3) review his monthly trust account records and client ledgers and reconcile those records with his monthly lawyer trust account bank statements.
- (g) For the period of probation, Landerholm will employ a bookkeeper approved by DCO ("Bookkeeper"), to assist in the monthly reconciliation of his lawyer trust account records and client ledger cards.

- (h) Within thirty (30) days of the effective date, Landerholm shall arrange for an accountant approved by DCO (“Accountant”) to conduct an audit of his lawyer trust account and to prepare a report of the audit for submission to DCO within ninety (90) days of the effective date. Specifically, that audit will establish:
 - (1) That Landerholm is currently utilizing proper procedures for tracking and management of the firm trust account.
 - (2) The current amount of any discrepancy in or funds owed to Landerholm’s trust account (“owed funds”).
- (3) Not less than ninety (90) days after the effective date, Landerholm shall provide to DCO a repayment schedule for the owed funds, which shall effectuate full repayment of any owed funds prior to the end of the period of probation.
- (i) On or before July 31, 2021, Landerholm shall arrange for an accountant to conduct a final audit of his lawyer trust account and to prepare a report of the audit for submission to DCO on or before September 1, 2021.
- (j) Ellen C. Pitcher, OSB No. 814454, shall serve as Landerholm’s probation supervisor (“Supervisor”). Landerholm shall cooperate and comply with all reasonable requests made by his Supervisor that she, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Landerholm’s clients, the profession, the legal system, and the public.
- (k) Beginning with the first month of the period of probation, Landerholm shall meet with his Supervisor in person at least once a month for the purpose of permitting his Supervisor to inspect and review Landerholm’s accounting and record keeping systems to confirm that he is reviewing and reconciling his lawyer trust account records and maintaining complete records of the receipt and disbursement of client funds. Landerholm agrees that his Supervisor may contact his Bookkeeper, Accountant, and all employees and independent contractors who assist Landerholm in the review and reconciliation of his lawyer trust account records.
- (l) Landerholm authorizes his Supervisor to communicate with DCO regarding his compliance or non-compliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Landerholm’s compliance.
- (m) Within thirty (30) days of the effective date, Landerholm shall contact the Professional Liability Fund (PLF) and schedule an appointment on the soonest date available to consult with PLF practice management advisors in order to obtain practice management advice. Landerholm shall schedule the first

available appointment with the PLF and notify the Bar of the time and date of the appointment.

- (n) Landerholm shall attend the appointment with the PLF practice management advisor and seek advice and assistance regarding his office practices and trust accounting procedures. No later than thirty (30) days after recommendations are made by the PLF, Landerholm shall adopt and implement those recommendations.
- (o) No later than sixty (60) days after recommendations are made by the PLF, Landerholm shall provide a copy of the Office Practice Assessment from the PLF and file a report with Disciplinary Counsel's Office stating the date of his consultation(s) with the PLF; identifying the recommendations that he has adopted and implemented; and identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.
- (p) On a monthly basis, on dates to be established by DCO beginning no later than thirty (30) days after the effective date, Landerholm shall submit to DCO a written "Compliance Report," approved as to substance by Supervisor (and signed by Bookkeeper, confirming reconciliation of appropriate handling of accounts and trust transactions), advising whether Landerholm is in compliance with terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Landerholm's meetings with his Supervisor.
 - (2) The status of Landerholm's repayment of owed funds to his trust account.
 - (3) Whether Landerholm has completed the other provisions recommended by Supervisor, if applicable.
 - (4) In the event Landerholm 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.
- (q) Landerholm is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (r) Landerholm's failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of Supervisor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.

- (s) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (t) The SPRB's decision to bring a formal complaint against Landerholm for unethical conduct that occurred or continued during the period of his probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

20.

In addition, on or before December 31, 2018, Landerholm shall pay to the Bar its reasonable and necessary costs in the amount of \$258.50, incurred for court reporter services in connection with his deposition. Should Landerholm fail to pay \$258.50 in full by December 31, 2018, the Bar may thereafter, without further notice to him, obtain a judgment against Landerholm for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

21.

Landerholm 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. This requirement is in addition to any other provision of this agreement that requires Landerholm to attend or obtain continuing legal education (CLE) credit hours.

22.

Landerholm 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 Landerholm is admitted: US District Court for the District of Oregon.

23.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on August 16, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 19th day of September, 2018.

/s/ Lewis Irwin Landerholm

Lewis Irwin Landerholm

OSB No. 101192

Cite as *In re Landerholm*, 32 DB Rptr 372 (2018)

EXECUTED this 19th day of September, 2018.

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. 18-151
)
EVERETT WALTON,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Respondent: None
Disciplinary Board: None
Disposition: Violation of RPC 3.3(a)(1), RPC 5.4(a), RPC 5.5(a), and
RPC 8.4(a)(3). Disciplinary Board Order Imposing
Reciprocal Discipline. 30-day suspension.
Effective Date of Order: December 1, 2018

ORDER IMPOSING RECIPROCAL DISCIPLINE

Pursuant to BR 3.5(a), the Oregon State Bar (“Bar”) has filed a petition seeking reciprocal discipline against respondent Everett Walton. The Bar requests the imposition of a 30 day suspension. Respondent has answered the petition. Respondent’s answer is: “Respondent hereby stipulates and agrees to the imposition of the thirty-day suspension sought in the Petition herein.”

Respondent has been issued a public reprimand by the State of Hawaii for the conduct at issue here. Pursuant to BR 3.5(b), there is a rebuttable presumption that the sanction to be imposed shall be equivalent, to the extent reasonably practicable, to the sanction imposed in the other jurisdiction. Here, however, respondent has stipulated to the imposition of a 30 day suspension. Accordingly, I accept the recommendation of the Bar, and respondent is suspended for 30 days effective on the date this Order becomes final.

Cite as *In re Walton*, 32 DB Rptr 383 (2018)

Respondent is ordered to comply with the provisions of BR (BR) 6.3(a), (b) and (c). Disciplinary Counsel may seek a contempt proceeding and appropriate sanctions before the Supreme Court for failure to comply. BR 6.3(d).

Dated this 31st day of October, 2018.

/s/ Mark A. Turner

Mark A. Turner

Adjudicator

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 18-145
)
J. M. SANDLOW,)
)
Respondent.)

Counsel for the Bar: Angela W. Bennett
Counsel for the Respondent: None
Disciplinary Board: None
Disposition: Violation of RPC 8.4(a)(2). Disciplinary Board Order
Imposing Reciprocal Discipline. Six-month suspension.
Effective Date of Order: December 8, 2018

ORDER IMPOSING RECIPROCAL DISCIPLINE

Pursuant to BR 3.5(a), the Oregon State Bar (“Bar”) has filed a petition seeking reciprocal discipline against respondent J. M. Sandlow. The Bar requests the imposition of a six month suspension. Respondent has answered the petition via an email message dated November 1, 2018. Respondent states: “I stipulate to the petition and imposition of the requested six month suspension and will not be filing an objection, answer or any defense. I accept full responsibility for the situation.”

Respondent was disciplined by the Colorado Supreme Court by order dated December 13, 2017, which adopted a stipulation whereby respondent agreed to a six month suspension, with three months stayed pending successful completion of a two-year probation. Respondent also agreed to pay costs. Pursuant to BR 3.5(b), there is a rebuttable presumption that the sanction to be imposed shall be equivalent, to the extent reasonably practicable, to the sanction imposed in the other jurisdiction. Here, however, respondent has stipulated to the imposition of a six month suspension without any probationary period. Accordingly, I accept the recommendation of the Bar, and respondent is suspended for six months effective on the date this Order becomes final.

Cite as *In re Sandlow*, 32 DB Rptr 385 (2018)

Respondent is ordered to comply with the provisions of BR (BR) 6.3(a), (b) and (c). Disciplinary Counsel may seek a contempt proceeding and appropriate sanctions before the Supreme Court for failure to comply. BR 6.3(d).

Dated this 7th day of November, 2018.

/s/ Mark A. Turner

Mark A. Turner

Adjudicator

Cite full opinion as 364 Or 190 (2018)

In re:)
)
Complaint as to the Conduct of)
)
STEVEN L. MAURER,)
)
Respondent.)

(OSB 16-04) (S064901)

En Banc

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

Argued and submitted June 27, 2018.

Theodore W. Reuter, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the briefs for the Oregon State Bar.

