IN THE SUPREME COURT OF THE STATE OF OREGON

In re: Complaint as to the Conduct of ALLAN F. KNAPPENBERGER, Accused.	OSB Case Nos. 01-9, 01-121, and 01-122 SC S49996

OREGON STATE BAR'S RESPONDENT'S BRIEF

Stacy J. Hankin
Assistant Disciplinary Counsel
Oregon State Bar
5200 SW Meadows Road
Lake Oswego, OR 97035-0889
503-620-0222, Ext. 347
Bar No. 86202

Stephen F. English, Esq.
Bullivant Houser Bailey PC
888 S.W. 5th Ave., Ste. 300
Portland, OR 97204
503-499-4411
Bar No. 73084

Attorneys for Oregon State Bar

Peter R. Jarvis
Stoel Rives LLP
900 S.W. 5th Ave., Ste. 2600
Portland, OR 97204
503-294-9456
Bar No. 76186

Attorney for the Accused

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding

The Oregon State Bar filed an amended formal complaint against the Accused on August 10, 2001. The Accused answered that amended complaint on September 28, 2001, and October 3, 2001.

A Trial Panel was appointed and the matter was tried on October 8, 2002. The Trial Panel filed its opinion on November 27, 2002. It found that the Accused violated DR 5-101(A) in the Mura matter, DR 6-101(B) in the Loitz matter, and DR 5-101(A) and DR 6-101(B) in the Bridge matter. The Trial Panel imposed a one year suspension, with nine months stayed pending satisfactory completion of a two-year period of probation.

B. Nature of Judgment Sought to be Reviewed

This proceeding is a consolidation of three separate matters. The Bar's complaint alleged violations of DR 5-101(A) in the Mura matter, DR 6-101(B) in the Loitz matter and DR 5-101(A) and DR 6-101(B) in the Bridge matter.

C. Statutory Basis for Appellate Jurisdiction

This matter is before the Court pursuant to ORS 9.536(1), BR 10.1, BR 10.5, and BR 10.6. The Court shall consider this matter *de novo*.

II. RESPONSE TO ACCUSED'S QUESTIONS ON REVIEW

A. The Bar proved by clear and convincing evidence that the Accused violated DR 5-101(A) when he continued to represent Mura without obtaining his consent after full disclosure, after the exercise of the Accused's professional judgment was or reasonably may have been affected by his failure to timely file the petition for post conviction relief on Mura's behalf. (Response to Accused's Questions on Review No. 1.)

B. The Bar proved by clear and convincing evidence that the Accused engaged in a course of neglectful conduct while representing Loitz. (Response to Accused's Question on Review No. 2.)

C. The Bar proved by clear and convincing evidence that the Accused violated DR 5-101(A) when he continued to represent Bridge without obtaining her consent after full disclosure, after the exercise of his professional judgment was or reasonably may have been affected by his failure to properly serve a notice of appeal on Bridge's behalf. (Response to Accused's Question on Review No. 3.)

D. The Bar proved by clear and convincing evidence that the Accused engaged in a course of neglectful conduct while representing Bridge. (Response to Accused's Question on Review No. 3.)

E. The Accused's conduct warrants a suspension of no less than six months. (Response to Accused's Question on Review No. 4.)

III. SUMMARY OF BAR'S ARGUMENT

The Bar asks this court to accept the Trial Panel's factual and legal findings with regard to the violations in their entirety.

The Trial Panel correctly concluded that the Accused violated DR 5-101 when he failed to fully explain, in a manner that Mura could understand, that the Accused's late filing of the petition for post conviction relief put the Accused's interests in conflict with those of Mura and that Mura should seek independent legal advice regarding whether and how to proceed. The Trial Panel also correctly found that the Accused's failure to make full disclosure to Mura was consistent with his desire to avoid the loss of income and the avoidance of potential malpractice claims.

The Trial Panel correctly held that the Accused violated DR 6-101(B) when he neglected to keep Loitz informed of the progress of his case and when he failed to pursue dissemination of information regarding the appellate bond. The Trial Panel correctly found that the Accused's explanation as to why he failed to communicate with Loitz was not credible.

The Trial Panel correctly concluded that the Accused violated DR 5-101(A) when he failed to explain fully, in a manner that Bridge could understand, that the Accused's failure to effect proper service on her ex-husband put the Accused's interests in conflict with those of Bridge and that Bridge should seek independent legal advice regarding whether and how to proceed. The Trial Panel correctly concluded that the Accused's failure to make full

disclosure to Bridge was consistent with his desire to avoid a malpractice claim and to continue to bill Bridge.

