

**DISCIPLINARY
BOARD
REPORTER**

Report of Lawyer Discipline Cases
Decided by the Disciplinary Board
and by the
Oregon Supreme Court
for 2020

VOLUME 34

January 1, 2020, to December 31, 2020

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 2020 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 34 DB Rptr ____ (2020).

In 2020, 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

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IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Grievance as to the Conduct of)	Case No. 19-87
)	
DANIEL F. KELLINGTON,)	
)	
Respondent.)	

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: None

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. Public
Reprimand.

Effective Date of Order: January 13, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Daniel F. Kellington is publicly reprimanded for violation of RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).

DATED this 13th day of January, 2020.

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

STIPULATION FOR DISCIPLINE

Daniel F. Kellington, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 24, 1965, and has been a member of the Bar continuously since that time, having his office and place of business in Jackson County, Oregon.

3.

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

4.

On October 19, 2019, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent 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.

In December 2018, Respondent held in his trust account \$500 received from a client for payment attorney fees. He subsequently paid himself from trust a total of \$720 for fees earned on the client's matter. In so doing, Respondent drew on funds he held in trust for other clients, and thus failed to safeguard client funds in his possession, and failed to keep complete records of client funds held in trust.

In January 2019, Respondent made two \$200 withdrawals, totaling \$400, from his trust account. Both times, he drew on funds belonging to other clients before he had earned the funds as fees, or had incurred costs for the clients. In so doing, Respondent withdrew client funds from his trust account before fees were earned or expenses incurred.

In February 2019, Respondent wrote a check for \$1,000 from his trust account at a time when his account held insufficient funds to cover the check. The bank honored the check, thus overdrawing Respondent's account by \$300. Once he became aware of the overdraft, Respondent deposited a total of \$340 into his trust account. While the majority of that deposit went to restoring clients' funds Respondent had prematurely removed from trust, Respondent

also kept an additional amount in his trust account for reasons other than bank service fees or minimum balance requirements.

Violations

6.

Respondent admits that, by engaging in the conduct described above, he violated the trust account rules codified in RPC 1.15-1(a), RPC 1.15-1(b), and RPC 1.15-1(c).

Sanction

7.

Respondent 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 Respondent'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 *Standards* presume that the most important duties a lawyer owes are those owed to clients. *Standards* at 5. Respondent violated his duty to his clients to preserve their property. *Standards*, § 4.1.
- b. **Mental State.** The *Standards* recognize three mental states: "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.

Respondent's conduct reflects a negligent mental state. Respondent negligently failed to confirm and record the amounts he was withdrawing from his trust account, which led to his wrongful withdrawals of client funds before they were earned and the overdraft of his trust account.

- c. **Injury.** Injury can be either 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.

Respondent caused potential injury to his clients by failing to preserve their funds in trust and in drawing on client funds before they were earned.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Selfish motive. *Standards* § 9.22 (b).
 2. Substantial experience in the practice of law. *Standards* § 9.22(i). Respondent has been practicing law in Oregon since 1965.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards* § 9.32(a).
 2. Timely good faith effort to rectify consequences of misconduct. *Standards* § 9.32(d).
 3. Full and free disclosure during disciplinary proceeding. *Standards* § 9.32(e).

8.

Under the ABA *Standards*, a public reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards* § 4.13.

9.

In comparable situations, the Disciplinary Board has approved stipulations imposing reprimands and suspensions subject to probation. *See, e.g.,*

- *In re Todd S. Baran*, 32 DB Rptr 243 (2018) [**stipulated reprimand**]. During the transition of moving from Oregon and closing his law firm, respondent mixed up his business checks and IOLTA checks, and inadvertently paid himself from client funds before earned; utilized a different client's unearned funds to pay himself more than he had earned; and commingled a client's unearned funds with his own earned funds in his business account through inaccurate bookkeeping records. [RPC 1.15-1(a), RPC 1.15-1 (b), and RPC 1.15-1(c)]
- *In re James J. Kolstoe*, 29 DB Rptr 128 (2015) [**stipulated reprimand**]. Respondent correctly deposited \$500 in earned fees from a client into his business account, but mistakenly recorded the transaction as a deposit into his trust account. Forgetting that he had already collected the earned fees from the client, respondent mistakenly withdrew \$500 from the trust account as earned fees. Since the client did not have funds in trust, that \$500 was paid from the funds of other clients in the trust account. 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 trust were insufficient to pay another check he issued on that account. [RPC 1.15-1(a)]

- *In re Gregory L. Gudger*, 21 DB Rptr 160 (2007) [**stipulated reprimand**]. A client paid a retainer, which respondent properly deposited into his lawyer trust account. After performing some work on the case, respondent inadvertently withdrew more of the retainer than he had earned. [DR 9-101(A)]
- *In re Iain E. Levie*, 20 DB Rptr 72 (2006) [**stipulated reprimand**]. Attorney failed to maintain complete records of a client's settlement proceeds and could not document the disbursements reportedly made from those funds when called upon to do so. [DR 9-101(C)(3)]
- *In re Brian J. Dobie*, 19 DB Rptr 6 (2005) [**stipulated reprimand**]. Respondent represented a client in trust matters. When the representation ended, the client asked respondent to forward accounting records to her new attorney. Respondent failed to make and preserve adequate records of the client's funds and was unable to provide the client with complete financial records when asked to do so. [DR 9-101(C)(3)].
- *In re Robert G. Klahn*, 19 DB Rptr 1 (2005) [**stipulated reprimand**]. Six checks were drawn against Klahn's lawyer trust account and presented for payment. The bank honored all six, resulting in a negative balance in the account. Review of the account records revealed that deposits were mistakenly entered twice for the same client, checks received from two clients were recorded as having been deposited when in fact they were locked in a safety deposit box for a number of months, and a check drawn on the trust account many years prior had not been recorded in the check register. In addition, respondent had stopped making periodic reconciliations of the office account and trust account, which allowed many errors to go undetected. [DR 9-101(A), DR 9-101(C)(3)].

10.

Consistent with the *Standards* and Oregon case law, the parties agree Respondent 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 the Disciplinary Board's approval of this Stipulation for Discipline.

11.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

12.

Respondent 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 Respondent is admitted: None

13.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on October 19, 2019. 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 27th day of December, 2019.

/s/ Daniel F. Kellington
Daniel F. Kellington, OSB No. 650605

EXECUTED this 10th day of January, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel
Courtney C. Dippel, OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of)	Case No. 18-186
)	
MICHAEL S. STERNER,)	
)	
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. 30-day suspension.

Effective Date of Order: January 31, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Sterner is suspended for 30 days, effective January 31, 2020 for violations of RPC 1.1, RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

DATED this 24th day of January, 2020.

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

APPROVED AS TO FORM AND CONTENT:

/s/ Michael S. Sterner
 Michael S. Sterner, OSB No. 101564

/s/ Courtney C. Dippel
 Courtney C. Dippel, OSB No. 022916

STIPULATION FOR DISCIPLINE

Michael S. Sterner, attorney at law (Respondent), 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.

Respondent 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 Multnomah County, Oregon.

3.

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

4.

On December 28, 2018, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violations of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.7(a)(2), RPC 1.7(b), and RPC 8.4(a)(3) 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.

Kiara James (James) retained Respondent in July 2012 to assist her in vacating her rental residence due to the presence of toxic mold. After negotiating James's move-out agreement, Respondent agreed to represent James in a civil action for personal injuries despite having no experience in handling toxic mold or landlord/tenant disputes.

6.

Respondent filed the complaint in September 2013, which alleged various claims for relief under the Oregon Residential Landlord Tenant Act (ORLTA) and breach of contract. Pursuant to ORS 12.125, the ORLTA claims were subject to a one-year statute of limitations.

7.

After serving the complaint, Respondent did not require the defendants to make an appearance (by motion or answer). Although Respondent filed a notice of intent to take default, Respondent never moved for an order of default or entry of default judgment.

8.

Respondent did not inspect the subject property, take depositions, request discovery of the defendants, retain an expert witness, or speak with James's treating physician, upon whom James was relying for proof of her injuries and causation.

9.

Respondent did not contact or associate with any lawyers with expertise in the subject matter, or attend any CLEs or other seminars regarding toxic mold litigation or landlord/tenant issues.

10.

Due to Respondent's inaction, on July 7, 2015, the court dismissed James's complaint for want of prosecution. At that time, all of James's claims were time-barred except for her breach of contract claim. After dismissal, Respondent did not move to reinstate the case because he was unaware of Oregon's Saving Statute, ORS 12.220, which required that he file a motion to reinstate by January 1, 2016.

11.

The case languished for another year and a half with no action by Respondent. James filed a Bar complaint on February 10, 2017. Respondent terminated his representation of her on November 18, 2017.

Violations

12.

Respondent admits that by engaging in the conduct described above, he failed to provide competent representation, in violation of RPC 1.1, he neglected a legal matter entrusted to him, in violation of RPC 1.3, he failed to keep his client reasonably informed about the status of a matter, in violation of RPC 1.4(a), and failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation, in violation of RPC 1.4(b).

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 1.7(a)(2), RPC 1.7(b), and RPC 8.4(a)(3) should be and, upon the approval of this stipulation, are dismissed.

Sanction

13.

Respondent 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 Respondent'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 Standards presume that the most important duties a lawyer owes are those owed to clients. Standards at 5. Respondent violated his duty to act with reasonable diligence and promptness, which includes the duty to adequately and effectively communicate with his client regarding the representation. Standard 4.4. Respondent also violated his duty to provide his client with competent representation. Standard 4.5.
- b. **Mental State.** The Standards recognize three mental states. "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.

Respondent's conduct reflects a negligent mental state. When Respondent undertook to represent James, he had been practicing in Oregon for two years and was inexperienced in the subject matter, but wanted to assist James. He was negligent in failing to prepare to competently handle the litigation. His lack of knowledge led him to neglect the matter because he did not know how to prosecute the litigation and to fail to adequately communicate with James. That conduct reflects a deviation from the standard of care that a reasonable lawyer would have exercised in a comparable situation.

- 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.

Respondent caused actual injury to James. Respondent's conduct prohibited her from receiving the benefit of competent counsel to advise her in navigating the case and understanding the merits of the case. Ultimately, James's case was dismissed due to Respondent's lack of competence in timely prosecuting the case, and thereafter, failing to timely reinstate the case.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Multiple offenses. Standard 9.22(d).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. Standard 9.32(a).
 2. Absence of a dishonest or selfish motive. Standard 9.32(b).
 3. Full and free disclosure or cooperative attitude toward proceedings. Standard 9.32(e).
 4. Inexperience in the practice of law. Respondent had been practicing for two years when his representation of James commenced. Standard 9.32(f).
 5. Remorse. During his deposition, Respondent expressed remorse for his conduct. Standard 9.32(l).

Respondent's mitigating factors significantly outweigh his sole aggravating factor, justifying a downward adjustment in any suspension.

14.

Under the ABA Standards, without considering aggravating or mitigating factors, the following Standards apply:

- Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; Standard 4.42(a).
- Suspension is generally appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Standard 4.42(b).
- 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. Standard 4.43.
- Suspension is generally appropriate when a lawyer engages in an area of practice in which he knows he is not competent, and causes injury or potential injury to a client. Standard 4.52.
- Reprimand is generally appropriate when a lawyer demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client. Standard 4.53(a).

The parties agree that the significant injury caused by Respondent's conduct suggests some term of suspension is warranted.

15.

Respondent's misconduct may be attributed to his lack of competence in handling James's case. In relevant case law, the court has imposed sanctions ranging from reprimand to six-month suspension:

- *In re Odman*, 297 Or 744, 748-49, 687 P2d 153 (1984) [**Reprimand**] Attorney had a conflict of interest, neglected a probate proceeding, and failed to provide competent representation while handling the probate where the Bar demonstrated that the attorney filed late accountings, inventories, and inheritance tax returns that were not only late, but also frequently improperly filed. The attorney did not know the basic steps in administering and closing the decedent's insolvent estate and undertook no basic steps to become qualified to do estate work.
- *In re Bettis*, 342 Or 232, 149 P3d 1194 (2006) [**30-day suspension**] Attorney failed to provide competent representation to a criminal defense client when he sought and obtained his client's waiver of the right to a jury trial without first reviewing any discovery or conducting any factual or legal investigation into the issues in the case.
- *In re Obert*, 352 Or 231, 282 P3d 825 (2012) [**Six-month suspension**] Despite instructions from a trial judge in a civil case that the judge would grant a motion for JNOV in favor of attorney's client if filed, and a caution about when such a motion was due, attorney failed to timely file the motion and instead filed a notice of appeal, which deprived the trial court of jurisdiction. The notice of appeal was defective, the appeal ultimately was dismissed, and attorney failed to refile his post-trial motions timely. He also filed a second, untimely notice of appeal, intending to argue that a criminal statute that permitted the late filing of a notice of appeal should apply to his client's civil case. Attorney was found to have engaged in a pattern of incompetence.

In both *Obert* and *Bettis*, the lawyers had significant aggravating factors, and in the case of *Obert*, additional violations. In *Obert*, the respondent was also found to have charged or collected an excessive fee and failed to respond to a request for information from his disciplinary authority. He also had a significant amount of aggravating factors – prior disciplinary history; a pattern of misconduct; multiple offenses; and substantial experience in the practice of law. *In re Obert*, 352 Or at 252. With regards to *Bettis*, the attorney also had a prior disciplinary record and substantial experience in the practice of law. *In re Bettis*, 342 Or at 241.

16.

Consistent with the Standards and Oregon case law, the parties agree that Respondent shall be suspended for 30 days for violations of RPC 1.1, RPC 1.3, RPC 1.4(a), and 1.4(b), the sanction to be effective January 31, 2020.

17.

In addition, on or before February 1, 2020, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$216.00, incurred for court reporting services. Should Respondent fail to pay \$216.00 in full by February 1, 2020, the Bar may thereafter, without further notice to him, obtain a judgment against Respondent 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.

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

19.

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

20.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

21.

Respondent 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 Respondent is admitted: U.S. Tax Court.

22.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 7, 2019. Approval as to form by Disciplinary Counsel is evidenced below. The

Cite as *In re Sterner*, 34 DB Rptr 7 (2020)

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 January, 2020.

/s/ Michael S. Sterner

Michael S. Sterner, OSB No. 101564

EXECUTED this 23rd day of January, 2020.

OREGON STATE BAR

By: s/ Courtney C. Dippel

Courtney C. Dippel, OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 18-195
)
TODD STEPHEN HAMMOND,)
)
Respondent.)

Counsel for the Bar: Theodore W. Reuter

Counsel for the Respondent: David J. Elkanich

Disciplinary Board: None

Disposition: Violation of RPC 1.5(a) and RPC 1.8(a). Stipulation for Discipline. 60-day suspension, all stayed, 2-year probation.

Effective Date of Order: January 31, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Todd Stephen Hammond is suspended for 60 days, with all the suspension stayed, pending Todd Stephen Hammond's successful completion of a two year term of probation, effective upon approval of the Adjudicator for violation of RPC 1.5(a) and RPC 1.8(a).

DATED this 31st day of January, 2020.

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

STIPULATION FOR DISCIPLINE

Todd Stephen Hammond, attorney at law (Respondent), 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.

Respondent 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 Marion County, Oregon.

3.

Respondent 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 15, 2018, the SPRB authorized formal proceedings against Respondent. On March 7, 2019, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.5(a), RPC 1.7(a)(2) and RPC 1.8(a). On January 23, 2020, the Bar filed an amended complaint, dismissing the allegation that Respondent had violated RPC 1.7(a)(2). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

Around May 2009, Respondent agreed to represent Eric S. Anderson (Anderson) in relation to his claim for disability benefits from the Department of Veterans Affairs (VA). The parties entered into a written contingency fee agreement, entitling Respondent to 20% of any recovery he obtained for Anderson. The agreement further provided that the VA should withhold the amount of attorney’s fees that Respondent was entitled to receive from Anderson’s award and pay that amount directly to Respondent.

6.

The VA has statutory authority to regulate the collection of attorney’s fees pursuant to agreements such as the one described in paragraph 5. Pursuant to its statutory authority, the VA properly promulgated 38 CFR 14.636.

7.

At all relevant times, 38 CFR 14.636(c)(1) stated that attorneys may only charge a claimant in Anderson's position if, among other things, the fee agreement met the requirements of 38 CFR. 14.636(g).

8.

At all relevant times, 38 CFR 14.636(g) required, among other things, that a copy of all fee agreements for the collection of attorney fees to be sent to the VA. Fee agreements which contemplated the VA withholding attorney's fees from the award of past due benefits were required to be filed with "the agency of original jurisdiction within 30 days of execution." 38 CFR 14.636(g)(3). Fee agreements which contemplated the attorney collecting money from his client were required be filed with the Office of General Counsel within 30 days of execution. *Id.*

9.

Respondent properly filed the fee agreement referenced in paragraph 5 with the agency of original jurisdiction and with the Office of General Counsel.

10.

In September 2017, Anderson and Respondent learned that the VA had awarded Anderson disability benefits totaling \$144,000.

11.

In early October 2017, prior to his receipt of any funds from Anderson's September 2017 award, Respondent contacted Anderson and requested that Anderson transfer approximately \$28,958.86 of the money that Anderson had received from the VA to him in return for Respondent "releasing his lien" on the amount that the VA was holding back for Respondent's fee (early fee payment). The amount Respondent asked Anderson for was the same as the amount the VA had withheld from Anderson's total award for Respondent's fee. Respondent was requesting Anderson to advance him his expected fee.

12.

Respondent and Anderson believed that the VA was likely to release funds in its possession to Anderson more quickly than it would release the funds to Respondent. However, this was not the case. It was the VA's policy not to expedite the release of fund unless the attorney withdrew the fee agreement filed with the agency and once the fee had been withheld, it was too late to do so.

13.

Respondent was Anderson's attorney at the time of Respondent's request for the early fee payment. Respondent did not offer Anderson any compensation or additional consideration for Anderson's early fee payment. Respondent did not recommend that Anderson seek independent counsel before agreeing to the early fee payment. Respondent did not disclose any potential conflict of interest between himself and Anderson in relation to early fee payment, or discuss any of the risks related to this advancement of funds. To the extent that it may have been available, Respondent did not seek or obtain Anderson's informed consent to the early fee payment transaction, confirmed in writing.

14.

Respondent emailed the VA requesting that it release the funds it was holding directly to Anderson. Respondent accepted the Early Fee Payment from Anderson a few days later. The VA did not release the funds it was holding for Respondent's fee for over two months after Respondent requested the release.

15.

Respondent did not enter into a new written agreement with Anderson before accepting the early fee payment.

Violations

16.

Respondent admits that, by accepting the early fee payment, he charged or collected an illegal fee, in violation of RPC 1.5(a), because his payment arrangements with Anderson were not in compliance with 38 CFR 14.636(g)(3). His collection of the early fee payment also constituted a business transaction with a client without the required disclosures in violation of RPC 1.8(a).

Sanction

17.

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

- a. **Duty Violated.** In engaging in a business transaction with a client, Respondent violated his duty to a client to avoid conflicts of interest. Standard 4.3. In

charging his client an illegal fee, Respondent violated his duty to the profession. Standard 7.0.

- b. Mental State.** “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. Standards at 9. Respondent should have known that by accepting payment early, he was violating 38 CFR 14.363 and that he had an obligation to comply with the safeguards in RPC 1.8(a) when entering into a business transaction with his client.
- c. Injury.** Anderson was harmed by not having the benefit of disclosures the rules require before making his decision to advance Respondent his fee. Additionally, Respondent caused Anderson anxiety by the delay associated with having to await repayment of the advance made to Respondent by the VA. *In re Maurer*, 364 Or 190, 201, 431 P 3d 410 (2018)(finding that unwarranted additional anxiety is actual injury under the disciplinary rules).
- d. Aggravating Circumstances.** Aggravating circumstances include:

 - 1. Prior Disciplinary Offenses. Standard 9.22(a). Respondent has been sanctioned twice before for an illegal or excessive fee. *See In re Hammond*, 22 DB Rptr 168 (2008); *In re Hammond*, 24 DB Rptr 187 (2010).
 - 2. Selfish Motive. Standard 9.22(b) Respondent sought immediate payment for his own personal gain and did not consider the effect this would have on his client.
 - 3. A pattern of misconduct. Standard 9.22(c). “[W]hen a lawyer violates a rule for which he or she previously has been disciplined, the prior violation can establish both a record of prior discipline and a pattern of misconduct.” *In re Bertoni*, 363 Or 614, 643, 426 P3d 64 (2018) (citations omitted). Respondent’s conduct herein is of precisely the same conduct for which he has previously been sanctioned.
 - 4. Vulnerability of victim. Standard 9.22(h). Anderson is a severely disabled veteran. He relied on Respondent as his attorney for nearly ten years at the time of Respondent’s misconduct.
 - 5. Substantial experience in the practice of law. Standard 9.22(i). Respondent had been practicing law in Oregon for approximately 20 years when this conduct occurred.
- e. Mitigating Circumstances.** Mitigating circumstances include:

 - 1. Cooperation in these proceedings. Standard 9.32(e)

2. Remorse. Standard 9.32(l).
3. Remoteness of prior offenses. Standard 9.32(m). Respondent's previous misconduct is relatively remote in time. The parties acknowledge that this factor is usually analyzed by the court in its consideration of Standard 9.22(a) above. See *In re Jones*, 326 Or 195, 200, n 4, 951 P2d 149 (1997).

18.

Violations of RPC 1.5(a) and RPC 1.8(a) are violations of an attorney's duty to the profession (Standard 7.0) and to avoid conflicts of interest (Standard 4.3) respectively. A reprimand is appropriate for negligent violations of either standard that causes injury. Standard 4.33; Standard 7.3. Aggravating factors outweigh mitigating factors making a short suspension appropriate.

19.

Oregon case law is in accord. 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).

20.

When the court has found that an attorney charged an illegal fee, the sanction has also been a suspension. See, e.g. *In re Lopez*, 350 Or 192, 252 P3d 312 (2011) (attorney received a nine month suspension for mishandling client property, false advertising, and charging a fee to a minor without court approval in a reciprocal discipline matter); *In re Knappenberger V*, 344 Or 559, 186 P3d 272 (2008) (attorney suspended for two years for charging an illegal fee to one client and an excessive fee to another client. The court cited significant prior discipline as the reason for the length of the suspension.); *In re Altstatt*, 321 Or 324, 897 P2d 1164 (1995) (suspending an attorney for one year for conflict of interest, collection of an illegal fee, and conduct prejudicial to the administration of justice.).

21.

Matching sanctions is an inexact science. See *In re Obert*, 352 Or 231, 262, 282 P3d 825 (2010)(*citations omitted*). The Bar concedes that Respondent's conduct, while serious, is not as serious as the attorneys' conduct in the above cases. In particular, while the above attorneys all had multiple areas of misconduct, Respondent's only violation was seeking to be paid in a manner that did not comply with the VA's regulations and his professional obligations.

22.

Respondent has twice before engaged in similar conduct. The parties agree that his conduct falls between the conduct in *In re Spencer*, 355 Or 679, 330 P3d 538 (2014) and *In re*

Obert, 352 Or 231, 282 P3d 825 (2012). In *Spencer*, an attorney received a 30-day suspension for a single violation of RPC 1.8(a). *In re Spencer*, 355 Or at 550-51 (2014). In that case, the court found that Spencer's prior unrelated discipline had moderate weight, and also that his victim was vulnerable. *Id.* at 699-700. However, Spencer's conduct was mitigated by his cooperation with the disciplinary proceedings. *Id.* at 700. Respondent's conduct is more serious because his previous violations are so similar and because additional aggravating factors apply.

23.

The parties agree that Respondent's conduct is less serious than the conduct in *In re Obert*, 352 Or 231, 282 P3d 825 (2012). Obert committed seven violations of the rules of professional conduct including a violation of RPC 1.5(a). *Id.* at 259. He had previously been suspended for 30 days. His conduct was part of a pattern, and he committed multiple offenses. *Id.* at 260. The court gave him credit for full and free disclosure to the disciplinary authority, his good reputation in the community, and a good faith effort to rectify the consequences of his misconduct. *Id.* at 261-62. The court suspended him for 6 months. *Id.* at 264.

24.

In this case, Respondent has fewer violations than Obert, but also less mitigation. Obert's misconduct involved dishonesty, which is not charged here. Accordingly, a shorter period of suspension is 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. 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.

26.

Consistent with the *Standards* and Oregon case law, the parties agree that Respondent shall be suspended for 60 days for violations of RPC 1.5(a) and RPC 1.8(a), with all of the suspension stayed, pending Respondent's successful completion of a two year term of probation. The sanction shall be effective upon approval by the Adjudicator, or as otherwise directed by the Disciplinary Board (effective date).

27.

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, Respondent shall abide by the following conditions:

- (a) Respondent 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) Respondent has been represented in this proceeding by David Elkanich (Elkanich). Respondent and Elkanich hereby authorize direct communication between Respondent and DCO after the date this Stipulation for Discipline is signed by both parties, for the purposes of administering this agreement and monitoring Respondent's compliance with his probationary terms.
- (c) Respondent 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, Respondent shall attend not less than four MCLE accredited programs, for a total of 24 hours, which shall emphasize law practice management. These credit hours shall be in addition to those MCLE credit hours required of Respondent for his normal MCLE reporting period. (The Ethics School requirement does 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 his period of probation, Respondent shall submit to DCO a completed and signed MCLE Affidavit of Compliance which lists the programs he completed.
- (e) Respondent shall maintain written copies of each fee agreement or modification of a fee agreement for each client.
- (f) Each month during the period of probation, Respondent 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) keep a list of all cases which result in recovery to client and/or payments made to Respondent, including the amounts and dates of payment.
- (g) Jeffery Jones, OSB No. 892749, shall serve as Respondent's probation supervisor (Supervisor). Respondent 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 Respondent's clients, the profession, the legal system, and the public. Respondent agrees that, if Supervisor ceases to be his Supervisor for any reason, Respondent 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, Respondent shall meet with his Supervisor in person at least once a month for the purpose of:
 - (1) Allowing his Supervisor to review the status of Respondent's law practice and his performance of legal services on the behalf of clients. Each month during the period of probation, Respondent shall provide Supervisor with a list of all cases which resulted in new payments to Respondent's clients, Respondent or both. Supervisor shall conduct a random audit of two (2) client files or twenty-five percent (25%), whichever is greater, of the cases that resulted in new payments to Respondent's clients, Respondent or both, to determine whether Respondent is fully compliant with his statutory and ethical obligations with respect to his fee agreements and the collection of those fees.
 - (2) Permitting his Supervisor to inspect and review Respondent'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. Respondent agrees that his Supervisor may contact all employees and independent contractors who assist Respondent in the review and reconciliation of his business and lawyer trust account records.
- (i) Respondent authorizes 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 Respondent's compliance.
- (j) On a quarterly basis, on dates to be established by DCO beginning no later than 90 days after the effective date, Respondent shall submit to DCO a written "Compliance Report," approved as to substance by his Supervisor, advising whether Respondent is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of Respondent's meetings with his Supervisor.
 - (2) The number of Respondent's cases that resulted in payments to clients, Respondent or both and percentage reviewed in the monthly audit with Supervisor and the results thereof.
 - (3) Whether Respondent has completed the other provisions recommended by his Supervisor, if applicable.
 - (4) In the event that Respondent 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) Respondent is responsible for any costs required under the terms of this stipulation and the terms of probation.

- (l) Respondent'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 Respondent 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. The Bar and the Respondent acknowledge that there is presently an investigation pending with DCO. If the SPRB finds probable cause of a violation in that matter, it shall not constitute a violation of his probation.

28.

In addition, on or before February 29, 2020, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$808.25, incurred for his deposition. Should Respondent fail to pay \$808.25 in full by February 29, 2020, the Bar may thereafter, without further notice to him, obtain a judgment against Respondent 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.

Respondent acknowledges that reinstatement is not automatic on expiration of any period of suspension, if the 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. Respondent 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.

30.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

31.

Respondent 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 Respondent is admitted: Washington.

32.

Approval of this Stipulation for Discipline as to substance was given by the SPRB chair on January 24, 2020. 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 30th day of January, 2020.

/s/ Todd Stephen Hammond
Todd Stephen Hammond
OSB No. 982468

APPROVED AS TO FORM AND CONTENT:

/s/ David J. Elkanich
David J. Elkanich
OSB No. 992558

EXECUTED this 30th day of January, 2020.

OREGON STATE BAR

By: /s/ Theodore W. Reuter
Theodore W. Reuter
OSB No. 084529
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-128
)
CONRAD E. YUNKER,)
)
Respondent.)

Counsel for the Bar: Susan R. Cournoyer

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.3, 1.4(a), and 1.4(b). Stipulation for Discipline. 60-day suspension.

Effective Date of Order: June 1, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is suspended for 60 days, effective June 1, 2020, for violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

DATED this 26th day of March, 2020.

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

STIPULATION FOR DISCIPLINE

Conrad E. Yunker, attorney at law (Respondent), 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.

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

3.

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

4.

On December 7, 2019, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against Respondent for alleged violations of 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 June 2016, Respondent agreed to represent a client before the building codes division of the Department of Consumer and Business Services (DCB).

6.

Respondent appeared at an administrative hearing and filed exceptions to the proposed order. Nevertheless, the DCB issued its final order on November 1, 2017 and mailed that order to Respondent and his client.

7.

The order included a notice stating that the deadline to appeal was 60 days after the date that the order was served. Respondent asserts that, because the order lacked a certificate or other showing of the date it had been mailed (which typically appears in agency orders to permit recipients to calculate appeal deadlines), Respondent read the notice to mean 60 days from the date he or his client had received the order. However, pursuant to ORS 185.482(1), it

actually meant within 60 days of the date that the agency mailed the order. Accordingly, the deadline to appeal was January 2, 2018.

8.

Respondent filed his appeal on January 3, 2018. The DCB moved to dismiss the appeal as untimely.

9.

On April 3, 2018 the Appellate Commissioner granted the DCB's motion to dismiss the appeal as untimely. Respondent timely sought reconsideration of the dismissal and the Court of Appeals Chief Judge affirmed the Appellate Commissioner's decision on June 15, 2018. Respondent timely informed his client of the agency's motion to dismiss and the adverse orders by the Appellate Commissioner and the Chief Judge. ORAP 9.05(2) sets the deadline for filing a petition for review at 35 days after the date of the order on a timely petition for reconsideration. Accordingly, the deadline to file a petition for review with the Oregon Supreme Court was July 20, 2018.

10.

Respondent did not file anything with the Oregon Supreme Court.

11.

In September 2018, the Appellate Commissioner filed an appellate judgment dismissing Respondent's client's case.

12.

Respondent did not inform his client in a timely fashion of the dismissal of the case.

Violations

13.

Respondent admits that, by failing to timely file an appeal of the agency decision and failing to timely file for review of the Court of Appeals decision by the Supreme Court, Respondent neglected his client's case in violation of RPC 1.3. Respondent admits that by failing to notify his client of the dismissal of the case in a timely fashion, he failed to keep his client reasonably informed about the status of the matter in violation of RPC 1.4(a), and failed to explain a matter to the extent reasonably necessary to permit a client to make informed decisions in violation of RPC 1.4(b).

Sanction

14.

Respondent 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 Respondent'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.** Respondent violated his duties to attend to his client's case and communicate with his client. Standard 4.4. The most important duties a lawyer owes are those owed to clients. Standards at 5.
- b. **Mental State.** The Standards recognize three mental states. "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. Respondent neglected to timely file documentation which would permit his client to contest the decision of the DCB. He was also neglected to communicate to his client that he had failed to timely file for review with the Oregon Supreme Court.
- c. **Injury.** Respondent's lack of diligence and failure to communicate with his client cost his client the opportunity to seek review of the DCB order at the Court of Appeals and the Supreme Court.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. *Prior disciplinary offenses.* Standard 9.22(a). Respondent has recent prior discipline for the same and similar rule violations; in 2017 and 2011, he was reprimanded for violations of RPC 1.3 and RPC 1.4(b) and (a) respectively. *In re Yunker*, 31 DB Rptr 133 (2007); *In re Yunker*, 25 DB Rptr 50 (2011).
 2. *A pattern of misconduct.* Standard 9.22(c). Respondent's prior discipline involved similar misconduct as his misconduct in this matter. *See In re Bertoni*, 363 Or 614, 644, 426 P3d 64 (2018) ("..."[A] pattern of misconduct... bears on whether the violation is a one-time mistake which may call for a lesser sanction, or part of a larger pattern, which may reflect a more serious ethical problem.").
 3. *Substantial experience in the practice of law.* Standard 9.22(i). Respondent had been a lawyer in Oregon for over 25 years at the time of the misconduct.