Lawrence K. Peterson, Glazer, Maurer & Peterson, PC, Lake Oswego, argued the cause and filed the brief for respondent.

PER CURIAM

In this lawyer discipline case, the Oregon State Bar charged Steven L. Maurer, a retired judge who is now a practicing lawyer, with violating two disciplinary rules: (1) RPC 1.12(a), which prohibits a lawyer from representing a person in connection with a matter in which the lawyer participated personally and substantially as a judge without the informed written consent of all parties; and (2) RPC 8.4(a)(4), which prohibits conduct prejudicial to the administration of justice. A trial panel of the Disciplinary Board conducted a hearing and found that respondent had not committed the charged offenses, because the proceeding in which he represented his client as a lawyer was not the same matter in which he had participated as a judge. For the reasons that follow, we find that respondent's conduct violated RPC 1.12(a), that it did not violate RPC 8.4(a)(4), and that the appropriate sanction for respondent's misconduct is a 30-day suspension from the practice of law.

We review decisions of the trial panel *de novo*. ORS 9.536(2); BR 10.6. We find the following facts by clear and convincing evidence. BR 5.2 (Bar has burden of establishing alleged misconduct by clear and convincing evidence).

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case Nos. 17-37, 18-48, 18-56,
) and 18-165
CAROL J. FREDRICK,)
)
Respondent.)

Counsel for the Bar: Nik T. Chourey
Counsel for the Respondent: Trisha Thompson
Disciplinary Board: None
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(4), and ORS 9.160(1). Stipulation for Discipline. 120-day suspension, all but 60 days stayed, two-year probation.
Effective Date of Order: February 11, 2019

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Carol J. Fredrick is suspended for 120 days for violations of 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)(4) in Case No. 17-37; RPC 1.3 and RPC 1.4(a) in Case No. 18-48; RPC 8.1(a)(2) in Case No. 18-56; and RPC 5.5(a) and ORS 9.160(1) in Case No. 18-165, with all but 60 days of the suspension stayed, pending Fredrick's successful completion of a two-year term of probation. The sanction shall be effective February 11, 2019.

DATED this 18th day of December, 2018.

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

STIPULATION FOR DISCIPLINE

Carol J. Fredrick, attorney at law (“Fredrick”), and the Oregon State Bar (“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.

Fredrick was admitted by the Oregon Supreme Court to the practice of law in Oregon on December 8, 1988, and has been a member of the Bar continuously since that time, having her office and place of business in Yamhill County, Oregon.

3.

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

4.

On March 10, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Fredrick for alleged violations of the Oregon Rules of Professional Conduct (“RPCs”): RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 8.1(a)(2) and RPC 8.4(a)(4) in Case No. 17-37 and RPC 1.3, RPC 1.4(a), and RPC 1.15-1(d) in Case No. 18-48. On September 22, 2018, the SPRB authorized formal disciplinary proceedings against Fredrick for alleged violations of RPC 8.1(a)(2) in Case No. 18-56 and RPC 5.5(a) and ORS 9.160(1) in Case No. 18-165. 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 September 25, 2018, an amended Formal Complaint was filed against Fredrick, alleging violations of 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)(4) in Case No. 17-37; RPC 1.3, RPC 1.4(a), and RPC 1.15-1(d) in Case No. 18-48; RPC 8.1(a)(2) in Case No. 18-56; and RPC 5.5(a), ORS 9.160(1) and RPC 8.4(a)(4) in Case No. 18-165. 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

Almquist Estate Matter - Case No. 17-37

5.

In December 2014, Fredrick was retained by Robert M. Almquist (“Almquist”) to probate his father’s will (“Estate”). At the time, the Department of Human Services (“DHS”)

held a Medicaid lien against the Estate for approximately \$50,000 (“DHS lien”), a circumstance made known to Fredrick. On multiple occasions during the representation, Almquist reminded Fredrick that probate of the Estate was time-sensitive, in part, because a delay would result in the Estate’s liability for interest accruing on the DHS lien.

6.

Fredrick represented Almquist regarding the Estate between December 2014 and March 2017 (27 months); but did not take substantive action to address the DHS lien or timely probate the Estate. During the representation, Fredrick was unresponsive to many of Almquist’s requests for case information and action.

7.

During the representation, Fredrick did not respond to multiple court notices to correct deficiencies in her pleadings and did not comply with statutory deadlines for probate filings.

8.

During the representation, Fredrick did not provide a copy of all the court notices to Almquist or otherwise notify him of the court’s concerns, the reasons the Estate was delayed, or her contribution to the delay.

9.

In November 2016, Almquist contacted the Bar’s Client Assistance Office (“CAO”), complained about Fredrick’s lack of communication, and sought CAO’s assistance facilitating communication with Fredrick.

10.

During the representation, Fredrick submitted an invoice to Almquist which, in part, billed Almquist for time that her office incurred responding to telephone calls from Assistant General Counsel Linn Davis at the CAO regarding Almquist’s complaints.

11.

In March 2017, Almquist retained Michael Schmidt (“Schmidt”) to replace Fredrick as attorney for the personal representative in the Estate. Schmidt closed the Estate in August 2017.

12.

On March 16, 2017, CAO referred Almquist’s complaint regarding Fredrick’s conduct in her representation of him as personal representative to the Disciplinary Counsel’s Office (“DCO”) of the Bar.

13.

On March 30, 2017, DCO requested that Fredrick account for her conduct in the Almquist matter. The letter was sent by first class mail to Fredrick at her address then on record

with the Bar (“record address”). The letter was also sent by email to Fredrick’s email address then on record with the Bar (“record email address”). Neither the email nor the letter were returned undeliverable, and Fredrick did not respond to either method of communication.

14.

On April 21, 2017, DCO again requested that Fredrick account for her conduct in the Almquist matter. The letter was addressed to Fredrick at the record address, and was sent by both first class and by certified mail, return receipt requested. An agent of Fredrick signed the certified mail receipt. The letter was also sent by email to the record email address. Fredrick did not respond and, pursuant to BR 7.1, DCO petitioned the Disciplinary Board for Fredrick’s suspension and notified Fredrick of this action. Fredrick did not respond to DCO’s petition and, on May 12, 2017, Fredrick was suspended by order of the Disciplinary Board.

Violations

15.

Fredrick admits that her failure to more timely attend to Almquist’s legal matter was neglect of a legal matter, in violation of RPC 1.3. Fredrick further admits that her failure to respond to Almquist’s inquiries and inform him of court notices violated RPC 1.4(a) and RPC 1.4(b). Fredrick admits that in charging Almquist for her office’s time responding to telephone calls from Assistant General Counsel Davis she violated RPC 1.5(a). Fredrick admits that her failure to respond to lawful demands for information from a disciplinary authority violated RPC 8.1(a)(2). Fredrick admits that her failures to respond to multiple court notices to correct pleadings and failure to timely comply with statutory deadlines for probate filings constituted conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

Upon further factual inquiry, the parties agree that the charges of alleged violation of RPC 1.1 and RPC 8.4(a)(4) of the Fourth Cause of Complaint against Fredrick should be and, upon the approval of this stipulation, are dismissed.

Theresa Gavic Matter – Case No. 18-48

16.

On September 11, 2015, Theresa Gavic (“Gavic”) paid Fredrick a flat fee of \$1,335, and provided some of the documents necessary to file a Chapter 7 bankruptcy. Gavic repeatedly notified Fredrick that her matter was time-sensitive, as she already had a judgment against her for an outstanding debt, and she was receiving multiple calls from creditors.

17.

During the representation, Fredrick did not timely respond to Gavic’s multiple requests for case information and urgent action.

18.

On or about December 28, 2015, when a bankruptcy petition had still not been filed, Gavic terminated the representation.

Violations

19.

Fredrick admits that her failure to more timely attend to Gavic's legal matter was neglect of a legal matter, in violation of RPC 1.3. Fredrick further admits that her failure to respond to Gavic's inquiries violated RPC 1.4(a).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.15-1(d) should be and, upon the approval of this stipulation, is dismissed.

Jessica James Matter – Case No. 18-56

20.

On August 29, 2017, DCO received a complaint from Jessica James ("James"), regarding Fredrick's conduct in her representation of James.

21.