Finally, the Trial Panel correctly held that the Accused violated DR 6-101(B) when he neglected to keep Bridge informed about the progress of her case. The Trial Panel correctly found the Accused's explanation unpersuasive.

IV. STATEMENT OF FACTS

A. Mura matter.

On June 21, 1993, Mura (hereinafter "Mura"), was convicted for sexually abusing his daughter. (Ex. 1.) Mura pled no contest to that charge because the public defender who had been appointed to represent him told him that if the case went to trial he would be convicted without a doubt. (Tr. 33.)

Later in 1993 Mura's daughter informed her mother, in Mura's presence, that somebody else, and not Mura, had actually abused her. (Tr. 34.) As a result of that recantation, Mura retained the Accused to represent him and on October 21, 1993, the Accused filed a petition for post conviction relief. (Tr. 36; Ex. 2.)

Due to a calendaring error by the Accused, the petition for post conviction relief was filed one day late.[1] On January 26, 1994, the State of Oregon filed a motion to dismiss the petition on the grounds it had not been timely filed. (Ex. 7.) When the Accused received the motion to dismiss, he understood that his calendaring error put Mura at risk of losing his case. (Tr. 111-112.)

On January 30, 1994, the Accused sent Mura two letters. The first one, which included a copy of the state's motion, informed Mura that he need not be present at the February 14, 1994, hearing when the court would consider the motion, and expressed his disappointment that Mura had failed to pay his outstanding attorney fee bill. (Ex. 9.) After receiving that letter, Mura believed the Accused had the matter under control. (Tr. 39.) The second letter informed Mura about a February 28, 1994, trial date and emphasized that they

[1] The Bar is not alleging that the Accused's failure to timely file the petition for post-conviction relief constitutes a violation of the Code of Professional Responsibility.

would have to discuss fees before the Accused would proceed any further with the case. (Ex. 9.)

On February 1, 1994, the Accused met with Mura and informed him that his case "had slipped substantially as a result of not getting the little girl to the psychologist back in October or November 1993." (Ex. 10.) The Accused further informed Mura that he would not continue to work on the case without getting paid and that he wouldn't blame Mura, "for dismissing the case at this time and cutting his losses." (Ex. 10.) Even though the Accused knew that the motion to dismiss was hanging over his head because he had not timely filed the petition, he did not discuss the motion to dismiss with Mura other than to remind Mura that the hearing was coming up and he needed to prepare for it. (Tr. 119, 126.)

The Accused filed a response to the State's motion to dismiss in which he argued that the motion should be denied because the untimely filing was caused by the Accused and not attributable to Mura. (Ex. 11.) The Accused did not send a copy of that response to Mura (Ex. 17.)[2] At the February 14, 1994 hearing, the court granted the motion to dismiss because the petition was not timely filed and because Mura had not alleged facts which might constitute grounds for the late filing as provided in ORS 138.510(2). [3] (Ex. 12.)

On February 21, 1994, the Accused sent a letter to Mura informing him that the petition had been dismissed because it was not timely filed and that he had 30 days in which to file a notice of appeal. (Ex. 13.)

The Accused continued to pursue Mura's legal matter through January 1996. (Ex. 14-17.) At no time after he received the state's motion did the Accused obtain consent from Mura after full disclosure.

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[2] Contrary to the Accused's assertion in his opening brief, Mura never testified that he received the response filed by the Accused and the Accused's billing records do not show a copy was sent to Mura.

[3] ORS 138.510(2) allows a petition for post-conviction relief to be filed after 120 days from entry of the judgment if there is evidence that the grounds for relief could not reasonably have been raised timely.

B. Loitz matter.

Loitz (hereinafter "Loitz") retained the Accused in 1997 with the goal of reducing monthly spousal support payments he was required to make to his former wife. The matter went to trial on July 9, 1998, and on August 27, 1998, the court signed an order reducing Loitz's monthly spousal support obligation. (Ex. 22.) The Accused was upset with the decision because he believed the payments should have been reduced even more and strongly encouraged Loitz to appeal it. (Tr. 52 and 129.) Loitz took the Accused's advice and appealed.