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

1. *Absence of a dishonest motive.* Standard 9.32(b).
2. *A cooperative attitude towards these proceedings.* Standard 9.32(e).
3. *Remorse.* Standard 9.32(l).

15.

Under the ABA *Standards*, a reprimand is generally appropriate when a lawyer is negligent and does not act with a reasonable diligence in representing a client, resulting in injury or potential injury. Standard 4.43. In this case, the parties agree that Respondent's prior misconduct outweighs the mitigating circumstances making a suspension appropriate.

16.

Oregon case law is in accord. Generally, lawyers who knowingly neglect a legal matter or fail to keep clients informed are suspended. *In re Snyder*, 348 Or 307, 232 P3d 952 (2010). A 60-day suspension is an appropriate sanction for neglect and failure to communicate. *See In re Redden*, 342 Or 393, 153 P3d 1138 (2007) (60-day suspension for lawyer's failure to complete a client's child support arrearage matter for nearly 2 years); *In re Labahn*, 335 Or 357, 67 P3d 381 (2003) (attorney suspended for 60 days for neglect of a client matter and failure to communicate); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (attorney suspended for 120 days, 60 days of which was attributed to lawyer's knowing neglect of a client's case for several months by failing to communicate with the clients and opposing counsel).

17.

Respondent's conduct is most similar to *Labahn*. In that case, the Respondent attorney filed a case on the last day before the statute of limitations expired, but then failed to timely serve the opposing party, causing the case to be dismissed. *Labahn*, 335 Or at 360. The attorney did not inform the client of the dismissal, and the client only learned of it a year later from an attorney who he retained to handle a personal injury matter. *Id.* *Labahn* had a previous admonition for neglect of a client matter. *Id.* at 362. The court treated the admonition as prior discipline and suspended *Labahn* for 60 days. *Id.* at 363-67.

18.

Consistent with the *Standards* and Oregon case law, the parties agree that Respondent shall be suspended for 60 days for his violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b), the sanction to be effective on June 1, 2020.

19.

Respondent 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,

Respondent represented that as of June 1, 2020, when his suspension is effective, he will not have any active or open client files.

20.

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

21.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

22.

Respondent 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 Respondent is admitted: Washington.

23.

Approval of this Stipulation for Discipline, as to substance, was given by the SPRB on December 7, 2019. 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 18th day of March, 2020.

/s/ Conrad E. Yunker
Conrad E. Yunker, OSB No. 873740

EXECUTED this 19th day of March, 2020.

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. 19-112
)
AMBER N. WOLF,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: Christopher R. Hardman

Disciplinary Board: None

Disposition: Violation of RPC 8.4(a)(3). Stipulation for discipline.
Public reprimand.

Effective Date of Order: March 26, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Amber N. Wolf is publicly reprimanded for violation of RPC 8.4(a)(3).

DATED this 26th day of March, 2020.

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

STIPULATION FOR DISCIPLINE

Amber N. Wolf, attorney at law (respondent), 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.

Respondent 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 Clackamas County, Oregon.

3.

Respondent 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 17, 2019, the Bar filed a formal complaint against respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of RPC 8.4(a)(3) 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.

On October 31, 2018, through email communications, Megan Ayers (Ayers) set up a free telephone consultation with respondent for November 1, 2018, at 6 p.m., to discuss respondent potentially representing Ayers in a bankruptcy.

6.

At approximately 7 a.m. on November 1, 2018, Ayers sent an email to respondent, requesting to cancel their scheduled call that night. Respondent did not respond prior to the scheduled call.

7.

On November 2, 2018, at approximately 3:35 a.m., respondent wrote in response to Ayers' cancellation request, "Best of luck to you, but please know that you will be billed \$200.00 and also flagged in our referral system." ("3:35 email").

8.

At approximately 7:30 a.m. on November 2, 2018, Ayers contacted the Bar's Client Assistance Office (CAO) and expressed concerns about the potential of being charged for what respondent had advertised as a free consultation.

9.

On November 26, 2018, in response to an inquiry from CAO, respondent denied sending the 3:35 email, and denied asserting that Ayers would be billed \$200 and flagged in her system.

10.

In support of her account to CAO, respondent submitted an email thread reflecting her version of events and represented that the email thread contained the entirety of the emails exchanged between the two. It did not include the 3:35 email. Instead, it included a later email sent by respondent to Ayers on or about 9:48 a.m. on November 2, 2018, in which she simply wished Ayers luck.

11.

On January 10, 2019, respondent falsely asserted to CAO that Ayers' statements about the 3:35 email and its contents were "fabricated in content and date/time."

12.

In or around mid-June 2019, at the request of Disciplinary Counsel's Office (DCO), respondent and Ayers allowed the Bar's IT Systems Administrator, David Johnson (Johnson) to review their records of the emails between respondent and Ayers in their original electronic forms, with all metadata intact.

13.

During and following communications with Johnson, respondent acknowledged the existence of the 3:35 email, but disputed previously being aware of it. Respondent represented to DCO that she sent the 3:35 email from her phone, but because she no longer had the phone at the time of her communications with CAO, she was unable to see whether she had sent it; she also represented that she was unable to use a computer to access emails sent from her phone.

14.

Respondent's representations to CAO and Johnson as described above in paragraphs 9, 10, 11, and 13 were false and material, and respondent knew that they were false and material when she made them.

Violations

15.

Respondent admits that the aforementioned conduct involving dishonesty and misrepresentation that reflects adversely on her honesty, trustworthiness or fitness as a lawyer, in violation of RPC 8.4(a)(3).

Sanction

16.

Respondent 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* (“ABA Standards”). The ABA Standards require that respondent’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.** Respondent violated her duty to the public to maintain her personal integrity. Standard 5.0.
- b. **Mental State.** The ABA Standards recognize three mental states. The most culpable mental state is that of “intent,” when the lawyer acts with the conscious objective or purpose to accomplish a particular result. ABA Standards at 9. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. *Id.* “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent acted knowingly every time she misrepresented to CAO whether she sent the 3:35 email to Ayers.

- c. **Injury.** Injury is defined as harm to a client, the public, the legal system, or the profession that results from a lawyer’s misconduct. Potential injury is the harm that is reasonably foreseeable at the time of the misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. ABA Standards at 5. For purposes of determining an appropriate disciplinary sanction, the court will consider both actual and potential injury. ABA Standards at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

Respondent’s conduct caused potential injury to Ayers in that if Ayers had not contacted the Bar, she could have experienced significant distress over whether she needed to pay the \$200 cancellation fee, when she could ill afford such a

cost at a time that she was seeking representation to file bankruptcy. Respondent's conduct caused actual injury to the public as public confidence in the integrity of lawyers is undermined when lawyers make engage in dishonest conduct. ABA *Annotated Standards for Imposing Lawyer Sanctions* at 209.

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

1. Prior disciplinary history. Standard 9.22(a). In February 2018, respondent was suspended for one year, with all but 90 days stayed, pending a two-year probation for violations 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). *In re Wolf*, 32 DB Rptr 58 (2018).
2. Substantial experience in the practice of law. Standard 9.22(i). Respondent has been a lawyer in Oregon since 2003.

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

1. Cooperative attitude toward proceedings. Standard 9.32(e). Respondent cooperated with DCO's investigation.
2. Remorse. Respondent has expressed remorse for her misconduct and conveyed her apologies to Ayers. Standard 9.32(l).

17.

Under the ABA Standards, absent aggravating or mitigating circumstances, a suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice. Standard 5.12. 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. Standard 5.13. Respondent's conduct did not involve criminal conduct; as a result, a reprimand is the presumptive sanction under the ABA Standards.

18.

Oregon cases support the imposition of a public reprimand where lawyers have engaged in dishonest conduct or made misrepresentations directed to a non-client third-party. *See, e.g.: In re Everett Walton*, 352 Or 548, 287 P3d 1098 (2012) (attorney reprimanded for continuing to use his former employer's Westlaw password and account for 14 months without authorization or payment after leaving employment); *In re Lloyd S. Kumley*, 335 Or 639, 75 P3d 432 (2003) (attorney reprimanded for misrepresenting that he was an attorney in candidacy forms when he was precluded by statute from doing so because of his inactive membership

status); *In re Paul Flannery*, 334 Or 224, 47 P3d 891 (2002) (deputy district attorney reprimanded after he submitted a false application for a driver's license to DMV; court noted that the conduct did not seriously adversely reflect on his fitness to practice because the misrepresentation was trivial and lawyer had no financial personal gain).

19.

Consistent with the ABA Standards and Oregon case law, the parties agree that respondent shall be publicly reprimanded for violation of RPC 8.4(a)(3), the sanction to be effective on the date the order is signed.

20.

Respondent 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.

21.

Respondent 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 respondent is admitted: United States District Court for Oregon. CRH for Ms. Wolf 3/16/2020

22.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 25, 2020. 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 March, 2020.

/s/ Amber N. Wolf

Amber N. Wolf, OSB No. 031738

APPROVED AS TO FORM AND CONTENT:

/s/ Christopher R. Hardman

Christopher R. Hardman, OSB No. 792567

EXECUTED this 23rd day of March, 2020.

OREGON STATE BAR

By: /s/Courtney C. Dippel

Courtney C. Dippel, OSB No. 022916

Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-02
)
FRANK WALL,)
)
Respondent.)

Counsel for the Bar: Susan R. Cournoyer

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.3 and 1.4(a). Stipulation for Discipline. 60-day suspension, all stayed, 2-year probation.

Effective Date of Order: April 1, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is suspended for 60 days, all stayed, pending successful completion of a two-year term of probation, effective April 1, 2020, for violation of RPC 1.3 and RPC 1.4(a).

DATED this 31st day of March, 2020.

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

STIPULATION FOR DISCIPLINE

Frank Wall, attorney at law (respondent), 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.

Respondent 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 Multnomah County, Oregon.

3.

Respondent 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 January 25, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against respondent for alleged violations of RPC 1.3 and RPC 1.4(a) of the Oregon Rules of Professional Conduct. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

Andrew D (Client) consulted respondent in August 2018 regarding what Client considered to be a claim for false advertising relating to an apartment he had recently rented. Client's primary objective was to terminate his lease. Respondent agreed to send a demand letter to the property manager, but respondent and Client understood that further legal action would likely be required. Respondent told Client that he expected to hear back within the next four weeks.

On the day of this consultation, respondent appeared in court on two matters and held four other client consultations, two of which entailed preparation for two separate trials. As a result, respondent did not create a physical file for Client's matter, and took no further action on it.

Respondent believed that Client's false advertising claim implicated the Oregon Unlawful Trade Practices Act (UTPA), a violation of which would result in statutory damages of \$200 and was subject to a one-year statute of limitations.

Between September 6 and November 26, 2018, Client sent three emails to respondent, asking whether the property manager had responded to the demand. Respondent neither acknowledged nor responded to Client's inquiries until late November 2018, when Client reached him by telephone. Respondent told him that he had not sent a demand because a one-year statute of limitations applied to Client's claim.

Violations

6.

Respondent admits that, by failing to take action on Client's matter after assuring him that he would send a demand letter, he neglected a legal matter entrusted to him and violated RPC 1.3. Respondent further admits that, by failing to respond to Client's emails regarding the matter, he failed to keep a client reasonably informed of the status of a matter and failed to respond to reasonable requests for information, and violated RPC 1.4(a).

Sanction

7.

Respondent 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* (ABA Standards). The ABA Standards require that respondent'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.** Respondent violated his duty to his client to act with reasonable diligence.
- b. **Mental State.** Respondent acted knowingly when he failed to respond to Client's attempts to communicate with him. In failing to send a demand letter or take other action promptly, respondent acted in reliance upon the one-year statutes of limitations under the UTPA, rather than on Client's more urgent objective to rescind his lease. Respondent's failure to act with diligence was therefore negligent (i.e., the failure to be aware of a substantial risk that circumstances exist or that a result will follow, which failure deviates from the standard of care a reasonable lawyer would exercise in the situation).
- c. **Injury.** Respondent's conduct resulted in actual injury to Client, who lost several months waiting for demand to be made on his landlord or communication from respondent, and suffered frustration and anger as a result.
- d. **Aggravating Circumstances.** Aggravating circumstances include:

1. Prior discipline. ABA Standard 9.22(a). Respondent was admonished in October 2018 (the same time during which he was not responding to Client's inquiries) for failing to keep a client reasonably informed about her legal matter. A letter of admonition may be considered an aggravating factor when the conduct was of the same or similar type as the misconduct at issue. *In re Cohen*, 330 Or 489, 500-01, 3 P2d 953 (2000).
 2. Substantial experience in the practice of law. ABA Standard 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. ABA Standard 9.32(b);
 2. Good faith effort to make restitution. Respondent refunded the \$50 fee he had collected from Client upon request. ABA Standard 9.32(d).
 3. Full and free disclosure to the Bar. ABA Standard 9.32(e).

8.

Under the ABA Standards, absent mitigating or aggravating circumstances, 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. ABA Standard 4.43. When a lawyer causes injury or potential injury to a client by knowingly failing to perform services or engaging in a pattern of neglect, suspension is appropriate. ABA Standards 4.42(a), (b).

9.

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*, ABA Standard 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.

10.

A brief suspension, all stayed pending a probation focusing on practice management and client communication, is in accord with Oregon case law.

In re Conrad E. Yunker, 31 DB Rptr 133 (2017) [stipulated 60-day suspension, all stayed/one-year probation; violations of RPC 1.3 and RPC 1.4(b)]. A client approached attorney to handle a civil-rights claim. Attorney told the client that he would file a tort-claim notice after receiving the police report. Attorney received the police report but did not file the tort claim notice. In the months leading up to the deadline for filing the notice, attorney did not attempt to calculate the deadline or inform his client that he no longer intended to file the notice, and ultimately missed the filing deadline. Aggravating circumstances included prior

discipline, pattern of misconduct, and substantial experience. Mitigating factors included absence of dishonest or selfish motive, remorse (refunding fees paid), full and free disclosure, and personal health issues.

In re Timothy MPM Pizzo, 30 DB Rptr 371 (2016) [stipulated reprimand for violations of RPC 1.3 and RPC 1.4(a)]. Attorney represented a client in responding to show cause order to modify parenting time. He agreed to timely draft and file a response by the following week, with an interim draft to the client. Attorney did not send the client a draft as promised, or timely file the response, despite numerous messages from the client, and a call in which he assured the client that he would follow through. The client was forced to contact another attorney for assistance and to draft and file a response *pro se*. Aggravating circumstances included prior discipline, pattern of misconduct, and substantial experience. Mitigating factors included absence of dishonest or selfish motive, full and free disclosure, and medical issues.

In re Raylynn J. Peterson, 29 DB Rptr 221 (2015) [stipulated 60-day suspension, all stayed/one-year probation for violation of RPC 1.3 and RPB 1.4(b)]. Attorney failed to complete grandparent adoption for a year, despite earlier assurances that it was a simple process that would only take a few months. She failed to notify grandmother client that the matter had been placed on the backburner or to return the client's numerous calls requesting an update. Aggravating circumstances included prior discipline and substantial experience. Mitigating factors included absence of dishonest or selfish motive, personal problems, and remorse.

11.

Consistent with the ABA Standards and Oregon case law, the parties agree that respondent shall be suspended for 60 days for violations of RPC 1.3 and RPC 1.4(a), with all of the suspension stayed, pending respondent's successful completion of a two-year term of probation. The sanction shall become effective on April 1, 2020 (effective date).

12.

Probation shall commence upon the effective date and shall continue for a period of two years, ending on March 31, 2022 (the period of probation). During the period of probation, respondent shall abide by the following conditions:

- (a) Respondent 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) Respondent shall comply with all provisions of this Stipulation for Discipline, the Rules of Professional Conduct applicable to Oregon lawyers, and ORS Chapter 9.
- (c) Throughout the period of probation, respondent shall diligently attend to client matters and maintain reasonable communication with clients regarding their cases.

- (d) Each month during the period of probation, respondent shall review all client files to ensure that he is timely attending to the clients' matters and that he is maintaining adequate communication with clients, the court, and opposing counsel.
- (e) Stanley N. Wax shall serve as respondent's probation supervisor (supervisor). Respondent 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 respondent's clients, the profession, the legal system, and the public. Respondent agrees that, if supervisor ceases to serve as probation supervisor for any reason, respondent will immediately notify DCO and engage a new probation supervisor, approved by DCO, within one month.
- (f) Beginning with the first month of the period of probation, respondent shall meet with supervisor in person at least once a month for the purpose of:
 - (1) Allowing supervisor to review the status of respondent's law practice and 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 respondent's active caseload, whichever is greater, to determine whether respondent is timely, competently, diligently, and ethically attending to matters, and keeping his clients reasonably informed about the status of their matters and responding to their reasonable requests for information.
- (g) Respondent authorizes 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 respondent's compliance.
- (h) Within seven (7) days of the effective date, respondent shall contact the Professional Liability Fund (PLF) and schedule an appointment on the soonest date available to consult with PLF's Practice Management Attorneys in order to obtain practice management advice. Respondent shall notify DCO of the time and date of the appointment.
- (i) Respondent shall attend the appointment with the PLF's Practice Management Attorneys 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 Attorneys, respondent shall adopt and implement those recommendations.
- (j) No later than sixty (60) days after recommendations are made by the PLF's Practice Management Attorneys, respondent shall provide DCO a copy of the Office Practice Assessment from the PLF's Practice Management Attorneys,

and file a report with DCO: (1) stating the date of his consultation(s) with the PLF's Practice Management Attorneys; (2) identifying the recommendations that he has adopted and implemented; and (3) identifying the specific recommendations he has not implemented and explaining why he has not adopted and implemented those recommendations.

- (k) Respondent shall implement all recommended changes, to the extent reasonably possible, and participate in at least one follow-up review with PLF Practice Management Attorneys by October 30, 2020.
- (l) On a quarterly basis, on dates to be established by DCO beginning no later than 90 days after the effective date, respondent shall submit to DCO a written compliance report, approved as to substance by supervisor, advising whether respondent is in compliance with the terms of this Stipulation for Discipline, including:
 - (1) The dates and purpose of respondent's meetings with supervisor.
 - (2) The number of respondent's active cases and percentage reviewed in the monthly audit with supervisor and the results of the audit.
 - (3) Whether respondent has completed the other provisions recommended by supervisor, if applicable.
 - (4) In the event that respondent has not complied with any term of this Stipulation for Discipline, the compliance report shall describe the non-compliance and the reason for it.
- (m) Respondent is responsible for any costs required under the terms of this stipulation and the terms of probation.
- (n) Respondent'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.
- (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 respondent for misconduct 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.
- (q) Upon the filing of a petition to revoke respondent's probation pursuant to Bar Rule 6.2(d), respondent's remaining probationary term shall be automatically tolled and shall remain tolled until the BR 6.2(d) petition is adjudicated by the Adjudicator or, if appointed, the Disciplinary Board.

13.

Respondent 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. Respondent 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.

14.

Respondent 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.

15.

Respondent 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 respondent is admitted: none.

16.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 25, 2020. 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 March, 2020.

/s/ Frank Wall
Frank Wall
OSB No. 733160

EXECUTED this 26th day of March, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel
Courtney C. Dippel
OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-06
)
CAROLINE J. PONZINI,)
)
Respondent.)

Counsel for the Bar: Angela W. Bennett

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.4(a), RPC 1.15-1(d), and RPC 1.16(d). Stipulation for Discipline. Public Reprimand.

Effective Date of Order: May 4, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Caroline J. Ponzini is publicly reprimanded for violation of RPC 1.4(a), RPC 1.15-1(d), and RPC 1.16(d).

DATED this 4th day of May, 2020.

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

STIPULATION FOR DISCIPLINE

Caroline J. Ponzini, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 6, 2011, and has been a member of the Bar continuously since that time, having her office and place of business in Deschutes County, Oregon.

3.

Respondent 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 January 25, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 1.4(a), 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.

Respondent closed her Bend law practice in December 2018 without refunding the remaining retainer funds of one of her clients (the client). Between December 2018 and June 2019, the client attempted to contact Respondent via email, telephone, and through Respondent's former office, without receiving a response or a refund. Respondent's former office was able to contact her in May 2019, and she told them she would send the client a refund, but she failed to do so. The client sought help from the Bar in June 2019.

6.

Respondent admits that she did not promptly respond to the client's attempts to contact her, she did not promptly refund the client's funds, and she did not prioritize the client's request and should have done better. She attributes the delay to focusing on obtaining a degree in a different field, the logistics of moving and changing careers, and inaccessibility of the records needed to determine the proper refund amount.

7.

Respondent held the client's funds in her lawyer trust account during the relevant time period until they were refunded to the client. Respondent issued a refund check to the client in September 2019.

Violations

8.

Respondent admits that, by failing to respond to the client's reasonable requests for information, she violated RPC 1.4(a). Respondent further admits that by failing to promptly return the client's funds upon request, Respondent violated RPC 1.15-1(d) and RPC 1.16(d).

Sanction

9.

Respondent and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should refer to the *ABA Standards for Imposing Lawyer Sanctions* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated her duties to her client by failing to adequately communicate with her, and failing to promptly refund the client's funds upon request. ABA Standard 4.1. The most important duties a lawyer owes are those owed to clients. ABA Standards at 5.
- b. **Mental State.** The ABA Standards recognize three mental states. The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* Negligence is the failure to be aware of a substantial risk that circumstances exist or that a result will follow which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent acted knowingly when she failed to respond to the client's contact attempts and when she failed to promptly refund the client's funds to her.

- c. **Injury.** For the purpose of determining an appropriate disciplinary sanction, both actual and potential injury are taken into account. ABA Standards at 6. Respondent's failure to timely return the client's funds caused injury by

depriving the client of her funds for an extended period of time (approximately nine months). Respondent's failure to communicate with her client likely caused actual injury in the form of frustration and anxiety about what happened to her funds. See *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997) (client's anxiety and frustration constitute actual injury under ABA Standards).

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

1. Multiple offenses. ABA Standard 9.22(d).

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

1. No prior discipline. ABA Standard 9.32(a).

2. Absence of dishonest or selfish motive. ABA Standard 9.32(b).

3. Full and free disclosure and cooperative attitude toward the proceedings. ABA Standard 9.32(e).

4. Remorse. ABA Standard 9.32(l).

10.

Under the ABA Standards, absent aggravating or mitigating circumstances, 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 as a result. ABA Standard 4.12. A suspension is also generally appropriate when a lawyer engages in a pattern of neglect – such as failing to respond to a client – and causes injury or potential injury. ABA Standard 4.42. Although a suspension is contemplated as a possible disposition for Respondent's knowing conduct, in light of the fact that Respondent's mitigating factors substantially outweigh the single aggravating factor in both number and weight, a reprimand appears appropriate to address the misconduct in this instance.

11.

A reprimand is consistent with recent cases involving the same or similar rule violations. See, *In re O'Rourke*, 32 DB Rptr 36 (2018) (Respondent stipulated to a public reprimand for violation of RPC 1.16(d) where he took a nonrefundable fee for a criminal representation, was terminated before completing the services, and failed to refund any portion of the fee until the formal proceeding was filed); *In re Daraee*, 32 DB Rptr 252 (2018) (Respondent stipulated to a public reprimand 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), arising out of a situation in which lawyer took a \$15,000 retainer to defend his client against a civil suit. When circumstances changed and the client notified the lawyer that he no longer required the lawyer's services and directed where to send a refund, the lawyer did not respond to five letters from the client and one contact from the client's criminal lawyer, and did not refund the fee until eleven months after it was first requested and one month after the client filed a Bar complaint); *In re Collins*, 31 DB Rptr 167 (2017) (Respondent stipulated to a reprimand for not providing an accounting to client upon

request and taking over four months to provide a refund that was owed); *In re Morgan*, 31 DB Rptr 28 (2017) (Respondent stipulated to a reprimand for violation of RPC 1.15-1(a), (c), and (d) for failing to promptly account for or deliver funds that had been advanced for costs but remained unspent after termination of the representation, and for failing to maintain client funds in trust).

12.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be publicly reprimanded for violation of RPC 1.4(a), RPC 1.15-1(d), and RPC 1.16(d), the sanction to be effective upon approval by the Disciplinary Board.

13.

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

14.

Respondent 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 Respondent is admitted: none.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 25, 2020. 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 April, 2020.

/s/ Caroline J. Ponzini
Caroline J. Ponzini, OSB No. 111346

EXECUTED this 30th day of April, 2020.

OREGON STATE BAR

By: /s/ Angela W. Bennett
Angela W. Bennett, OSB No. 092818
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of)	Case No. 19-46 & 19-53
)	
FRANKLIN G. PATRICK,)	
)	
Respondent.)	

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: Arden J. Olson

Disciplinary Board: None

Disposition: Violation of RPC 1.7(a)(2). Stipulation for Discipline.
60-day suspension.

Effective Date of Order: August 3, 2020

ORDER APPROVING STIPULATON FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Franklin G. Patrick (Respondent) and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is suspended for 60 days, effective August 3, 2020, for violations of RPC 1.7(a)(2).

DATED this 20th day of May, 2020.

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

STIPULATION FOR DISCIPLINE

Franklin G. Patrick, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 21, 1976, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

Respondent 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 22, 2019, the Bar filed a formal complaint against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violations of Oregon Rule of Professional Conduct (RPC) 1.7(a)(2). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

Prior to June 2009, attorney Brooks Harlow (Harlow) had represented Davel Communications, Inc. (Davel), in various matters before the Oregon Public Utility Commission, the Federal Communications Commission, and other courts in Oregon and Washington. Respondent replaced Harlow as counsel for those utility matters in July 2009. Three years later, Respondent filed a legal malpractice action against Harlow on behalf of those plaintiffs in the United States District Court of Oregon, *Northwest Public Communications Council et al v. Harlow et al*, Case No. 3:12-cv-01923-BR (legal malpractice matter).

6.

On July 25, 2012, Davel ceased to exist as a corporation under Delaware law. Respondent, after investigation, concluded that the interests which had been Davel's were thereafter controlled by Y.A. Global, a secured creditor that, although it had not assumed Davel's obligations, had the right to control Davel's stock, assets and corporate authority under its Article 9 UCC recorded security agreement.

7.

In August 2014, while Respondent was still representing Davel's interests in the legal malpractice matter and in at least one utility matter, *The Northwest Public Communications Council v. Qwest Corp*, Docket No. Dr26/UC 600, Oregon Public Utility Commission (the Qwest Case), Respondent's law firm, Corporate Lawyers, P.C. (Corporate), filed suit against Davel in Washington County Circuit Court (the Washington County matter) for breach of Davel's fee agreement with Respondent.

8.

Corporate sought to foreclose on its attorney charging lien pursuant to ORS 87.445 against Davel and to acquire Davel's claims in the legal malpractice matter, as well as Davel's claims in five other pending litigation matters being handled by Respondent. Respondent obtained a default judgment against Davel, after entering into an agreement with Y.A. Global that Respondent believed constituted a consent for him to proceed despite any conflict of interest, which included a declaration that Corporate obtained all of Davel's rights in the legal malpractice matter (and the other matters) and a money judgment against Davel in the amount of the fair value of the legal services provided, \$375,000 and for costs advanced by Corporate that Respondent contended Y.A. Global had not advanced or reimbursed. On reflection now, however, Respondent agrees that the agreement by Y.A. Global did not satisfy the "informed consent" requirements of RPC 1.7(b)(4).

9.

Respondent purchased Davel's claims under the default judgment at a public Sheriff's auction sale and then transferred those claims to a limited liability company jointly owned by Corporate and Respondent's co-counsel (the LLC). Thereafter, Respondent continued to represent Davel's interests, now owned by the LLC, in the Qwest Case and the legal malpractice matter until the United States District Court ordered him to withdraw from the malpractice case due to a perceived conflict of interest on October 31, 2017. Respondent withdrew from representing Davel in that matter on December 20, 2017.

Violations

10.

Respondent admits that, by suing Davel while prosecuting the Davel interests as a current client in other matters, there was a significant risk that the representation of one or more clients would be materially limited by Respondent's personal interests. Respondent admits that he had a conflict of interest in violation of RPC 1.7(a)(2) to which the persons authorized to speak for his client had not validly given informed consent.

Sanction

11.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duty of loyalty to a current client by acquiring what had been the interests of Davel without validly obtaining the client's informed consent, which Respondent believed and believes could only have been obtained from Y.A. Global. ABA Standard 4.3.
- 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. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent's conduct was intentional. He acted to accomplish a particular result – obtain a judgment against his current client and his client's interests in its claims in the ongoing litigation.

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

Davel's interests suffered actual injury by being subjected to a judgment obtained by Respondent while he was representing those interests in the Qwest and legal malpractice actions. Additionally, after the court ordered respondent to withdraw, Davel's interests were left unrepresented in the legal malpractice matter.

- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Dishonest or selfish motive. ABA Standard 9.22(b). Respondent's purpose in suing Davel was to protect his right to attorney's fees and obtain Davel's rights and interests in the ongoing lawsuits.
 2. Substantial experience in the practice of law. ABA Standard 9.22(j). Respondent was licensed to practice in Oregon in 1976.

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. ABA Standard 9.32(a).
 2. Cooperative attitude toward proceedings. ABA Standard 9.32(e).

1.12.

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. ABA Standard 4.32.

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 materially adversely affect another client, and causes injury or potential injury to a client. ABA Standard 4.33.

13.

The parties acknowledge that the Oregon Supreme Court has imposed a range of sanctions, including reprimands, in conflict of interest cases. However, “[w]e have imposed suspension in cases involving serious aggravating circumstances,” for conflicts of interest even in the absence of the any other rule violations. *In re Hockett*, 303 Or 150, 163, 734 P2d 877 (1987).

The following cases reflect suspensions ranging from 60 days to seven months when the lawyers' only disciplinary violations were conflicts of interest:

- *In re Baer*, 298 Or 29, 688 P2d 1324 (1984) [**60-day suspension**] Attorney violated the conflict rule when he represented the buyer, his wife, and the sellers, in a real estate transaction.
- *In re Boyer*, 295 Or 624, 669 P2d 326 (1983) [**7-month suspension**] Attorney violated the conflict rule when he represented the borrower and lender on a loan transaction and failed to disclose to the lender that he had a financial interest in the loan transaction in the form of a finder's fee paid by the borrower after the loan closed.
- *In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999) [**four-month suspension**] Attorney violated the conflict of interest rule when, while representing a corporation, the attorney also represented a lender on an underlying loan to the corporation, and sought to represent the lender in collecting the loan.

14.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for 60 days for violation of RPC 1.7(a)(2), the sanction to be effective August 3, 2020.

15.

In addition, on or before May 31, 2020, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$980.10, incurred for the cost of the court reporter's appearance fee and deposition transcript reproduction. Should Respondent fail to pay \$980.10 in full by May 31, 2020, the Bar may thereafter, without further notice to him, obtain a judgment against Respondent for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

16.

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

17.

Respondent 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. Respondent 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.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

19.

Respondent 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 Respondent is admitted: none.

20.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 7, 2020. 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 May, 2020.

/s/ Franklin G. Patrick

Franklin G. Patrick, OSB No. 760228

APPROVED AS TO FORM AND CONTENT:

/s/ Arden J. Olson

Arden J. Olson, OSB No. 870704

EXECUTED this 18th day of May, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel, OSB No. 022916

Disciplinary Counsel

Cite full opinion as 366 Or 475, 466 P3d 22 (2020)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of)
)
JAMES D. HARRIS,)
)
Accused.)

(SC S066593)

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

David J. Elkanich, Holland & Knight LLP, Portland, argued the cause and filed the brief on behalf of respondent. Also on the brief was Calon N. Russell.

Theodore W. Reuter, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the briefs on behalf of the Oregon State Bar.