On January 11, 2018, DCO requested that Fredrick account for her conduct in the James matter. The letter was sent by first class mail to Fredrick at the record address. The letter was also sent by email to Fredrick at the record email address. Neither the email nor the letter were returned undeliverable, and Fredrick did not respond to either method of communication.

22.

On March 13, 2018, DCO again requested Fredrick's account of her conduct. The letter was addressed to Fredrick at the record address, and was sent by both first class and by certified mail, return receipt requested. An agent of Fredrick signed the certified mail receipt. Fredrick did not respond and, pursuant to BR 7.1, DCO petitioned the Disciplinary Board for Fredrick's suspension and notified Fredrick of this action. Fredrick did not respond to DCO's petition and, on April 9, 2018, Fredrick was again suspended by order of the Disciplinary Board.

Violation

23.

Fredrick admits that her failure to respond to lawful demands for information from a disciplinary authority violated RPC 8.1(a)(2).

OSB Matter – Case No. 18-165

24.

On April 10, 2018, Fredrick appeared on behalf of a client in Yamhill County Circuit Court at a time when she was suspended from the practice of law.

Violations

25.

Fredrick admits that by practicing law in violation of the regulations of the profession and when not an active member of the Bar, she violated RPC 5.5(a) and ORS 9.160(1).

Upon further factual inquiry, the parties agree that the Eighth Cause of Complaint against Fredrick should be and, upon the approval of this stipulation, is dismissed.

Sanction

26.

Fredrick 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* (“*Standards*”). The *Standards* require that Fredrick’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.** Fredrick’s failure to provide diligent representation and adequate client communication violated duties owed to clients. *Standards* § 4.4. Fredrick violated her duty to the legal system to avoid conduct prejudicial to the administration of justice. *Standards* § 6.2. Fredrick violated her duty to the profession to avoid charging an excessive fee. *Standards* § 7.0. Fredrick also violated her duty to the profession to refrain from the unauthorized practice of law. *Standards* § 7.0. Finally, Fredrick violated her duty to the profession in failing to cooperate in the investigation of professional misconduct by the Bar. *Standards* § 7.0.
- b. **Mental State.** Fredrick’s mental state was generally knowing. In the Almquist probate matter she received multiple notices from the court to correct deficient pleadings, she received multiple requests from her client to communicate, and she received multiple requests from the Bar to cooperate in the investigation of her conduct. She did not comply. She demonstrated this knowing unresponsiveness to a lesser degree in the Gavic and James matters. Her 2018 appearance while suspended, while not knowing, was negligent in that she had previously been suspended for failing to cooperate with the Bar’s investigation of the Almquist matter.

- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Standards* at 7. Fredrick’s lack of diligence and lack of communication with two clients 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*). Fredrick’s problems in moving the Almquist Estate matter to conclusion caused the court more work in the repeated rejection of her pleadings. Fredrick’s knowing refusal to cooperate during the Bar’s investigation of her conduct caused actual injury to both the legal profession and to the public by wasting the Bar’s time and resources, and delaying and preventing the Bar from fulfilling its responsibility to protect the public. *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior discipline. *Standards* § 9.22(a). In 2012, Fredrick received a public reprimand for her failure to provide competent representation to a client in a dissolution proceeding, in violation of DR 6-101(A) (*current* RPC 1.1). *In re Fredrick*, 26 DB Rptr 129 (2012).
 2. Pattern of misconduct. *Standards* § 9.22(c).
 3. Multiple offenses. *Standards* § 9.22(d).
 4. Substantial experience in the practice of law. *Standards* § 9.22(i). Fredrick was admitted in Oregon in 1988.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a selfish or dishonest motive. *Standards* § 9.32(b).
 2. Personal or emotional problems. *Standards* § 9.32(c). Fredrick demonstrated that she was experiencing personal and emotional problems at the time of the misconduct in these matters.
 3. Timely good faith effort to make restitution or to rectify consequences of misconduct. § 9.32(d). In the Almquist Estate Matter (Case No. 17-37) Fredrick paid the Estate \$2,435.64 for damages caused by her probate delays and she waived all of her attorney fees and costs.
 4. Remorse. *Standards* § 9.32(l). Fredrick has expressed remorse for her conduct in these matters.

27.

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. § 4.42(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. § 6.22. Finally, 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. § 7.2.

28.

Oregon cases similarly find that a suspension is appropriate for misconduct that involves neglect of a legal matter, failing to communicate with clients, and failing to respond to the Bar. *See, e.g., In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004) (stating that the court has generally imposed a 60-day suspension is appropriate for neglectful conduct, including failing to adequately communicate with clients); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (imposing a 120 day suspension—60 days for failing to cooperate with the Bar and 60 days for knowingly neglecting clients’ case for several months by failing to communicate with clients and opposing counsel). Fredrick also charged Almquist a clearly excessive fee. Fredrick, however, waived her fees and costs and paid damages to the client. As such, that conduct caused no injury to the client and it is similar to this case: *In re Buchanan*, 32 DB Rptr __ (2018) (imposing a public reprimand for violation of RPC 1.5(a) when attorney entered into a fee agreement with a client with an escalation provision that increased his contingency fee from 49% to 59% in the event that the client did not pay his expenses or attorney fees promptly upon his demand when the The enforcement of such an escalation provision would serve attorney’s interests, while providing no benefit to the client).

Attorneys, like Fredrick, who practice law for a short time while suspended, who do not realize that they are suspended, and who disclose their unauthorized practice on reinstatement forms, generally receive letters of admonition. In other cases, lawyers have received public reprimands for acknowledging the practice of law during suspension. *See, e.g., In re Dixon*, 17 DB Rptr 102 (2003). Attorney with prior discipline practiced for eight days while suspended; *In re Bassett*, 16 DB Rptr 190 (2002) (attorney practiced for fifteen days while suspended for failing to timely pay his PLF assessment due to an NSF check). Lastly, Fredrick’s conduct had some, but not substantial, prejudicial impact on the procedural functioning of the probate court, which makes it somewhat distinguishable from the following case: *In re Glass*, 28 DB Rptr 295 (2014), where the attorney was suspended for 30 days for failing to appear for scheduled court hearings in circuit court, which impacted the court’s ability to manage its dockets as well as the legal interest of the affected clients.

29.

BR 6.2 recognizes that probation can be appropriate and permits a suspension to be stayed pending the successful completion of a probation. *See also Standards* § 2.7 (probation can be imposed alone or with a suspension and is an appropriate sanction for conduct which may be corrected). In addition to a period of suspension, a period of probation designed to ensure the adoption and continuation of better practices will best serve the purpose of protecting clients, the public, and the legal system.

30.

Consistent with the *Standards* and Oregon case law, the parties agree that Fredrick shall be suspended for 120 days for violations of 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)(4) in Case No. 17-37; RPC 1.3 and RPC 1.4(a) in Case No. 18-48; RPC 8.1(a)(2) in Case No. 18-56; and RPC 5.5(a) and ORS 9.160(1) Case No. 18-165, with all but 60 days of the suspension stayed, pending Fredrick's successful completion of a two-year term of probation. The sanction shall be effective February 11, 2019.

31.

Fredrick's license to practice law shall be suspended for a period of 60 days beginning on the effective date, or as otherwise directed by the Disciplinary Board ("actual suspension"), assuming all conditions have been met. Fredrick understands that reinstatement is not automatic and that she cannot resume the practice of law until she has taken all steps necessary to re-attain active membership status with the Bar. During the period of actual suspension, and continuing through the date upon which Fredrick re-attains her active membership status with the Bar, Fredrick shall not practice law or represent that she is qualified to practice law; shall not hold herself out as a lawyer; and shall not charge or collect fees for the delivery of legal services other than for work performed and completed prior to the period of actual suspension.

32.

Probation shall commence upon the date Fredrick is reinstated to active membership status and shall continue for a period of two years, ending on the day prior to the two year anniversary of the effective date (the "period of probation"). During the period of probation, Fredrick shall abide by the following conditions:

- (a) Fredrick will communicate with Disciplinary Counsel's Office ("DCO") and allow DCO access to information, as DCO deems necessary, to monitor compliance with her probationary terms.
- (b) Fredrick has been represented in this proceeding by Peter Jarvis ("Jarvis") and Trisha Thompson ("Thompson"). Fredrick, Jarvis, and Thompson hereby authorize direct communication between Fredrick and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of

administering this agreement and monitoring Fredrick's compliance with her probationary terms.