On September 21, 1999, the Accused argued the matter before the Court of Appeals. (Ex. 24.) On that same day, the Accused spoke with Loitz about the argument. Then, except for one telephone call on January 27, 2000, the Accused had no further communications with Loitz. During the subsequent months, the following events occurred:

Sept. 26	Letter from Court Bonds to Accused reminding him that the premium on the bond is overdue. (Ex. 23.)[4]
Oct. 6	Court of Appeals issued opinion affirming the trial judge's decision. (Ex. 24.).
Oct. 12	Opposing lawyer filed statement for costs and petition for attorney fees. (Ex. 25.)
Oct. 15	Letter from Court Bonds to Accused reminding him that premium on bond is overdue. (Ex. 26.)
Oct. 20	Opposing lawyer sends true copies of petition for attorney fees to Court Administrator with copy to Accused. (Ex. 27.)
Nov. 18	Letter from Court Bonds to Accused demanding premium payment in 10 days. (Ex. 29.)
Nov. 30	Letter from Court Bonds to Loitz regarding failure to pay bond premium. (Ex. 30.)
Dec. 7	Facsimile from Loitz to Accused asking about bond and Court of Appeals decision. (Ex. 31.)
Dec. 13	Loitz contacts Lisa at Accused's office is told to re-send facsimile. (Tr. 59.)
Dec. 13	Loitz re-sends Dec. 7th facsimile. (Ex. 32.)

[4] In order to avoid paying spousal support during the pending of the appeal, Loitz purchased a supercedes bond in September 1998.

Dec. 20 Appellate Judgment issued against Loitz for $8,157.50. (Ex. 33.)

During these months, the Accused was given a daily log prepared by his staff of the first-class mail received by the office. (Tr. 130.) The Accused was supposed to review the log and the mail, and then either handle the mail himself or delegate it to his staff. (Tr. 130.)

According to those logs, the Accused's office received the October 12, 1999, and October 20, 1999, letters from the opposing lawyer, the appellate judgment issued on December 20, 1999, and all three of the letters from Court Bonds. (Tr. 132, 133, 137 and 142.) The Accused did not review any of these documents, and did not either send copies of them to Loitz or otherwise notify Loitz of them. (Tr. 57, 132, 133 and 142).[5]

Loitz first learned about the overdue bond premium when he received the November 30, 1999, letter from Court Bonds. (Tr. 55 -56.) Loitz was surprised to receive that notice because in July or August 1999 when he asked the Accused whether he had to keep paying for the bond, the Accused told him he would check into it. (Tr. 71-72.)

When Loitz received the November 30, 1999 letter from Court Bonds he had not yet heard back from the Accused. Therefore, he sent a facsimile to the Accused asking about the status of the bond. (Ex. 31.) Loitz called the Accused on December 13, 1999 because he had not received a response to the prior facsimile. (Tr. 59.) At that time, the Accused's assistant told Loitz to re-send the facsimile. (Tr. 59.) He did, but never received any response from the Accused. (Tr. 59-60.)

Loitz was first informed about the Court of Appeals decision and the judgment against him when he received a March 17, 2000 letter, from Reliance Surety Company, the surety of the supersedes bond. (Ex. 35.) Because Loitz had not yet heard from the Accused about the court's decision he did not understand the significance of the March 17, 2000, letter until he sold a piece of property in July 2000. (Tr. 59 and 73.) At that time, he learned that he owed his former wife almost $15,000. (Tr. 59-60.). Thereafter, Loitz tried to contact the Accused, but never heard from him. (Tr. 60-61.)

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[5] The Accused dictated a letter to Loitz regarding a November 19, 1999 conversation he had had with Janis Harsden at Court Bonds. (Ex. 29.) However, no letter was ever sent. (Tr. 138.)

C. **Bridge matter**

Bridge retained the Accused to represent her in a dissolution of marriage proceeding, which went to trial in November 1997. (Tr. 83.) The main issue at trial was the validity of a pre-nuptial agreement that prevented Bridge from receiving any spousal support. (Tr. 178-179.) On July 13, 1998, the court signed a judgment of dissolution of marriage upholding the validity of the agreement, but nonetheless awarding some spousal support to Bridge. (Ex. 41.) Based upon the Accused's advice that the court had made legal errors in its decision, a notice of appeal was filed in August 1998. (Tr. 84, 178; Ex. 42.) The opposing party filed a cross-appeal. (Ex. 43.)

On June 15, 1999, the lawyer representing the opposing party filed a brief contending, among other things, that Bridge's appeal should be dismissed because the Accused failed to properly serve Bridge's former husband with the notice of appeal. (Ex. 45.) At that time, the Accused recognized that as a result of his conduct, Bridge's appeal was at risk, although he decided that the risk was either minimal or non-existent. (Tr. 187, 192.) At that time, the Accused merely sent the opposing party's brief to Bridge and did not discuss that risk or anything about the service issue with her. (Ex. 57.)