PER CURIAM

In this lawyer discipline case, respondent moved to Oregon from Pennsylvania and began work as general counsel for Portland Public Schools (PPS) before he became a member of the Oregon Bar. The Bar charged respondent with violating RPC 5.5(a), RPC 5.5(b)(1) and (2), and ORS 9.160(1), which prohibit the unauthorized practice of law. A trial panel of the Disciplinary Board conducted a hearing and found that respondent had not committed the charged offenses. The trial panel concluded that respondent’s conduct was covered by RPC 5.5(c), which provides an exception to the rules and statute for a lawyer “provid[ing] legal services on a temporary basis.” The Bar seeks a ruling that that exception does not apply, and it urges the court to find that respondent committed the charged violations and to suspend respondent for 30 days. For the reasons that follow, we agree with the trial panel that respondent did not commit the charged violations of the disciplinary rules.

We review decisions of the trial panel de novo. ORS 9.536(3); 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 No. 17-31
)
ERIN C. WALTERS,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: None

Disciplinary Board: Mark A. Turner, Adjudicator
Arnold S. Polk
Sandra L. Frederiksen, Public Member

Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 8.1(a)(1), RPC 8.1(a)(2), RPC 8.4(a)(2), RPC 8.4(a)(3), and ORS 9.527(2). Trial Panel Opinion. Disbarment.

Effective Date of Opinion: May 21, 2020

TRIAL PANEL OPINION

In this disciplinary proceeding the Oregon State Bar (Bar) seeks the disbarment of respondent Erin Walters for conversion of client funds, felony theft convictions for the conversion, and additional misconduct, including misrepresentations to her client and knowing false statements to the Bar. Respondent is also charged with neglect, failure to communicate with her client, and trust account violations.

Respondent is in default for failure to answer the Bar’s second amended complaint. In a default case, we are bound to accept the facts alleged to be true. We analyze those allegations to determine whether they satisfy the elements of each charge. We do not look at extrinsic evidence. We are limited to the four corners of the complaint.

If we determine that the violations are sufficiently alleged, we must decide the appropriate sanction. We may consider additional evidence in answering this question. The Bar submitted a memorandum and exhibits supporting its proposed sanction.

As discussed below, we find that the Bar has sufficiently alleged each of the violations pleaded. We agree with the recommended sanction and order that respondent be disbarred.

PROCEDURAL POSTURE

The Bar filed its formal complaint on February 8, 2018. The Bar also filed a BR 3.1 petition seeking respondent's immediate interlocutory suspension. Respondent stipulated to that suspension and it was ordered on May 14, 2018.

On June 26, 2018, respondent moved to stay this proceeding due to a criminal investigation regarding her conduct. Bonita Pursel, respondent's former client, made the criminal complaint.¹ Respondent argued that her right against self-incrimination would be jeopardized if this proceeding was tried before the criminal charges. Given the fact that respondent was suspended from practice so that delay would not endanger the public or clients, the stay was granted on July 18, 2018. It was extended through subsequent orders as the criminal prosecution proceeded. The BR 3.1 suspension was also extended.

Respondent's criminal trial in Yamhill County began in August 2019. On September 10, 2019, the Yamhill County Circuit Court convicted respondent on two counts of felony theft.

The Adjudicator lifted the stay on this proceeding on October 25, 2019. The Bar filed and served respondent with a second amended complaint on December 16, 2019. After respondent failed to answer the second amended complaint, the Bar moved for an order of default, which was granted on February 21, 2020.

FACTS

The allegations of the second amended complaint are set forth here. They are grouped roughly according to the nature of the misconduct alleged.

Conversion

Respondent's misconduct occurred in the handling of an estate. On February 28, 2011, Lyle Pursel, Bonita's husband, died. At the time, he and Bonita were represented by a law firm, Weitz & Luxenberg, P.C. (W&L), in a mesothelioma class action. The firm advised Bonita after Lyle died to open a probate proceeding and be named personal representative in order to receive anticipated future settlement payments from the class action. ¶ 4.² Bonita hired respondent to do this. Respondent filed a petition to admit Lyle's will to probate in April 2011 in Yamhill County Circuit Court.

In February 2012, Bonita was appointed personal representative and special administrator for purposes of the class action. Bonita was the sole devisee under the will. ¶ 5.

Respondent maintained her lawyer trust account at Columbia Bank. From July 2011 through June 2016, W&L mailed checks for settlement proceeds to respondent. They totaled

¹ Bonita also filed the Bar complaint that generated this proceeding.

² All paragraph citations are to the second amended complaint.

\$442,211.21. Of that amount, respondent disbursed only \$422,140.57 to the estate, which left a balance of \$20,070 held in trust for the estate. ¶ 6.

Between July 2011 and March 2016, respondent was authorized by her client to withhold certain sums to be kept in her trust account for future payment of attorney fees or filing fees in the following amounts (¶ 7):

DATE	AMOUNT	DESCRIPTION
7/27/2011	\$5,000	Retainer
1/2/2013	\$677	For filing fee
1/31/2014	\$1,067	For amended filing fee
4/16/2015	\$4,299	\$799 Filing fee \$3,500 Retainer
3/16/2016	\$5,000	In trust for attorney fees

ORS 116.183 requires court approval before an attorney for a personal representative may collect fees from an estate. Instead of holding the above sums in her trust account until she was entitled to payment, respondent spent the money. She wrote checks to herself, withdrew cash, and wrote checks to others. Respondent was never authorized by the court to disburse the funds. ¶¶ 8-17. In total, respondent withdrew approximately \$20,070 of the estate’s money. ¶ 17.

Misrepresentations to Bonita Pursel

On April 16, 2015, respondent gave Bonita a receipt showing she retained \$4,299 of the estate’s money--\$799 for a filing fee and \$3,500 for a retainer. ¶ 20. By that date, however, respondent had already withdrawn cash and written checks to herself draining the total \$4,299. When respondent advised her client she was retaining \$4,299 in trust when she already used up the funds, her representation was knowingly false. ¶ 21.

On June 10, 2016, respondent deposited a W&L settlement check for \$31,228 in her trust account. ¶ 22. On August 25, 2016, respondent purchased a cashier’s check in the amount of \$3,000 for Thomas Walters using some of that money. The following day respondent represented to Bonita that she could only remit \$28,000 of the June \$31,228 settlement payment because there was a bank hold on the remaining \$3,000. On September 6, 2016, she again told Bonita that \$3,000 was still on hold by her bank. ¶ 23.

On August 26, 2016, respondent told Bonita that she had only received the \$31,228 settlement check that same month. She had in fact deposited the check back on June 10, 2016. ¶ 24.

On September 6, 2016, respondent advised Bonita that she would remit the last \$3,000 from the June settlement payment that week. ¶ 25.

None of these foregoing statements to her client were true.

Criminal Conduct & Convictions

When respondent converted her client's money, ORS 164.055 provided that a person commits the crime of theft in the first degree if, by means other than extortion, the person commits theft as defined in ORS 164.015 and the total value of the property in a single or aggregate transaction is \$1,000 or more. ORS 164.015 defined theft to occur when a person, with intent to deprive another of property or to appropriate property to the person or to a third person, takes, appropriates, obtains or withholds such property from an owner thereof.

The allegations establish that respondent obtained \$20,070 of the estate's funds. She received and disbursed the money to herself and others. The allegations establish that respondent intended to deprive the owner of the property. ¶ 30.

On September 10, 2019, respondent was convicted in Yamhill County Circuit Court of two counts of committing theft in the first degree, a Class C Felony, in violation of ORS 164.055. Those felony convictions resulted from respondent's conversion of client funds. ¶ 75.

Mishandling of the Trust Account and Failure to Account

Between July 2011 and March 2016, Bonita and her predecessor personal representative entrusted estate funds to respondent for attorney fees and costs, including \$2,543 that respondent said were for additional filing fees. The only filing fee paid in the probate proceedings was \$78 when the probate was opened in April 2011. Respondent failed to maintain the \$2,543 in her trust account until the costs were incurred and the probate court approved fees, costs, and disbursement to respondent. ¶ 36. Despite requests, respondent has failed to provide an accounting of the estate funds to Bonita and has failed to transfer the funds she retained. ¶ 36.

Throughout the time that respondent received W&L settlement checks, W&L sent the checks using tracking mechanisms that required her confirmation of receipt. ¶ 40. In some instances, respondent delayed the estate's receipt of the funds by failing to take delivery of mail requiring acknowledgment. As a result, unclaimed envelopes were returned to W&L and had to be re-sent. At one point, W&L advised respondent that a check for \$31,228 would be arriving on a date certain and provided tracking information to her, yet W&L had to send that check three separate times between March and June 2016. ¶ 41.

After receiving and depositing W&L checks, respondent delayed remitting the proceeds to the estate. On or about October 15, 2014, respondent deposited a W&L check, but waited until December 2, 2014 to write a check to the estate. With respect to the \$31,228 check from W&L that respondent deposited on June 10, 2016, respondent waited until August 25,

2016 to write a check to the estate. ¶ 42. As discussed above, respondent then only disbursed \$28,000. *Id.*

Failure to Communicate and Keep the Client Informed

Respondent failed to respond to repeated requests from Bonita between March 2016 and June 2016 about the status of the \$31,228 check. ¶ 43.

In October 2016, Bonita contacted the Yamhill County probate clerk and learned that respondent had not filed documents she had Bonita sign several weeks earlier. ¶ 44. When Bonita later asked respondent to return the funds held in trust and let her know about the status of the probate, respondent did not return any funds, provide an accounting, or provide any substantive information regarding the probate. ¶ 45.

The probate proceeding for the estate was open from April 2011 until September 20, 2017. ¶ 46. On April 18, 2013, respondent filed a request for an extension of time to file the 2012 annual accounting for the estate. She never filed it. ¶ 47.

On three occasions, July 8, 2014, January 9, 2017, and June 1, 2017, the probate court issued delinquency notices to respondent because the annual accountings were overdue. Respondent did not respond to or notify Bonita of the notices. ¶ 48.

On September 20, 2017, the court closed the probate due to respondent's failure to file annual accountings or respond to its prior notices. Respondent did not notify Bonita of this event. ¶ 49.

Failure to Cooperate with the Investigation

Bonita contacted the Bar about respondent's lack of communication. Disciplinary Counsel's Office (DCO) then asked respondent for documents and an explanation regarding her conduct as part of its investigation. ¶ 52. On several occasions, DCO asked respondent to provide a complete accounting for all funds she received on behalf of the estate, including dates, amounts, and reasons for all disbursements from her trust account along with all supporting documentation. ¶ 53. DCO also made multiple requests that respondent explain what she had done with the funds she collected from the estate for filing fees. ¶ 54.

In response, on January 5 2017 respondent claimed that she had told W&L to send all settlement checks directly to Bonita and that W&L did not comply with those directions. On several occasions, DCO requested that respondent provide DCO with all communications between respondent and W&L in support of that assertion. Respondent did not provide any communications in response to those requests for information. ¶ 57.

On May 8, 2017, respondent provided to DCO what she described as a trust account ledger for the estate and receipts for some estate funds she claimed to have retained in her trust account. Other than the ledger, respondent did not provide DCO with any accounting, billing statements, or invoices for any work. ¶ 55.

In July 2017, DCO was notified that respondent had overdrawn her trust account. Thereafter, DCO twice requested that respondent provide her justification for disbursing all of the estate funds from her trust account by July 2017. ¶ 56. At this time DCO was apparently not aware that funds had been converted beginning in 2011.

On December 22, 2017, respondent sent DCO a letter in which, for the first time, she claimed that she had earned all sums she had disbursed to herself from the estate because they paid her attorney fees in a separate civil case for wrongful death. Respondent represented that, on the advice of the Professional Liability Fund, she redeposited \$16,842 in trust and then later re-disbursed the amount to herself. ¶ 58.

On January 3, 2018, DCO requested that respondent produce a number of items: (1) complete copies of her trust account ledgers for the estate (that had previously been requested) and for the civil case she described in her December 22, 2017 letter, reflecting all disbursements and deposits; (2) a complete copy of her file in the civil case she described in her December 22, 2017 letter, including all billing statements, trust account ledgers, and other financial records from the matter; (3) an accounting for the funds she disbursed from trust, including the amounts, dates, and reasons for the disbursement, along with the dates, amounts and documentation of any re-deposits; and (4) a description and supporting documents of all of respondent's efforts to notify Bonita of the amounts and reasons for any attorney fees she claimed, including all billing statements and trust accounting showing that respondent intended to pay herself from the funds that she held in trust for the estate, and notification to Bonita of Bonita's right to object to respondent's disbursement of trust account funds. ¶ 59.

During the investigation, other than the trust account ledger, respondent never produced any accountings for the estate, or any related supporting documents. Respondent never produced any documents relating to her claim that she had directed W&L to send all settlement checks directly to her client. Respondent never produced the materials identified in the previous paragraph. ¶ 60.

False Statements to Disciplinary Counsel

Respondent originally denied to DCO that she had taken any estate funds for fees, costs or other expenses. Multiple times she represented that no less than \$16,842 of estate funds remained in her trust account as of September 8, 2016, January 5, 2017, February 20, 2017, and May 8, 2017. ¶ 63.

Respondent gave DCO a trust account ledger she claimed was for the Pursel estate. The ledger showed that she made a final payment to the estate on September 8, 2016, in the amount of \$3,228.64, bringing the balance of estate funds in trust to \$16,842. This payment had never been made and the amount of remaining funds in trust was false. ¶ 64. In explaining this final payment to the estate, respondent stated that she had sent the \$3,228.64 to Bonita on September 8, 2016, along with the paperwork from the check distribution. ¶ 65. She also said that the June 2016 W&L check for \$31,228, that she deposited on June 10, 2016, was reissued in August and subject to a hold from her bank in August of 2016. ¶ 66.

In July 2017, during the investigation, respondent overdrew her trust account. ¶70. When question about this by DCO, she explained that she had made an honest mistake in writing a check to a client for more than the client had on deposit in the account and that she then re-issued a check to the client in the correct amount. Instead, respondent actually overdrew her trust account because she had written the check in question to herself for \$1,500. After the bank dishonored that check, she wrote another check to herself for the amount remaining in her trust account. ¶ 71.

After DCO discovered respondent's conversion of client funds, respondent changed her story. For the first time, she claimed that she had earned the funds as fees for the wrongful death case for Bonita. In December 2017, respondent stated to DCO:

“I consulted with the PLF after receiving Ms. Pursel's complaint from the OSB; they advised me to re-deposit any monies disbursed from [sic] the trust in case until it was determined whether Ms. Pursel objected to the attorney fees. Ms. Pursel's response did not include any objection to fees, only that she thought I had not disbursed monies owing to 'her' from W&L. Hearing no objection to the attorney fees, and operating under the assumption that the probate matter had been closed by the court pursuant to their notice(s), I re-disbursed the earned attorney fees in the civil matter (wrongful death case).”

She also stated: “Please note that I have not disbursed any [lawyer trust account] money for attorney fees in the probate case.” ¶ 67.

These two statements were false and material to the Bar's inquiries, and respondent made each statement knowing they were false and material. ¶¶ 63-67, 70-72.

ANALYSIS OF THE CHARGES

First Cause of Complaint

Violation RPC 8.4(a)(3) -- Conversion.

RPC 8.4(a)(3) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law.” Knowing conversion constitutes dishonest conduct in violation of the rule. *In re Martin*, 328 Or at 186; *In re Holman*, 297 Or 36, 57-58, 682 P2d 243 (1984); *In re Phelps*, 306 Or 508, 512-13, 760 P2d 1331 (1988).

The allegations establish that respondent knowingly converted client funds over a five-year period. She told her client that she would hold the sums in trust for retainers or additional filing fees. Instead she paid herself and others. She also never asked for or received authority from the court to disburse the funds despite the statutory requirement. Respondent violated RPC 8.4(a)(3).

Second Cause of Complaint

Violation of RPC 8.4(a)(3) -- Material Misrepresentations.

A lawyer also violates RPC 8.4(a)(3) when the lawyer makes a representation, either directly or by omission, that the lawyer knows is false and material. *In re Jackson*, 347 Or 426, 440, 223 P3d 387 (2009); *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004); *In re Worth*, 337 Or 167, 92 P3d 721 (2004); *In re Davenport*, 334 Or 298, 308, *recon*, 335 Or 67, 57 P3d 897 (2002). A representation is material if it would or could significantly influence the recipient's decision regarding the subject at issue. *Davenport*, 334 Or at 308. The Bar does not need to establish actual reliance. *In re Summer*, 338 Or 29, 39, 105 P3d 848 (2005). The Bar does not have to prove intent to deceive. *In re Claussen*, 322 Or 466, 481, 909 P2d 862 (1996). It is sufficient to show that the lawyer's statement could have influenced the decision-maker. *Summer*, 338 Or at 39.

The allegations establish that respondent made multiple material misrepresentations to Bonita, discussed above. We find that respondent made the material misrepresentations alleged in violation of RPC 8.4(a)(3).

Third and Tenth Causes of Complaint

Violation of RPC 8.4(a)(2) -- Criminal Conduct

Violation of ORS 9.527 -- Felony Convictions

RPC 8.4(a)(2) provides it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, truthfulness or fitness as a lawyer in other aspects." ORS 9.527(2) provides that the Oregon Supreme Court may "disbar, suspend, or reprimand," members of the bar who have been convicted of a felony in this state.

The Bar does not need a criminal conviction to show a violation of the rule, although the convictions are alleged here. *In re Hassenstab*, 325 Or 166, 176, 934 P2d 166 (1997). There must be some rational connection, other than the criminality of the act, between the conduct and the lawyer's fitness to practice law. *In re White*, 311 Or 573, 589, 815 P2d 1257 (1991). Theft from a client is the quintessential example of criminal conduct that reflects adversely on a lawyer's fitness to practice. Violation of RPC 8.4(a)(2) is amply demonstrated here. Since the conduct resulted in felony convictions, respondent also violated ORS 9.527(2).

Fourth Cause of Complaint

Violation of RPC 1.5(a) -- Illegal Fee.

ORS 116.183 requires court approval before an attorney for a personal representative may collect fees from an estate. Respondent did not obtain a court order approving any disbursement for attorney fees or costs in the estate proceeding.

RPC 1.5(a) 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.” A lawyer who accepts a fee in a probate matter without prior court approval has violated the Oregon statute requiring approval and collected an illegal fee. *In re Altstatt*, 321 Or 324, 333, 897 P2d 1164 (1995). By disbursing estate funds to herself without obtaining a court order, respondent violated RPC 1.5(a).

Fifth Cause of Complaint

Violation of RPC 1.15-1(a), (c), and (d) – Mishandling Trust Account.

RPC 1.15-1(a) provides, in relevant part: “A lawyer shall hold property of clients or third persons that is in a lawyer’s possession separate from the lawyer’s own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate “Lawyer Trust Account” maintained in the jurisdiction where the lawyer’s office is situated. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.”

Attorneys must safeguard client funds in their possession. Throughout the engagement, Bonita entrusted funds belonging to the estate with respondent. They were to be held for specific purposes. By converting those funds for her own personal use, respondent failed to safeguard client property in violation of RPC 1.15-1(a).

RPC 1.15-1(c) provides: “A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred....”

Respondent collected approximately \$20,070 from the estate. Respondent identified some of the money as a retainer to pay for future legal fees, and some to hold in trust to pay filing fees. Attorneys are required to keep such advance payments in their trust account until the fees are earned and the costs incurred. In this case, as well, no payments could be made to respondent until they were approved by the court.

The funds in respondent’s trust account were client funds belonging to the estate. Respondent never obtained court approval for \$20,070 for fees and costs beyond the \$78 fee she paid in April 2011. Respondent failed to maintain in trust the funds paid in advance for legal fees and expenses, in violation of RPC 1.15-1(c).

RPC 1.15-1(d) states that: “Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.”

Although her client consented to respondent retaining estate funds in her trust account for the future payments discussed previously, the funds in trust were still estate assets. Bonita was entitled to possess the money. She demanded that respondent transfer the money to her. RPC 1.15-1(d) required her to do so promptly. Her client also asked for an accounting of the funds in respondent's possession. Despite requests, respondent has not provided such an accounting. This conduct violates RPC 1.15-1(d).

Sixth Cause of Complaint

Violation of RPC 1.3 and 1.4(a) --Neglect and Failure to Communicate

RPC 1.3 provides: "A lawyer shall not neglect a legal matter entrusted to the lawyer." Neglect under the rule is the failure to act, or the failure to act diligently. We are to examine a lawyer's conduct over time and not just look at discrete or isolated events. *In re Magar*, 335 Or 306, 321, 66 P2d 1014 (2003); *In re Eadie*, 333 Or 42, 64, 36 P3d 468 (2001).

Respondent failed to file annual accountings. She ignored notices from the court that the accountings were overdue. The court dismissed the proceeding. Respondent was not diligent when it came to accepting and handling the checks from W&L. She also was not diligent about responding to many client inquiries about case status and checks. We find that respondent engaged in a course of neglectful conduct in violation of RPC 1.3.

RPC 1.4(a) states that: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Attorneys owe their clients "the duty of diligence, which requires the lawyer communicate with and keep the client informed of the status, progress, and disposition of a legal matter." *In re Bourcier (II)*, 325 Or 429, 434, 939 P2d 604 (1997).

To determine whether a lawyer has failed to keep a client reasonably informed we consider the length of time elapsed between an event and the lawyer's communication about it to the client; whether the lawyer failed to respond promptly to reasonable requests for information from the client; and whether the lawyer knew or a reasonable lawyer would have foreseen that a delay in communication would prejudice the client. *In re Groom*, 350 Or 113, 124, 249 P3d 976 (2011).

The failures to communicate described above support a finding that respondent violated RPC 1.4(a) by failing to keep her client reasonably informed.

Seventh Cause of Complaint

Violation of RPC 8.1(a)(2) -- Failure to Respond to Requests for Information

RPC 8.1(a)(2) states 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 respond when DCO investigates disciplinary matters.

DCO made multiple written requests for information from respondent while investigating her client’s complaint. Respondent failed to respond, except to create a trust account ledger. She then falsely claimed that she had earned all of the funds she spent representing Bonita in a separate civil action. She then failed to provide any requested documents to prove that statement. These knowing failures to respond to lawful demands for information violated RPC 8.1(a)(2). *In re Miles*, 324 Or 218, 221, 923 P2d 1219 (1996); *In re Obert*, 352 Or 231, 248-49, 282 P3d 825 (2012) (attorney failed to respond to numerous requests until subpoenaed); *In re Paulson*, 346 Or 676, 216 P3d 859, 687 (2009), *adhered to on recons.*, 347 Or 529 (2010) (attorney failed to respond or responded incompletely and insubstantially, asserting that the underlying complaint was without merit).

Eighth and Ninth Causes of Complaint

Violation of RPC 8.1(a)(1) -- False Statements of Material Fact to the Bar

RPC 8.1(a)(1) 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 “knowingly make a false statement of material fact.”

Recently the Oregon Supreme Court analyzed this rule. The court said we must answer three specific questions: (1) whether the statement at issue was false when it was made; (2) if so, whether the lawyer knew it was false at the time; and (3) if so, whether the statement was material and whether lawyer knew that as well. *In re Nisley*, 365 Or 793, 802-03, 453 P3d 529 (2019) (citations omitted).

The statements at issue here were false, respondent knew they were false, and they were clearly material. Respondent lied when she said all of the estate’s money remained in trust. She lied when she said she had paid the estate \$3,228.64 in September 2016. She gave DCO a phony trust account ledger. After overdrawing her trust account, respondent also gave the Bar a false explanation for that.

Respondent’s later story that she had earned attorney fees in a wrongful death case and that she re-disbursed the funds as earned fees was false. There was no other case. Respondent did not re-deposit the \$16,842 to her trust account and then re-disburse that amount to herself.

All of these false statements were material to the Bar. They all involved respondent’s disposition of client funds.

Respondent intentionally provided false information to DCOs to conceal her conversion. After she was caught she provided more false information in an attempt to deceive DCO.

We find that respondent violated RPC 8.1(a)(1) multiple times.

SANCTION

We refer to the ABA *Standards for Imposing Lawyer Sanctions* (“Standards”), in addition to Oregon case law for guidance in determining the appropriate sanction for lawyer misconduct. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993); *In re Eakin*, 334 Or 238, 257, 48 3d 147 (2002).

ABA Standards

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using four factors: (1) the ethical duty violated; (2) the attorney’s mental state; (3) the actual or potential injury caused by the conduct; and (4) the existence of aggravating and mitigating circumstances. *Standards* §3.0; *In re Jackson*, 347 Or 426, 440, 223 P3d 387 (2009); *In re Knappenberger*, 344 Or 559, 574, 186 P3rd 272 (2008). We analyze the first three factors to reach a presumptive sanction. That sanction can then be adjusted based upon the presence of aggravating or mitigating circumstances. *In re Jackson*, 347 Or at 441. We address each of the factors in order:

Duty Violated

The most important ethical duties lawyers owe are to their clients. *Standards* at 5. Respondent violated the duty she owed to her client to preserve client property. *Standard 4.1*. Respondent violated the duty to act with reasonable diligence and promptness, which includes the obligation to timely and effectively communicate. *Standard 4.4*. Respondent also violated her duty of candor to her client. *Standard 4.6*.

When she committed criminal acts that reflect adversely on her fitness to practice law, respondent violated her duty to maintain her personal integrity. *Standard 5.1*.

Respondent also violated the duties she owed as a professional. She violated her duty to cooperate with disciplinary authorities, including her duty of candor to be truthful in her statements to DCO. *Standard 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 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.*

Respondent acted intentionally when she committed the misconduct involving conversion and dishonesty. She acted intentionally or knowingly when she committed the trust

account violations. Respondent's misconduct was intentional when she failed to respond or lied to DCO.

Respondent's neglect of the probate proceeding and failure to communicate with her client were at least done knowingly.

Extent of Actual or Potential Injury

We may take into account both actual and potential injury in assessing an appropriate sanction. *Standards* at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992).

Here the client, the public, the legal profession, and the Bar have all sustained actual injury due to respondent's misconduct. A lawyer who converts client funds causes actual injury to the client. *In re Webb*, 363 Or 42, 51-52, 418 P3d 2 (2018). A client also sustains actual injury when an attorney fails to actively pursue the client's case. *See e.g. In re Parker*, 330 Or 541, 546-47, 9 P3d 107 (2000). Respondent's failure to communicate and neglect of her duties caused her client 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).

Respondent's false statements of material fact to DCO caused actual injury to the Bar. *Nisley*, 365 Or at 815 (lawyer causes injury to the disciplinary system when lawyer is not candid during the disciplinary process). Respondent's failure to cooperate with the investigation also caused actual injury to the legal profession, the public, and the Bar. *Schaffner, supra; Miles*, 324 Or at 221-22.

Preliminary Sanction

The following *Standards* apply:

Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. *Standard 4.11*.

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. *Standard 4.12*.

Disbarment is generally appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. *Standard 4.41(b)*.

Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standard 4.42(a)*.

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. *Standard 4.61*.

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

Disbarment is generally appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation or theft. *Standard 5.11(a)*.

Disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. *Standard 5.11(b)*.

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. *Standard 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. *Standard 7.2*.

The presumptive sanction for the misconduct alleged here is disbarment.

Aggravating and Mitigating Circumstances

The following aggravating factors are present here:

1. A dishonest or selfish motive. *Standard 9.22(b)*. Respondent acted to enrich herself at her client's expense and engaged in a pattern of misrepresentation trying to avoid the consequences.
2. Pattern of Misconduct. *Standard 9.22(c)*. "[A] pattern of misconduct does not necessarily require proof of a prior sanction. Rather, that aggravating factor bears on whether the violation is a one-time mistake, which may call for a lesser sanction, or part of a larger pattern, which may reflect a more serious ethical problem." *In re Bertoni*, 363 Or 614, 644, 426 P3d 64 (2018). Respondent's misconduct spanned more than five years and continued when the Bar began investigating her client's complaint.
3. Multiple offenses. *Standard 9.22(d)*.
4. Refusal to acknowledge wrongful nature of conduct. *Standard 9.22(g)*.
5. Vulnerability of victim. *Standard 9.22(h)*. Bonita was a widow apparently in ill health during the time of respondent's misconduct.

In mitigation, we find the following factors here:

1. Absence of a prior record of discipline. *Standard 9.32(a)*.³
2. Imposition of other penalties or sanctions. *Standard 9.32(k)*. Respondent was found guilty and convicted of committing two felony counts of theft and was sentenced to 30 days in jail.
3. Inexperience in the practice of law. *Standard 9.32(f)*. When respondent's misconduct began, she had only been practicing in Oregon for three years.

The aggravating factors outweigh the mitigating factors in number and in scope. There is no basis for reducing the sanction to something less than disbarment.

Oregon Case Law

Oregon cases dictate that we disbar respondent. The court has consistently disbarred lawyers who convert client funds. *Webb*, 363 Or at 52. "Drawing together the factors of duty, mental state, and injury, and before examining aggravating and mitigating factors, under both the ABA Standards and this court's case law, disbarment is the presumptively appropriate sanction" for conversion of client funds. *Id.* "[A] lawyer may suffer all the claimed disabilities and may have the greatest of attributes, but if he or she steals funds from a client, the sanction is disbarment." *Martin*, 328 Or at 193 (quoting *In re Phelps*, 306 Or 508, 520, 760 P2d 1331 (1988)).

Conversion of client funds alone warrants disbarment. The resultant felony theft convictions alone warrant disbarment. We have no doubt that this is the sanction that would be imposed by the court.

Restitution

Pursuant to BR 6.1(a) we also order respondent to make restitution of the client funds she converted, \$20,070, less any funds respondent has already paid pursuant to the terms of her judgment of criminal conviction. We are advised that the Client Security Fund (CSF) paid the client's claim for reimbursement of that amount so the restitution award is on behalf of the CSF.

CONCLUSION

Sanctions in disciplinary matters are not meant to punish a 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).

³ The Bar acknowledges that respondent's stipulated BR 3.1 suspension in this proceeding does not constitute prior discipline.

Respondent violated one of a lawyer's most fundamental duties when she repeatedly converted her client's funds for her own use over a five-year period. Her representation of Bonita Pursel was rife with other acts of misconduct as well. We therefore order respondent disbarred immediately. Respondent is ordered to comply with the provisions of 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, pursuant to BR 6.3(d).

Respectfully submitted this 20th day of April, 2020.

/s/ Mark A. Turner

Mark A. Turner, Adjudicator

/s/ Arnie Polk

Arnie Polk, Attorney Panel Member

/s/ Sandra Frederiksen

Sandra Frederiksen, Public Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of)	Case No. 19-32
)	
BRENT S. TANTILLO,)	
)	
Respondent.)	

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: Steven B. Ungar

Disciplinary Board: None

Disposition: Violation of RPC 3.3(a)(1), RPC 5.3(a), RPC 5.3(b),
RPC 5.5(a), and ORS 9.160(1). Stipulation for
Discipline. 60-day suspension.

Effective Date of Order: May 31, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Brent S. Tantillo (Respondent) and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is suspended for 60 days, effective ten (10) days after the date of this order, for violations of RPC 3.3(a)(1), RPC 5.5(a), RPC 5.3(a) and (b), and ORS 9.160(1).

DATED this 21st day of May, 2020.

/s/ Mark A. Turner

 Mark A. Turner
 Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Brent S. Tantillo, attorney at law (Respondent), 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.

Respondent was, at all times mentioned herein, admitted to practice law in the District of Columbia and was not admitted to practice in Oregon. Respondent was admitted to practice law in the District of Columbia on November 12, 2004.

3.

Respondent 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 2, 2019, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of rules 3.3(a)(1), 5.3(a), 5.3(b)(2), and 5.5(a) of the Oregon Rules of Professional Conduct, and ORS 9.160(1). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

On or about February 2, 2018, Respondent filed a pleading in Washington County Circuit Court case number 18LT01187 entitled “Notice of Removal of Action Pursuant to 28 U.S.C. 1332(a), 1441(a) and (b)” (Notice of Removal). In the Notice of Removal, Respondent purported to represent an individual named Lisa Diamond.

6.

The Notice of Removal was prepared by Respondent’s employee, Ajit Narasimham, over whom Respondent had direct supervisory authority. Respondent reviewed the Notice of Removal before it was filed with the court.

7.

In the Notice of Removal, Respondent knowingly represented that he was admitted to appear in the matter *pro hac vice*. When he made this representation, Respondent knew that he was not admitted to appear *pro hac vice*, and had not sought permission to appear *pro hac vice*, in the matter.

8.

When counsel for the opposing party contacted Respondent about his false representation regarding *pro hac vice* admission, Respondent failed to promptly correct this false statement or take other remedial action.

Violations

9.