- (c) Fredrick shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS chapter 9.
- (d) During the period of probation, Fredrick shall attend not less than 12 MCLE accredited programs, for a total of 12 hours, which shall emphasize law practice management and time management. These credit hours shall be in addition to those MCLE credit hours required of Fredrick for her normal MCLE reporting period. (The Ethics School and Trust Accounting School requirements do not count towards the 12 hours needed to comply with this condition.) Upon completion of the CLE programs described in this paragraph, and prior to the end of her period of probation, Fredrick shall submit an Affidavit of Compliance to DCO.
- (e) Throughout the period of probation, Fredrick shall diligently attend to client matters and adequately communicate with clients regarding their cases.
- (f) Each month during the period of probation, Fredrick 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.
- (g) Michael Finch shall serve as Fredrick's probation supervisor ("Supervisor"). Fredrick shall cooperate and comply with all reasonable requests made by her Supervisor that Supervisor, in her sole discretion, determines are designed to achieve the purpose of the probation and the protection of Fredrick's clients, the profession, the legal system, and the public. Fredrick agrees that, if Supervisor ceases to be her Supervisor for any reason, Fredrick will immediately notify DCO and engage a new Supervisor, approved by DCO, within one month.
- (h) Beginning with the first month of the period of probation, Fredrick shall meet with Supervisor in person at least once a month for the purpose of:
 - (1) Allowing her Supervisor to review the status of Fredrick's law practice and her performance of legal services on the behalf of clients. Each month during the period of probation, Supervisor shall conduct a random audit of ten (10) client files or ten percent (10%) of Fredrick's active caseload, whichever is greater, to determine whether Fredrick is timely, competently, diligently, and ethically attending to matters, and

taking reasonably practicable steps to protect her clients' interests upon the termination of employment.

- (i) Fredrick authorizes her Supervisor to communicate with DCO regarding her compliance or non-compliance with the terms of this agreement, and to release to DCO any information necessary to permit DCO to assess Fredrick's compliance.
- (j) Within seven (7) days of her reinstatement date, Fredrick shall contact the Professional Liability Fund ("PLF") and schedule an appointment on the soonest date available to consult with PLF's Practice Management Advisors in order to obtain practice management advice. Fredrick shall notify DCO of the time and date of the appointment.
- (k) Fredrick shall attend the appointment with the PLF's Practice Management Advisors and seek advice and assistance regarding procedures for diligently pursuing client matters, communicating with clients, and effectively managing a client caseload. No later than thirty (30) days after recommendations are made by the PLF's Practice Management Advisors, Fredrick shall adopt and implement those recommendations.
- (l) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Advisors, Fredrick shall provide a copy of the Office Practice Assessment from the PLF's Practice Management Advisors and file a report with DCO stating the date of her consultation(s) with the PLF's Practice Management Advisors; identifying the recommendations that Fredrick has adopted and implemented; and identifying the specific recommendations she has not implemented and explaining why she has not adopted and implemented those recommendations.
- (m) Fredrick shall implement all recommended changes, to the extent reasonably possible, and participate in at least one follow-up review with PLF Practice Management Advisors on or before November 1, 2019.
- (n) A member of the State Lawyer's Assistance Committee ("SLAC") or such other person approved by DCO in writing shall monitor Fredrick's probation ("Monitor"), and Fredrick agrees to enter into and comply with the terms of a Monitoring Agreement with SLAC. Fredrick is not currently working with the Oregon Attorney Assistance Program ("OAAP") regarding possible treatment. Fredrick shall notify SLAC within 14 days of the effective date of:
 - (1) the existence and contents of this Stipulation for Discipline;
 - (2) the history and status of any OAAP treatment or programs in which Fredrick has/is participating; and

- (3) discuss with SLAC whether and how to modify her current treatment plan to best accomplish the objectives of Fredrick's probation.
- (o) Prior to the probationary period, Fredrick shall arrange for and meet with a mental health care professional acceptable to DCO and Fredrick's Monitor, to evaluate Fredrick, and develop and implement a course of treatment, if appropriate.
- (p) Fredrick shall meet with Monitor as often as recommended by SLAC, and shall comply with all reasonable requests and recommendations made by SLAC to supplement her treatment and to promote compliance with this Stipulation for Discipline, and as necessary for the purpose of reviewing Fredrick's compliance with the terms of the probation. Fredrick 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.
- (q) Fredrick authorizes Monitor to communicate with DCO regarding Fredrick's compliance or noncompliance with the terms of her probation and to release to DCO any information DCO deems necessary to permit it to assess Fredrick's compliance.
- (r) Fredrick shall continue regular treatment sessions with Dr. Gregory Cole ("Current Treating Professional") or another mental health treatment provider determined by SLAC to be appropriate.
- (s) Fredrick agrees that, if SLAC is alerted to facts that raise concerns regarding compliance with the terms of this Stipulation for Discipline or the objectives of probation, Fredrick will participate in a further evaluation at the request and direction of SLAC.
- (t) Fredrick shall arrange for and meet with her Current Treating Professional or another health care professional acceptable to DCO and Monitor to develop and implement a course of treatment that will address any identifiable concerns.
- (u) Fredrick shall continue to attend regular counseling/treatment sessions with the approved health care professional for the entire term of her probation. Fredrick shall obtain and take and/or continue to take, as prescribed, any health-related medications.
- (v) Fredrick shall not terminate her grief counseling and treatment or reduce the frequency of her grief counseling and treatment sessions without first submitting to DCO a written recommendation from her Current Treating Professional or other approved health care professional that her grief counseling and treatment sessions should be reduced in frequency or terminated.

- (w) Fredrick consents to the release of information by her Current Treating Professional, or other mental health treatment program or provider, OAAP, or any designee, to SLAC and to DCO, regarding her treatment plan, his progress under that plan, and her compliance with the terms of this Stipulation for Discipline, waives any privilege or right of confidentiality to permit such disclosure to SLAC and to DCO, and agrees to execute such releases as may be required by such providers upon request by SLAC or DCO. Fredrick acknowledges and agrees that SLAC shall promptly report to DCO any violation of the terms of this Stipulation for Discipline.
- (x) On a quarterly basis, on dates to be established by DCO beginning no later than 30 days after her reinstatement to active membership status, Fredrick shall submit to DCO a written “Compliance Report,” approved as to substance by her Supervisor and Monitor, if appointed, advising whether Fredrick is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Fredrick’s meetings with her Supervisor.
 - (2) The dates and purpose of Fredrick’s meetings with her Monitor.
 - (3) The number of Fredrick’s active cases and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (4) Whether Fredrick has completed the other provisions recommended by her Supervisor and/or Monitor, if applicable.
 - (5) In the event that Fredrick has not complied with any term of this Stipulation for Discipline, the Compliance Report shall describe the non-compliance and the reason for it.
- (y) Fredrick is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (z) Fredrick’s failure to comply with any term of this agreement, including conditions of timely and truthfully reporting to DCO, or with any reasonable request of her Supervisor and/or Monitor, shall constitute a basis for the revocation of probation and imposition of the stayed portion of the suspension.
- (aa) A Compliance Report is timely if it is emailed, mailed, faxed, or delivered to DCO on or before its due date.
- (bb) The SPRB’s decision to bring a formal complaint against Fredrick for unethical conduct that occurred or continued during the period of her probation shall also constitute a basis for revocation of the probation and imposition of the stayed portion of the suspension.

33.

Fredrick 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, Fredrick has arranged for Michael Finch (“Finch”), 20146 N. Hwy. 99 W. Ste. D, McMinneville, OR 97128, an active member of the Bar, to either take possession of or have ongoing access to Fredrick’s client files and serve as the contact person for clients in need of the files during the term of her actual suspension. Fredrick represents that Finch has agreed to accept this responsibility.

34.

Fredrick 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. Fredrick 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.

35.

Fredrick 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. This requirement is in addition to any other provision of this agreement that requires Fredrick to attend continuing legal education (CLE) courses.

36.

Fredrick 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 Fredrick is admitted: none.

37

Approval of this Stipulation for Discipline as to substance was given by the SPRB on November 3, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re Fredrick*, 32 DB Rptr 388 (2018)

EXECUTED this 18th day of December, 2018.