On October 6, 1999, the Accused argued the matter before the Court of Appeals, and on April 12, 2000, the court issued an opinion dismissing Bridge's appeal because the Accused had failed to properly serve the notice of appeal. (Ex. 47.)

The Accused thereafter hired another lawyer to file a Petition for Review and on May 17, 2000, requested an extension of time in which to file that petition. (Tr. 49 and 182.)

The Accused first spoke with Bridge about the Court of Appeals decision on May 22, 2000. At that time, the Accused only discussed his plans to appeal that decision. (Tr. 92.)

The Accused continued to pursue Bridge's legal matter. (Ex. 54 and 60.) At no time did he obtain consent from Bridge after full disclosure. (Tr. 204.)

After the Court of Appeals' decision, the Accused failed to inform Bridge that the opposing lawyer filed a petition for costs and attorney fees (Ex. 48.), that the Oregon

Supreme Court denied her Petition for Review (Ex. 55.), and that an Appellate Judgment against her for $3,320.50 had been entered. (Ex. 56.)

Bridge first learned about these events after she was contacted by a collection agency in November 2000. (Tr. 96.) The next month Bridge sent a letter to the Accused because she had not heard from him in a long time. (Tr. 99.) The Accused never responded to that letter.

V. Arguments

A. The Accused violated DR 5-101(A) when he continued to represent Mura without first obtaining his consent after full disclosure.

> DR 5-101(A)(1) provides that:
> Except with the consent of the lawyer's client after full disclosure, a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interest.

In evaluating the circumstances in which a lawyer must obtain consent after full disclosure as provided in DR 5-101(A)(1):

> "[W]ill be affected" is a prediction with a high degree of certainty. It plainly requires a determination on the facts of each case. "May be affected" contemplates a much lower degree of certainty; a substantial risk suffices. It might state an absolute prophylactic rule but for the qualifying adverb "reasonably" which implies that the apprehension of impaired professional judgment must be reasonable under the circumstances. *In re Tonkon*, 292 Or 660, 642 P2d 660 (1982).

The question under DR 5-101 is whether the facts negate the inference of potentially impaired professional judgment. *Id.* at 667, n. 6. DR 5-101(A)(1) does not require that the lawyer's judgment be actually impaired. It is enough if there are facts from which an inference can be made that the lawyer's judgment potentially may be impaired.

There is clear and convincing evidence that exercise of the Accused's judgment was affected by his own interests. Specifically, when the Accused had an opportunity to discuss the basis for the State's motion to dismiss or his error with Mura, he chose to instead to encourage Mura to drop the case because it had, "slipped substantially as a result of not

getting the little girl to the psychologist back in October or November." (Ex. 10.). The Accused, in an attempt to minimize the consequences of his error, attempted to place blame for the status of the case on Mura.

The pendency or potential pendency of a malpractice claim by a client against the lawyer triggers a lawyer's duty to comply with the requirements of DR 5-101(A)(1). *See In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001) [lawyer violated DR 5-101(A) when he continued to represent a client without obtaining consent after full disclosure after the trial court had entered a default judgment against the client because the lawyer failed to file a timely response to a petition for dissolution of marriage].

The pendency or potential pendency of a malpractice claim by Mura against the Accused first arose on January 26, 1994, when the State filed its motion to dismiss. The issue arose again on February 14, 1994, when the court granted the motion to dismiss. At both of those points in time, the Accused's objective interests in eliminating or minimizing a potential malpractice claim against him reasonably may have impaired the decisions he made or advise he gave to Mura.

The Accused never spoke with Mura about the motion to dismiss, but merely sent him a copy of it. (Tr. 119, 126.) In order to comply with the full disclosure requirements of DR 10-101(B), a lawyer must give the type of advice which a prudent lawyer would be expected to give the client if the client consulted the lawyer regarding the underlying issue or transaction. *In re Montgomery*, 292 Or 796, 803, 643 P2d 338 (1982); *In re Germundson*, 301 Or 656, 661, 724 P2d 793 (1986) [lawyers must take care to make the same kind of "full disclosure" to a client or potential client as they would seek on behalf of that client in a similar transaction with a third party]

Under that standard, when the State filed its motion to dismiss and no later than when the court granted that motion, the Accused was required to 1) provide Mura with an explanation sufficient to apprise him of the potential adverse impact on him, of the Accused's continued representation of him in the matter; 2) recommend that Mura seek independent legal advice to determine whether he should give his consent; and 3) contemporaneously

confirm the full disclosure in writing. The Accused conduct here falls far short of that standard.