Respondent admits that, by engaging in the conduct described in paragraphs 1 through 8 herein, he violated RPC 3.3(a)(1), RPC 5.5(a), RPC 5.3(a) and (b), and ORS 9.160(1).

Sanction

10.

Respondent 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 Respondent'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.** Respondent violated his duty to the legal system to refrain from making false statements to the court, and his duty owed as a professional to refrain from engaging in or assisting in the unauthorized practice of law. Standards 6.1 and 7.0.
- b. **Mental State.** Respondent acted knowingly, i.e., with the conscious awareness of the nature or attendant circumstances of his conduct, but without the conscious objective to accomplish a particular result. Standard 3.0(b).
- c. **Injury.** Respondent's unlawful practice of law and misrepresentations to the court inherently posed the potential for injury to Diamond and the court. *In re Devers*, 328 Or 230,242, 974 P29 191 (1999).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior disciplinary offenses. Respondent was admonished in November 2014 by the Washington, DC Bar for making a false statement to court personnel in litigation in the state of Florida. At the time of the conduct in this case, Respondent also was under investigation by the California State Bar for appearing in litigation in that state without *pro hac vice* admission. Standard 9.22(a).
 2. Multiple disciplinary offenses. Standard 9.22(d).

3. Substantial experience in the practice of law. Respondent has been a member of the Washington, DC Bar since 2004. Standard 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a dishonest or selfish motive. Standard 9.32(b).
 2. Personal or emotional problems. At the time of the conduct described above, Respondent was separated from his wife and children and involved in the dissolution of his marriage. Respondent's son was also hospitalized twice during the time in which his conduct occurred. These problems increased Respondent's reliance upon his staff and interfered with his ability to supervise his staff. Standard 9.32(c).
 4. Cooperation with DCO's investigation. Respondent made full and free disclosure and displayed a cooperative attitude in these proceedings. Standard 9.32(e).
 5. Remorse. Respondent has expressed remorse for his conduct. Standard 9.32(l).

11.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly makes a false statement to the court and takes no remedial action, resulting in injury or potential injury to a party or causes a potentially adverse effect upon that proceeding. Standard 6.12. 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. Standard 7.2.

12.

Oregon case law is in accord. *In re Billman*, 27 DB Rptr 126 (2013) [lawyer suspended for 30 days for representing to the court that his client had approved the terms of a settlement when she had not]; *In re Barker*, 24 DB Rptr 246 (2010) [Idaho lawyer suspended for 60 days for representing a client in Oregon where he was suspended, and making a false statement to the Bar during its investigation of his conduct]; *In re Carreon*, 19 DB Rptr 297 (2005) [lawyer suspended for 60 days for acting as house counsel and practicing law in Canada without admission to the British Columbia Bar].

13.

Consistent with the *Standards* and Oregon case law, the parties agree that Respondent shall be suspended for a period of 60 days for violation of RPC 3.3(a)(1), RPC 5.5(a), RPC 5.3(a) and (b), and ORS 9.160(1), the sanction to be effective 10 days after the date on which this stipulation is approved by the Disciplinary Board.

14.

Respondent is admitted to practice law in Washington, DC, where his current status is active, and he acknowledges that the Bar will inform that jurisdiction of the final disposition of this proceeding.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on April 13, 2019. 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 May, 2020.

/s/ Brent S. Tantillo

Brent S. Tantillo, OSB No. 4258971

APPROVED AS TO FORM AND CONTENT:

/s/ Steven B. Ungar

Steven B. Ungar, OSB No. 960029

EXECUTED this 20th day of May, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel, OSB No. 022916

Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-99
)
MARYANN MEANEY,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: Wayne Mackeson

Disciplinary Board: None

Disposition: Violation of RPC 1.16(d). Stipulation for Discipline.
Public Reprimand.

Effective Date of Order: June 2, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

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

DATED this 2nd day of June, 2020.

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

STIPULATION FOR DISCIPLINE

Maryann Meaney, attorney at law (Respondent), 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.

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

3.

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

4.

On November 12, 2019, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of 1.16(d) 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.

Respondent represented William A. Kirk (Kirk) in a criminal matter until about October 2017. On or about January 9, 2018, Kirk requested a copy of specified documents from Respondent's client file, including her handwritten notes regarding her interviews with Kirk and her handwritten notes taken during her review of statements given by the victims to third parties. Respondent understood Kirk's request to include only the discovery provided by the District Attorney in the case. Accordingly, she did not send Kirk copies of all of the documents described by Kirk in his January 9, 2018, letter. Thereafter, between February 2018 and May 2019, Kirk made repeated requests for his "complete file."

6.

Respondent did not take steps to the extent reasonably practicable to protect Kirk's interests in that she failed to surrender papers to which Kirk was entitled, namely the handwritten notes described in paragraph 5 above, until April 2019.

Violations

7.

Respondent admits that, by engaging in the conduct described in paragraphs 5 and 6 herein, she violated RPC 1.16(d).

Sanction

8.

Respondent 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 Respondent'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.** Respondent violated her duty to her client to promptly return all of the documents to which he was entitled upon the termination of her employment. *Standard 4.0*.
- b. **Mental State.** Respondent acted negligently in determining whether Kirk was entitled to receive certain documents from her client file. *Standards* at 7.
- c. **Injury.** Kirk was not actually injured with respect to any post-conviction relief he may have wanted to seek because the documents Respondent did not promptly produce were not relevant to such proceedings. Kirk did suffer some actual injury in the form of aggravation in not receiving the documents he desired, but he had been given access to Respondent's file during her representation of him, and Respondent believes she had sent him a redacted copy of the discovery after trial as he requested. *Standards* at 7.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Kirk was a vulnerable victim. *Standard 9.22(h)*.
 2. Respondent had substantial experience in the practice of law, having been admitted to the Bar in 1989. *Standard 9.22(i)*.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. *Standard 9.32(a)*.
 2. Absence of a dishonest or selfish motive. *Standard 9.32(b)*.

3. Full and free disclosure to and cooperative attitude toward these proceedings. *Standard 9.32(e)*.
4. Respondent is of good character and reputation. *Standard 9.32(g)*.
5. Remorse. *Standard 9.32(l)*.

9.

Under the ABA *Standards*, reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standard 4.13*.

10.

Oregon case law is in accord. *In re Farrell*, 33 DB Rptr 164 (2019) [Public reprimand for violation of RPC 1.16(d)]; *In re Roberts*, 33 DB Rptr 181 (2019) [Public reprimand for violation of RPC 1.16(d) and RPC 4.2]; and *In re Kmetc*, 33 DB Rptr 518 (2019) [Public reprimand for violation of RPC 1.5(a) and RPC 1.16(d)].

11.

Consistent with the *Standards* and Oregon case law, the parties agree that Respondent shall be publicly reprimanded for violation of RPC 1.16(d), effective upon approval by the Disciplinary Board Adjudicator.

12.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

13.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on May 5, 2020. 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 Meaney*, 34 DB Rptr 80 (2020)

EXECUTED this 26th day of May, 2020.

/s/ Maryann Meaney
Maryann Meaney, OSB No. 893081

APPROVED AS TO FORM AND CONTENT:

/s/ Wayne Mackeson
Wayne Mackeson, OSB No. 823269

EXECUTED this 27th day of May, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel
Courtney C. Dippel, OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of)	Case No. 19-124
)	
ADAM FAMULARY,)	
)	
Respondent.)	

Counsel for the Bar: Angela W. Bennett

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 3.3(a)(1) and RPC 8.4(a)(4).
Stipulation for Discipline. 30-day suspension.

Effective Date of Order: August 1, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Adam Famulary is suspended for 30 days, effective 60 days after approval by the Disciplinary Board, for violation of RPC 3.3(a)(1) and RPC 8.4(a)(4).

DATED this 2nd day of June 2020.

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

STIPULATION FOR DISCIPLINE

Adam Famulary, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 10, 2013, and has been a member of the Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On December 7, 2019, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 3.3(a)(1) 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.

Attorney Neal Peton (Peton) represented a woman who was allegedly injured by Rudolph Beeman (Beeman) as he operated his car in a parking lot. Before Peton filed a personal injury lawsuit against Beeman on his client's behalf, Beeman died. Peton asked Respondent to open a probate for Beeman's estate so that Peton could file suit. Respondent drafted and filed a probate petition the next day, seeking his own appointment as personal representative.

2.6.

Prior to filing the petition, Respondent made no effort to determine whether Beeman died testate or had any heirs. Despite this, in his probate petition, Respondent represented to the court that he believed Beeman died intestate and that he (Respondent) had made reasonable efforts to identify and locate all the decedent's heirs. These representations were knowing, material, and false.

3.7.

Shortly after he filed the Beeman probate petition, Respondent became aware that Beeman had executed a will and had heirs, and that his representations to the court on those material issues were false. He nevertheless failed to correct these material misstatements, claiming that he had no duty to do so because the named personal representative could submit the will at any time.

4.8.

Respondent's conduct caused actual and potential injury to the court in the form of wasted time and resources, as well as that of the other involved parties (creditors, heirs, and the named personal representative).

Violations

9.

Respondent admits that, by knowingly making false statements of fact to the court and failing to correct materially false statements previously made, he violated RPC 3.3(a)(1), and engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

Sanction

10.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duty to maintain the integrity of the legal system, to avoid false statements and misrepresentation, and to avoid prejudicing the administration of justice. ABA Standard 6.1.
- b. **Mental State.** The ABA Standards recognize three mental states. The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. *Id.* "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent acted knowingly when he misrepresented to the court the extent of his pre-petition due diligence and later failed to correct his material misrepresentations once he learned of their falsity.

- c. **Injury.** Injury is defined as harm to a client, the public, the legal system, or the profession that results from a lawyer’s misconduct. Potential injury is the harm that is reasonably foreseeable at the time of the misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. ABA Standards at 5. For the purposes of determining an appropriate disciplinary sanction, the court will consider both actual and potential injury. ABA Standards at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

Respondent caused injury by violating the integrity of the legal process and failing to fulfill his duty of candor to the probate court. *In re Hedrick II*, 312 Or 442, 450, 822 P2d 1187 (1991). Further, his conduct injured the profession as it reflects poorly on lawyers and diminishes the public’s trust in the justice system. Finally, his actions caused injury to the procedural functioning of the court in the form of wasted time and resources of the court and the parties.

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

1. Multiple offenses. ABA Standard 9.22(d).

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

1. Absence of prior discipline. ABA Standard 9.32(a).

2. Inexperience in the practice of law. ABA Standard 9.32(f). At the time of the conduct in question, Respondent had been a lawyer for three years.

11.

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

Respondent’s knowing misrepresentations to the court and subsequent failure to correct material misrepresentations after becoming aware of them, caused actual injury; as a result, the presumptive sanction under the ABA Standards would be a short suspension.

12.

Oregon cases confirm that some period of suspension is warranted where lawyers have made false statements to courts or failed to inform courts of all material facts. *In re Carroll*,

15 DB Rptr 48 (2001) (attorney suspended for 30 days for violation of *former* DR 1-102(A)(3), 7-102(A)(5) and 7-104(A) (*current* RPC 8.4(a)(3), 3.3(a)(1), and 4.2) when, in support of a motion to compel discovery, she misrepresented to the court that she had spoken to opposing counsel about a request for production and that no documents had been produced in response); *In re Hoffman*, 14 DB Rptr 121 (2000) (attorney stipulated to a 30-day suspension for violation of *former* DR 1-102(A)(3), 1-102(A)(4), and 7-102(B)(1) (*current* RPC 8.4(a)(3), 8.4(a)(4), and 3.3(b)) when, knowing that a prior attorney for the client had unknowingly made a misrepresentation to the court concerning the whereabouts of a witness, Hoffman perpetuated the false impression that the witness was out-of-state in her communications with the court and opposing counsel, and did not ask the client for authorization to correct the misimpression); *In re Greene*, 290 Or 291, 620 P2d 1379 (1980) (court suspended attorney for 60 days after he presented to the court two *ex parte* petitions seeking approval for a conservator to purchase and improve real property for the benefit of the minor wards, but failed to disclose that the real property belonged to the conservator who was also the attorney's wife. The court emphasized that judges must be able to rely upon the integrity of the lawyer, and stated, the "necessity for complete candor when dealing with the court ... cannot be overemphasized." The court found the lawyer's conduct constituted a misrepresentation which, in turn, adversely reflected on his fitness to practice law and was prejudicial to the administration of justice.).

13.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for 30 days for violation of RPC 3.3(a)(1) and RPC 8.4(a)(4), the sanction to be effective 60 days after this stipulation is approved by the Disciplinary Board.

14.

Respondent 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, Respondent has arranged for Amanda C. Minks, Famulary Law, 12725 SW Millikan Way, Suite 300, Beaverton, OR 97005, and Alexis M. Shimada, Famulary LLC, 3040 Commercial Street SE, Suite 120, Salem, OR 97302, both active members of the Bar, to either take possession of or have ongoing access to Respondent's client files and serve as contact people for clients in need of the files during the term of his suspension. Respondent represents that Amanda C. Minks and Alexis M. Shimada have both agreed to accept this responsibility.

15.

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

16.

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

17.

Respondent 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 Respondent is admitted: none.

18.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on December 7, 2019. 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 19th day of May 2020.

/s/ Adam Famulary
Adam Famulary, OSB No. 133556

EXECUTED this 28th day of May 2020.

OREGON STATE BAR

By: /s/ Angela W. Bennett
Angela W. Bennett, OSB No. 092818
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-91
)
J. MATHEW DEVORE,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: None

Disciplinary Board: Mark A. Turner, Adjudicator
S. Michael Rose
Trevor I. Briedé, Public Member

Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC
1.5(a), RPC 8.1(a)(2), RPC 8.4(a)(2), and RPC
8.4(a)(3). Trial Panel Opinion. Disbarment.

Effective Date of Opinion: June 4, 2020

TRIAL PANEL OPINION

In this disciplinary proceeding the Oregon State Bar (Bar) asks us to disbar respondent J. Mathew DeVore for forging documents, including a phony judgment, to conceal his failure to pursue his client’s case. He is also charged with neglect of the matter, failure to adequately communicate with his client, charging an excessive fee, and refusing to respond to inquiries from Disciplinary Counsel’s Office (DCO).

Respondent is in default for failure to answer the complaint. In a default case, we are bound to accept the facts alleged as true. We analyze those allegations to determine whether they satisfy the elements of each charge. We do not look at extrinsic evidence. We are limited to the four corners of the complaint.

If we determine that a violation is sufficiently alleged, we must decide the appropriate sanction. We may consider additional evidence in answering this question. The Bar submitted a memorandum supporting its proposed sanction.

As discussed below, we find that the Bar has sufficiently alleged each of the violations pleaded. We agree with the recommended sanction and order that respondent be disbarred.

PROCEDURAL POSTURE

The Bar filed its formal complaint on November 8, 2019. Respondent was properly served. Respondent has not appeared. On January 31, 2020, an order of default was entered against him.

A trial panel was appointed, consisting of Mark A. Turner, Adjudicator, S. Michael Rose, Attorney Member, and Trevor I. Briedé, Public Member.

FACTS AND VIOLATIONS

Respondent had represented Jessica Mozeico in a dissolution proceeding while employed as an associate at Stahancyk Kent & Hook. In November 2014, respondent moved to the Grace Family Law firm. In September 2017, Mozeico hired him to handle a custody and child support matter. ¶¶ 3-4.¹

The parties mediated the case on December 20-21, 2017. Mozeico's ex-husband participated *pro se*. They reached an agreement. The mediation judge tasked respondent with initiating a domestic relations case so that the agreement could be entered as a judgment. ¶ 5.

Respondent never filed a domestic relations proceeding. He performed no further legal services for his client after the mediation. Despite his failure to perform, respondent charged and collected \$1,350 from his client for work he claimed he did after the mediation. ¶ 6.

In April 2018 respondent sent Mozeico a draft judgment for her review despite the fact that he had never filed the case. He said he would send it to her ex-husband for review, but never did so. ¶ 7.

In May 2018, respondent drafted and had his client sign a Petition for Custody and Parenting Time for filing in Multnomah County Circuit Court. Respondent never filed this petition. He represented to his client that he had done so. This representation was false and material to the client. Respondent knew it was false and material when he made it. ¶ 8.

On July 6, 2018, respondent represented to his client that he had served her ex-husband with the Petition for Custody and Parenting Time. He had not done so. On July 30, 2018, respondent advised his client that the case was set for trial in September 2018. These representations were false and material to the client, and respondent knew they were false and material when he made them. ¶¶ 9-10.

On September 28, 2018, respondent told his client that her ex-husband had not appeared for trial and that the court had entered an order of default against him. These representations were false and material to the client, and respondent knew they were false and material when he made them. ¶ 11. Even though respondent had not appeared in court for trial on September 28, 2018 he billed his client for an appearance. ¶ 11.

¹ All paragraph citations are from the Bar's formal complaint.

After the purported default, the client sent multiple emails to respondent asking for updates and copies of the pleadings. Respondent did not answer for months. ¶ 12.

On January 16, 2019, respondent emailed his client copies of what he claimed were multiple pleadings filed in her case. These included a Petition for Custody and Parenting Time, proof of service of the petition, a Petitioner's Hearing Memorandum, and a General Judgment Re: Custody, Parenting Time and Child Support. He forged the signature of Judge Patricia McGuire on the judgment. None of these documents had actually been filed with the court. Respondent prepared and sent these documents to his client with the intent to deceive her into believing that he had pursued her case and had obtained judgment in her favor. ¶ 13.

On the same day respondent emailed his client a proposed writ of garnishment showing an amount owing of \$12,847. Respondent proposed that his client authorize him to garnish her ex-husband's wages. These representations were false and material to his client, and respondent knew they were false and material when he made them. ¶ 15.

At the end of February 2019, another attorney at the Grace Family Law firm advised Mozeico that no case had ever been filed on her behalf and that the pleadings respondent had sent her were fraudulent. ¶ 16.

The Bar received a grievance from another attorney complaining of respondent's conduct. The Bar began an investigation. Respondent failed to respond to repeated requests for information from DCO. ¶¶ 19-21. Respondent's failure to respond resulted in his administrative suspension pursuant to BR 7.1. ¶¶ 22-23.

ANALYSIS OF THE CHARGES

A. Violation of RPC 1.3: Neglect.

RPC 1.3 provides: "A lawyer shall not neglect a legal matter entrusted to the lawyer." Neglect of a legal matter is the failure to act or the failure to act diligently when the lawyer's conduct is considered over time. *In re Magar*, 335 Or 306, 321, 66 P3d 1014 (2003). The Oregon Supreme Court has found neglect when a lawyer ignores a matter over several months. *In re L. Charles Purvis*, 306 Or 522, 524-25, 760 P2d 254 (1988) (respondent neglected matter between June and September 1986 when he took no action despite assurances that he was doing so).

It is hard to imagine a more representative example of neglect than failing to perform any work for many months while telling the client that you are doing so. If respondent had devoted the energy he spent covering up his failures in pursuing his client's case in the first place we would not be here. Respondent violated RPC 1.3.

B. Violation of RPC 1.4(a) and (b): Inadequate Communication.

RPC 1.4 provides in subsection (a): "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

In subsection (b) it states: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Attorneys have a duty to timely and effectively communicate with clients. To decide whether the above rules have been violated, we must consider multiple factors, including the length of time between an event and the lawyer’s communication of it to the client; whether the lawyer failed to respond promptly to reasonable requests for information from the client; and whether the lawyer knew, or a reasonable lawyer would have foreseen, that a delay in communication would prejudice the client. *In re Groom*, 350 Or 113, 122, 249 P3d 976 (2011).

From December 2017 into January 2019, respondent failed to advise his client that he had done nothing on her case. In September 2018, respondent’s client asked about the status of her case. Respondent did not reply for at least three months. Respondent also intentionally misled his client regarding the true status of her matter. Respondent’s conduct prejudiced his client. The fact that respondent tried to cover his tracks rather than remedy his failures implies that he was well aware that his client was prejudiced by his inaction. We find that respondent violated both RPC 1.4(a) and (b).

C. Violation of RPC 1.5(a): Excessive Fee.

RPC 1.5(a) states: “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 allegations recite that respondent charged and collected \$1,350 for legal services he did not perform. A fee is clearly excessive under the rule if a lawyer charges for services that were not performed. *In re Gastineau*, 316 Or 545, 551-52, 857 P2d 960 (1983). We find that respondent violated RPC 1.5(a).

D. Violation of RPC 8.4(a)(2) and (3): Criminal and Dishonest Conduct.

RPC 8.4(a)(2) provides: “It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, truthfulness or fitness as a lawyer in other aspects.” Subsection (a)(3) goes on: “It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.”

A violation of RPC 8.4(a)(2) has two elements. There must be sufficient evidence—or, in this case, allegations—that the respondent committed a criminal act, though a criminal conviction is not required. *In re Hassenstab*, 325 Or 166, 176, 934 P2d 166 (1997). Then there must be some rational connection between the conduct and the lawyer’s fitness to practice law other than the criminality of the act itself. *In re White*, 311 Or 573, 589, 815 P2d 1257 (1991). *White* sets out factors to consider, including the lawyer’s mental state, the extent to which the criminal act demonstrates disrespect for the law or law enforcement, the presence or absence of a victim, the extent of actual or potential injury to a victim, and the presence or absence of a pattern of criminal conduct. *Id.* at 589.

The Bar cites us to *In re Kirkman*, 313 Or 181, 184, 830 P2d 206 (1992), where the court held that intentionally preparing a single falsified judgment constitutes the crime of forgery as defined in ORS 165.013, and that a lawyer who engages in such conduct violates

the predecessors to current RPC 8.4(a)(2) and current RPC 8.4(a)(3).² The court further held that the commission of the crime of forgery reflects adversely upon a lawyer's honesty, trustworthiness, and fitness to practice law. *Kirkman*, 313 Or at 185.

Respondent forged multiple documents in violation of the statute. He forged a judgment with a phony signature from a judge. These documents related to the entire purpose of the representation. Respondent's criminal conduct reflects adversely on his fitness to practice in the most fundamental of ways.

Respondent knew that his representations about performing the work his client expected were material. Respondent intended to mislead his client. This deceptive conduct reflects adversely on respondent's fitness to practice as well.

We find that respondent violated both RPC 8.4(a)(2) and RPC 8.4(a)(3).

E. Violation of RPC 8.1(a)(2): Failure to Respond to Disciplinary Counsel.

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

"...[A], a lawyer...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."

DCO is a disciplinary authority under the rule. RPC 8.1(a)(2) requires Oregon lawyers to respond to DCO's inquiries.

DCO requested information from respondent multiple times. The allegations establish that the requests were properly delivered to the required mail and email addresses provided by respondent to the Bar. None were returned.

This knowing failure to respond to lawful demands for information violates the rule. *In re Miles*, 324 Or 218, 221, 923 P2d 1219 (1996); *In re Obert*, 352 Or 231, 248-49, 282 P3d 825 (2012) (attorney failed to respond to numerous requests from the Bar about complaint until subpoenaed); *In re Paulson*, 346 Or 676, 216 P3d 859, 687 (2009), *adhered to on recons.*, 347 Or 529 (2010) (attorney failed to respond to Bar, or responded incompletely and insubstantially, asserting that the underlying complaint was without merit).

We find that respondent violated RPC 8.1(a)(2).

² Under ORS 165.013, a person commits the crime of first degree forgery if a person, with intent to injure or defraud, falsely makes, completes or alters a written instrument; or [delivers, publishes, circulates, disseminates, or transfers] a written instrument which the person knows to be forged, and the written instrument is or purports to be a public record. The crime is a Class C felony.

SANCTION

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

ABA Standards

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

Duty Violated

The most important ethical duties lawyers owe are to their clients. ABA Standards at 5. Respondent violated the duty to act with reasonable diligence and promptness, which includes the obligation to communicate in a timely and effective manner. ABA Standard 4.4. Respondent also violated his duty of candor to his client. ABA Standard 4.6.

By committing criminal acts that reflect adversely on his fitness to practice law, respondent violated his duty to maintain his personal integrity. ABA Standard 5.1.

Respondent also violated the duties he owes to the profession. Respondent violated his duty to cooperate with disciplinary authorities, and his duty to refrain from charging or collecting excessive fees. ABA Standard 7.0; *Miles*, 324 at 221.

Mental State

The ABA Standards define "intent" as "the conscious objective or purpose to accomplish a particular result." ABA Standards at 7. "Knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." "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.*

We agree with the Bar that respondent acted intentionally or knowingly. Respondent acted with the conscious objective to deceive his client about what work he had actually performed when he prepared fabricated court documents to cover his false statements.

Respondent knowingly neglected his client's case after December 21, 2017. He failed to commence a domestic relations proceeding to implement the terms of the parties' agreement. He failed to take any constructive action to achieve his client's objectives. His efforts were spent misleading his client regarding the status of her case. He also repeatedly failed to communicate at all.

Respondent also acted knowingly when he chose not to respond to the disciplinary investigation.

Extent of Actual or Potential Injury

We may take into account both actual and potential injury when deciding on a sanction. ABA Standards at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992).

The actual injury to the client here is significant. She paid for legal services she never received. She was misled about her case, jeopardizing her rights regarding custody, parenting time, and support for her child. The legal profession and the client were also actually injured by respondent's failure to respond because the Bar's investigation and the resolution of the complaint were delayed. *Miles*, 324 Or at 220.

Preliminary Sanction

Absent aggravating or mitigating circumstances, the following ABA Standards apply:

Disbarment is generally appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. ABA Standard 4.41(b).

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 serious potential injury to a client. ABA Standard 4.61.

Disbarment is generally appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation or theft. ABA Standard 5.11(a).

Disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. ABA Standard 5.11(b).

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. ABA Standard 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. ABA Standard 7.2.

The presumptive sanction here is disbarment.

Aggravating and Mitigating Circumstances

The following aggravating factors exist in this case:

1. A dishonest or selfish motive. ABA Standard 9.22(b). Respondent acted in his own self-interest in forging court documents to hide his malfeasance and issuing a bill for time spent performing tasks he did not do.
2. Multiple offenses. ABA Standard 9.22(d). Respondent has violated seven disciplinary rules.
3. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent was admitted to practice in Oregon in 2010.
4. Indifference to making restitution. ABA Standard 9.22(j). Respondent has made no effort to reimburse his client.

In mitigation, the Bar acknowledges that respondent has no prior disciplinary record. ABA Standard 9.32(a). By failing to participate in this case respondent has chosen to forfeit his opportunity to argue the existence of any other mitigating factors.

Oregon Case Law

Oregon case law also compels us to conclude that disbarment is appropriate. The Oregon Supreme Court has consistently disbarred lawyers who forge or fabricate documents. *Kirkman*, 313 Or at 184 (lawyer and former judge was disbarred for forging judgment of dissolution and providing it to his girlfriend, attempting to mislead her about the status of his marriage; lawyer committed felony forgery); *In re Leonhardt*, 324 Or 498, 501, 930 P2d 844 (1997) (former district attorney was disbarred for committing forgery by altering grand jury indictments); *In re Yacob*, 318 Or 10, 23, 860 P2d 811 (1993) (lawyer disbarred for fabricating documents and submitting them to the Bar in response to ethics complaint).

The court's holding in *Kirkman* leaves us with little doubt that disbarment is called for here. The court stated:

“Because the accused’s misconduct is so great, because the nature of the misconduct is so destructive of truth and honesty, because public confidence in the integrity of the legal profession is so important, and because appropriate discipline deters unethical conduct, we must conclude that the accused must be disbarred.” 313 Or at 184.

Restitution

Pursuant to BR 6.1(a), we order respondent to make restitution to Jessica Mozeico in the amount of \$1,350.

CONCLUSION

Sanctions in disciplinary matters are intended to protect the public and the integrity of the profession, not to penalize the lawyer. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). Appropriate discipline deters unethical conduct. *Kirkman*, 313 Or at 188. The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties properly. ABA Standard 1.1.

We therefore order respondent disbarred immediately. Respondent is ordered to comply with the provisions of 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, pursuant to BR 6.3(d).

Respectfully submitted this 4th day of May, 2020.

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

/s/ S. Michael Rose
S. Michael Rose, Trial Panel Member

/s/ Trevor I. Briedé
Trevor I. Briedé, Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-11
)
MATTHEW L. SOWA,)
)
Respondent.)

Counsel for the Bar: Stacy R. Owen

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b).
Stipulation for Discipline. 60-day suspension.

Effective Date of Order: June 10, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Matthew L. Sowa is suspended for sixty days, effective June 10, 2020, for violation of RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

DATED this 8th day of June 2020.

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

STIPULATION FOR DISCIPLINE

Matthew L. Sowa, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 2003, and has been a member of the Bar continuously since that time. Respondent's office and place of business is in Marion County, Oregon.

3.

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

4.

On March 7, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of Oregon Rules of Professional Conduct (RPC) 1.3, RPC 1.4(a), and RPC 1.4(b). The parties intend that this stipulation set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

A client hired Respondent for a domestic relations matter involving custody issues. After the issuance of a custody evaluation report, the client and Respondent discussed obtaining a second expert opinion, so Respondent asked for the evaluator's file. When Respondent had not received the evaluator's file with the trial date approaching, Respondent moved for a continuance.

In a court status conference on May 9, 2018, regarding Respondent's motion for continuance, when Respondent stated that his client had not hired a second opinion expert, the court delayed granting Respondent's motion. At a follow up conference on May 11, 2018, after Respondent reported that an expert had been hired, the court granted the continuance and the trial was reset to August 7, 2018.

After May 11, 2018, the client made at least ten unsuccessful attempts to communicate with Respondent about the status of the case. After May 11, 2018, Respondent communicated with his client once, but did not do any other work on the client's matter. On July 9, 2018, because he had not heard from Respondent and with the trial approaching, the client hired new counsel.

Violations

6.

Respondent admits that by ceasing work on client's matter, by failing to respond to his client's inquiries, and by failing to explain that he was no longer working on client's matter, thus preventing his client from making informed decisions about the representation, he violated RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

Sanction

7.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duty to his client by failing to diligently attend to his matter, and also by failing to communicate with him in a timely and effective manner. ABA Standard 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. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Respondent acted knowingly in his violations of his duties.
- c. **Injury.** Injury can be either actual or potential under the ABA Standards. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). The client suffered actual injury through Respondent's failure to advance the client's case. 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, 546-47, 9 P3d 107 (2000). Relatedly, the client was forced to retain different counsel to complete the case. The client also suffered actual injury in the form of the anxiety and frustration that he experienced as the result of Respondent's failure to adequately communicate with him or work on client's matter. *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 ABA Standards); *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
1. Multiple offenses. ABA Standard 9.22(d).
 2. Refusal to acknowledge wrongful nature of conduct. ABA Standard 9.22(g).
 3. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent had practiced for fifteen years at the time of these events.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary history. ABA Standard 9.32(a).
 2. Cooperative attitude toward proceedings. ABA Standard 9.32(e).

8.

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. ABA Standard 4.42.

9.

Oregon case law supports the imposition of a suspension. The presumption is that neglect of a client's legal matter typically results in a 60-day suspension. *See In re Redden*, 342 Or 393, 401, 153 P3d 113 (2007) (court so concluded after reviewing similar cases). Similar sanctions have been imposed in cases involving neglect and failure to communicate. *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004) (imposing a 60-day suspension for neglect, including failing to adequately communicate with clients); *In re LeBahn*, 335 Or 357, 67 P3d 381 (2003) (imposing 60-day suspension where attorney filed lawsuit on last day before statute of limitations ran, failed to effect timely service, which caused the court to dismiss the case, and then failed to inform his client of the dismissal for more than one year).

5.10.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for sixty days for violating RPC 1.3, RPC 1.4(a), and RPC 1.4(b), the sanction to be effective June 10, 2020.

11.

Respondent 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, Respondent has arranged for David T. Johnson, Law Office of David Johnson, 117 Commercial Street NE, Suite 275, Salem, OR 97301, an active member of the Bar, to either

take possession of or have ongoing access to Respondent's client files and serve as the contact person for clients in need of the files during the term of his suspension. Respondent represents that David T. Johnson has agreed to accept this responsibility.

12.

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

13.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

14.

Respondent 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 Respondent is admitted: none.

15.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on March 7, 2020. 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 3rd day of June 2020.

/s/ Matthew L. Sowa

Matthew L. Sowa, OSB No. 034617

EXECUTED this 4th day of June 2020.