/s/ Carol J. Fredrick

Carol J. Fredrick
OSB No. 883705

APPROVED AS TO FORM AND CONTENT:

/s/ Trisha Thompson

Trisha Thompson
OSB No. 164929

EXECUTED this 18th day of December, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey
OSB No. 060478
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-164
)	
JONATHAN A. CLARK,)	
)	
Respondent.)	

Counsel for the Bar:	Nik T. Chourey
Counsel for the Respondent:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.3. Stipulation for Discipline. Public reprimand.
Effective Date of Order:	December 20, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Jonathan A. Clark is publicly reprimanded for violation of RPC 1.3.

DATED this 18th day of December, 2018.

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

STIPULATION FOR DISCIPLINE

Jonathan A. Clark, attorney at law (“Clark”), and the Oregon State Bar (“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.

Clark was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 30, 2002, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

Clark 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 22, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Clark for alleged violation of RPC 1.3 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 or around early 2014, Mary Lou Chavez (“Chavez”) retained Clark to represent her in a wrongful death action (“Action”). On or about February 18, 2014, Clark filed the wrongful death complaint initiating the Action. Thereafter, Clark made various efforts to serve the defendant, but he was ultimately unable to perfect service.

6.

On or about July 24, 2014, Clark moved for and obtained an order extending the time for service and allowing service by publication in the Action. Clark failed to serve the defendant.

7.

On or about September 26, 2014, Clark moved for an order extending the time for service by publication in the Action. On or about October 6, 2014, the court granted Clark’s motion, but required Clark to perfect service no later than December 5, 2014. Clark failed to serve the defendant.

8.

In or around June 2016, Clark sent a letter to Chavez in which he informed her he was unable to serve the defendant and that she may have a malpractice action against him for his representation in the Action. In or around June 2016, Clark believes that an attorney or attorneys for Chavez contacted Clark, and Clark believed Chavez had obtained new representation (possibly to bring a malpractice suit against him). As a result, Clark incorrectly

believed the matter related to the Action was resolved and he made no further efforts to serve the defendant.

9.

On or about July 17, 2017, the Action was dismissed by the court for Clark's failure to serve the defendant and prosecute the Action.

Violations

10.

Clark admits that by failing to perfect service of the defendant on behalf of his client he neglected a legal matter entrusted to him, in violation of RPC 1.3.

Sanction

11.

Clark 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* ("*Standards*"). The *Standards* require that Clark'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.** Clark violated his duty to Chavez to act with diligence in the representation. *Standards* § 4.4.
- b. **Mental State.** "Intent" is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 9. Clark did not act intentionally, rather Clark's conduct in this matter was primarily negligent. Clark acted negligently when he failed to serve the defendant and incorrectly concluded that Chavez had retained substitute counsel who would then accomplish service on the defendant and/or sue him for malpractice.
- c. **Injury.** Clark caused actual injury. Chavez retained Clark to properly and timely serve the wrongful death complaint. Clark's neglect prejudiced Chavez's interests, as the Action was dismissed because of Clark's neglect.
- 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 a prior disciplinary record. *Standards* § 9.32(a).
 2. Absence of a dishonest or selfish motive. *Standards* § 9.32(b).
 3. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. *Standards* § 9.32(e).
 4. Remorse. *Standards* § 9.32(l).

12.

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 engages in a pattern of neglect and causes injury or potential injury to a client. *Standards* § 4.42. A reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. *Standards* § 4.43.

13.

Oregon cases likewise provide that a public reprimand is appropriate for Clark's violation, where mitigation outweighs aggravation. *See, e.g., In re Bryant*, 25 DB Rptr 167 (2011) (attorney with more mitigation than aggravation was reprimanded where he failed to timely file a request for a hearing in a child support administrative proceeding, communicate a settlement proposal to his client, failed to appeal the order, and failed to respond to the client's requests for information); *In re Slininger*, 25 DB Rptr 8 (2011) (attorney who failed to respond to his incarcerated client's requests to correct an error in the criminal judgment was reprimanded where his inaction resulted in his client serving a longer sentence, having been wrongfully denied credit for good time, but where attorney had substantial mitigation); *In re Pieretti*, 24 DB Rptr 277 (2010) (respondent attorney with greater mitigation was reprimanded where, after his personal injury client agreed to abate the case in order to submit the dispute to arbitration, respondent took no further action over several years, resulting in dismissal of the case).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that Clark shall be publicly reprimanded for violation of RPC 1.3, the sanction to be effective ten days after this stipulation is approved.

15.

Clark 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. This requirement is in addition to any other provision of this agreement that requires Clark to attend or obtain continuing legal education (CLE) credit hours.

16.

Clark 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 Clark is admitted: none.

17.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on September 22, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 12th day of December, 2018.

/s/ Jonathan A. Clark

Jonathan A. Clark

OSB No. 022740

EXECUTED this 17th day of December, 2018.

OREGON STATE BAR

By: /s/ Nik T. Chourey

Nik T. Chourey

OSB No. 060478

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 18-06
)
ANDREW M. SEHER,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel
Counsel for the Respondent: None
Disciplinary Board: Mark A. Turner, Adjudicator
Ronald W. Atwood
Charles H. Martin, Public Member
Disposition: Violation of RPC 5.5(b)(2), RPC 7.1, RPC 8.1(a)(2), and
RPC 8.4(a)(4). Trial Panel Opinion. Five-month suspen-
sion.
Effective Date of Opinion: December 27, 2018

TRIAL PANEL OPINION

In this proceeding the Oregon State Bar (“Bar”) alleged that respondent, Andrew M. Seher, violated four Rules of Professional Conduct (“RPC”). The first cause of complaint charged respondent with engaging in conduct prejudicial to the administration of justice. The second charged respondent with holding himself out to the public to practice law while suspended, false advertising, and failing to respond to Disciplinary Counsel’s Office (“DCO”) during its investigation of respondent’s conduct. The Bar asked for a five month suspension plus formal reinstatement if respondent seeks to return to practicing law following his suspension.

Respondent was declared in default for failure to answer the formal complaint. Accordingly, the trial panel has assumed that all of the allegations in the formal complaint are true. The trial panel has concluded that the allegations in the formal complaint properly allege violations of the specified rules. For the reasons set forth below, the trial panel has determined that a five month suspension is the appropriate sanction. We will not require formal reinstatement.

Undisputed Alleged Facts

For purposes of considering whether the charges asserted are proved, we assume the following facts alleged in the formal complaint are true. Our consideration at this point is limited to these facts alone. Any additional exhibits offered by the Bar are received only for the purpose of considering the appropriate sanction.

A. The *City Craft* Litigation – First Cause of Complaint

Until approximately April 25, 2017, respondent represented City Craft Development, LLC in a case captioned, *The Design Center, Inc. v. City Craft Development, LLC et al*, Multnomah County Circuit Court Case No. 16CV37243 (“*City Craft* litigation”), a construction lien foreclosure lawsuit. In defense of the lien claim, respondent’s client asserted counterclaims regarding the quality of the materials plaintiff supplied and plaintiff’s installation of those materials on the subject premises. Formal Complaint (“Complaint”), ¶ 3. The condition of the premises was an issue in the case.

On February 16, 2017, the plaintiff served respondent with a Request for Entry Upon Land for Inspection pursuant to ORCP 43 requesting an inspection of the premises on February 22, 2017. Complaint, ¶ 4.

On February 21, 2017, the plaintiff served an Amended ORCP 43 Request (“Amended Request”) moving the inspection date to March 1, 2017. Respondent did not object to either the original or amended request. Complaint, ¶ 5.

On March 1, 2017, the plaintiff appeared for the inspection. Neither respondent nor his client appeared so the noticed inspection did not happen. That day, plaintiff’s counsel emailed respondent regarding the inspection. He did not respond. Complaint, ¶ 6.

Due to respondent’s failure to respond, on March 9, 2017, plaintiff filed a motion to compel an inspection of the premises. Complaint, ¶ 7. Respondent failed to attend the hearing on plaintiff’s motion and on April 10, 2017, the court granted the motion to compel. *Id.* The court ordered respondent’s client to allow the inspection and assessed a \$500 sanction against respondent for plaintiff’s fees and costs. *Id.*

B. The Bar’s Investigation – Second Cause of Complaint

1. Representations Regarding Respondent’s Ability to Practice

The Bar suspended respondent on July 14, 2017, after he failed to pay his Professional Liability Fund dues. Respondent has remained suspended since that date. Complaint, ¶ 10.