The Accused has provided no evidence whatsoever that he provided Mura with any explanation about the potential adverse impact on Mura of the Accused's continued representation of him in the matter. At most, the Accused did not withhold from Mura the fact that the state had filed a motion to dismiss. Keeping a client informed about the status of their case is not the same as providing a client with an explanation sufficient to apprise them of the potential adverse impact on him of the Accused's continued representation of him in that matter.

Even if this court accepts the Accused's contention that sending documents to Mura constitutes full disclosure, it should nonetheless reject any argument that the Accused's failure to fully comply with DR 10-101(B)(2) was minor. The explicit requirements of DR 10-101(B)(2) may not be dispensed with casually. *Lawrence, supra* at 512.

B. The Accused neglected Loitz's legal matter, in violation of DR 6-101(B).

DR 6-101(B) prohibits a lawyer from neglecting a legal matter entrusted to the lawyer. Under DR 6-101(B), a lawyer has a duty to pursue a client's case and a duty to maintain adequate communications with a client. *In re Bourcier II*, 325 Or 429, 939 P2d 604 (1997); *In re McKee*, 316 Or 114, 849 P2d 509 (1993); *In re Recker*, 309 Or 633, 789 P2d 663 (1990); *In re Purvis*, 306 Or 522, 760 P2d 254 (1988); *In re Thies*, 305 Or 104, 750 P2d 490 (1988). A lawyer who engages in a course of neglectful conduct, either by failing to pursue a client's case and or by failing to maintain adequate communications with a client, violates DR 6-101(B). *In re Magar*, 335 Or 306, 666 P3d 1014 (2003).

A lawyer can violate DR 6-101(B) where the time period involved is relatively short. In *In re Meyer*, 328 Or 220, 225, 970 P2d 647 (1999) the court found a DR 6-101(B) violation even where the lawyer rendered some service during a two-month period, because the lawyer took no constructive action to advance or protect his client's position. See also *In re Purvis, supra* [lawyer violated DR 6-101(B) when, as a result of the lawyer's failure to

pursue the reinstatement of child support payments for four months, the client lost nine months of payments].

A lawyer's duty to communicate with a client arises even when a client does not inquire about the status of their legal matter. For example, in *In re Bourcier II, supra*, the court found that a lawyer's failure to provide information to a client regarding a criminal appeal constituted neglect of a legal matter, even though there was no evidence the client had contacted the lawyer inquiring about the status of the matter. *See also In re McKee, supra,* [lawyer's failure to inform client about his potential liability regarding a counter-claim filed by the opposing party constituted neglect of a legal matter].

By definition a course of neglectful conduct must arise out of a series of individual events. If the individual events are discrete and isolated, then there is no DR 6-101(B) violation. *Magar, supra* at 321. However, if the events are not discrete and isolated, but instead arise out of a course of neglectful conduct, then a lawyer violates DR 6-101(B).

In this case, after September 21, 1999, the Accused failed to notify Loitz about important events in his legal matter. He failed to inform Loitz about the Court of Appeals' decision, the opposing lawyer's statement for attorney fees, the money judgment, and numerous letters he received from Court Bonds. The Accused also failed to respond to Loitz's inquiries.

The events underlying the Accused's conduct in this case are not discrete and isolated. Instead, they resulted from the Accused's persistent failure to; review the first-class mail log prepared by his staff, and read the mail received by his office. It is undisputed that on at least five different days between September 26th and December 20th, the Accused failed to review the logs and incoming first-class mail. The Accused not only failed to review the logs on the days they were prepared and failed to read the mail on the days it was received, but also failed to review those logs or read that mail at anytime thereafter.

The trial panel specifically found the Accused's explanation that he failure to read his mail because of a breakdown in office procedures as not credible. This court should give

substantial weight to the trial panel's credibility findings. *In re Kumley*, __ Or __, __ P3d __ (opinion filed August 14, 2003)

The bar has satisfied its burden of proving that after September 21, 1999, the Accused engaged in a course of neglectful conduct in the Loitz matter.

C. The Accused violated DR 5-101(A)(1) when he continued to represent Bridge without first obtaining her consent after full disclosure.

There is clear and convincing evidence that the exercise of the Accused's judgment was affected by his personal interests. The Accused was incensed by the Court of Appeals' decision, most likely because it faulted him for failing to properly serve the notice of appeal. (Tr. 181.) As a result of that emotional response, the Accused hired another lawyer to file a Petition for Review, even before he spoke with Bridge about the court's decision. (Ex. 49 and 51.)