OREGON STATE BAR

By: /s/ Stacy R. Owen

Stacy R. Owen, OSB No. 074826

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-110
)
STEFANIE L. BURKE,)
)
Respondent.)

Counsel for the Bar: Samuel Leineweber

Counsel for the Respondent: Wayne Mackeson

Disciplinary Board: None

Disposition: Violation of RPC 8.4(a)(4). Stipulation for Discipline.
Public reprimand.

Effective Date of Order: June 18, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Stefanie Burke (Respondent) and the Oregon State Bar, and good cause appearing,

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

DATED this 18th day of June, 2020.

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

STIPULATION FOR DISCIPLINE

Stefanie Burke, attorney at law (Respondent), and the Oregon State Bar (Bar) hereby stipulate to the following 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 2003, and has been a member of the Bar continuously since that time. Respondent's office and place of business is in Jackson County, Oregon.

3.

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

4.

On September 7, 2019, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 3.4(c) and RPC 8.4(a)(4) of the Oregon Rules of Professional Conduct. On October 14, 2019, a formal complaint was filed against Respondent pursuant to the authorization of the (SPRB), alleging violations of RPC 3.4(c) 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.

Respondent represented the Wife in a marital dissolution proceeding. On Wife's behalf, Respondent sought discovery from Husband's former employer, PRS Management, Inc. (PRS), of documents relevant to the termination of Husband's employment. Husband and his counsel at the time, Lynn Myrick (Myrick), sought a protective order preventing dissemination of Husband's employment records beyond Respondent's law office. Husband was particularly concerned that his and Wife's son not view the records.

Myrick prepared a protective order, to which Respondent stipulated on behalf of Wife, and which the court signed in June 2018. The protective order provided that all materials and information Husband provided relating to his employment with PRS shall be considered "confidential material," and that all confidential material "shall not be shown to, given to, discussed with, or otherwise disclosed to any person other than Wife's attorney of record, experts retained by Wife's attorney of record, and Wife, except the confidential material must

be reviewed by her only in her attorney's office, and shall not be removed by Wife from that office." Wife was provided with a copy of the protective order shortly after it was signed.

In October 2018, Respondent issued a subpoena duces tecum to PRS requesting a copy of Husband's employee file. In November 2018, PRS's counsel, Dave Riewald (Riewald), asked Respondent to confirm her agreement that the protective order would apply to any information and documents PRS provided to her. By email dated November 9, 2018, Respondent agreed. That same day, Riewald emailed the records to Respondent, and Respondent emailed copies to John C. Howry (Howry), Husband's attorney (who had substituted in for Myrick on November 8, 2018). Respondent then routinely forwarded to her client, the Wife, a copy of the email that Respondent had just sent to Howry, not having the protective order in mind when she did so. Thus Respondent delivered the confidential documents to her client in violation of the order. Approximately one month later Husband informed Howry that wife had shown the documents to the parties' teenage son.

Violations

6.

Respondent admits that she had an obligation to understand and abide by the terms of the stipulated protective order entered by the court. Respondent violated the protective order by sending her client prohibited discovery documents, causing harm to the litigants and requiring the expenditure of additional court time and resources, thereby engaging in conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

Upon approval of this stipulation, the parties agree that the charge of violation of RPC 3.4(c) shall be dismissed.

Sanction

7.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated her duty owed to the legal system. ABA Standard 6.0.
- 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. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious

objective or purpose to accomplish a particular result. *Id.* “Negligence” is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Respondent was negligent in failing to be aware of the specific terms of the protective order when she disseminated documents covered by said order.

- c. **Injury.** By delivering documents to her client in violation of a court order, Respondent exposed her client to sanctions for a discovery violation, and caused Husband, the opposing party, embarrassment and expense in the form of attorney fees incurred in moving for discovery sanctions. The court was also required to expend judicial resources to review and rule on the sanctions motion.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 - 1. Substantial experience in the practice of law. ABA Standard 9.22(j). Respondent was licensed to practice in Oregon in 2003.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 - 1. Absence of prior disciplinary record. ABA Standard 9.32(a).
 - 2. Absence of dishonest or selfish motive. ABA Standard 9.32(b).

8.

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, reprimand is generally appropriate. ABA Standard 6.23.

9.

The following prior Oregon cases, all resulting in public reprimands, suggest that sanction is appropriate here. *In re Scott J. Rubin*, 25 DB Rptr 13 (2011), the Bar stipulated to a reprimand when an attorney violated a protective order issued in one proceeding by filing a motion in a separate proceeding describing information that the protective order deemed confidential. *In re James Dodge*, 22 DB Rptr 271 (2008) resulted in a stipulated public reprimand where, following a failed mediation in which attorney represented a client seeking workers compensation benefits from his employer, attorney disclosed to a BOLI investigator who was looking into the client’s related administrative claims confidential mediation communications about settlement offers.

6.10.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be publicly reprimanded for violation of RPC 8.4(a)(4), the sanction to be effective immediately after this stipulation is approved.

11.

In addition, on or before September 15, 2020, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$367, incurred for Respondent's deposition. Should Respondent fail to pay \$367 in full by September 15, 2020 the Bar may thereafter, without further notice to her, obtain a judgment against Respondent for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

12.

Respondent acknowledges that she is subject to the Ethics School requirement set forth in BR 6.4 and that failure to complete the requirement timely under that rule may result in her suspension.

13.

Respondent 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 Respondent is admitted: California.

14.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 8, 2020 . 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 June, 2020.

/s/ Stefanie Burke
Stefanie Burke, OSB No. 032783

APPROVED AS TO FORM AND CONTENT:

/s/Wayne Mackeson
Wayne Mackeson, OSB No. 823269
Attorney for Respondent

EXECUTED this 15th day of June, 2020.

OREGON STATE BAR

By: /s/ Samuel Leineweber
Samuel Leineweber, OSB No. 123704
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of)	Case No. 19-60
)	SC S067768
TIMOTHY MPM PIZZO,)	
)	
Respondent.)	

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: Jon S. Henricksen

Disciplinary Board: None

Disposition: Violation of RPC 1.1, RPC 1.3, RPC 1.4(a),
RPC 1.4(b), RPC 8.1(a)(2), and RPC 8.4(a)(4).
Stipulation for Discipline. 9-month suspension.

Effective Date of Order: November 24, 2021

ORDER ACCEPTING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court accepts the Stipulation for Discipline. Effective on November 24, 2021, respondent is suspended from the practice of law in the State of Oregon for a period of nine months. All other terms and conditions recited in the parties' Stipulation for Discipline apply.

/s/ Martha L. Walters
 Martha L. Walters
 Chief Justice, Supreme Court
 7/2/2020 11:50 AM

STIPULATION FOR DISCIPLINE

Timothy MPM Pizzo, attorney at law (Respondent), and the Oregon State Bar (Bar) hereby stipulate to the following matters pursuant to Bar Rule of Procedure (BR) 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 22, 1996, and has been a member of the Bar continuously since that time, having his office and place of business in Columbia County, Oregon.

3.

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

4.

On September 9, 2019, the Bar filed a formal complaint against Respondent, pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.1(a)(2), and RPC 8.4(a)(4), 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.

Respondent was hired by Gregory G. Lynn (Lynn) to represent him as petitioner in a custody and parenting time proceeding. Lynn had filed a petition *pro se* styled *Gregory G. Lynn vs. Shandel R. Abrams* in Wasco County Circuit Court, Case No. 18DR08953 (Lynn suit) on April 26, 2018. On June 5, 2018, Respondent initially appeared on Lynn's behalf in the Lynn suit by filing a First Amended Petition to Establish Child Custody, Supervised Parenting Time and Child Support, and Petitioner's Motion for a Show Cause Hearing for Pendente Lite Orders of Custody, Parenting Time, and Child Support. Having entered an appearance, Respondent thereafter was the recipient of notices generated through the court's email system pertaining to the Lynn suit.

6.

Respondent failed to participate in telephonic status conferences scheduled for November 26, 2018 and January 9, 2019, despite having received notice of each conference from the court through its electronic mail system.

7.

On January 9, 2019, the court set trial in the Lynn suit for March 11, 2019. The court notified Respondent of the trial setting through its electronic mail system.

8.

On February 26, 2019, the court scheduled a hearing for February 28, 2019 to hear a motion to compel filed by the opposing party in the Lynn suit. Although Respondent received, and viewed, the court's electronic notice of the setting the same day it was sent, he failed to appear at the hearing or to answer his telephone when a court employee sought to contact him at the time of the hearing. As a result of that hearing, an order compelling production of the requested documents and awarding the opposing party's attorney's fees was entered against Lynn. Notice of entry of the order was sent to Respondent electronically. Respondent viewed the signed order compelling production and awarding attorney's fees, but did not share the order or its requirements with Lynn.

9.

The court also electronically sent to Respondent an additional notice of the March 11, 2019, trial setting; however, the court's system did not detect that Respondent viewed that document. Neither Respondent nor Lynn appeared for trial on March 11, 2019, and judgment was entered against Lynn. The opposing party's attorney in the Lynn suit informed the court that she had tried multiple times without success to contact Respondent prior to the trial date.

10.

Respondent did not inform Lynn of: the telephonic hearings that were scheduled; Respondent's failure to attend the hearings; the entry of the order compelling production of documents and granting the opposing party's attorney's fees against Lynn; or the date for the trial setting. Lynn only learned of the entry of judgment in the opposing party's favor well after the fact from the opposing party, not Respondent. When Lynn found and confronted Respondent, he claimed not to have received the various court notices, asserted that his phone had been stolen, and advised Lynn to get a new lawyer.

11.

In April 2019, Disciplinary Counsel's Office (DCO), a disciplinary authority, sent a letter forwarding to Respondent a grievance from Judge John A. Wolf regarding Respondent's conduct relating to the Lynn suit, and requested his response to questions posed in the letter by May 16, 2019. The letter was sent by first class mail to Respondent's physical address on file with the Bar and via email to his record email address on file with the Bar. The letter was not returned as undeliverable and the email was not rejected as undeliverable. On May 20, 2019, when Respondent had not responded to DCO's correspondence, DCO filed a petition for suspension of Respondent's law license pursuant to BR 7.1. Respondent was personally served with the petition, declaration, a copy of the April 25, 2019, letter requesting a response to Judge

Wolf's grievance, a notice to respond, and a proposed order of suspension pursuant to BR 7.1. Respondent did not respond and was suspended pursuant to BR 7.1 on June 10, 2019.

Violations

12.

Respondent admits that, by failing to appear for hearings on Lynn's behalf, and failing to inform Lynn of the developments that occurred in the matter, he failed to provide competent representation to Lynn, neglected Lynn's legal matter, failed to keep Lynn reasonably informed about the status of his matter, and failed to sufficiently communicate with Lynn to allow him 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). Respondent further admits that he engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4) when he failed to appear for scheduled court hearings, and caused harm to his client and the court as a result. Finally, Respondent admits that his failure to respond to DCO in its investigation of Judge Wolf's grievance constituted a knowing failure to respond to a lawful demand from a disciplinary authority, in violation of RPC 8.1(a)(2).

Sanction

13.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duties of competence and diligence to his client, which includes the duty to timely and effectively communicate with his client. ABA Standards 4.4; 4.5. The Standards presume that the most important ethical duties are those which lawyers owe to their clients. ABA Standards at 5. Respondent also violated his duty to the legal system to avoid abuse of the legal process, and his duty to the profession to timely and fully respond to inquiries from the Bar. ABA Standards 6.2; 7.0.
- b. **Mental State.** The ABA Standards recognize three mental states. The most culpable mental state is that of "intent," when the lawyer acts with the conscious objective or purpose to accomplish a particular result. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. *Id.* "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent was negligent in failing to provide competent representation, communicate with Lynn, and timely attend to Lynn’s legal matter. Respondent also acted negligently when he missed the March trial because he had not viewed the court notices.

By contrast, Respondent acted knowingly when he failed to appear for court proceedings after having viewed the court’s notices. Respondent knowingly failed to cooperate with the Bar’s investigation where he failed to respond even after he received the Bar’s correspondence requesting his response to Judge Wolf’s grievance and was personally served with the Bar’s Petition for BR 7.1 Suspension.

- c. **Injury.** Both the court and Lynn were actually injured as a result of Respondent’s inaction and lack of communication. Respondent’s conduct adversely affected Lynn’s parenting time and rights with his son, and wasted the court’s time and resources. Additionally, Lynn was required to pay a portion of the opposing party’s attorney’s fees as a result of Respondent’s conduct. Finally, Respondent’s failure to respond to the Bar delayed the Bar’s investigation and resolution of the grievance, thereby causing actual injury to both the legal profession and the public. *See In re Miles*, 324 Or 218, 222, 923 P2d 1219 (1996) (failure to cooperate harmed the profession and the public “because [the lawyer] delayed the Bar’s investigation and, consequently, the resolution of her clients’ complaints”).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Prior discipline. ABA Standard 9.22(a). Respondent was admonished for neglect in 2000. In 2016 he stipulated to a public reprimand for neglect of a legal matter and inadequate client communication. *In re Pizzo*, 30 DB Rptr 371 (2016). Most recently, the Disciplinary Board suspended Respondent for two years. *In re Pizzo*, 33 DB Rptr 439 (2019). Because Respondent’s misconduct in the present matter predated the imposition of the 2019 suspension, its weight in aggravation is diminished. *See In re Kluge*, 335 Or 326, 351, 33 P3d 492 (2003) (fact that accused lawyer not sanctioned for offenses before committing the offenses at issue in current case diminishes weight of prior offense).
 2. Selfish motive. ABA Standard 9.22(b). Respondent acted with a selfish motive when he failed to respond to DCO’s inquiries.
 3. Multiple offenses. ABA Standard 9.22(d).
 4. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been licensed in Oregon since 1996.

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Personal problems. ABA Standard 9.32(c). At the time of the misconduct, Respondent was suffering from personal health issues.

14.

The ABA Standards provide that a reprimand is generally appropriate when a lawyer demonstrates a failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client. ABA Standard 4.53. A suspension is generally appropriate when a lawyer either knowingly fails to perform services for a client, or engages in a pattern of neglect, and causes injury or potential injury to a client as a result. ABA Standard 4.42. Similarly, a suspension is generally appropriate when a lawyer knowingly 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. ABA Standard 6.22. Finally, a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. ABA Standard 7.2.

Overall, a suspension of some duration is appropriate in this matter. On balance, Respondent's aggravation outweighs his mitigation in number and weight, which would support an increase in the length of suspension imposed.

15.

Prior Oregon cases indicate that a substantial period of suspension is appropriate for Respondent's cumulative misconduct where it involves incompetence, neglect of a legal matter, failing to communicate with clients, failing to respond to the Bar's investigation, and engaging in conduct prejudicial to the administration of justice. There are no cases involving the exact same rule violations as those found in this matter, and the court has noted that "[c]ase-matching in the context of disciplinary proceedings is an inexact science." *In re Stauffer*, 327 Or 44, 70, 956 P2d 967 (1998).

Failure to provide competent representation and engaging in conduct prejudicial to justice warrants a suspension. *See e.g., In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (Respondent suspended for 60 days for knowingly engaging in conduct prejudicial to the administration of justice and negligently providing incompetent representation where Respondent represented the conservator of an estate and failed to comply with applicable procedural and substantive rules, failed to handle substantive issues, and failed to give the requisite attention to the case).

In several cases, the court has imposed a presumptive sanction of at least 60 days for freestanding neglect. *See In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (60-day suspension was appropriate for each of attorney's neglect and his failure to cooperate with the Bar); *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension imposed for single serious neglect despite that young, inexperienced lawyer had no prior discipline); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (attorney who failed to move a client's case forward, despite several

warnings from the court and a court directive to schedule arbitration by a date certain, was suspended for 120 days, where his neglect resulted in the court granting the opposing party's motion to dismiss); *In re Knappenberger*, 340 Or 573, 135 P3d 297 (2006) (court will generally impose a 60-day suspension when a lawyer knowingly neglects a client's legal matter).

The court typically imposes some term of suspension for lapses in communication. *See, e.g., In re Koch*, 345 Or 444, 198 P3d 910 (2008) (attorney suspended for 120 days where she failed to advise her client that another lawyer would prepare a qualified domestic relations order for the client, and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter); *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006) (three-month suspension, plus formal reinstatement, was appropriate for attorney appointed to handle a client's appeal, who took no action and failed to disclose the ultimate dismissal to the client).

The court has also consistently imposed a suspension of at least 60 days where a lawyer failed to cooperate in a Bar investigation. *In re Miles*, 324 Or at 222-223 (120-day suspension for two instances where Respondent failed to cooperate in the Bar's investigation).

Attorneys who engaged in conduct prejudicial to the administration of justice by missing court hearings have also been suspended. *In re Carini*, 354 Or 47, 308 P3d 197 (2013) (30-day suspension where Respondent engaged in conduct prejudicial to the administration of justice by repeatedly failing to appear at court hearings, and the fact that missed appearances occurred in different matters did not negate the cumulative prejudicial effect); *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (120-day suspension arising out of Respondent's representation of a client in a dissolution-of-marriage proceeding, where Respondent 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 the arbitration after a second referral to arbitration by the court).

In total, Respondent's collective misconduct would warrant a suspension of 180 days at a minimum, and when considered in light of Respondent's prior, similar discipline and other aggravating factors, a nine-month suspension is an appropriate sanction to address Respondent's misconduct.

16.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for nine months for violation of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.1(a)(2), and RPC 8.4(a)(4), the sanction to be effective November 24, 2021, the day after the end date (November 23, 2021) of Respondent's current two-year suspension.

17.

In addition, on or before May 31, 2020, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$861.68, incurred for service by publication costs. Should Respondent fail to pay \$861.68 in full by May 31, 2020, the Bar may thereafter, without further notice to him, obtain a judgment against Respondent 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.

Respondent 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, Respondent represents that he has no active or open client files, and does not have possession of any open client files. Respondent's closed client files are in a locked storage facility.

19.

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

20.

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

21.

Respondent 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 Respondent is admitted: none.

22.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on January 25, 2020. 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 21st day of May, 2020.

/s/ Timothy MPM Pizzo

Timothy MPM Pizzo
OSB No. 961709

APPROVED AS TO FORM AND CONTENT:

/s/ Jon S. Henricksen

Jon S. Henricksen, OSB No. 731351
Counsel for Respondent

EXECUTED this 28th day of May, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel

Courtney C. Dippel, OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-54
)
LEONARD R. BERMAN,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 7.3(a), RPC 7.3(b), and RPC 7.3(c).
Stipulation for Discipline. Public Reprimand.

Effective Date of Order: July 6, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Berman is publicly reprimanded for violation of RPC 7.3(a), (b), and (c).

DATED 6th day of July, 2020.

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

STIPULATION FOR DISCIPLINE

Leonard R. Berman, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 23, 1996, and has been a member of the Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

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

4.

On December 20, 2019, a formal complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB), alleging violation of former RPC 7.3(a), RPC 7.3(b), and RPC 7.3(c) of the Oregon Rules of Professional Conduct. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In 2016, Respondent obtained access to the Coffee Creek Correctional Facility (CCCF) former inmate Facebook community through a client who was a member. Respondent posted messages on the page that were intended to solicit professional employment by former inmates regarding potential civil claims against one or more CCCF employees. Respondent's posts on the Facebook page for former CCCF inmates were not labeled as advertising material and contained misleading information, such as, "[t]he State is talking settlement in the CCCF/Dr. Snider filed matter. Come forward now or forever hold your peace..."

6.

Respondent sought to communicate with the former CCCF inmates because he knew that they were in need of legal services with respect to potential claims against a CCCF agent with whom they came into contact while they were CCCF inmates.

7.

In or around the second half of 2016, Respondent also mailed communications intended to solicit legal business to various inmates then incarcerated at CCCF. The communications were labeled at the top, "LEGAL NOTICE TO ALL CCCF FEMALE INMATES." They did not contain the word "Advertisement" and asserted, "You were randomly selected for this Notice."

8.

Respondent subsequently telephoned some of the inmates to whom he had mailed the letter described in paragraph 7 above and who had not responded to the letter, and solicited professional employment. None of these inmates had previously contacted Respondent by telephone or by any other means. None of the inmates Respondent contacted by telephone were lawyers or persons with whom Respondent had a family, close personal, or prior professional relationship.

9.

One inmate, Camellia Forness (Forness), notified Respondent in writing that she did not want his professional services. Despite receiving this letter from Forness, Respondent visited Forness in prison and attempted in person to solicit professional employment.

10.

Forness asked a third party, Robert Hake (Hake), to contact Respondent to reiterate her desire not to employ Respondent. Respondent asked Hake to attempt to persuade Forness to accept his professional services. Thereafter, Hake felt it necessary to contact Respondent a second time to convince him to stop contacting Forness to solicit professional employment.

11.

In engaging in all the communications described in paragraphs above, Respondent was significantly motivated by pecuniary gain.

Violations

12.

Respondent admits that, by engaging in the conduct described in paragraphs 5 through 11 above, he violated former RPC 7.3(a), RPC 7.3(b), and RPC 7.3(c).

Sanction

13.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duty as a professional to avoid improper solicitation of employment and misleading advertisement. ABA 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. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Respondent knowingly engaged in the conduct described above, i.e. with the conscious awareness of the nature of his conduct, but without the conscious objective or purpose to mislead those former inmates with whom he had contact or to expose them to adverse consequences. Moreover, Respondent negligently relied upon a comment from a federal court judge as to whether he was permitted to contact CCCF inmates directly as he did. ABA Standards at 7.
- c. **Injury.** Most of the former and current inmates who Respondent contacted suffered no actual injury from their contacts with Respondent, but were exposed to the potential for retribution from CCCF employees. Forness suffered actual injury in the aggravation and frustration caused by Respondent's repeated attempts to persuade her to employ him. *In re Obert*, 352 Or 231, 260, 282 P3d 825 (2012).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Selfish motive. ABA Standard 9.22(b).
 2. Pattern of misconduct. ABA Standard 9.22(c).
 3. Vulnerability of the victims. ABA Standard 9.22(h).
 4. Substantial experience in the practice of law. Respondent has been a member of the Bar since 1996. ABA Standard 9.22(i).

- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. ABA Standard 9.32(a).
 2. Absence of a dishonest motive. ABA Standard 9.32(b.)
 3. Full disclosure to Disciplinary Counsel's Office and cooperative attitude toward these proceedings. ABA Standard 9.32(e)

14.

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

15.

Oregon case law is in accord. See, *In re Idiart*, 19 DB Rptr 316 (2005) [lawyer reprimanded for violation of RPC 5.3(b), RPC 7.3 (b)(1) and RPC 8.4(a)(1) for having his employee contact victims of motor vehicle accidents within days after the accidents occurred]; *In re Fellows*, 9 DB Rptr 197 (1995) [lawyer reprimanded for violation of former DR 2-101(A) and (C) and former DR 2-103(C)(4) for publishing a misleading Yellow Pages advertisement]; and *In re Smith*, 9 DB Rptr 79 (1995) [lawyer reprimanded for violation of former DR 2-101(A) and (E), and former DR 6-102(A) for publishing a misleading Yellow Pages advertisement].

16.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be reprimanded for violation of RPC 7.3(a), (b), and (c).

17.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

18.

Respondent 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 Respondent is admitted: Washington.

19.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 6, 2020. 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 23rd day of June, 2020.

/s/ Leonard R. Berman
Leonard R. Berman, OSB No. 960409

EXECUTED this 29th day of June, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel
Courtney C. Dippel, OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-111
)
JOHN A. WALSH,)
)
Respondent.)

Counsel for the Bar: Courtney C. Dippel

Counsel for the Respondent: Andrew C. Balyeat

Disciplinary Board: None

Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and
RPC 1.8(a). Stipulation for Discipline. 30-day
suspension.

Effective Date of Order: August 7, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Walsh is suspended for 30 days, effective August 7, 2020, for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.8(e).

DATED this 5th day of August, 2020.

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

STIPULATION FOR DISCIPLINE

John A. Walsh, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 13, 2011, and has been a member of the Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

Respondent 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 20, 2019, a formal complaint was filed against Respondent 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 1.8(e) 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 March 2015, Respondent undertook to represent Patsy Cowan (Cowan) in a personal injury matter arising from a motor vehicle accident. Respondent sent a settlement demand letter to the adverse carrier on August 31, 2016 and subsequently provided medical records, bills and records detailing Cowan's lost wages. The adverse carrier requested tax returns to support the lost wage claim. Cowan did not produce them. In October 2015, Respondent suffered a stroke, which left him blind in one eye. While rehabilitating from this stroke, Respondent filed a complaint on February 23, 2017, before the statute of limitations ran, and served the defendant with a summons and a copy of the complaint.

6.

After the answer was filed, Respondent began to suffer some health problems, and asked defense counsel not to pressure him to move the case along. In December 2017, Respondent suffered a second major stroke, which deprived him of the ability to speak and to use his facial muscles. He advised opposing counsel of his condition, but was too proud to tell Cowan.

7.

After filing and serving the complaint, Respondent neglected Cowan's case. He filed no further pleadings, conducted no discovery and did not attempt any settlement negotiations, despite Cowan's repeated requests that he do so.

8.

Cowan eventually terminated Respondent and secured replacement counsel by September 2018. Cowan later settled her claim with the adverse carrier. Throughout Respondent's representation, he did not keep Cowan apprised of the progress of the case and did not respond to most of her reasonable requests for information. Additionally, Respondent told Cowan that he was working on the matter between January and March 2018, when he took no action for several months before and after that time. Respondent did not explain events in the case, or the fact that he was not moving the case along due to his health condition, to the extent reasonably necessary to permit Cowan to make informed decisions regarding the representation.

9.

In the accident, Cowan injured one of her front teeth. Her dentist extracted the tooth but would not replace it because Cowan had not paid him for the extraction. It was upsetting for Cowan to be missing a front tooth, and she complained to Respondent. Respondent ultimately paid Cowan's dental bill so she could have her tooth replaced. He believed that because the injury to Cowan's tooth was caused by the accident, and her dental bill would be recovered as an element of damages, it was an expense of litigation that he was permitted to advance under RPC 1.8(e)(2). Respondent was not reimbursed for the dental bill or filing fee advanced on behalf of Cowan.

Violations

10.

Respondent admits that, by engaging in the conduct described above, he neglected a legal matter entrusted to him in violation of RPC 1.3; failed to keep a client reasonably informed and promptly respond to requests for information in violation of RPC 1.4(a); failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of RPC 1.4(b); and provided impermissible financial assistance to a client in violation of RPC 1.8(e).

Sanction

11.

Respondent 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*

(ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duty of diligence to his client, which includes the duty to appropriately communicate with his client. ABA Standard 4.4.
- b. **Mental State.** Under the ABA Standards, knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standards at 7. While Respondent did know that he had had strokes, his medical condition compromised his judgment about whether he should go forward with Cowan's case, and thus he acted with a negligent mental state.
- c. **Injury.** Respondent's inaction caused Cowan frustration and anxiety, but it did not compromise her legal claim. ABA Standard 3.0.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Multiple offenses. ABA Standard 9.22(d); and
 2. Substantial experience in the practice of law. ABA Standard 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. ABA Standard 9.32(a);
 2. Absence of a dishonest or selfish motive. ABA Standard 9.32(b); and
 3. Physical disability. ABA Standard 9.32(h).

12.

Under the ABA Standard 4.42, suspension is generally appropriate when the lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. ABA Standard 4.43.

13.

Oregon case law suggests that some amount of suspension is warranted. *See, In re Redden*, 342 Or 393, 153 P3d 113 (2007) [lawyer suspended for 60 days for neglect of a legal

matter]; and *In re Carstens*, 17 DB Rptr 46 (2003) [lawyer suspended for 30 days for violation of former DR 5-101(A) [lawyer's self-interest conflict], Former DR 5-103(B) [advancing financial assistance to a client], and former DR 5-105(C) [former client conflict of interest]].

While a neglect violation alone generally warrants a 60-day suspension, Respondent's medical condition and the attempts he made to protect Cowan's interests (including paying her dental bill), warrant significant consideration as mitigating factors, suggesting that a downward departure is appropriate.

14.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for 30 days for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 1.8(e), the sanction to be effective August 7, 2020.

15.

Respondent 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, Respondent represents that he has one active client, and has arranged for the Professional Liability Fund to take possession of or have ongoing access to Respondent's client file and serve as the contact person for clients in need of the files during the term of his suspension. Respondent represents that the Professional Liability Fund has agreed to accept this responsibility.

16.

Respondent 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. Respondent 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.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

18.

Respondent 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 Respondent is admitted: Washington.

19.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on June 6, 2020. 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 4th day of August, 2020.

/s/ John A. Walsh
John A. Walsh, OSB No. 112851

APPROVED AS TO FORM AND CONTENT:

/s/ Andrew C. Balyeat
Andrew C. Balyeat, OSB No. 951927

EXECUTED this 5th day of August, 2020.

OREGON STATE BAR

By: /s/ Courtney C. Dippel
Courtney C. Dippel, OSB No. 022916
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-58
)
THOMAS DANIEL O'NEIL,)
)
Respondent.)

Counsel for the Bar: Eric J. Collins

Counsel for the Respondent: None

Disciplinary Board: Mark A. Turner, Adjudicator
Lorena M. Reynolds
Fadd E. Beyrouthy, Public Member

Disposition: Violation of RPC 3.4(c), RPC 8.1(a)(2), and RPC
8.4(a)(4). Trial Panel Opinion. 60-day suspension.

Effective Date of Opinion: Final September 24, 2020, effective October 24, 2020

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged respondent, Thomas Daniel O'Neil, with violating Oregon Rules of Professional Conduct (RPC) 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), 8.4(a)(4) (conduct prejudicial to the administration of justice), and 8.1(a)(2) (failure to respond to a lawful demand for information from Disciplinary Counsel's Office (DCO)). Respondent failed to obey a subpoena to appear as a witness at a post-conviction relief (PCR) trial involving a former client. After failing to appear, respondent refused to cooperate with his former client's new attorney, causing the attorney to continue the proceeding. The former client's new attorney complained to the Bar and an investigation ensued. Respondent failed for an extended time to provide substantive responses to inquiries from DCO. He answered only after he was administratively suspended and did so only after repeated requests for complete responses from DCO. The Bar asked us to impose a 60 to 90 day suspension.

Trial took place on July 8, 2020 before a panel consisting of the Adjudicator, Mark A. Turner, the attorney member, Lorena Reynolds, and the public member, Fadd Beyrouthy. The Bar appeared through counsel, Eric Collins. Respondent appeared *pro se*.

Respondent did not seriously challenge the truth of the allegations. Instead, his argument centered on his contention that his testimony was not relevant or necessary in the

PCR trial and that his practice would be significantly impaired if he were suspended. He also argued that his administrative suspension for failure to respond to the Bar should be credited to him now to offset the proposed suspension. He contended that the appropriate sanction would be a public reprimand.

As discussed below, after considering the evidence and argument offered at trial, we conclude that the Bar proved the alleged violations by clear and convincing evidence. Respondent provided no precedent, and we are aware of none, that treats an administrative suspension as the equivalent of “time served.” The case law in this state is clear that the violations proved here require a suspension to deter future misconduct and protect the public. We suspend respondent for a period of 60 days, commencing 30 days after this opinion becomes final.

FACTS AND VIOLATIONS

Respondent did not contest most of the relevant facts, stating: “I’m perfectly willing to admit and stipulate to whatever the bar wants me to stipulate to in order to avoid that suspension. Knowing what I know now, if I had been able to talk with the bar last year -- yes, I would have done things differently.” Tr. at 19. And, “Fine. I did wrong. I did not answer in the timely fashion that I was supposed to, but I paid one heck of a price for that as we’re going along.” Tr. at 109. A summary of the facts, however, will clarify our reasons for imposing a suspension in this matter.

Failure to comply with a subpoena.

Respondent was appointed to represent a criminal defendant, Jose Moreno, in 2012 in a case involving sexual abuse allegations. Respondent withdrew from the case before trial when Moreno retained attorney James Susee. Susee represented Moreno at a stipulated facts trial. Susee discontinued the representation prior to sentencing. Respondent was then reappointed to the case and represented Moreno at sentencing. Moreno was sentenced to 150 months in prison.

Attorney Teri Herivel was subsequently appointed to represent Moreno on a PCR petition for ineffective assistance of counsel. Moreno’s PCR claim raised issues involving both Susee and respondent.