Respondent maintains a website, *seherlaw.com*, which remained active as of the date of the formal complaint, June 21, 2018, and as late as September 13, 2018. Complaint, ¶ 11. Respondent’s website advertises that his “reverence for Oregon and its people informs [his] law practice.” Respondent’s website discusses representing clients, lists his practice areas, and displays his Oregon State Bar number. Complaint, ¶ 12.

Respondent's website represents that he "[r]un[s] a client-center [sic] practice focused on reaching positive legal outcomes at a reasonable price point. If you would like to schedule a consult to sit down and talk your problem through, my information is in the 'Contact Me' section. Even if I am not able to help you personally, I may be able to refer you to someone who can." Complaint, ¶ 13.

The Bar argues that, despite respondent's suspension, his website would lead the public to believe that respondent is presently able to practice law. Consequently, it contains false and misleading communications regarding respondent and his legal services. Complaint, ¶ 14.

2. Failure to Respond to Disciplinary Counsel's Inquiries

On September 18, 2017, DCO received a complaint about respondent's conduct in the *City Craft* litigation from Robert Muth ("Muth"). By letter dated September 29, 2017, DCO requested a response to Muth's complaint. The letter was addressed to respondent at the address on record with the Bar and sent by first class mail and email to his email address on record with the Bar. Complaint, ¶ 15. On October 12, 2017, the letter that was sent by mail was returned to the Bar. Respondent did not respond to DCO's letter. *Id.*

By letter dated November 7, 2017, DCO again requested a response to the complaint. DCO addressed its letter to respondent at his residence address and sent it both by first class mail and by email to his email address on record with the Bar. Complaint, ¶ 16. Neither letter was returned undelivered. Respondent did not respond. *Id.*

On November 8, 2017, respondent updated his address with the Bar. Complaint, ¶ 17. By letter dated December 27, 2017, DCO again requested a response to Muth's complaint. DCO addressed this letter to respondent at his residence address, his business address on record with the Bar, and his email on record with the Bar. DCO sent the letter by first class mail, certified mail, return receipt requested, and by email. Complaint, ¶ 18. The letter sent by first class mail to respondent's business address was returned to the Bar on January 3, 2018, but the letter sent to his residential address was not returned undelivered. Respondent still did not respond. *Id.*

On January 10, 2018, respondent finally telephoned DCO and confirmed that his address on record with the Bar was the physical address to which DCO should send all correspondence. He also confirmed that his email address on record with the Bar was the correct email address for him. Complaint, ¶ 19.¹

¹ The Bar offers additional evidence showing that respondent requested that DCO provide him with a copy of the Client Assistance Office file for Muth's complaint. DCO provided him with a copy of the file that day and again requested that he respond to Muth's complaint. Respondent did nothing. None of these letters sent by mail or email to respondent were returned as undeliverable. Exhibits 10 and 11 to the Declaration of Courtney C. Dippel in Support of the Bar's Memorandum Re Sanction.

On January 25, 2018, DCO served respondent with a BR 7.1 petition to suspend his license to practice law until he adequately responded to DCO's inquiries. Respondent filed nothing to oppose the petition. The Adjudicator suspended respondent on February 7, 2018. To date, respondent has not answered any of DCO's inquiries. Complaint ¶ 21.

DISCUSSION

A. RPC 8.4(a)(4) – First Cause of Complaint

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

A lawyer violates this rule when he does something he should not do, or fails to do something that he should do, and causes actual or potential harm either to the procedural functioning of a judicial proceeding or to the substantive interest of a party to that proceeding. To establish such a violation the allegations in the Complaint must demonstrate that: (1) respondent's action or inaction was improper; (2) respondent's conduct occurred during the course of a judicial proceeding; and (3) respondent's conduct did or could have had a prejudicial effect upon the administration of justice. *See In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003) (holding with regard to identically worded former DR 1–102(A)(4)). If respondent engaged in several wrongful acts or omissions, the allegations need only demonstrate that there was some actual or potential harm to the administration of justice. *In re Haws*, 310 Or 741, 748, 801 P2d 818 (1990). The concept “administration of justice” includes the procedural functioning of a case and the substantive interests of the parties. *In re Hartfield*, 349 Or 108, 115, 239 P3d 992 (2010).

The Bar rightly contends that the focus of the rule is on the effect of the lawyer's conduct rather than the lawyer's state of mind, so no allegation of intent is required. *In re Lawrence*, 337 Or 450, 464, 98 P3d 366 (2004). Lawyers who behave obstructively during discovery have been found to violate RPC 8.4(a)(4). *See In re Skagen*, 342 Or 183, 149 P3d 1171 (2006).

As to the first element of the *In re Kluge* analysis, the Bar argues that respondent's inaction was improper in the *City Craft* litigation in multiple respects. We agree.

It was improper for respondent and his client to fail to appear for the properly noticed inspection on March 1, 2017, after having served no objection to the requested inspection. It was also wrong for respondent to fail to tell plaintiff's counsel that the inspection would not occur.

We agree that respondent's failure to answer plaintiff's March 1, 2017 email regarding the failed inspection, failure to contest the motion to compel, and failure to attend the hearing on the motion to compel all violated the rule. Parties in litigation have a right to discovery. Lawyers have a duty to attempt to resolve discovery disputes prior to involving the court. *See, e.g.*, UTCR 5.010(2) (conferral requirement as a condition of filing discovery motions).

Because this conduct occurred in the course of a judicial proceeding, the second element of *In re Kluge* is present.

As to the third element, we agree that respondent's conduct prejudiced the administration of justice. It created unnecessary work for the court and plaintiff's counsel. Plaintiff was forced to file a motion to compel despite respondent's failure to object to the requested inspection. Respondent then failed to respond to the motion itself, which caused plaintiff's counsel to make an unnecessary court appearance. The panel concludes that these multiple failures to act caused actual harm to the plaintiff and to the procedural functioning of the court, in violation of RPC 8.4(a)(4).

B. RPC 5.5 and RPC 7.1 – Second Cause of Complaint

RPC 5.5(b)(2) provides that “a lawyer who is not admitted to practice in this jurisdiction shall not . . . hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”

In the same vein, RPC 7.1 provides that “a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.” It defines a false or misleading communication as one containing a material misrepresentation of fact or law, or an omission of fact necessary to make the statement considered as a whole not materially misleading.

The Bar argues that respondent violated these rules by maintaining an active website which represented that respondent was an active, licensed attorney in Oregon during his BR 7.1 suspension, which began on July 14, 2017. The Bar alleges that the statements still appeared on the site as recently as September 13, 2018. The Bar contends that such statements are false and misleading.

Multiple times on the website, respondent states that he represents clients, lists his practice areas, and displays his Oregon State Bar number. Exhibit 5 to Dippel Declaration. The website tells readers how to contact respondent to discuss potential representation.

These statements would lead the public to believe that respondent was presently able to represent clients when such a statement was untrue. We agree that the statements are false and misleading because they make material misrepresentations—namely, that respondent was presently able to practice law. We agree that this conduct violated RPC 5.5(b)(2) and RPC 7.1. The Bar cites multiple cases reaching similar conclusions. *See In re Bach*, 273 Or 24, 539 P2d 1075 (1975) (lawyer was disciplined for holding himself out as a partner when no partnership existed); *In re R. Kevin Hendrick*, 24 DB Rptr 138 (2010) (lawyer's website advertisement was false in that it described lawyer's solo practice as a team of lawyers, and it also promised full refunds to clients dissatisfied with his services, but failed to make such a refund); *In re Foster*, 29 DB Rptr 35 (2015) (trial panel suspended lawyer for unlawful practice and for holding herself out to the public in television and internet advertising as being able to practice despite being administratively suspended); *In re Carstens*, 22 DB Rptr 97 (2008) (while suspended

from practice, attorney continued to use letterhead on which he was identified as an attorney, failed to remove his name from the firm website and office sign, and provided comments to local media as an attorney in violation of RPC 5.5(b)(2)).

C. RPC 8.1(a)(2) – Second Cause of Complaint

RPC 8.1(a)(2) provides that an applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6. This rule requires Oregon lawyers to cooperate with DCO when DCO is investigating disciplinary matters. It includes an obligation to respond to DCO's inquiries.