As discussed in connection with the Mura matter, the pendency or potential pendency of a malpractice claim by a client against a lawyer triggers the lawyer's duty to obtain consent after full disclosure as provided in DR 5-101(A)(1).

The pendency or potential pendency of a malpractice claim by Bridge against the Accused first arose on June 16, 1999, when the failure to properly serve the notice of appeal was raised by the opposing lawyer. The issue arose again on April 12, 2000, when the Court of Appeals dismissed Bridge's appeal. At both of those points in time, the Accused's objective interests in eliminating or minimizing a potential malpractice claim against him reasonably may have impaired the decisions he made or advice he gave to Bridge. There is evidence that the Accused recognized his potential liability in that he contacted the Professional Liability Fund in June 2000. (Ex. 52.) Under these circumstances, the Accused could not continue to represent Bridge without first obtaining her consent after full disclosure.

The fact that the Accused had another lawyer prepare the petition for review and did not charge Bridge for that work does not absolve him from needing to obtain consent from her after full disclosure, particularly when the facts which form the basis for the potential

malpractice claim arose ten months before the Accused hired the other lawyer. *See In re Lawrence, supra* [a lawyer's duty to obtain consent after full disclosure as required by DR 5-101(A)(1) is not eliminated because the lawyer provided additional services to the client without charge, or arranged for another lawyer to represent the client for a period of time].

The Accused suggests that the application of DR 5-101(A) should be limited to cases in which the lawyer's error and the resulting prospect of harm to a client are both clear and present. However, the plain language of DR 5-101(A) applies when the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own interests. The focus in evaluating a DR 5-101(A) violation is on the exercise of the lawyer's professional judgment and not on the quality or extent of harm to a client.

The bar has satisfied its burden of proving that beginning on June 16, 1999, the Accused violated DR 5-101(A) when he continued to represent Bridge without obtaining her consent after full disclosure.

D. The Accused neglected Bridge's legal matter, in violation of DR 6-101(B).

As discussed earlier, a lawyer has a duty to pursue a client's case. A lawyer violates DR 6-101(B) by failing to timely file a client's claim. *In re Dixson*, 305 Or 83, 88, 750 P2d 157 (1988). The Accused violated DR 6-101(B) when he failed to properly serve the notice of appeal.

Where a lawyer's failure to communicate with a client arises out of a course of neglectful conduct, the lawyer violates DR 6-101(B). *Magar, supra.*

In this case, the Accused failed to timely inform Bridge about the Court of Appeals decision. He also failed to inform her that 1) the opposing lawyer filed a statement for attorney fees filed on May 1, 2000; 2) the Oregon Supreme Court denied review on August 15, 2000; and 3) a money judgment was entered against her for $3,320.50 on October 18, 2000.

The Accused appears to argue that to the extent Bridge did not contact him after she learned about the Court of Appeals decision from her best friend on April 27, 2000, and did not ask the Accused to send her any documents, he did not neglect her legal matter.

As a matter of fact, the Accused's argument has no merit. Contrary to the Accused's assertion, Bridge testified that she must have tried to contact the Accused after she learned about the Court of Appeals decision from her friend. (Tr. 92.)

As a matter of law, the Accused's argument also has no merit. As discussed in connection with the Loitz matter, a lawyer has a duty to communicate with a client, even if the client has not made any inquiries.

VI. SANCTION

This court refers to the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"), in addition to its own case law for guidance in determining the appropriate sanction for attorney misconduct. *In re Willie*, 327 Or 175, 181, 957 P2d 1222 (1998).

A. ABA Standards.

The *Standards* provide an analytical framework for determining the appropriate sanction in lawyer discipline cases using three factors: 1) the duty violated; 2) the lawyer's mental state; and 3) the actual or potential injury caused by the misconduct. Once these factors are analyzed, the court makes a preliminary determination of sanction, after which it adjusts the sanction, if appropriate, based upon the existence of aggravating or mitigating circumstances.

1. Duty Violated. The most important duties the lawyer owes are those owed to clients. *Standards* at p. 6. The Accused violated two duties he owed to clients: to avoid conflicts of interest, and to act with reasonable diligence and promptness in representing clients. *Standards* §§ 4.3 and 4.4.

2. Mental State. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "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 of the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at p. 7.