Herivel believed respondent’s testimony was relevant to Moreno’s claim, in particular as it related to a conversation Moreno claimed he had with respondent. Tr. at 32-33. Herivel hired a private investigator, Mary Mutschler, to serve a subpoena on respondent to testify at trial. Mutschler emailed respondent on September 24, 2018, advising him that Herivel intended to subpoena him for the PCR trial on October 23, 2018, that he could appear by telephone, and that his attendance would be required between 3:30 p.m. and 4:30 p.m. on that date.

On October 4, 2018, Mutschler again emailed respondent, providing the same information as her prior email to him. Mutschler also asked respondent to reply to her email to confirm receipt.

On October 10, 2018, Herivel emailed respondent, telling him that she would need his testimony earlier than 3:30. Herivel also asked respondent to reply to confirm that he was available for the trial and whether he would agree to accept service of the subpoena by email.

The following day, Mutschler emailed respondent, explaining that respondent had not confirmed his willingness to accept service of the subpoena via email so she would personally serve him.

Later that day, Mutschler called respondent to discuss accepting service of the subpoena by email. After the call, Mutschler sent an email to respondent confirming that he had agreed to accept service. She attached the subpoena to the email. It identified the trial date as October 23, 2018, and the time for respondent's appearance to be from 1:30 p.m. to 2:30 p.m. It stated that respondent could appear by phone.

On October 22, 2018, Herivel emailed respondent and Susee, reminding them of the PCR trial the following afternoon and asking for a phone number for the court to contact them for their testimony. A representative responded for Susee with a phone number. Respondent did not reply.

On October 23, 2018, respondent failed to appear to testify. At 2:50 p.m. on the afternoon of the trial, respondent emailed Herivel, stating, "Good lord! Just saw this e-mail. Don't have testimony on the calendar. I am available at 503-xxx-xxxx. tom" *Ex. 7*. Herivel was in court and did not see the email until later that day.

That evening, Herivel emailed respondent, explaining that the PCR court kept the record open an additional two weeks so she could obtain respondent's testimony via declaration or deposition. The court allowed the state to respond to the anticipated testimony within two weeks. Herivel also asked respondent for his availability. She received no response so she emailed respondent again on October 25, 2018, requesting a 10-minute phone call. Respondent did not reply.

Herivel then asked Mutschler to try to contact respondent. On November 12, 2018, Mutschler spoke to respondent by phone and asked him to call Herivel the next morning. Respondent did not do so.

Herivel complained to the PCR judge by letter dated November 15, 2018, stating that she had exhausted all avenues to bring respondent to trial and requested an appropriate remedy, including a finding of contempt. Herivel did not ask to keep the matter open for any additional time.

On November 16, 2018, respondent wrote a letter to the judge. He did not discuss his failure to appear, nor did he mention the subpoena. Instead, he complained that he did not know how many times he needed to tell Herivel and her investigator that he did not remember specifics about his former client Moreno's case. He then complained about Herivel and her investigator trying to set a time to speak to him about the matter rather than just asking him questions when they got in touch with him. The trial court imposed no penalty on respondent for failing to appear.

Failure to respond to DCO.

On December 12, 2018, Herivel complained to the Bar about respondent's conduct. Herivel noted that respondent's contract with the Office of Public Defense Services required him to cooperate with post-conviction attorneys. At trial, respondent testified that he was not aware of this, but did not contend that his lack of knowledge about the contract mitigated his failure to appear.

The complaint was transferred to DCO. Assistant Disciplinary Counsel Angela Bennett sent respondent a letter dated March 19, 2019, requesting his response to Herivel's complaint. She asked that he address six specific issues. Bennett's letter set a deadline of April 9, 2019, for a response. She also told respondent he could ask for an extension of time. The letter was sent by first class mail to respondent's record mailing address. It was also sent to respondent's record email address.

Respondent did not reply by the deadline. On April 10, 2019, the day after the deadline, respondent emailed Bennett. He did not address the issues DCO asked about, nor did he request additional time to respond. Instead, he wrote:

“Ms. Bennett. I am getting very tired of responding to the incompetency of Ms. Herivel. Do you know what a witness is? Ms. Herivel does not. Have you read anything I have sent to the Bar or the court? Ms. Herivel's complaints all relates [sic] to the clients trial which took place many weeks before I ever knew the client existed. In order to be a witness you have to have been in a position to perceive the events. Hello? Is this thing on? How can I be a witness to anything that transpired weeks before I even knew such was occurring? Ask me a relevant question and I'll gladly answer it. However, you might want to ask why Ms. Herivel does not know what a witness is or why you would call one to trial. Next, she is abusing process, harassing me and maliciously prosecuting a worthless claim with you. Now answer my questions. This is my complaint against her. Again, what is a witness, that is the question. When you can answer, in this circumstance, contact me and I'll be glad to answer. Tom ONeil” *Ex 16*.

On April 11, 2019, Bennett sent another letter to respondent. In it she told him that his email was not a substantive response. Bennett asked respondent to address her initial questions by April 15. The letter was again sent by first class mail to respondent's record mailing address, and by email to respondent's record email address. Respondent did not reply.

On April 23, 2019, Bennett filed a petition pursuant to BR 7.1 seeking respondent's immediate administrative suspension from practice for failure to respond to DCO's inquiry. DCO sent written notification of the petition to respondent. On May 2, 2019, respondent submitted a response to the petition. Instead of answering DCO's questions, respondent claimed that the Bar had no jurisdiction over him and that Herivel had no authority to subpoena him because he did not represent Moreno during the stipulated-facts trial.

On May 20, 2019, the Adjudicator rejected respondent's argument and issued an order administratively suspending respondent. The order stated the suspension would last until respondent responded to DCO's requests for information, which is the case with all BR 7.1

administrative suspensions. Full cooperation with DCO eliminates the suspension. The respondent always has the ability immediately to remedy the situation. Respondent acknowledged at trial that he had received the order.

He still did not respond to DCO, however, until June 27, 2019, and then not fully. Bennett continued to request clarification and additional explanation from respondent for several more weeks. Bennet believed the responses were incomplete and inaccurate. Respondent continued to express frustration, ending an email to Bennett on July 12, 2019, stating, "Is there some point where (Herivel) is going to answer any question, or you. I am becoming very frustrated as I can't get any answers and you aren't getting any answers from (Herivel). I retired in May but I am not going out on the nonsense uttered by Ms. Heirvel (sic). Thank you, tom."

Respondent's administrative suspension was apparently lifted some time in August of 2019 and he returned to practicing. At the time of trial, he testified he had several cases with trial dates pending.

ANALYSIS OF THE CHARGES

A. We find that respondent knowingly disobeyed a subpoena in violation of RPC 3.4(c).

RPC 3.4(c) provides: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."¹

The Bar proved by clear and convincing evidence that respondent knowingly failed to appear as a witness at trial despite being subpoenaed. He also refused to take any substantive steps to remedy that failure. The PCR court was a tribunal, and respondent did not openly refuse to obey based on an assertion that no valid obligation existed. Instead, he failed to appear or to communicate that he would not appear. It appears that he initially failed to calendar the appearance, even after receiving the subpoena and reminder emails. It was not until later that he began claiming that Herival had no authority to require his appearance.

Respondent testified that he did not recall the emails sent by Herivel and her investigator, but did not deny that he received them. He did not deny receipt of the email confirming that he had agreed to accept service. Respondent did not admit that he intentionally avoided testifying at the trial, but regardless of his views on the need for his testimony, respondent knowingly disobeyed the subpoena for purposes of the rule.

Neither side at trial mentioned the fact that respondent's remedy, if he disagreed with the need for him to appear at trial, was to seek to quash the subpoena. It is not acceptable for a

¹ "Knowingly" is defined by RPC 1.0(h), which states, in relevant part: "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question.... A person's knowledge may be inferred from the circumstances."

subpoenaed witness simply to fail to appear. That principle should apply even more forcefully when the witness is an attorney.

This was not a merely negligent failure to calendar the trial date. Respondent knew of his obligation to testify but did not appear. He did nothing to remedy his failure during the extra time allowed by the trial court. He ignored Herivel and her investigator's efforts to get his testimony another way. Respondent knowingly chose to disobey the subpoena in violation of RPC 3.4(c).

B. We find that respondent's conduct also violated RPC 8.4(a)(4).

"It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." RPC 8.4(a)(4). To prove a violation of this rule, the Bar must prove by clear and convincing evidence that a respondent did something he should not have done or failed to do something he should have done. *In re Haws*, 3310 Or 741, 748, 801 P2d 818 (1990). This must have occurred during the course of a judicial proceeding. *Id.* If the conduct consisted of a single act or failure to act, the Bar must prove that it caused substantial actual or potential harm to the administration of justice. If the lawyer engaged in several wrongful acts or omissions, the Bar need only prove that there was some actual or potential harm to the administration of justice. *Id.* "Administration of justice" includes the procedural functioning of a proceeding and the substantive interest of a party in the proceeding. *Id.* at 747. "A lawyer's conduct could have a prejudicial effect on either component or both." *Id.* The Bar is not required to prove any particular mental state to show a violation of the rule.

We find that respondent engaged in conduct that was prejudicial to the administration of justice when he failed to appear as a witness at trial despite being subpoenaed and when he failed to do anything to remedy that failure over the course of several weeks.

Respondent's conduct caused potential harm to the administration of justice. First, his failure appear at trial caused the trial record to remain open for Herivel to secure his testimony, potentially harming the procedural functioning of the court. The court also had to extend the time for the proceeding to give the state additional time to respond to the tardy anticipated testimony. The court left the matter open an additional month when the record would have otherwise been closed. Next, respondent's post-trial refusal to cooperate with Herivel ultimately caused her to petition the court for action to address respondent's lack of cooperation. The court then received the letter from respondent. Respondent's conduct burdened the trial court with a new dispute and required the trial court to engage in needless added work.

The Bar cited two cases in which, it argues, the Oregon Supreme Court found comparable conduct prejudicial to the administration of justice under the predecessor Disciplinary Rule. First, in *In re Meyer*, 328 Or 211, 214, 970 P2d 652 (1999), the court held that an accused lawyer's appearance at a DMV hearing on behalf of a client while under the influence of intoxicants sufficiently prejudiced the procedural functioning of the hearing process because it caused the rescheduling of the hearing. Second, in *In re Eadie*, 333 Or 42, 36, P3d 468 (2001), the court held that a lawyer's misrepresentation to a trial court that was intended to influence the judge to change the trial date harmed the procedural functioning of

the court because it created additional work for the court, both in resolving a dispute that resulted from the lawyer's misrepresentation but also in requiring the court to redraft an order. *Id.*

We find respondent's conduct here prejudiced the procedural functioning of the PCR court at least as much as the respondents in the two cited cases. We find that respondent's conduct was prejudicial to the administration of justice. The Bar proved by clear and convincing evidence that respondent violated RPC 8.4(a)(4).

C. Respondent's failure to adequately respond to the disciplinary investigation violated RPC 8.1(a)(2).

RPC 8.1(a)(2) provides: "A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6." RPC 8.1(a)(2). This rule requires full cooperation from a lawyer subject to a disciplinary investigation. *In re Schaffner*, 325 Or 421, 425, 939 P2d 39 (1997). Partial cooperation is not sufficient. *Id.*

Here respondent failed to make any substantive response to DCO despite repeated letters requesting one in March and April 2019. Instead, respondent chose to argue with DCO that he would not respond until Herivel could define the term "witness." Respondent's actions caused DCO to then seek an administrative suspension of respondent. After he was administratively suspended, he went more than a month before finally responding to the questions posed by DCO three months earlier. This hampered the Bar's ability to investigate the complaint.

The fact that respondent questioned the legitimacy of the charge did not relieve him of the obligation to respond. The Oregon Supreme Court rejects an attorney's deliberate disregard of the duty to fully cooperate with investigations. *See In re Schenck*, 345 Or 350, 367, 194 P3d 804 (2008), *adhered to on recons.*, 345 Or 652 (2009) (lawfulness of Bar's request for information does not depend on there being an actual violation). The Bar has authority to investigate when it has been presented with "an arguable complaint of misconduct." ORS 9.542; BR 2.5(b)(1); *see also, In re Paulson*, 346 Or 676, 689-90, 216 P3d 859 (2009), *adh'd to as modified on recons.*, 347 Or 529 (2010) (attorney's assertion that underlying complaint meritless was not a defense to charge of failure to respond to investigation even when complaint was dismissed after investigation).

The exception to the rule involving information protected by RPC 1.6 does not apply here. Accordingly, respondent's course of conduct violated RPC 8.1(a)(2).

SANCTION

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

ABA Standards

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

Duty Violated

Respondent had a duty to the legal system to avoid conduct that burdened the court with unnecessary work and that prejudiced the administration of justice. ABA Standard 6.2. Respondent also had a duty to the legal system to obey a subpoena. ABA Standard 6.2. Respondent finally had a duty of loyalty to his former client that required him to at least minimally cooperate with the former client's new counsel. ABA Standard 4.2.

When he failed to cooperate with DCO's investigation, respondent violated his duty to uphold the reputation of the profession. He violated his duty to the legal profession to respond to DCO's inquiries. ABA Standard 7.0. Respondent also violated his duty to the public because the disciplinary process serves to protect the public. ABA Standard 5.0.

Mental State

The ABA Standards recognize three mental states: "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards at 7.

As discussed earlier, we find that respondent acted knowingly when he failed to obey the subpoena. Although he testified that he initially forgot to put the appearance on his calendar, thus arguably making the initial failure to appear merely accidental, his failure to cooperate afterwards is what changes this from a possible case of neglect to a knowing refusal to appear. Respondent acted knowingly when he failed to cooperate with Herivel despite repeated requests to do so.

Respondent's failure to cooperate with the Bar inquiry was intentional, although misguided. Until his administrative suspension, he took the position that the Bar had no authority to require him to answer questions. He consciously chose not to engage with the Bar.

Extent of Actual or Potential Injury

For purposes of determining an appropriate sanction, we may consider both actual and potential injury. ABA Standards at 6. "The term 'injury' is broadly defined to encompass

'harm to a client, the public, the legal system or the profession which results from a lawyer's misconduct.'" *In re Sanai*, 360 Or 497, 539, 383 P3d 821 (2016); ABA Standards at 7.

The legal system was injured by respondent's misconduct. The trial court had to spend extra time and attention on Moreno's case due to respondent's failure to obey the subpoena and failure to cooperate with Herivel. Moreno was potentially injured. Herivel was never able to ascertain whether respondent's testimony would have aided his case. He was also potentially injured by the inability to present that testimony. The public was actually injured. Herivel was paid out of indigent defense funds. The extra time she spent trying to obtain respondent's testimony was paid for by the public.

Failure to respond to the Bar causes actual injury to the Bar and the legal profession. "The Bar's work of administering the profession and protecting the public with a relatively small staff depends to a significant degree on the honesty and cooperation of the lawyers whom the Bar regulates." *In re Wyllie*, 327 Or 175, 182, 957 P2d 1222 (1998).²

Presumptive Sanction

The following ABA Standards apply to the present case.

Suspension is generally appropriate when a lawyer knowingly violates a court order or rule and there is interference with a legal proceeding or injury or potential injury to a client or a party. ABA Standard 6.22.

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. ABA Standard 7.2.

The presumptive sanction here is a suspension. As noted, the Bar asks for the suspension to run from 60 to 90 days.

Aggravating and Mitigating Circumstances

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

² See *In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (Bar prejudiced when a lawyer fails to cooperate because Bar has to investigate in a more time-consuming way, and public respect for Bar is diminished because Bar cannot provide timely and informed responses to complaints); see also, *In re Paulson*, *supra*, 346 Or at 717 ("a lawyer's failure to cooperate with the Bar's investigatory efforts, when that failure is persistent and intentional, as it was in these matters, poses **potential serious** injury to the profession and to the public as well.... When a lawyer intentionally evades the procedures by which the Bar can determine if the lawyer is one who has not discharged, will not discharge, or is unlikely to properly discharge his or her professional duties, the interests of clients, the public, the legal system, and the legal profession... may be **seriously** injured.") (emphasis in original).

1. Multiple offenses. ABA Standard 9.22(d).
2. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent had been a practicing attorney for more than 28 years when the misconduct occurred.

The Bar acknowledges that respondent's absence of a prior disciplinary record is a mitigating factor here. ABA Standard 9.32(a).

Respondent also testified to being diagnosed with depression at or around the time of the misconduct and suggested that may have influenced his negative interaction with the Bar investigation. Tr. at 110. Personal or emotional problems can be a mitigating factor. ABA Standard 9.32(c). Mental disability is also a recognized mitigating factor if a respondent provides medical evidence of the disability, that the disability caused the misconduct, that the respondent has demonstrated a meaningful and sustained period of successful rehabilitation, and that the recovery arrested the misconduct and recurrence of the misconduct is unlikely. ABA Standard 9.32(i).

Here respondent's evidence did not satisfy the requirements to establish a mental disability. The testimony does describe a possible personal or emotional problem, but for us to consider it an actual mitigating factor there must be some relationship between the problem and the misconduct. Respondent's testimony does not tie the two together sufficiently to be a material mitigating factor.

Finally, remorse can be a mitigating factor. ABA Standard 9.32(l). Here respondent testified to remorse over how he responded to the Bar's investigation. Yet he expressed no remorse regarding his failure to obey the subpoena and failure to cooperate with his former client's new attorney. He continued to maintain that the subpoena was improper and unnecessary. The issue here is not the reasoning behind the subpoena, it is the failure to address that issue properly by asking the court to quash it rather than arrogating that decision to himself. Respondent never acknowledged that he was in the wrong.

Considered together, we find that the aggravating and mitigating factors here are sufficiently balanced that we find no reason to enhance or diminish the presumptive sanction.

Oregon Case Law

We recognize that Oregon cases support the imposition of a suspension in this case. Failure to respond to and cooperate with a disciplinary investigation, standing alone, is considered by the court to be a serious ethical violation. *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000).

The Bar argues that lawyers who refuse to respond to a Bar inquiry are subject to a presumptive 60-day suspension, citing *In re Schaffner*, 323 Or 472, 479-81, 918 P2d 803 (1996). In *Schaffner* a 60-day suspension was imposed, although we do not read the case as holding that such a suspension is per se the presumptive sanction. However, the reasoning in

the case does apply here, and when we add in the misconduct that generated the investigation in the first place, we believe that a 60-day suspension is appropriate.

Respondent's arguments against any suspension were twofold. First, he testified that he believes his practice will be ended for good if he were suspended for any period of time. We are sympathetic to respondent's concern, although we believe a 60-day suspension will not produce that result, but it is not germane to the question of sanctions. We presume that every sanction imposed has negative consequences. However, the alleged severity of those consequences is not identified as factor for us to consider in arriving at the appropriate sanction by either the ABA or the Oregon Supreme Court.

Disciplinary sanctions are intended to protect the public and the integrity of the profession, not to penalize the respondent. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998). The court instructs us that proper discipline deters unethical conduct. *In re Kirkman*, 313 Or 181, 188, 830 P2d 206 (1992). It is this yardstick we must use in measuring the length of respondent's suspension.

Respondent also argued that no suspension should be imposed now because he had already served a substantial suspension while the case was pending, due to the BR 7.1 petition. He asked us to consider that administrative suspension to be "time served," and credited to him. He cited no authority in support of such a proposition, and we are aware of none. It is not a consideration under the ABA Standards or Oregon case law. We must reject the proposition.

Moreover, respondent's prior suspension was administrative, resulting from his failure to respond to the Bar during the investigation, a not infrequent consequence to uncooperative respondents. Whether a suspension is imposed and the length it runs, however, are entirely under the control of the respondent. If a respondent complies with the duty to cooperate when a BR 7.1 petition is filed, the petition is withdrawn. If a suspension is imposed, it is terminated when the respondent complies as well. The length of the suspension was respondent's choice. It will not be used to diminish the sanction that is merited by the misconduct.

When an attorney refuses to cooperate, it undermines the public's confidence in the entire disciplinary system because it hampers the timeliness of the Bar's response to a complaint. *In re Miles*, 324 Or 218, 222-23, 923 P2d 1219 (1996). "The public protection provided by [the predecessor disciplinary rule] is undermined when a lawyer accused of violating another provision of the Code of Professional Responsibility fails to participate in the investigatory process. Indeed the disciplinary system likely would break down if the mandatory cooperation rule...were not in place, given the lack of incentive for a lawyer to cooperate with a Bar investigation if that lawyer had the option of not cooperating." *Id.*

Respondent's other violations further justify the suspension, and would support a lengthier suspension if we so chose. We are satisfied, however, that the purposes of attorney discipline will be fulfilled by a 60-day suspension.

The Bar cites a number of cases imposing longer suspensions for failure to cooperate coupled with other misconduct. We do not find any of them compelling enough to increase the length of the suspension.

CONCLUSION

We find that the Bar proved the alleged rule violations by clear and convincing evidence as outlined above, and order that respondent be suspended from the practice of law for a period of 60 days, commencing 30 days after this decision becomes final.

Respectfully submitted this 24th day of August, 2020.

/s/ Mark A. Turner

Mark A. Turner, Adjudicator

/s/ Lorena Reynolds

Lorena Reynolds, Trial Panel Member

/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. 20-39
)
KIMBERLY S. BROWN,)
)
Respondent.)

Counsel for the Bar: Susan Cournoyer

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.15-1(d) and RPC 1.16(d).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: September 29, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Kimberly S. Brown (Respondent) and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is publically reprimanded for violation of RPC 1.15-1(d) and 1.16(d).

DATED this 29th day of September, 2020.

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

STIPULATION FOR DISCIPLINE

Kimberly S. Brown, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 6, 1998, and has been a member of the Bar continuously since that time, having her office and place of business in Clackamas County, Oregon.

3.

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

4.

On August 29, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of Rules 1.15-1(d) and 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 May 2018, Mother retained Respondent to represent her in a custody, parenting time, and child support dispute. Mother paid Respondent a \$4,000 retainer, against which Respondent agreed to bill at \$225 per hour.

In late October 2018, Mother terminated Respondent's representation, and requested an itemized billing and a refund of any unearned fees. Respondent provided Mother an itemized billing statement reflecting that Respondent had earned \$2,790 in fees and incurred \$417 in costs, leaving a \$793 balance of unearned fees as of October 25, 2018.

Mother secured new counsel, to whom Respondent forwarded Mother's file materials. Respondent also offered to send the retainer balance to Mother upon receiving appropriate directions from the new attorney, but that attorney declined to handle the refund. Respondent was uncertain whether to contact Mother directly, as Mother was now represented by counsel. In an October 31, 2019 communication to Disciplinary Counsel's Office (DCO) in connection

with a grievance Mother had made to the Bar, Respondent offered to send the unearned balance to Mother immediately if directed by DCO.¹ Respondent admits that she “froze.”

Respondent did attempt to call Mother on two occasions, but was unable to leave a message because Mother’s voicemail was full. In addition, Mother moved during this period, and Respondent did not have her new address. After obtaining Mother’s new mailing address, Respondent refunded \$793 to Mother on April 3, 2020.

Violations

6.

Respondent admits that, by holding \$793 of Mother’s unearned retainer from the end of October 2018 until April 2020, she violated RPC 1.15-1(d). Respondent further admits that this failure to return unearned advance fees upon termination of representation, and when Mother was continuing in active litigation, violated RPC 1.16(d).

Sanction

7.

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

- a. **Duty Violated.** By failing to promptly return the unearned portion of Mother’s retainer upon termination of representation, Respondent violated her duty to her client to handle client property appropriately, and her duty to the profession to withdraw from representation properly. ABA Standards 4.0, 7.0.
- b. **Mental State.** Respondent acted negligently in failing to ascertain that she was obligated to promptly refund the undisputed portion of Mother’s unearned retainer, even after offering to send the money to Mother’s new counsel.
- c. **Injury.** Respondent’s delay in making the refund resulted in actual injury to Mother, who lost the use of her \$793 for an 18-month period in which she was engaged in litigation.

¹ In reply, DCO advised that DCO could not give her legal advice, referred her to general counsel, and suggested that she review RPCs 1.15-1(d) and 1.16(d).

- d. **Aggravating Circumstances.** Aggravating circumstances include:
 - 1. Vulnerability of victim, who remained engaged in active litigation. ABA Standard 9.22(h).
 - 2. Substantial experience in the practice of law. ABA Standard 9.22(i).
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 - 1. Absence of prior discipline. ABA Standard 9.32(a).
 - 2. Absence of a dishonest or selfish motive. ABA Standard 9.32(b).

Because the mitigating and aggravating factors are in equipoise, they justify neither an increase nor a reduction in the degree of discipline to be imposed. ABA Standards 9.21, 9.32.

8.

Absent mitigating or aggravating factors, reprimand is generally appropriate when a lawyer causes injury or potential injury to a client by dealing negligently with client property. ABA Standard 4.13. Reprimand is also generally appropriate when a lawyer negligently engages in conduct that violates a duty owed as a professional, and causes injury or potential injury to a client. ABA Standard 7.3.

Public reprimand is consistent with Oregon case law, including:

In re Daraee, 32 DB Rptr 252 (2018) (attorney knowingly delayed responding to client's request that he withdraw and return unearned portion of retainer for 11 months, due to his uncertainty as to how withdrawal would negatively impact client's interests);

In re O'Rourke, 32 DB Rptr 36 (2018) (after client terminated representation, attorney failed to refund unearned portion of advance fee until Bar proceedings were initiated);

In re Zackheim, 28 DB Rptr 9 (2014) (after clients terminated representation and instructed attorney to forward their files to new counsel, attorney refused, improperly asserting that he was entitled to retain files); and

In re Witte, 24 DB Rptr 10 (2010) (attorney withdrew from representation without returning file materials so client could proceed pro se).

9.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be publically reprimanded for violation of RPC 1.15-1(d) and RPC 1.16(d), the sanction to be effective immediately upon the Disciplinary Board's approval of this stipulation.

10.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

11.

Respondent represents that, other than Oregon, she is not admitted to practice law in any other jurisdictions, whether her current status elsewhere is active, inactive, or suspended.

12.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on August 29, 2020. 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 September, 2020.

/s/ Kimberly S. Brown
Kimberly S. Brown, OSB No. 983861

EXECUTED this 25th day of September, 2020.

OREGON STATE BAR

By: /s/ Susan Cournoyer
Susan Cournoyer, OSB No. 863381
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of)	Case Nos. 19-119, 20-24, 20-
)	25 and 20-26
WILLIAM E. CARL,)	
)	
Respondent.)	

Counsel for the Bar: Samuel Leineweber

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.5(c)(3); RPC 1.7(a)(2), RPC 1.15-1(c); and RPC 1.16(d). Stipulation for Discipline. 60-day suspension.

Effective Date of Order: January 2, 2021

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is suspended for 60 days, effective January 2, 2021 for violation of RPC 1.5(c)(3), RPC 1.15-1(c), and RPC 1.16(d) in Case No. 19-119; violation of RPC 1.5(c)(3) and RPC 1.15-1(c) in Case No. 20-24; violation of RPC 1.7(a)(2) in Case No. 20-25; and violation of RPC 1.5(c)(3) in Case No. 20-26.

DATED this 8th day of October, 2020.

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

STIPULATION FOR DISCIPLINE

William E. Carl, attorney at law (Respondent), 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.

Respondent 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 Jefferson County, Oregon.

3.

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

4.

On February 3, 2020, the Bar filed a formal complaint against Respondent pursuant to the authorization of the State Professional Responsibility Board (SPRB). The formal complaint alleged violations of RPC 1.5(c)(3), RPC 1.15-1(c), and RPC 1.16(d) of the Oregon Rules of Professional Conduct in Case No. 19-11. The Bar filed an amended complaint on June 25, 2020, pursuant to the authorization of the SPRB. The amended complaint added violations of RPC 1.5(c)(3) and RPC 1.15-1(c) in Case No. 20-24; violations of RPC 1.7(a)(2) and RPC 1.8(j) in Case No. 20-25; and a violation of RPC 1.5(c)(3) in Case No. 20-26. 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. 19-119

Lisa Dubisar Matter

5.

Facts

In early February 2019, Lisa M. Dubisar (Dubisar) retained Respondent to represent her in a marital dissolution proceeding filed by her husband. Respondent and Dubisar agreed that Dubisar would pay an initial retainer of \$2,500, comprised of \$1,500 cash and \$1,000 in trade.

On February 10, 2019, Dubisar paid Respondent \$1,500 in cash. At the time that Dubisar paid Respondent, the two had not entered into a written fee agreement. Upon receipt of the \$1,500, Respondent deposited the funds into his business account, rather than his client trust account.

On February 12, 2019, Respondent left for a three-week personal leave. Before Respondent took his leave, he drafted a general denial response and counterclaim in Dubisar's dissolution proceeding and prepared an ORCP 69B letter to the husband's attorney, requesting 10 days advance notice of any motion for default.

Respondent returned to his office on March 7, 2019 and on March 11, 2019, Respondent and Dubisar executed a fee agreement. However, the fee agreement did not explain that Dubisar could discharge Respondent at any time and in that event she may be entitled to a full or partial refund.

On March 14, 2019, Dubisar terminated Respondent's representation and requested a refund. Respondent did not provide an accounting to Dubisar and declined to provide a refund.

6.

Violations

Respondent admits that by executing a fee agreement with Dubisar that did not articulate that his client's funds would not be deposited in to a client trust account and that the client could terminate Respondent's representation and be potentially entitled to a refund, he violated RPC 1.5(c)(3).

Respondent admits that by depositing client funds into his business account instead of his trust account until the funds were earned, he violated RPC 1.15-1(c).

Respondent admits that by not providing an accounting or refund, he violated RPC 1.16(d).

Case No. 20-24

Warren Espinola Matter

7.

Facts

On July 6, 2018, Warren A. Espinola (Espinola) retained Respondent and the firm of Glenn, Reeder, Gassner and Carl, LLP, (the firm) to file a petition for marital dissolution. Espinola initially paid a \$2,500 fee to the firm pursuant to a written fee agreement, which provided that Respondent would bill Espinola at a \$200 hourly rate. In October 2018, Respondent left the firm, and established a solo practice. Espinola elected to continue representation with Respondent.

In December 2018, Respondent and Espinola agreed to a \$3,500 flat fee for Respondent's remaining legal services in the dissolution case. Espinola paid Respondent \$3,500 in two installments: \$1,100 on December 13, 2018, and \$2,400 on December 18, 2018. Espinola did not sign a written fee agreement designating the \$3,500 flat fee as non-refundable

or earned upon receipt, or disclosing that the funds would not be deposited into a trust account. Respondent did not deposit the \$3,500 received from Espinola into his client trust account.

8.

Violations

Respondent admits that by executing a fee agreement that did not articulate that his client's funds would not be deposited in to a client trust account and that they could terminate Respondent's representation and be potentially entitled to a refund, he violated RPC 1.5(c)(3).

Respondent admits that by depositing unearned client funds into his business account instead of his trust account, he violated RPC 1.15-1(c).

Case No. 20-25

Kathleen Dundom-Garrett Matter

9.

Facts

In the summer of 2018 Respondent and Kathleen Dundom-Garrett (Dundom-Garrett) began a sexual relationship. On August 25, 2018, Dundom-Garrett retained Respondent to file a dissolution of marriage petition against her husband, Matthew Dundom (Dundom). Respondent filed the petition for dissolution on August 30, 2018. Child custody, parenting time, financial support, and possession of the family home, were at issue in the dissolution proceeding.

On September 4, 2018, Dundom-Garrett obtained a Family Abuse Prevention Act (FAPA) restraining order against Dundom. Dundom was ordered to leave the family home and have limited contact with the Dundom children.

Respondent had a personal interest in pursuing or maintaining an intimate relationship with Dundom-Garrett and a bond with her children. There was a significant risk that Respondent's interest in Dundom-Garrett's personal life and marital status could materially limit his ability to provide objective and competent legal advice to Dundom-Garrett in the dissolution. Dundom-Garrett did not provide informed consent, confirmed in writing, to Respondent's representation notwithstanding the existence of a current conflict of interest.

10.

Violations

Respondent admits that there was a significant risk that his representation of Dundom-Garrett could be materially limited by his own personal interest, and that Dundom-Garrett did not give informed consent confirmed in writing, and therefore violated RPC 1.7(a)(2).

Upon further factual inquiry, the parties agree that the charge of alleged violation of RPC 1.8(j) should be, upon the approval of this stipulation, dismissed.