DCO is a disciplinary authority. It made four separate written requests to respondent for a response to Muth's complaint about the *City Craft* litigation. Although two of the letters sent by first class mail were returned, none of the Bar's emails (which attached the same letters) were returned as undeliverable. On January 10, 2018, after DCO sent its first three letters, respondent finally telephoned DCO and requested the Client Assistance Office file for Muth's complaint. DCO again asked for a response from respondent, this time by January 24, 2018.

It appears that respondent received every request for information from DCO, each of which put him on notice of his obligation to respond. In each instance, respondent knowingly failed to respond. We agree that this knowing failure to respond was a violation of RPC 8.1(a)(2). *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Obert*, 352 Or 231, 282 P3d 825 (2012) (attorney failed to respond to numerous requests from the Bar about an ethics complaint until subpoenaed to do so); *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adh'd to as modified on recons*, 347 Or 529, 225 P3d 41 (2010) (in response to Bar inquiries, attorney failed to respond or responded incompletely and insubstantially, asserting that the underlying complaint was without merit).

SANCTION

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* ("*Standards*"), in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct.

ABA Standards

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

Duty Violated

Respondent violated his duty to the legal process to avoid prejudicing the administration of justice. *Standards* § 6.2. Respondent also violated the duties he owed as a professional to refrain from making false or misleading communications regarding his services and to cooperate with his disciplinary authorities. *Standards* § 7.0.

Mental State

The *Standards* recognize three mental states. The most culpable mental state is that of “intent,” when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 450.² “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* “Negligence” is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent acted knowingly in the *City Craft* litigation when he failed to respond to the plaintiff’s two requests for inspection, and when he failed to appear for the noticed inspection. He acted knowingly when he failed to respond to plaintiff’s counsel’s communications, and when he failed to appear at the hearing on the motion to compel. He further acted knowingly when he did not respond to DCO’s multiple inquires.

The Bar contends that he also acted knowingly when he left his website up, uncorrected, while suspended. We are not certain we agree with the Bar’s position on this issue. It is arguable that neither the allegations in the complaint nor the additional evidence submitted establish such a mental state by clear and convincing evidence. However, we do not need to decide that particular issue in this context because it would not affect the sanction to be imposed.

Extent of Actual or Potential Injury

For purposes of determining an appropriate sanction, we may take into account both actual and potential injury. *Standards* at 450; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

We find that respondent’s conduct in the *City Craft* litigation caused actual injury to the plaintiff and to the court. It interfered with the court’s procedural functioning. It caused a waste of court time and resources. Respondent’s was silent in response to plaintiff’s request to inspect the subject premises. This conduct required opposing counsel to file a motion to compel despite the lack of any good faith objection to the request. This conduct caused the plaintiff to incur additional fees and costs that should not have been incurred.

² Page references are to the 2017 edition of *Compendium of Professional Responsibility Rules and Standards*.

We also find that respondent's failure to cooperate with DCO's investigation of his conduct also caused actual injury to both the legal profession and to the public. *In re Schaffner, supra; In re Miles*, 324 Or 218, 221-22 (1996); *In re Haws*, 310 Or 741 (1990); *see also, In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (lawyer's persistent failure to respond prejudiced the Bar because it had to investigate in a more time-consuming way, and public respect for the Bar was diminished when the Bar could not provide a timely and informed response to complaints).

Preliminary Sanction

Absent aggravating or mitigating circumstances, these *Standards* apply. 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* § 6.22. Suspension is also 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.

Aggravating and Mitigating Circumstances

The following aggravating factors under the *Standards* exist in this case:

1. Multiple offenses. *Standards* § 9.22(d). Respondent violated three distinct sets of rules at different times. While an active lawyer, he engaged in conduct prejudicial to the administration of justice. After his July 2017 suspension, he continued to keep his website active containing false and misleading statements. After Muth complained to the Bar, respondent failed to respond to DCO and cooperate in its investigation.
2. Refusal to acknowledge wrongful nature of conduct. *Standards* § 9.22(g). By not cooperating with DCO, respondent has refused to acknowledge his violations of the rules.

The only mitigating factor we find is an absence of a prior record of discipline. *Standards* § 9.32(a).

Oregon Case Law

Oregon cases tell us that some period of suspension is warranted for respondent's conduct. Sanctions in disciplinary matters are not intended to penalize the respondent. They are intended to protect the public and the integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). Appropriate discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992).

Conduct Prejudicial to the Administration of Justice

The sanction for conduct prejudicial to the administration of justice depends on the extent of the actual or potential injury to the legal process. Where the lawyer's conduct is

knowing suspensions have been imposed. *See, e.g., In re Carini*, 354 Or 47, 308 P3d 197 (2013) (30-day suspension for attorney's repeated failure to appear at court hearings); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (120-day suspension where domestic relations attorney was not prepared for a settlement conference he had requested, and then failed to send his calendar of available dates to an arbitrator, respond to messages from the arbitrator's office, or pursue the arbitration after the court referred the case to arbitration a second time); *In re Worth*, 336 Or 256, 82 P3d 605 (2003) (court-appointed postconviction relief attorney was suspended for 90 days where his failures to read the provisions of a consortium contract, notify the court that he was the lawyer assigned by the consortium to individual cases, and monitor client matters, resulted in their repeated dismissals and subsequent reinstatements, aggravated by his failure to communicate with his clients); *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995) (a criminal defense lawyer who did not want to proceed to trial that day was suspended for nine months where he threatened to create reversible error unless the court granted his motion to continue).

The Bar argues that respondent's conduct is closest to that in *Carini*. The Bar states that if conduct prejudicial to the administration of justice were the only charge, it would request a suspension of at least thirty days.

False and Misleading Advertising

The sanctions imposed for false and misleading advertising also vary. The Supreme Court and trial panels have usually imposed some period of suspension. *In re Magar*, 337 Or 548, 100 P3d 727 (2004) (one year suspension imposed by trial panel and affirmed by the court where attorney filed pleadings and sent letters on his letterhead to the court and opposing counsel when he was an inactive member of the bar and not eligible to practice law under former DR 2-101(A)(1)); *In re Hendrick*, 24 DB Rptr 138 (two-year suspension for attorney whose website advertisement was false in that it described the firm as a team of lawyers, when attorney practiced by himself, and it promised full refunds to clients dissatisfied with attorney's services, but attorney failed to make such a refund); *In re Shatzen*, 18 DB Rptr 213 (2004) (120-day suspension by trial panel where attorney made misrepresentations when he continued to advertise that he was a certified public accountant years after his CPA certificate had lapsed under former DR 2-101(A)(1)); *In re Rencher*, 14 DB Rptr 217 (2000) (30-day suspension by trial panel for attorney who made false and misleading statements in letters sent to individuals for whom his firm had prepared living trusts, for the purpose of inducing the recipients to send him additional money for trust revisions that may not have been necessary).

The Bar states that if false or misleading advertising were the only charge it would request a suspension of at least thirty days. We believe, in light of our earlier discussion regarding respondent's mental state that, if this charge were standing alone, we would have to seriously consider a lesser sanction. *See, e.g., In re Fjelstad*, 29 DB Rptr 122 (2015) (stipulated public reprimand involving failure to correct website to reflect Oregon suspension or later Washington suspension). However, even if we were to decide a public reprimand was an

appropriate sanction for the charge standing alone, it would not change our view of the appropriate sanction for the collective misconduct.

Failure to Respond to Disciplinary Authority

Lawyers who fail to cooperate with disciplinary authorities generally receive terms of suspension. *In re Bourcier*, 325 Or 429, 436, 939 P2d 604 (1997); *see also In re Hereford*, 306 Or 69, 756 P2d 30 (1988) (126-day suspension for non-cooperation alone; attorney found not guilty of all other charges).

The Supreme Court has held many times that the “failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation.” *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000). The court has also stressed that it does not tolerate violations of this rule. *In re Miles*, 324 Or at 222–23 (120-day suspension and formal reinstatement required for non-cooperation). In *Miles*, the attorney failed to respond to inquiries from DCO, failed to respond to the Bar’s formal complaint, did not appear at trial, and a default was entered against her. *See also In re Arbuckle*, 308 Or 135, 775 P2d 832 (1989) (two-year suspension where attorney with no prior discipline failed to return client property and respond to the Bar).

The Bar argues that respondent’s conduct is most similar to *Miles*. It asks for at least a four-month suspension.