In the Mura matter, the Accused recognized that his failure to timely file the petition for post-conviction relief might affect Mura's rights when he received the State's motion to dismiss. (Ex. 11.) Despite that recognition, the Accused tried to persuade Mura to dismiss the case because it had "slipped substantially as a result of not getting the little girl to the psychologist" four months earlier. (Ex. 10.) The Accused understood the potential conflict between his and his client's interests, and knowingly continued to pursue Mura's case without obtaining consent after full disclosure from him.

In the Bridge matter, the Accused recognized that his failure to properly serve the notice of appeal might affect Bridge's rights when he received the opposing lawyer's brief in June 1999. (Tr. 187.) Despite that recognition, the Accused failed to explain the problem to Bridge. Initially, the Accused ignored the issue, believing the court would find in his favor and the situation would resolve itself. (Tr. 187 and 192.) When the court found against him, the Accused did not discuss his error with Bridge, but only his plans to appeal the decision. (Tr. 92.) The Accused knowingly continued to pursue Bridge's case without obtaining consent after full disclosure from her.

The Accused asserts that he did not realize that he needed to obtain consent after full disclosure from either Mura or Bridge. The Accused is charged with knowing the requirements of DR 5-101(A)(1) and DR 10-101(B). *See In re Devers*, 328 Or 230, 241, 974 P2d 191 (1999) [lawyer is charged with knowing ORS 9.160 which prohibits a person from practicing law unless that person is an active member of the Oregon State Bar]. To the extent the Accused understood that his clients were at risk because of his conduct, and thereafter continued to represent them without obtaining their consent, the Accused acted knowingly.

The Accused negligently failed to act with reasonable diligence and promptness in representing Loitz and Bridge.

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

Both Loitz and Bridge sustained actual injury in the form of anxiety and frustration because the Accused failed to communicate to them important events in their legal matters. *In re Schaffner II*, 325 Or 421, 426-27, 939 P2d 39 (1997).

The Accused's violation of DR 6-101(B) in the Loitz and Bridge matter also caused potential injury to both of them. They lost the opportunity to decide whether to object to the petition for costs and attorney fees filed by the opposing lawyer. They also lost the opportunity to decide whether to timely pay the judgment taken against them. By the time they learned about the judgment, additional amounts in interest had accrued.

The Accused's violation of DR 5-101(A) caused potential injury to both Mura and Bridge. Because of the undisclosed conflict of interests, they did not understand or consent to the Accused's divided loyalty.

4. Preliminary sanction.

Drawing together the factors of duty, mental state, and injury, the *Standards* provide the following:

> 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
>
> 4.42 Suspension is generally appropriate when:
>
> . . . . . .
>
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Before looking at aggravating and mitigating circumstances, the *Standards* suggest that suspension is appropriate in this case.

5. Aggravating circumstances.

The following aggravating circumstances are present in this case:

a. Prior disciplinary offenses. In September 2000, the Accused was reprimanded for violating DR 7-104(A)(1). *In re Knappenberger*, 14 DB Rptr 148 (2000). In October 1990, the Accused was admonished for violating of DR 5-101(A) when he had a sexual relationship with a client. (Ex. 62.) *Standards* § 9.22(a).

b. Selfish motive with regard to the DR 5-101(A) violations. *Standards* § 9.22(b). The Accused recognized that his conduct in the Mura and Bridge matters might subject him to malpractice claims.

c. Pattern of misconduct. On two occasions, and under similar circumstances, the Accused had a self-interest conflict of interest and failed to obtain consent after full disclosure. Under similar circumstances, he also failed to maintain adequate communications with two different clients. *In re Schaffner I*, 323 Or 472, 480, 918 P2d 803 (1996). *Standards* § 9.22(c).

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

e. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1973. *Standards* § 9.22(i).

6. Mitigating circumstances.

The following mitigating circumstance is present in this case:

a. Cooperative attitude toward the proceeding. *Standards* § 9.32(e).

Because the aggravating circumstances far out weigh the mitigating circumstances, the *Standards* dictate that suspension is the appropriate sanction.