Case No. 20-26

Justin Hendrix Matter

11.

Facts

In September 2018, Justin Hendrix (Hendrix) retained Respondent to defend him on felony assault charges arising from allegations that he had struck his step-son, and to assist Hendrix with a pending Department of Human Services (DHS) investigation.

On September 25, 2018, Respondent signed a flat fee agreement with Hendrix whereby Hendrix agreed to pay Respondent's law firm a \$2,000 initial retainer "as a flat fee, due and earned immediately, and non-refundable," for the purpose of negotiating a plea offer, entry of a plea or dismissal, on Third Degree Assault and First Degree Criminal Mistreatment charges. The agreement called for an additional \$2,500 trial fee due two weeks before the trial date. This fee agreement did not indicate that the funds would not be deposited into trust or that Hendrix could terminate the representation, and possibly receive a refund.

12.

Violations

Respondent admits that by executing a fee agreement that did not articulate that his client's funds would not be deposited in to a client trust account and that the client could terminate Respondent's representation and be potentially entitled to a refund, he violated RPC 1.5(c)(3).

13.

Sanction

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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 ABA Standards provide that the most important ethical duties are those which lawyers owe their clients. ABA Standards at 5. In violating RPC 1.7(a)(2), Respondent violated his duty of loyalty to his client to avoid personal conflicts of interest. ABA Standard 4.3. In violating RPC 1.5(c)(3), Respondent violated his duty to the legal profession by entering into an improper fee agreement. ABA Standard 7.0. In violating RPC 1.15-1(c) and RPC 1.16(d), Respondent violated his duty to preserve client property. ABA Standard 4.1.
- b. **Mental State.** Respondent's mental state for the conduct in the fee agreement violations amounts to negligence. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards at 7. Respondent's mental state for the conduct in the conflict of interest violation amounts to knowledge. "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. ABA Standards at 7.
- c. **Injury.** The ABA Standards define "injury" as harm to the client, the public, the legal system, or the profession that results from a lawyer's conduct. "Potential injury" is harm to the client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer's conduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. ABA Standards at 7. An injury does not need to be actual to support the imposition of sanctions. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Dundom-Garrett was actually injured to the extent that Respondent had to withdraw from her legal matter and she was without counsel. Dundom-Garrett was potentially injured to the extent that Respondent's representation of her in her legal matter was affected by his personal feelings for her. Respondent's failure to utilize proper fee agreements caused actual or potential injury to the profession, as it reflects poorly on the profession and undermines the public's trust in lawyers.
- d. **Aggravating Circumstances.** Aggravating circumstances include:

1. A dishonest or selfish motive. ABA Standard 9.22(b). Respondent acted for his own personal benefit in engaging in a sexual relationship with a client.
 2. Multiple Offenses. ABA Standard 9.22(e). Respondent used improper fee agreements in multiple cases over multiple time periods.
 3. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been licensed in Oregon since 2002.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
1. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. ABA Standard 9.32(e).
 2. Remorse. Respondent has expressed remorse for his conduct and has corrected his flat fee agreements to conform to the Rules of Professional Conduct. ABA Standard 9.32(1).

14.

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. ABA Standard 4.32. Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. ABA Standard 4.13. 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. ABA Standard 7.3.

15.

Oregon case law holds that a knowing violation of a conflict of interest generally justifies a 30-day suspension. *In re Hockett*, 303 Or 150, 734 P2d 877 (1987). While cases dealing with conflicts of interest stemming from a sexual relationship have resulted in sanctions ranging from a reprimand to lengthy suspension, several similar cases have resulted in 60-day suspensions. *In re Michael G. Romano*, 30 DB Rptr 61 (2016) (stipulated 60-day suspension for an attorney who developed a romantic relationship with his client during the course of representation and did not withdraw or execute a conflict waiver); *In re James Patrick McHugh*, 14 DB Rptr 23 (2000) (stipulated 60-day suspension when attorney engaged in sexual relations with a current client).

Oregon case law also supports the imposition of a short suspension for similar fee agreement and trust account violations. See, *In re M. Christian Bottoms*, 31 DB Rptr 328 (2017) (stipulated 30-day suspension for violation of RPC 1.5(c)(3) where lawyer deposited client funds in a business account, treating the funds as earned on receipt, without a written fee agreement authorizing a nonrefundable retainer); *In re Theodore C. Coran*, 27 DB Rptr 170 (2013) (stipulated 30-day suspension for violation of RPC 1.5(c)(3) and RPC 1.15-1 (a), (c), and (d), where lawyer's flat-fee agreement failed to explain that the client could discharge

lawyer at any time and in that event might be entitled to a refund of all or part of the fee if the services for which the fee was paid were not complete); *In re Ireland*, 26 DB Rptr 47 (2012) (30-day suspension for violations of RPC 1.15-1(a) and RPC 1.15-1(c) in failing to deposit client funds in trust upon receipt).

Oregon cases and the ABA Standards support a suspension under these circumstances. In addressing multiple charges of misconduct, the ABA Standards recommend that the ultimate sanction be at least consistent with the sanction for the most serious instance of misconduct among the several violations.

16.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for 60 days for violation of RPC 1.5(c)(3), RPC 1.7(a)(2), RPC 1.15-1(c), and RPC 1.16(d), the sanction to be effective January 2, 2021.

17.

In addition, on or before January 2, 2021, Respondent shall pay to the Bar its reasonable and necessary costs in the amount of \$347.50, incurred for Respondent's deposition. Should Respondent fail to pay \$347.50 in full by January 2, 2021, the Bar may thereafter, without further notice to him, obtain a judgment against Respondent 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.

Respondent 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, Respondent has arranged for Mr. Jered Reid, Law Office of Jered Reid LLC, 35 SE C St Ste D, Madras OR 97741, an active member of the Bar, to either take possession of or have ongoing access to Respondent's client files and serve as the contact person for clients in need of the files during the term of his suspension. Respondent represents that Mr. Jered Reid, Law Office of Jered Reid LLC, 35 SE C St Ste D, Madras OR 97741 has agreed to accept this responsibility.

19.

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

20.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

21.

Respondent 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 Respondent is admitted: none.

22.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on August 17, 2020. 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 September, 2020.

/s/ William E. Carl

William E. Carl, OSB No. 022679

EXECUTED this 29th day of September, 2020.

OREGON STATE BAR

By: /s/ Samuel Leineweber

Samuel Leineweber, OSB No. 123704
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-25
)
SARA LYNN ALLEN,)
)
Respondent.)

Counsel for the Bar: Rebecca Salwin

Counsel for the Respondent: None

Disciplinary Board: Mark A. Turner, Adjudicator
Ankur H. Doshi
Eugene L. Bentley, Public Member

Disposition: Violation of RPC 8.1(a)(2). Trial Panel Opinion. 6-month suspension.

Effective Date of Opinion: Final November 19, 2020, effective December 19, 2020

TRIAL PANEL OPINION

The Oregon State Bar (“Bar”) seeks a suspension of four to six months of respondent Sara Lynn Allen based on her failure to respond to a disciplinary investigation in violation of RPC 8.1(a)(2).¹ For the reasons set forth below, we find that respondent committed the alleged misconduct and suspends her for a period of six months.

PROCEDURAL POSTURE

The Bar filed a formal complaint on July 24, 2019. The Bar could not personally serve respondent so, by order of the Adjudicator dated November 6, 2019, she was served by publication. Respondent failed to answer. The Bar moved for an order of default. The motion was granted on January 31, 2020.

¹ The amended formal complaint also alleged 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 in other aspects); and RPC 8.4(a)(3) (conduct involving dishonesty and fraud that reflects adversely on lawyer’s professional obligations). The Bar voluntarily dismissed those charges.

The Bar then filed an amended formal complaint on February 27, 2020, nullifying the order of default. Respondent answered this complaint on March 13, 2020. Trial was set for August 18, 2020.

The Bar filed a motion to compel discovery and continue the trial date based on respondent's failure to respond to discovery requests. Respondent filed no opposition. The Adjudicator granted the motion to compel on July 27, 2020, ordering respondent to produce documents by August 3, 2020. Respondent did not produce any documents or provide any response.

On August 5, 2020, the Bar filed a motion for discovery sanctions. Respondent again filed no opposition. On August 17, 2020, the Adjudicator granted the motion for discovery sanctions, ordering pursuant to BR 4.5(e) that the answer was stricken, that respondent was prohibited from offering evidence to dispute the allegations, and that the allegations in the amended formal complaint were deemed to be true. We treat this case as we would one in which a default order has been issued pursuant to BR 5.8(a).

Our role as the trial panel at this juncture is to determine whether the facts alleged establish the elements of the pleaded rule violation, and, if so, what sanction is appropriate. *See In re Koch*, 345 Or 444, 448, 198 P3d 910 (2008).

RESPONDENT'S MISCONDUCT

On December 16, 2018, Steve and Therese Walker filed a grievance with the Bar's Client Assistance Office ("CAO"), alleging that respondent knowingly issued them three checks that bounced in 2018. One check was for rent. The Walkers began eviction proceedings. Respondent offered to settle by paying the rent owed plus attorney's fees. Respondent issued the Walkers two checks for attorney's fees. Both checks were returned for insufficient funds. *Amended Formal Complaint*, ¶¶ 5-7.

Respondent did not respond to CAO's requests for information. CAO then referred the case to Disciplinary Counsel's Office (DCO) on January 17, 2019.

DCO asked for respondent's reply to the grievance by letters dated January 25, 2019, February 22, 2019, March 4, 2019, and March 21, 2019. Respondent received these letters, but knowingly failed to provide the information DCO requested. *Id* at ¶¶ 11-15.

Respondent did not respond at all to the letter dated January 25, 2019. DCO wrote a second letter on February 22, 2019, and on March 4, 2019, respondent acknowledged receipt and responded in part, but did not answer the inquiries set out in the letter. On March 4, 2019, DCO sent a third letter, seeking respondent's reply to the specific questions that were initially asked in the letter dated January 25, 2019. DCO received no response and sent a fourth letter on March 21, 2019, again seeking a response to the specific questions that were initially asked in the letter dated January 25, 2019. DCO received no response. *Id*.

DCO petitioned the Adjudicator to suspend respondent from the practice of law pursuant to BR 7.1, which provides for suspension of an attorney who fails to timely respond

to a request from DCO for information or records, or fails to respond to a subpoena issued pursuant to BR 2.2(b)(2). The Adjudicator granted the petition on April 19, 2019, suspending respondent from the practice of law until she complied with the requests from DCO. *Id* at ¶16.

We find that these allegations establish that respondent violated RPC 8.1(a)(2). That rule states that, in connection with a disciplinary matter, a lawyer shall not “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.” DCO is a disciplinary authority. DCO made multiple lawful demands for information relating to the landlords’ grievance. Respondent received the demands.

Respondent failed to respond to the Bar’s first letter; acknowledged receipt of the Bar’s second letter, but made an insufficient response to it; and then failed to respond to the two following letters. Her failure to respond was knowing. The Bar has alleged the elements of the violation. *See In re Paulson*, 346 Or 676, 216 P3d 859, 687 (2009), *affirmed*, 347 Or 529 (2010) (finding violation of RPC 8.1(a)(2) when attorney provided non-substantive responses or did not respond at all to multiple Bar inquiries).

SANCTION

We refer to the *ABA Standards for Imposing Lawyer Sanctions* (ABA Standards), and Oregon case law, for guidance in determining the appropriate sanctions for lawyer misconduct. *See In re Nisley*, 365 Or 793, 815, 453 P3d 529 (2019); *In re Obert*, 352 Or 231, 258, 282 P3d 825 (2012).

ABA Standards

The ABA Standards establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer’s mental state; and the actual or potential injury caused by the conduct. After this analysis, we make a preliminary determination of an appropriate sanction. We then may adjust the sanction, if appropriate, for aggravating or mitigating circumstances. *See Obert*, 352 Or at 258.

Duty Violated

Respondent violated her duty to the legal profession. ABA Standard 7.0.

Mental State

The ABA Standards recognize three mental states. “Intent” is when the lawyer acts with 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 to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards at 9.

Respondent acted knowingly when she refused to respond to DCO's inquiries.

Extent of Actual or Potential Injury

We may take into account both actual and potential injury. ABA Standards at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Oregon Supreme Court recognizes the serious injury caused by failing to cooperate with a disciplinary investigation, because such conduct undermines public protection and threatens the disciplinary system. *In re Miles*, 324 Or 218, 222-23, 923 P2d 1219 (1996). Respondent caused actual injury to the legal profession. Her failure to cooperate caused the Bar's investigation to be hampered and delayed.

Preliminary Sanction

The Bar argues that ABA Standard 7.2 applies here. That standard states that 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. ABA Standard 7.2.

We agree that suspension is the presumptive sanction.

Aggravating and Mitigating Circumstances

We find the following aggravating factors are present here:

1. A prior record of discipline. ABA Standard 9.22(a). This factor weighs heavily here. Respondent has been disciplined before for failure to respond to a Bar investigation. Her first case included multiple violations of this type. She was suspended for six months, all stayed pending completion of a 3-year probation. *In Re Allen*, 28 DB Rptr 275 (2014). In a case decided two years later, respondent defaulted after appearing. The trial panel suspended respondent for 60 days and further ordered that she apply for formal reinstatement under BR 8.1. *In re Allen*, 30 DB Rptr 362 (2016).²
2. A pattern of misconduct. ABA Standard 9.22(c). This case presents an obvious pattern of misconduct. Other than answering the amended complaint, respondent refused to engage in the process in any way.
3. Bad faith obstruction of the disciplinary proceeding. ABA Standard 9.22(e). Respondent's conduct also demonstrates a pattern of bad faith obstruction of this proceeding.
4. Refusal to acknowledge wrongful nature of conduct. ABA Standard 9.22(g). Her silence speaks for itself.

² Formal reinstatement under BR 8.1 automatically applies to any suspension of six months or more. For it to apply to a shorter suspension, the trial panel must specifically order it.

We find none of the mitigating factors listed in ABA Standard 9.32 on the facts before us.

Oregon Case Law

A lawyer who “fails to cooperate with the disciplinary authorities is a threat to the profession and the public.” *In re Bourcier*, 325 Or 429, 437, 939 P2d 604, 608 (1997). The Supreme Court has imposed significant suspensions for repeated refusals to cooperate.

The Bar points us to *In re Miles*. In that case, the attorney did not respond to a disciplinary investigation. She was only charged with failing to cooperate with a disciplinary investigation. She defaulted. *In re Miles*, 324 Or 218, 220, 923 P2d 1219 (1996). The court suspended her for 120 days and ordered formal reinstatement. The court stated, “we take this opportunity to emphasize the seriousness with which this court views the failure of a lawyer to cooperate with a disciplinary investigation.” *Id* at 222.

The Bar also compares this case to *In re Obert*. There the attorney was suspended for six months for misconduct that included failure to respond to the Bar for four months and forcing the Bar to issue a subpoena to secure his response. *Obert*, 352 Or 231, 248. The court explained that failing to respond to Bar inquires “can result in a public reprimand, or, in more flagrant cases, suspension for 60 days.” *Id* at 262. The court cited *In re Haws*, 310 Or 741, 801 P2d 818 (1990) where a 63 day suspension was upheld because of “repeated” uncooperative behavior. *Id.* at 262-63.³

Here, respondent repeatedly failed to cooperate. She was sanctioned for similar misconduct in the past. She ignored an order compelling her to produce documents. Given these facts, we find that a six-month suspension is appropriate in this case and order that respondent be suspended for that period beginning 30 days after this decision becomes final. We also note that a lengthier suspension could be justified here, but we will not exceed the upper limit of DCO’s requested sanction.

CONCLUSION

The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge properly their professional duties. ABA Standard 1.1. To accomplish that end, we order that respondent be suspended for a period of six months, beginning 30 days after this decision becomes final.

³ The Bar also cites us to: *In re Murphy*, 349 Or 366, 245 P3d 100 (2010) (attorney was suspended for 120 days when she failed to respond to DCO in three separate disciplinary matters); *In re Skagen*, 342 Or 183, 185, 149 P3d 1171 (2006) (attorney suspended for one year, in part, for refusing to cooperate with the Bar’s discovery requests); *In re Griffith*, 32 DB Rptr 167 (2018) (attorney suspended for 18 months when, among other misconduct, he knowingly failed to cooperate in three disciplinary proceedings).

Dated this 19th day of October, 2019.

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

/s/Ankur H. Doshi
Ankur H. Doshi, Trial Panel Member

/s/Eugene L. Bentley
Eugene L. Bentley, Trial Panel Public Member

Cite full opinion as 367 Or 236, 476 P3d 942 (2020)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of)
)
CHRISTOPHER K. SKAGEN,)
)
Accused.)

(OSB 911020; SC S066706)

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

Christopher K. Skagen, Wellington, New Zealand, argued the cause and filed the brief 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.

PER CURIAM

This is a reciprocal discipline review proceeding conducted under Oregon State Bar Rule of Procedure (BR) 3.5. Respondent, Christopher K. Skagen, was licensed to practice law in New Zealand and in Oregon during the years relevant to this proceeding. He was struck from New Zealand’s Roll of Barristers and Solicitors by the High Court of New Zealand Wellington Registry (High Court) in August 2016 based on misconduct respecting two clients and his significant disciplinary history. That action was the equivalent of disbarment in Oregon. The Oregon State Bar (the Bar) then petitioned the Bar’s Disciplinary Board for reciprocal disbarment, alleging that respondent’s misconduct in New Zealand constituted multiple violations of the Oregon Rules of Professional Conduct (RPC). A trial panel of the Disciplinary Board was convened, and the matter went to a hearing in January 2019. The trial panel issued an opinion, concluding that respondent should be reciprocally disbarred in Oregon as a result of his misconduct in New Zealand. Respondent now appeals that decision, which we review *de novo*. ORS 9.536(2); BR 10.6. For the reasons set out below, we agree with the trial panel’s decision that respondent should now be disbarred in Oregon.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-53
)
ROBERT P. JOHNSON,)
)
Respondent.)

Counsel for the Bar: Stacy R. Owen

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 5.5(a) and ORS 9.160(1). Stipulation for Discipline. 30-day suspension.

Effective Date of Order: November 19, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

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

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Johnson is suspended for 30 days for violations of RPC 5.5(a) and ORS 9.160(1), effective immediately.

DATED this 19th day of November 2020.

s/ Mark A. Turner

Mark A. Turner
Adjudicator, Disciplinary Board

STIPULATION FOR DISCIPLINE

Robert P. Johnson, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 21, 1973, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Respondent 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 17, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 5.5(a) of the Oregon Rules of Professional Conduct and ORS 9.160(1). 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 2017, Respondent transferred to Retired status, a form of inactive Bar membership. After Respondent declined to pay his annual assessment, he was placed on administrative suspension on September 14, 2018. At some point during this period, Johnson's friend of over fifty years became a widower and sought Respondent's advice regarding estate planning. Respondent informed his friend that he could not represent him because he was retired. However, when his friend continued to ask legal questions, he relented and performed legal work. Respondent prepared a revocable living trust and provided his friend with a quit claim deed in order to place his friend's home into the trust.

Violations

6.

Respondent admits that, by conducting the above-described estate planning tasks while an inactive and administratively suspended member of the Bar, he violated RPC 5.5(a) and ORS 9.160(1).

Sanction

7.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent violated his duty owed as a professional through his unauthorized practice of law. ABA Standard 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. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.* Here, Respondent acted with the knowledge of the nature or attendant circumstances of his conduct, but without the conscious objective or purpose to accomplish a particular result.
- c. **Injury.** Injury can be either actual or potential under the ABA Standards. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). Based upon the available evidence, there was the potential for injury to Respondent's friend through his unauthorized practice of law.
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Pattern of misconduct. ABA Standard 9.22(c). Respondent took several actions constituting the unauthorized practice of law.
 2. Multiple offenses. ABA Standard 9.22(d).
 3. Vulnerability of victim. ABA Standard 9.22(h). Respondent's friend was 80 years old and a recent widower.
 4. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent was licensed to practice in Oregon in 1973.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of dishonest motive. ABA Standard 9.32(b).

2. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. ABA Standard 9.32(e).

8.

Under the ABA Standards, 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. ABA Standard 7.2.

9.

Oregon decisions support suspension. *In re Jones*, 308 Or 306 (1989) (imposing a 6-month suspension for knowingly assisting a non-lawyer in unlawful practice of law); *In re Butler*, Or S Ct No. S40533 (1993) (suspending attorney for 90 days for filing an answer to a complaint in Nebraska when he was not authorized to practice law in that state); *In re Kenney*, 28 DB Rptr 269 (2014) [stipulation] (imposing 30-day suspension on inactive MD attorney, for practicing in OR before the Social Security Administration); *In re Foster*, 27 DB Rptr 163 (2013) [trial panel opinion] (imposing 30-day suspension where lawyer practiced administrative law while she knew that she was suspended and knowingly made misleading communications about her ability to perform services); *In re Mary W. Johnson*, 20 DB Rptr 223 (2006) [trial panel opinion] (imposing 30-day suspension where, as a result of “willful ignorance ... tantamount to knowing” the reinstatement procedures, lawyer practiced law while suspended).

10.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for 30 days for violations of RPC 5.5(a) and ORS 9.160(1), effective upon approval of this stipulation for discipline. Respondent 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 Respondent to attend continuing legal education (CLE) courses.

11.

Respondent 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 Respondent is admitted: None.

12.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on October 17, 2020. 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 November 2020.

s/ Robert P. Johnson
Robert P. Johnson, OSB No. 731566

EXECUTED this 17th day of November 2020.

OREGON STATE BAR

By: s/ Stacy R. Owen
Stacy R. Owen, OSB No. 074826
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-34
)
BROOKS F. COOPER,)
)
Respondent.)

Counsel for the Bar: Rebecca Salwin

Counsel for the Respondent: David J. Elkanich

Disciplinary Board: None

Disposition: Violation of RPC 1.15-1(b). Stipulation for discipline.
Public reprimand.

Effective Date of Order: November 19, 2020

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Brooks F. Cooper (Respondent) and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is publically reprimanded, for violation of RPC 1.15-1(b).

DATED this 19th day of November, 2020.

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

STIPULATION FOR DISCIPLINE

Brooks F. Cooper, attorney at law (Respondent), 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.

Respondent was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 4, 1994, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

Respondent 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 25, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 1.15-1(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.

At all times in April 2015, Respondent's IOLTA account had a balance above \$100,000.

6.

In April 2015, Respondent discovered a bookkeeping error in his IOLTA records, which suggested that a recent check may have been drawn on the IOLTA account for \$24,250.00, when Respondent knew that the check should have been drafted for only \$2,425.00. Also in April 2015, Respondent received a valid instruction to distribute \$57,719.16 from funds that he held in his IOLTA account for a third-party, in connection with a probate matter.

7.

On April 15, 2015, Respondent deposited \$41,000 of his own personal or business funds into his IOLTA account to ensure that he would have adequate funds in his IOLTA account to cover the distribution and the potentially erroneous check. However, Respondent did not review his IOLTA account balance or IOLTA records prior to making the deposit. Of

that \$41,000 deposit, \$19,000 was from a check drawn on his personal bank account, and the other \$22,000 was from a check drawn on the business account of a brewery that Respondent co-owned at the time.

8.

After depositing the \$41,000, Respondent then reviewed his IOLTA account balance and records more closely and realized that he did not need to make the deposit. After approximately ten days, he withdrew the same amount of money from his IOLTA account that he deposited, with a \$19,000 check to his personal account dated April 24, 2015, and a \$22,000 check to his brewery dated April 25, 2015.

9.

At no time was Respondent's IOLTA account in danger of falling below a minimum account balance. Respondent's deposit was for a reason other than paying bank service charges or satisfying a minimum balance requirement.

Violations

10.

Respondent admits that by depositing \$41,000 of his funds into his lawyer trust account for a reason other than paying bank service charges or meeting a minimum account balance, he violated RPC 1.15-1(b).

Sanction

11.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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.** Respondent's failure to properly manage his IOLTA account violated his duties to the profession. ABA Standard 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. ABA Standards at 9. Respondent was negligent. He deposited his own funds into his IOLTA account to cover two checks, even though he had significantly more money in his account than needed to cover the checks, and without first reviewing his IOLTA account balance to determine if the deposit

was necessary. This was a deviation from the standard of care that a reasonable lawyer would exercise.

- c. **Injury.** By failing to comply with the trust account rules, Respondent caused harm to the legal profession. *See In re Conduct of Obert*, 352 Or 231, 260, 282 P3d 825 (2012) (citing *In re Peterson*, 348 Or 325, 343, 232 P3d 940 (2010)).
- d. **Aggravating Circumstances.** Aggravating circumstances include:
 1. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been an active member of the Oregon Bar since 1994.
- e. **Mitigating Circumstances.** Mitigating circumstances include:
 1. Absence of a prior disciplinary record. ABA Standard 9.32(a).
 2. Timely good faith efforts to rectify consequences of misconduct. ABA Standards 9.32(d). Respondent withdrew the funds from his IOLTA account approximately ten days after depositing them.
 3. Delay in disciplinary proceedings. ABA Standard 9.32(j). Respondent's misconduct occurred over five years ago but was not reported until 2019, and Respondent has not committed further misconduct since. *See In re Ramirez*, 362 Or 370, 385, 408 P3d 1065, 1073 (2018) (“A lengthy period of time between misconduct and a disciplinary decision can be a mitigating factor, if there has not been further misconduct by the accused.”).
 4. Remorse. ABA Standard 9.32(l)

12.

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. ABA Standard 4.13. 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. ABA Standard 4.12. These presumptive sanctions do not completely reflect Respondent's conduct. Even though he added funds to his IOLTA account without causing injury, he also should have known that he was nowhere close to risking an overdraft, given his large account balance. Additionally, the amount of funds that he transferred was significant.

13.

When lawyers commingle funds, the cases have resulted in stayed suspensions with educational conditions such as attending trust accounting school and additional trust accounting MCLE's, in accordance with the goal rehabilitation and the presumptive suspension provided by ABA Standard 4.13. *See, e.g. in re Allen Peters*, 32 DB Rptr (2018) (stipulated 8-month suspension, all but 30 days stayed, when the attorney had a series of

bookkeeping errors, including placing significantly more money into his trust account than was needed to remedy an NSF check); *in re Amber Wolf*, 32 DB Rptr 58 (2018) (stipulated 1-year suspension, all but 90 days stayed, where among other misconduct including the unauthorized practice of law, the attorney deposited personal money into her trust account out of convenience while her personal account was frozen). Here, however, a stayed suspension would be inappropriate, because Respondent's misconduct occurred over five years ago, and he has not received discipline in the interim. Moreover, there are significant mitigating factors. Therefore, a reprimand is an appropriate sanction.

14.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be publicly reprimanded for violation of RPC 1.15-1(b).

15.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

16.

Respondent 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 Respondent is admitted: none.

17.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on October 6, 2020. 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 November, 2020.

/s/Brooks F. Cooper
Brooks F. Cooper, OSB No. 941772

APPROVED AS TO FORM AND CONTENT:

/s/David J. Elakanich
David J. Elkanich, OSB No. 992558

EXECUTED this 12th day of November, 2020.

OREGON STATE BAR

By: /s/Rebecca Salwin
Rebecca Salwin, OSB No. 201650
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-83
)
RACHEL FRANCES O'NEAL,)
)
Respondent.)

Counsel for the Bar: Eric J. Collins

Counsel for the Respondent: Frederic E. Cann

Disciplinary Board: Mark A. Turner, Adjudicator
Susan Alterman
James E. Parker, Public Member

Disposition: Violation of RPC 1.7(a)(2), RPC 3.7(c), RPC 8.4(a)(2),
and RPC 8.4(a)(3). Trial Panel Opinion. 120-day
suspension.

Effective Date of Opinion: Final December 1, 2020, effective December 31, 2020

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged respondent, Rachel Frances O'Neal, with engaging in a conflict of interest in violation of RPC 1.7(a)(2) (current client conflict of interest), failing to withdraw when a personal conflict arose and it became apparent that she would be called to testify adversely to the client in violation of RPC 3.7(c) (lawyer as witness), committing the crime of false swearing in testimony she gave under oath at the client's dissolution trial in violation of RPC 8.4(a)(2) (commission of a criminal act reflecting adversely on lawyer's honesty, trustworthiness or fitness), and conduct involving dishonesty, fraud, deceit or misrepresentation in violation of RPC 8.4(a)(3). The case arose out of respondent's representation in a domestic relations matter of an individual with whom she had a pre-existing romantic relationship. At trial respondent conceded she had violated RPC 3.7(c). The Bar asked us to impose a 120-day suspension. Respondent contended that the appropriate sanction was a public reprimand.

Trial took place by videoconference on September 10 and 11, 2020. The trial panel consisted of the Adjudicator, Mark A. Turner, attorney member Susan T. Alterman, and public member James E. Parker. The Bar appeared through counsel, Eric Collins. Respondent appeared and was represented by counsel, Frederic Cann.

As discussed below, after considering the evidence and argument offered at trial, we conclude that the Bar proved the alleged violations by clear and convincing evidence. We suspend respondent for a period of 120 days, commencing 30 days after this opinion becomes final.

FACTS AND VIOLATIONS

The case involves respondent's representation of Valery Gurin. Gurin and his wife Jessica were divorced in February 2017. Respondent did not represent Gurin at the time. The judgment of dissolution required Gurin to pay child and spousal support. Jessica was awarded custody of their two minor children. When the judgment was entered, Gurin was on probation for a conviction for felony Criminal Mistreatment for an assault on his young son.

Respondent had known Gurin for several years. She testified that they met through a shared interest in poker. They began a romantic relationship in November 2017. At the end of November respondent agreed to represent Gurin to set aside the support award in his divorce judgment and to seek visitation with his children. Gurin moved into respondent's home in January 2018.

During this time respondent challenged the divorce judgment on Gurin's behalf. She filed a motion to vacate the judgment of dissolution under ORCP 71(B)(1), alleging fraud and misrepresentation by an adverse party.

At the same time, respondent also prepared a motion for sanctions against Jessica and Jessica's attorney, who obtained the default judgment, Josephine Townsend. Respondent intended to seek sanctions if the motion to vacate was granted. Before the motion to vacate was heard, respondent and Gurin had an argument during which respondent alleged that Gurin became violent. Respondent obtained a Family Abuse Protection Act (FAPA) restraining order against Gurin. She withdrew from representing him in the dissolution proceeding.

Respondent stated in her petition for the FAPA order that Gurin became angry when she told him that she was ending their personal relationship and would no longer represent him. She also alleged that, in a separate incident, he broke through a locked door, grabbed her cell phone and vehicle keys, and then threw her phone into the street. She said that Gurin had been drinking on both occasions despite the terms of his probation prohibiting consumption of alcohol. She also mentioned Gurin's probationary status for mistreatment of his son, and that his ex-wife also had a restraining order against him, to support her fears for her personal safety. Respondent certified that the statements she made were true and were subject to penalty for perjury.

After respondent withdrew from the representation, Gurin appeared *pro se* at the hearing on the motion to vacate the dissolution judgment. He prevailed. He then filed the motion for sanctions respondent had previously prepared. Townsend, who was no longer Jessica's lawyer when the dissolution judgment was set aside, moved to intervene in the case, hoping to vacate the order setting aside Jessica's dissolution judgment.

In April 18, 2018 respondent agreed to again represent Gurin on a limited basis, handling the motion for sanctions. Gurin signed an agreement stating that respondent would limit her representation to replying to any response filed on the motion and would appear at oral argument set for June 15, 2018. Gurin also signed a conflict waiver letter prepared by respondent, which stated, "As you know, I have withdrawn as your attorney in your dissolution proceeding due to a conflict of interest as I obtained a restraining order against you in Multnomah County in early March." The letter failed to include a recommendation that Gurin seek independent legal advice on whether to waive the conflict.

On the same day that she delivered the letter to Gurin, respondent moved to modify her FAPA order against her client. The modification allowed Gurin to enter the building where respondent worked but required that he remain 10 feet from her. The modified FAPA order also allowed Gurin to contact her by email only for attorney-client matters.

Respondent appeared in court for Gurin on the motion for sanctions. Townsend appeared, again representing Jessica. The court denied the motion for sanctions on June 15, 2018. It also denied Townsend's motion to reinstate the prior dissolution judgment. At this point respondent had performed all the tasks contemplated in the limited scope engagement agreement.