Collective Conduct

If respondent were sanctioned in the aggregate for his separate violations, the Bar contends that he would face a suspension of at least six months. The Bar concedes that two of the four violations are interrelated (RPC 5.5(b)(2) and RPC 7.1) Consequently, the Bar does not urge us to simply add up the presumptive sanctions to produce a particular length of suspension. The Bar suggests that if respondent’s overall conduct is considered along with the aggravating and mitigating factors, a suspension of at least five months is merited. The Bar asks for four months for his failure to respond to DCO and one month for his three other violations combined. We agree that a five month suspension is appropriate.

The Bar further asks the trial panel to require that respondent be subject to formal reinstatement under BR 8.1 at such time as he elects to return to active status following any suspension. We do not agree.

It is the panel’s view that the Bar Rules of Procedure essentially present us with a bright line. Suspensions of six months or longer require formal reinstatement. Shorter terms do not.

These rules were adopted after consideration by both the Board of Governors and the Oregon Supreme Court. We believe that the policy choice about the terms of suspension that should require formal reinstatement was intentional, and are not persuaded by the Bar’s argument that we should ignore this distinction. If formal reinstatement should be considered for suspensions shorter than six months the rules should so provide.

Because we do not grant the Bar's request we do not need to consider whether the trial panel can even require formal reinstatement in cases not specified in the rule. That appears to be an open question under the rules.

CONCLUSION

For the foregoing reasons, we conclude that respondent is suspended for a period of five months, beginning sixty days from the date of this opinion. Respondent is ordered to comply with the provisions of BR (BR) 6.3(a), (b) and (c). Disciplinary Counsel may seek a contempt proceeding and appropriate sanctions before the Supreme Court for failure to comply. BR 6.3(d).

Dated this 26th day of November, 2018.

/s/ Mark A. Turner

Mark A. Turner, Adjudicator

/s/ Ronald A. Atwood

Ronald A. Atwood, Trial Panel Member

/s/ Charles C. Martin

Charles C. Martin, Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 18-185
)	
MARGARET PARKER WASHBURN,)	
)	
Respondent.)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Respondent:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 4.2. Stipulation for Discipline. Public Reprimand.
Effective Date of Order:	December 28, 2018

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Margaret Parker Washburn is publicly reprimanded for violation of RPC 4.2.

DATED this 28th day of January, 2018.

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

STIPULATION FOR DISCIPLINE

Margaret Parker Washburn, attorney at law (“Washburn”), and the Oregon State Bar (“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.

Washburn was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 1996, and has been a member of the Bar continuously since that time, having her office and place of business in Deschutes County, Oregon.

3.

Washburn 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 3, 2018, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Washburn for alleged violation of RPC 4.2 (unauthorized communication with a represented party) 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 May 29, 2018, Robert W. Ickes (“Ickes”) sent a letter to Washburn stating that he had “just accepted the above entitled matter [*Kenneth Douglas v. Maria Douglas*], for which I will be substituting as counsel for [attorney] Deirdra Cherzan.” Ickes sent a second letter to Washburn, dated June 15, 2018, to share information from his client, Kenneth Douglas (“Douglas”), in response to her request for production of documents.

6.

On June 20, 2018, at 10:06 a.m., Washburn sent an email to Douglas informing him that his spousal support payment was overdue, insisting upon payment, and notifying him that she planned to file a motion seeking to hold him in contempt of court. Washburn did not copy Ickes on her email to Douglas.

7.

In response, in an email at 12:07 p.m. on which he copied Ickes, Douglas stated that he would mail a check after he was paid. Washburn responded at 1:03 p.m., without copying Ickes, informing Douglas that by the time her client received his check, it would be nearly a month overdue. Further, Washburn told Douglas, “[i]t seems that a Motion for Contempt is appropriate.” Douglas responded at 1:21 p.m., adding Ickes back on the email chain, letting Washburn know that he would pay once he was paid.

8.

On June 21, 2018, Ickes and Washburn engaged in an email conversation about Washburn's communication with Douglas. Ickes reminded Washburn of his representation of Douglas and instructed her not to communicate directly with his client.

9.

In response to Ickes's email, Washburn contended that she had looked online and, because she had not found a notice of representation, she assumed that he was not representing Douglas.

10.

Ickes reminded Washburn that a filed notice was not necessary to adequately inform her of his representation of Douglas. Washburn then stated, "I see you filed a Notice of Representation TODAY and emailed me a copy TODAY. I resent the allegation that I contacted your client, knowing he was represented. As I stated, he was not represented. Just because you say so, doesn't make it true."

Violations

11.

Washburn admits that, by sending two email messages to Douglas without first confirming that Ickes was not representing him, she violated RPC 4.2.

Sanction

12.

Washburn 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* ("*Standards*"). The *Standards* require that Washburn'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.** Washburn violated her duty to the profession to avoid improper communications with individuals in the legal system. *Standards* § 6.3.
- b. **Mental State.** The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *Standards* at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Washburn acknowledged a knowing mental state

in that she had heard from Ickes that he was representing Douglas, prior to her email messages with Douglas, and chose to disregard it.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). It does not appear that Washburn caused any actual injury to Douglas, nor was there any evidence of interference with, or an adverse effect upon, the outcome of the case. However, there was the potential for Washburn's conduct to harm Douglas's interests. *Standards* at 6. In addition to demanding payment, Washburn threatened Douglas with the filing of a motion seeking to find him in contempt of court. The Oregon Supreme Court has explained that the prohibition against contacting a represented party is intended to insulate the represented person against possible overreaching by the other attorneys in the matter, interference by those attorneys with the attorney-client relationship, and the possibility of disclosure of information relating to the representation by the represented party. *In re Knappenberger*, 338 Or 341, 344–346, 108 P3d 1161 (2005). The nature of Washburn's communication with Douglas created a higher risk of the harm that the rule is designed to prevent.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Multiple offenses. *Standards* § 9.22(d). Washburn contacted Douglas twice, without first inquiring if he was represented.
 2. Refusal to acknowledge the wrongfulness of her conduct. *Standards* § 9.22(g). Both to Ickes, and later to the Bar during its investigation, Washburn adamantly refused to acknowledge that she had done anything improper in twice communicating with Douglas following Ickes's notice of representation.
 3. Substantial experience in the practice of law. *Standards* § 9.22(i). Washburn was licensed to practice in Oregon in 1996.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 2. Absence of dishonest motive. *Standards* § 9.32(b).

13.

Under the *Standards*, reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. *Standards* § 6.33.

14.

Oregon cases also support a public reprimand. *See, e.g., In re Newell*, 348 Or 396, 234 P3d 967 (2010) (public reprimand when attorney noticed represented person to a deposition and examined him on the record on issues related to the representation without the consent of that person’s counsel); *In re Schenck*, 320 Or 94, 879 P2d 863 (1994) (public reprimand when attorney mailed notice directly to adverse party who attorney knew to be represented by counsel); *In re McCaffrey*, 275 Or 23, 549 P2d 666 (1976) (public reprimand when attorney acted carelessly in sending letter to party known to be represented); *In re Venn*, 235 Or 73, 383 P2d 774 (1963) (public reprimand when attorney acted in ignorance of ethical standards). *See also Hedrick*, 312 Or 442, 448–49, 822 P2d 1187 (1991) (noting that negligent communication with represented party typically resulted in public reprimand, but additional aggravation resulted in 60-day suspension); *In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984) (attorney suspended for multiple rule violations arising from contact with a represented party, but public reprimand would have been sufficient to address only an improper communication).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that Washburn shall be publicly reprimanded for her violation of RPC 4.2, the sanction to be effective upon approval by the Disciplinary Board.

16.

Washburn 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.

17.

Washburn 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 Washburn is admitted: none.

18.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on November 3, 2018. Approval as to form by Disciplinary Counsel is evidenced below. The parties agree the stipulation is to be submitted to the Adjudicator on behalf of the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

Cite as *In re Washburn*, 32 DB Rptr 419 (2018)

EXECUTED this 17th day of December, 2018.

/s/ Margaret Parker Washburn

Margaret Parker Washburn

OSB No. 965063

APPROVED AS TO FORM AND CONTENT this 10th day of December, 2018.

/s/ Christopher R. Hardman

Christopher R. Hardman

OSB No. 792567

EXECUTED this 21st day of December, 2018.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Chief Assistant Disciplinary Counsel