Prior to the hearing, on May 31, 2018, respondent filed a motion to dismiss her FAPA restraining order because she stated that it no longer necessary. Shortly after dismissing the FAPA order, respondent agreed to expand her representation of Gurin to include the completion of discovery and potential settlement of the dissolution proceeding. Ex. 36.

Respondent told Gurin that, although she would represent him in pretrial matters, she would not represent him at the dissolution trial because she anticipated being called as a witness in connection with her prior FAPA restraining order against him. She did not obtain any written consent from Gurin for this expanded representation. She did not recommend in writing that he seek independent legal counsel regarding whether he should waive the conflict. Respondent filed a notice of appearance on June 22, 2018 in the dissolution proceeding. The Bar presented uncontroverted expert testimony that parenting time would always be an issue when obtaining a dissolution judgment involving children.

Townsend sent a letter to respondent around August 8, notifying her that Townsend intended to call her as a witness adverse to her client. Townsend explained that respondent would testify because Gurin was requesting parenting time. His violent temper and alcohol abuse would be relevant to that issue. Townsend told respondent that respondent was required to resign under RPC 3.7 because her testimony would be adverse to her client. Townsend included a motion to disqualify respondent that she would file if respondent did not agree to withdraw.

Respondent testified that she first saw the letter in late August after returning from Wyoming. She had traveled there to help her mother, who had been involved in a serious SUV/trailer accident while driving to Oregon to live with respondent. Despite seeing the letter, she took no action. She gave various explanations for her failure to respond to the letter. She testified that her mother's accident, a funeral in Georgia, and a busy trial schedule occupied

her attention. She also stated that she believed that parenting time would not be an issue at the dissolution trial so that her testimony about the FAPA order would not be relevant. On September 5, 2018, Townsend filed the motion for an order to show cause why respondent should not be disqualified from acting as Gurin's counsel. Respondent did not file a response to the show cause motion.

Respondent continued representing Gurin until the hearing on the show cause motion on November 16, 2018. The motion was granted. The order stated that respondent was "disqualified from acting as counsel for ... Valery Gurin" in the dissolution proceeding. Ex. 29.

Of relevance to our inquiry, respondent argued to the judge that she should be allowed to continue a *limited* representation. She stated,

"And I'm only here on a limited scope with his informed consent not for purposes of trial. And I would reiterate that we already have an agreement in place that should this case go to trial and I be called as a witness that I will not be serving as lawyer and witness in this trial. **What I'm asking is that I not be removed from --from assisting Mr. Gurin in this matter on a pro se basis because it would be a significant financial hardship to him.** And he's not able to afford the services of another lawyer to get up to speed on this case that has been -- I've been representing him in this matter since November of --." Ex. 51 (emphasis added.)

The trial court denied respondent's request and ordered that respondent was disqualified from representing Gurin in the proceeding.

Jessica filed a bar complaint against respondent in late November 2018 over respondent's refusal to withdraw. Jessica testified in the disciplinary hearing that she paid Townsend to prepare and argue the disqualification motion.

The dissolution trial was set for April 4, 2019. Townsend subpoenaed respondent. As the trial approached, respondent and Gurin texted one another about the trial. Respondent did advise Gurin to get an attorney, but continued to give him advice on how to prepare for and handle the trial.

Two days before the trial, Gurin told respondent in a text message that he was going to represent himself at the trial. Ex. 33, p 4. Thereafter, respondent texted advice to Gurin. She told him what to propose to the court for a parenting plan. She told him what evidence to bring to court to prove his income and which witnesses he could call on his behalf. She identified favorable things she could testify about if he called her as a witness. *Id.* at pp 7-8, 11-13. Gurin in turn replied with some questions about her recommendations. *Id.* at pp 12-13, 18.

The morning of trial, respondent texted Gurin the following advice on how to cross-examine Jessica:

"If custody is at issue then a simple cross of Jessica would be ms [sic] Gurin how many days went by between the incident that gave rise to the criminal

conviction and when you reported it? Did we go to dinner as a family the following night? Did we have intercourse following that incident? And what happened in between in the marriage? Did you learn I was Emotionally [sic] unfaithful? To show bias and reason for the report. Just thoughts.

“You’d be better off letting custody lie and having money to hire a good lawyer later.” *Id.* at p 12.

Gurin relied on her guidance, advice and direction to prepare for the trial. He asked by text message: “So I shouldn’t ask for post probation parenting plan now? Just ask to modify later?” *Id.* at p. 13. As respondent continued to text him advice about questions to ask witnesses, he replied “I am taking notes”. *Id.* at p. 18.

Townsend called respondent as a witness at trial. Among other things, Townsend asked respondent if she had helped Gurin prepare for trial. Respondent answered, “Uh, no.” Ex 34, p 10. Townsend followed up, asking, “When you say, uh, no, what did you do to help him prepare for today?” *Id.* Respondent answered:

“Uh, well, we didn’t meet to prepare for today and we haven’t consulted about today. Um, we are close friends and so we’ve talked about, um, this case.

But obviously, there’s been a motion to remove me as lawyer and a bar complaint filed against me, so I’ve been very careful to tell him that he needed to seek, um, advice from a family law attorney, um someone else about, you know, what he should do in this case.

So our communication has just been limited to our discussions, um, person to person, friend to friend, but not as an attorney and client. I’m not his lawyer in this case, obviously.” *Id.* at 10-11.

The trial court awarded Jessica sole custody of the children. Gurin was granted supervised parenting time and ordered to be sober during any visits. The judge awarded Jessica \$10,556.60 in attorney fees, which included the fees for the motion to disqualify respondent.

ANALYSIS OF THE CHARGES

A. Respondent Violated RPC 1.7(a)(2) – Conflict of Interest: Current Clients.

RPC 1.7(a)(2) provides:

“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RPC 1.7(b) 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.”

The definition of “informed consent” is found in RPC 1.0(g):

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

Conflict-of-interest rules are “based upon the concern that, when a lawyer undertakes the representation of a client with interests differing from the interests of the lawyer or the lawyer’s other clients, the lawyer’s judgment might become impaired or the lawyer’s loyalty might become divided. *In re Knappenberger*, 337 Or 15, 27, 90 P3d 614 (2004) (*quoting In re Kluge II*, 335 Or 326, 335, 66 P3d 492 (2003)). The potential for impaired judgment or divided loyalty is the touchstone.

We find that respondent violated RPC 1.7(a)(2) when she represented Gurin after obtaining the FAPA restraining order against him. She had an interest in confirming the truth of what she had sworn to in the FAPA restraining order petition. That interest was adverse to Gurin’s interest in seeking parenting time. Respondent’s judgment might have been impaired by that desire and her loyalty might have been divided. It was in the client’s interest to discredit her account of the incidents to support his request for parenting time.

Respondent could have cured the conflict if she reasonably believed that she could provide competent and diligent representation and the client gave informed consent, confirmed in writing. Respondent did not do that. The limited representation agreement she prepared for Gurin did not recommend that he seek independent legal advice to determine whether he should give his consent, as required by RPC 1.7(b)(4).

Respondent also failed to comply with RPC 1.7(b) when her engagement expanded beyond the limited scope previously outlined. There was no written notice of the conflict to the client, and no recommendation to consult with other counsel.

The Bar presented clear and convincing evidence that respondent violated RPC 1.7(a)(2).

B. Respondent Violated RPC 3.7(c) – Lawyer as Witness.

RPC 3.7(c) provides:

“If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer’s firm may be called as a witness other than on behalf of the lawyer’s client, the lawyer may continue the representation until it is apparent that the lawyer’s or firm member’s testimony is or may be prejudicial to the lawyer’s client.”

Respondent failed to withdraw when it became apparent that her testimony could be prejudicial to her client. After the close of the evidence, respondent, through counsel, orally amended her answer to the Bar’s Amended Formal Complaint to admit this violation. Respondent’s failure to withdraw until disqualified by the court in November 2018 violated RPC 3.7(c).

C. Respondent violated RPC 8.4(a)(2).

RPC 8.4(a)(2) provides: “It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The complaint alleged that respondent committed the crime of false swearing when she testified at the dissolution trial and denied that she had helped Gurin prepare for trial or had advised him as an attorney would advise a client.

To establish a violation of RPC 8.4(a)(2), the Bar must prove that a lawyer violated a criminal statute and that the conduct reflects adversely on the lawyer’s fitness to practice. *In re Strickland*, 339 Or 595, 601, 124 P3d 1225 (2005). An underlying criminal conviction is not required to establish a violation of RPC 8.4(a)(2). *In re Kimmel*, 332 Or 480, 485, 31 P3d 414 (2001). The Oregon Supreme Court has held that criminal acts involving false swearing reflect adversely on a lawyer’s honesty, trustworthiness or fitness to practice law. *In re Kumley*, 335 Or 639, 650, 75 P3d 432, 438 (2003).

There is clear and convincing evidence that respondent violated ORS 162.075, the crime of false swearing. Under that statute, the Bar must prove that respondent made a false sworn statement knowing it to be false. False swearing is a Class A misdemeanor.

Respondent was under oath when she testified falsely that she did not help Gurin prepare for his dissolution trial and that her communications with him were not those an attorney would have with a client. She knew her statements were false and that they were being made under oath. An examination of respondent’s oral argument opposing the motion to disqualify confirms this conclusion. As set forth above, respondent stated to the judge, “What

I'm asking is that I not be removed from --from assisting Mr. Gurin in this matter on a pro se basis because it would be a significant financial hardship to him." Yet that is precisely what she did do despite the court's order. There is ample, undisputed evidence that respondent assisted Gurin in preparing and presenting his pro se case.

Accordingly, when she testified at trial that, "...we haven't consulted about today..." that was a knowingly false statement. When she testified that, "...our communication has just been limited to our discussions, um, person to person, friend to friend, but not as an attorney and client," that was a knowingly false statement. She had given him legal advice on a number of issues, he had asked her for clarification and for additional legal advice, and denying that those communications were "as an attorney and client" is clearly false.

Respondent's testimony at her disciplinary trial on the issue was unpersuasive. She said that she did not help Gurin "prepare" for trial because she views "preparation" for trial to involve detailed, face-to-face meetings to go over the courtroom presentation. Tr. at 247-248. This was why she claimed her answer of "uh, no" to the question, "And did you help him prepare for today?" was truthful. We disagree. Secretly defining a word in a question differently than its commonly accepted meaning is not a defense to the crime of false swearing. Moreover, even if respondent's explanation might somehow have created doubt about her intent in answering that first question, it does not address her unqualified denial of helping Gurin as an attorney would help a client.

The following testimony respondent gave at the disciplinary trial is revealing:

"Q. [By Mr. Cann]· In your mind, what was remaining that you could do?

"A. In my mind, what I could do was still to be able to talk to him. He was still a friend of mine, and someone that I cared about. I'm a lawyer, and I can't take that out of who I am or what I know, and I didn't think I was precluded from having conversations with him, or talking with him about his case, **or giving him advice about the case as not his trial attorney.** Or I'm sorry, not his lawyer or trial attorney, but --" Tr. at 246-247 (emphasis added.).

Respondent testified here that she believed she was allowed to give Gurin "advice about the case as not his trial attorney." Yet this is precisely the conduct she asked the judge to allow her to engage in at the hearing on the disqualification motion. The judge rejected her plea when she ordered respondent to withdraw from the case. When she testified that she had communicated with Gurin as a friend to a friend but not as a lawyer and a client, her statement was knowingly false.¹

¹ Perhaps realizing that respondent's admission was damaging, her counsel later asked her the following:

"Q. There's this word advice that you were asked. What is your understanding of the word 'advice' through the context of an attorney/client relation?

A. Yeah. So advice is the kind -- so for me, legal advice is where it's on me. The buck is going to stop with me. The recommendation I'm making, someone is seeking my legal advice, consultation, it's where -- it's advice I give to people that I represent. When I'm making a

Respondent also argued in her trial memorandum that the Bar was required to prove the crime of false swearing beyond a reasonable doubt because that is the standard for a criminal conviction. That is incorrect. The Bar's burden is proof by clear and convincing evidence. BR 5.2. That being said, however, we find that the proof on this issue would meet even a reasonable doubt standard.

We find that respondent violated RPC 8.4(a)(2).

D. Respondent Violated RPC 8.4(a)(3).

RPC 8.4(a)(3) states, "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." This charge is based on the same false statements underlying the violation of RPC 8.4(a)(2).

The Bar argues that respondent engaged in conduct involving dishonesty in violation of RPC 8.4(a)(3). Conduct involving "dishonesty is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity." *In re Dugger*, 334 Or 602, 609, 54 P3d 595 (2002). The dishonest conduct must show that the lawyer lacks those characteristics of trustworthiness and integrity that are essential to the practice of law. *See In re Carpenter*, 337 Or at 228. The respondent must have acted knowingly or intentionally. *See In re Martin*, 328 Or 177, 185-86, 970 P2d 638 (1998).

Respondent knew she was barred from providing legal advice to Gurin in the dissolution case. We have already concluded that she knowingly violated the disqualification order, doing exactly what the judge refused to allow her to do. When questioned on the subject, she testified falsely under oath. It appears she did so out of a desire to protect herself. Such conduct shows a lack of trustworthiness and integrity essential to the practice of law.

RPC 8.4(a)(3) also prohibits an attorney from making misrepresentations that are knowing, false, and material. *In re Eadie*, 333 Or 42, 53, 36 P3d 468 (2001). Such misrepresentations may be affirmative misstatements or omissions. To prove this charge the Bar must prove that respondent's statements were false, that she knew those statements were false, and that she knew the statements were material—that is, that they "would or could

recommendation, I have all the information. I can't give legal advice without being in an attorney/client relationship, and having all the information with which to give that advice and make that recommendation. It's when people are relying on me, it's when they know I'm their attorney, and they are relying on my advice; that's my understanding. It's uhm -- I think legal advice is -- uhm -- is my recommendations. It is for people who I represent what they should do in their case based on my role as an attorney and based on all the discovery and information that I have, when I've done my due diligence to investigate all the facts and the law as it applies to their situation that they retained me to advise them on.

Q. So after you were disqualified from representing Mr. Gurin, did you continue to act as Mr. Gurin's lawyer?

A. No." Tr. at 249-50.

We found this convoluted response to be distinctly unpersuasive.

significantly influence the hearer's decision-making process." *In re Huffman*, 331 Or 209, 218, 13 P3d 994 (2000) ("material facts" are those that, had they "been known by the court or other decision-maker, would or could have influenced the decision-making process significantly" (quoting *In re Gustafson*, 327 Or 636, 648–49, 968 P2d 367 (1998))).

We have already concluded that respondent made false statements knowing that they were false. The remaining question is whether she knew the statements were material.

As a trial lawyer, respondent knew the statements were material. Credibility is an issue with any witness. Whether respondent violated the court order disqualifying her from representing Gurin in the proceeding could have influenced a decision-maker's conclusions as to her credibility. Respondent's testimony was directly relevant to the question of parenting time. She downplayed the events that led her to get a FAPA restraining order against Gurin in her trial testimony. She also gave supportive testimony about Gurin's behavior with her children. Had respondent given truthful testimony showing that she violated the court order disqualifying her from representing Gurin, it could have materially affected the weight the trial judge gave her testimony.

Respondent's misrepresentation was also material because it would have shown that respondent was not a *pro se* party without the benefit of legal advice. Judges often give pro se parties great latitude in the presentation of their cases. A judge's willingness to do so for Gurin could have been affected by knowledge that Gurin was assisted by counsel in preparing for the dissolution trial.

Respondent's false testimony was material, and she knew it was material. We conclude that respondent also violated RPC 8.4(a)(3).

SANCTION

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

ABA Standards

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

Duty Violated

The most important ethical duties a lawyer owes are to her clients. ABA Standards at 5. Respondent violated her duty to her client when she continued representation of him despite a conflict of interest that her client did not waive with informed consent confirmed in writing.

She also violated this duty when she failed to withdraw after knowing that she would be called as a witness adverse to her client in the dissolution proceeding trial. ABA Standard 4.0.

Respondent violated her duty to maintain her personal integrity and her duty to the legal system when she engaged in criminal conduct that involved dishonesty, misrepresentation, and false testimony that reflects adversely on her fitness to practice law. ABA Standards 5.1, 6.1. One of the highest duties a lawyer owes to the legal system is the duty to refrain from intentionally misleading a court. *See In re Staar*, 324 Or 283, 290-91, 924 P2d 308 (1996) (finding a lawyer in violation for making false sworn statements in a restraining order petition).

Mental State

The ABA Standards recognize three mental states: “Intent” is the conscious objective or purpose to accomplish a particular result. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards at 7.

Here, we find respondent acted with negligence when she failed to obtain Gurin’s informed consent confirmed in writing as to her when she agreed to represent him again after obtaining the restraining order. After she dismissed the restraining order and agreed to expand the representation, she again acted with negligence when she failed for a second time to get informed consent confirmed in writing.

We find that respondent acted knowingly when she violated RPC 3.7. *See In re Kluge II*, 335 Or at 348 (because attorney was alerted that his testimony would be at least potentially prejudicial to his client, court found that his conduct was knowing).

We find that respondent acted intentionally when she falsely testified under oath that she did not help Gurin prepare for his trial. The purpose she sought to accomplish was simple --she did not want the court to know that she had violated the disqualification order.

Extent of Actual or Potential Injury

We consider both actual and potential injury in deciding on a sanction. ABA Standards at 6; *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). “The term ‘injury’ is broadly defined to encompass ‘harm to a client, the public, the legal system or the profession which results from a lawyer’s misconduct.’” *In re Sanai*, 360 Or 497, 539, 383 P3d 821 (2016); ABA Standards at 7.

Respondent caused at least potential harm to her client by continuing to represent him despite the conflict of interest. *See In re Devers*, 328 Or 230, 242, 974 P2d 191 (1999) (potential injury sufficient, because disciplinary process serves to protect public). Respondent

also caused actual injury to Gurin to the extent he was ordered to pay additional attorney fees to Jessica that were caused by her failure to withdraw.

Respondent caused actual injury to Jessica by causing her to incur additional attorney fees for the disqualification motion.

The legal system was injured by respondent's misconduct because the trial court had to spend time dealing with a motion on its docket that should have been unnecessary.

Respondent's false testimony caused potential injury to the legal system. *See In re Davenport*, 334 Or 298, 319, 49 P3d 91 (2002) ("the public's confidence in the integrity of the law is undermined if lawyers reject its rules and application."); *See also In re Barber*, 322 Or 194, 212, 904 P2d 620 (1995) (lawyer who misled court and made false written statement caused potential injury to public confidence in legal profession).

Preliminary Sanction

Absent aggravating or mitigating circumstances, the following ABA Standards apply:

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

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

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

The presumptive sanction here is a period of suspension.

Aggravating and Mitigating Circumstances

The following aggravating factors are present:

1. A dishonest or selfish motive. ABA Standard 9.22(b). Respondent had a dishonest or selfish motive when she gave false testimony. She wanted to avoid the consequences of violating the disqualification order.
2. Pattern of misconduct. ABA Standard 9.22(c). Respondent's ethical violations continued over a period of approximately 10 months. The conflict of interest problem was the genesis of the false swearing. This was a pattern of misconduct.

3. Multiple offenses. ABA Standard 9.22(d). This factor is self-explanatory, but we do note, as respondent argued, that the two violations under RPC 8.4(a) involve a single instance of misconduct.

These mitigating factors are present:

1. No prior disciplinary record. ABA Standard 9.32(a).
2. A cooperative attitude toward the proceedings. ABA Standard 9.32(e).

Respondent also testified to the existence of personal or emotional problems, which can be a mitigating factor. ABA Standard 9.32(c). She explained how her mother's serious automobile accident diverted her attention from dealing with the threat of disqualification and subsequent motion. She also testified to the distress her mother's injuries caused her. We will consider this factor in mitigation as it relates to the RPC 3.7 charge, but it does not appear to relate to the false testimony incident.

Oregon Case Law

Oregon cases tell us that a suspension is appropriate here. The Supreme Court has stated that knowingly or intentionally making false statements under oath is "among the most serious acts of misconduct that a lawyer can commit." *In re Paulson*, 346 Or 676, 721, 216 P3d 859, 886 (2009) (citing *Dugger*, 334 Or at 626); see also *In re William J. Sundstrom*, 250 Or 404, 409, 442 P2d 604 (1968) (falsely testifying under oath is among most serious charges that can be made against a lawyer).²

Suspension is also appropriate in cases involving conflict of interest. The Bar cites us to *In re Maurer*, 364 Or 190, 431 P3d 410 (2018) (quoting *In re Hostetter*, 348 Or 574, 603, 238 P3d 13 (2010); where the court noted, "[T]his court has repeatedly stated that a finding that a lawyer has violated the rule prohibiting current or former client conflicts of interest, standing alone, typically justifies a 30-day suspension."

The Bar likens this case to two involving dishonest conduct and conflict of interest. The first is *In re Morris*, 326 Or 493, 953 P2d 387 (1998). There, in a probate matter, the lawyer knowingly altered and filed a final accounting that had been previously signed and notarized by the client. The lawyer also represented the prior and successor personal representatives of the estate at the same time. The court described the lawyer's conduct as "both obvious and serious," and imposed a 120-day sanction after determining that the

² The Bar cited us to numerous cases where false statements under oath led to substantial suspensions or disbarment: *In re Staar*, 324 Or 283, 924 P2d 308 (1996) (two-year suspension for knowingly making false statements in petition for restraining order); *In re Hawkins*, 305 Or 319, 751 P2d 780 (1988) (disbarment for filing false affidavit and using false evidence); *In re Brown*, 298 Or 285, 692 P2d 107 (1984) (two-year suspension for preparation of false affidavit); *In re Wilson*, 342 Or 243, 251-52, 149 P3d 1200, 1205 (2006) (six-month suspension for making false statements to opposing counsel and court staff about illness that necessitated trial postponement and filing an affidavit containing same false statements).

mitigating factors, which included no prior disciplinary record, outweighed the aggravating factors in the case. *Id.* at 505-06.

The second is *In re Melmon*, 322 Or 380, 908 P2d 822 (1995). In *Melmon*, the lawyer represented multiple clients in three business transactions. The engagement required disclosure and consent, which was not done. *Id.* at 382-83. The lawyer also was involved in a deal involving a business client in which the lawyer participated in creating an aircraft bill of sale that falsely described the purchaser as a “rated” pilot so that the lawyer’s client could get better insurance premiums. *Id.* at 384. The lawyer received a 90-day suspension. Mitigating factors were no prior disciplinary record, conduct not motivated by personal gain, the lawyer was relatively inexperienced in the practice of law, and the lawyer was cooperative in the proceedings. *Id.* at 386.

Case matching for sanctions is an inexact science. Taking all circumstances into consideration, including the aggravating and mitigating factors, we find that a 120-day suspension is appropriate. We believe this sanction will accomplish the purpose of lawyer discipline—to protect the public and deter future misconduct.

CONCLUSION

We find that the Bar proved the alleged rule violations by clear and convincing evidence as outlined above, and order that respondent be suspended from the practice of law for a period of 120 days, commencing 30 days after this decision becomes final.

Respectfully submitted this 27th day of October 2020.

/s/ Mark A. Turner

Mark A. Turner, Adjudicator

/s/ Susan T. Alterman

Susan T. Alterman, Trial Panel Member

/s/ James E. Parker

James E. Parker, Public Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 20-40
)
THOMAS JOHNSON,)
)
Respondent.)

Counsel for the Bar: Samuel Leineweber

Counsel for the Respondent: None

Disciplinary Board: None

Disposition: Violation of RPC 1.3 and RPC 8.4(a)(3). Stipulation for Discipline. 150-day suspension.

Effective Date of Order: January 1, 2021

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Thomas Johnson (Respondent) and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Respondent is suspended for 150-days, effective January 1, 2010 for violation of RPC 1.3 and RPC 8.4(a)(3).

DATED this 31st day of December, 2020.

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

STIPULATION FOR DISCIPLINE

Thomas Johnson, attorney at law (Respondent), 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.

Respondent 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, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On August 29, 2020, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against Respondent for alleged violations of RPC 1.3 and RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct (RPC). 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.

Respondent was hired to mediate a dissolution of marriage case between Adam Vetere (Adam) and Tiffany Vetere (Tiffany). The Washington County Circuit Court entered a general judgment in the Vetere case on November 29, 2018, and incorporated the Veteres' mediated agreement into the judgment.

6.

Per the mediated agreement and judgment, Respondent was required to retain attorney Clark Williams (Williams) to prepare a Qualified Domestic Relations Order (QDRO) to effectuate a transfer of \$48,000 from Tiffany to Adam. In order to complete the QDRO, Respondent needed to provide information to Williams.

7.

In January 2019, Respondent went on vacation and asked his friend Natalie Harrison (Harrison) to mail the QDRO information to Williams while he was gone.

8.

Harrison neglected to mail the QDRO packet to Williams while Respondent was on vacation. When Respondent returned, he did not follow up with Harrison or Williams to ensure that the QDRO work was underway.

9.

On February 19, 2019, Adam asked Respondent about the status of the QDRO. Despite not consulting with Williams, Respondent emailed Adam the following reply:

“I checked with the QDRO guy and he is waiting for the plan to ‘qualify’ the order he drafted ... I will also check with the QDRO folks periodically for updates.”

10.

On May 5, 2019, Adam asked for another update and, the next day, Respondent replied that he had a phone conference set up with Williams for May 9, 2019, in order to get a status update.

11.

On May 14, 2019, Adam asked Respondent for an update following Respondent’s May 9th call with Williams. Again, without confirming the status of the QDRO with Williams, Respondent told Adam:

“The QDRO preparer is just as frustrated as we are. The plan administrator is just really slow. [William’s] staff keep sending reminders to the plan to try and move things along...”

12.

Adam retained an attorney, Nicole Deering (Deering), to check on the status of the QDRO. On May 20, 2019, Deering contacted Williams and learned that he was not working on the QDRO. On the same date, Deering emailed Respondent, asking if he had retained a different attorney to prepare the QDRO. On May 22, 2019, Respondent emailed Deering and admitted that the QDRO materials had not been sent to Williams.

13.

Respondent explained that after Deering’s inquiry, he discovered that Harrison had not mailed the QDRO packet, but she had been too embarrassed to admit her mistake. Williams therefore never received the materials necessary to begin working on the QDRO. Respondent admits that he made statements about the progress of the QDRO to Adam based on his own assumptions of what was happening, and that those statements misled Adam about the status of the QDRO.

Violations

14.

Respondent admits that by failing to ensure that the QDRO packet was mailed and failing to confirm that progress was being made on the QDRO for nearly five months, he neglected the matter in violation of RPC 1.3.

Respondent admits that by misrepresenting the status of the work being done on the QDRO to his client, he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on his fitness to practice law in violation of RPC 8.4(a)(3).

Sanction

15.

Respondent 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* (ABA Standards). The ABA Standards require that Respondent'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 that an attorney owes are to his or her clients. ABA Standards at 5. Respondent violated his duty to his client by failing to diligently attend to his clients' matter, ABA Standard 4.4, and he violated his duty of candor toward his client. ABA Standard 4.6.
- 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. ABA Standards at 9. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is the failure to be aware of a substantial risk that circumstances exist or that a result will follow and which deviates from the standard of care that a reasonable lawyer would exercise in the situation. *Id.*

Respondent acted with a knowing mental state in committing both violations. Respondent told the Veteres that he had communicated with Williams and gotten updates as to the QDRO when he had not. Likewise, Respondent knew that he was not ensuring that work was being done on the QDRO for months, despite requests from the Veteres.

- c. **Injury.** Injury can be either actual or potential under the ABA Standards. *In re Williams*, 314 Or 530, 547, 840 P2d 1280 (1992). The Veteres suffered actual injury through the delay of the matter. *In re Parker*, 330 Or 541, 546-47, 9 P3d

107 (2000) (holding that there is actual injury to a client when an attorney fails to actively pursue the client's matter). The Veteres also suffered actual injury in the form of the anxiety and frustration waiting for results and information from Respondent. 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 ABA Standards); *In re Schaffner*, 325 Or 421, 426-27, 939 P2d 39 (1997).

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

1. Prior disciplinary offense. ABA Standard 9.22(a). Respondent was previously suspended for 90 days when he neglected a client's matter for approximately 7 months and then made false representations to the client about his health and the status of the matter. *In re Thomas Johnson*, 19 DB Rptr 324 (2005).
2. Dishonest or selfish motive. ABA Standard 9.22(b). Respondent misrepresented the status of the matter to conceal his own inaction.
3. Pattern of misconduct. ABA Standard 9.22(c). Respondent's conduct in this matter bears a close resemblance to his 2005 matter as described above.
4. Multiple violations. ABA Standard 9.22(d). Respondent made multiple misrepresentations to the Veteres in this matter.
5. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent was licensed to practice in 1995.

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

1. Timely good faith effort to make restitution or to rectify consequences of misconduct. ABA Standard 9.32(d). Respondent refunded the Veteres the QDRO fee, and then paid the fee himself.
2. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. ABA Standard 9.32(e). Respondent has cooperated with the Bar throughout the proceeding.
3. Remorse. ABA Standard 9.32(l). Respondent has expressed remorse.

16.

Under the ABA Standards, a 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. ABA Standard 4.42(a). Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. ABA Standard 4.62.

17.

Oregon case law supports a period of suspension for Respondent for his misconduct.

In the matter of *In re Redden*, the Oregon Supreme Court noted that attorneys who knowingly neglect a client's legal matter are generally sanctioned with 60-day suspensions. 342 Or 393 at 401, 153 P3d 113 (2007).

Misrepresentations to clients have resulted in a range of sanctions by the Oregon Supreme Court or trial panels. *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (attorney suspended for 30 days for failing to inform his client for five months that the client's appeal had been dismissed due to the attorney's untimely filing, which was considered a misrepresentation by omission); *In re Butler*, 324 Or 69, 921 P2d 401 (1996) (attorney suspended for one year for assuring clients on several occasions that he was working on their case, although it had been dismissed for lack of prosecution); *In re Hedges*, 313 Or 618, 836 P2d 119 (1992) (attorney suspended for 63 days for misrepresentations to his client regarding the status of their litigation).

When attorneys have a prior disciplinary record involving misconduct similar to a case under consideration, the court generally imposes sanctions of greater magnitude than might be ordinarily warranted. *In re Cohen*, 330 Or 489, 506, 8 P3d 953 (2000) (citing *In re Jones*, 326 Or 195, 951 P2d 149 (1997), (imposing a 45-day suspension, rather than a 30-day suspension, for a single misrepresentation in light of prior similar misconduct); *In re Hereford*, 306 Or 69, 76, 756 P2d 30 (1988) (imposing a 126-day suspension instead of a public reprimand because of lawyer's record of related misconduct); *In re Meyer*, 328 Or 211, 227-28, 970 P2d 652 (1999) (imposing a one-year suspension for knowing neglect in light of previous reprimand for similar conduct).

18.

Consistent with the ABA Standards and Oregon case law, the parties agree that Respondent shall be suspended for 150 days for violation of RPC 1.3 and RPC 8.4(a)(3), the sanction to be effective January 1, 2021.

19.

Respondent 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. Respondent also represents that he does not have any current clients or open cases.

20.

Respondent 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. Respondent also acknowledges that he cannot hold himself out as an

active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

21.

Respondent 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 Respondent to attend continuing legal education (CLE) courses.

22.

Respondent 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 Respondent is admitted: None.

23.

Approval of this Stipulation for Discipline as to substance was given by the SPRB on August 29, 2020. 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 December, 2020.

/s/Thomas Johnson
Thomas Johnson, OSB No. 953126

EXECUTED this 30th day of December, 2020.

OREGON STATE BAR

By: /s/Samuel Leineweber
Samuel Leineweber, OSB No. 123704
Assistant Disciplinary Counsel

I hereby declare that the above statements are true to the best of my knowledge and belief, and I understand it is made for use as evidence in court and is subject to penalty for perjury.

/s/Thomas Johnson
Thomas Johnson

I, Samuel Leineweber, say that I am Assistant Disciplinary Counsel for the Bar and that I have reviewed the foregoing Stipulation for Discipline and that the sanction was approved by the SPRB for submission to the Disciplinary Board on the 29th day of August, 2020. I hereby

declare that the above statements are true to the best of my knowledge and belief, and I understand it is made for use as evidence in court and is subject to penalty for perjury.

/s/Samuel Leineweber
Samuel Leineweber