B. Oregon case law.

1. Impact of prior discipline.

Generally, this court imposes a greater sanction than is ordinarily warranted by the facts of a particular matter when a lawyer has a prior disciplinary record, particularly when the prior record includes misconduct similar to the misconduct at issue in the present proceeding. *In re Cohen II*, 330 Or 489, 506, 8 P3d 952 (2000).[6]

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[6] See *In re Meyer*, *supra* (lawyer who had previously been reprimanded for violating DR 2-110(A) and DR 6-101(B), received a one-year suspension for subsequently violating DR 6-101(B)); *In re Bourcier II*, 325 Or 429, 939 P2d 604 (1997) (lawyer who agreed to a 60-day suspension in 1993 for violating DR 6-101(B) in one matter and was subsequently suspended for two years in 1996 for violating DR 6-101(B) and DR 1-103(C) was thereafter disbarred for violating DR 6-101(B) and DR 1-103(C)); *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997) (lawyer who was previously suspended for 120-days for violating DR 6-101(B) and DR 1-103(C), was subsequently disciplined for two years for violating those same rules, among others); *In re Butler*, 324 Or 69, 921 P2d 401 (1996) (lawyer who agreed to a 90-day suspension in 1993 for violating DR 1-102(A)(3), DR 6-101(A), DR 6-101(B), and DR 3-101(B) was subsequently suspended for a year for violating DR 1-102(A)(3) and DR 6-101(B)); *In re Jones*,

In determining what weight to ascribe to prior disciplinary offenses, this court examines the timing of the current offense in relation to the prior offenses, the relative seriousness of the prior offenses and sanction, the similarity of the prior offenses to the offense in the case at bar, the number of prior offenses, and the relative recency. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997)

a. **DR 5-101(A) admonition.**

The Accused was admonished for violating DR 5-101(A) before the conduct at issue in these matters. The violation was not extremely serious as it was sanctioned with an admonition. The admonition arose out of a DR 5-101(A) violation, the same rule at issue in the Mura and Bridge matters. The admonition was imposed thirteen years ago.

b. **DR 7-104(A)(1) reprimand**

The Accused was reprimanded for violating DR 7-104(A)(1) after the conduct at issue in these matters. The violation was serious enough to deserve a reprimand. The reprimand was imposed for conduct that is different than the conduct involved in the present proceeding. The reprimand was imposed only three years ago.

Prior offenses and sanctions demonstrate a lawyer's carelessness with respect to ethical obligations. *Id.* at 201. This is the third time the Accused will be sanctioned for unethical conduct. The prior offenses should be given some weight in considering the appropriate sanction to be imposed in this proceeding.

2. Relevant case law

Although no Oregon case contains the exact violations at issue here, various cases provide guidance in each of the areas of violation. When the violations committed by the

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326 Or 195, 200, 951 P2d 149 (1997). (lawyer who had previously been reprimanded for violating DR 1-102(A)(3) was suspended for 45 days, instead of 30 days, for subsequently violating DR 1-102(A)(3) and DR 1-102(A)(4)); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (lawyer who had previously been suspended 30 days and then 63 days for violating DR 1-103(C) and DR 6-101(B), suspended for two years for violating those same rules); *In re Bridges*, 302 Or 250, 728 P2d 863 (1986) (lawyer who had previously been suspended for 60 days for violating various disciplinary rules was disbarred for subsequently violating those same rules in a nomber of matters); and *In re Crist*, 297 Or 334, 683 P2d 85 (1984) (lawyer who had been suspended on two prior occasions, one of which involved violations of DR 1-103(C) and DR 6-101(B), was subsequently suspended for five years for violating those same rules).

Accused are taken as a whole, and in light of his prior disciplinary record, the Accused should be suspended from the practice of law for at least four months.

With regard to the DR 6-101(B) violations, the court should consider *In re LaBahn*, 335 Or 357,67 P3d 381 (2003) [where aggravating and mitigating circumstances were equal, lawyer who neglected a legal matter by failing to communicate with his client received a 60-day suspension]; *In re Schaffner I*, *supra* [lawyer with no prior disciplinary history was suspended from the practice of law for 120 days, 60 of which resulted from neglecting one legal matter] and *In re Holm*, 275 Or 178, 590 P2d 233 (1979) [60-day suspension for lawyer who neglected one legal matter]. Based upon this case law, the court should suspend the Accused for 120 days, 60 for each DR 6-101(B) violation.

The Accused asserts that, at most, he should be reprimanded for violating DR 5-101(A) in the Mura matter. However, the cases cited by the Accused are inapposite.

In *In re Harrington*, 301 Or 18, 718 P2d 725 (1986) the court imposed a public reprimand because it found the accused lawyer acted in utmost good faith, was motivated by kindness and consideration for the less fortunate, and his clients were not injured, but instead received valuable services without charge. No comparable facts exist in this case.

In *In re Cohen*, 316 Or 657, 853 P2d 286 (1993) the court imposed a public reprimand because the mitigating circumstances far outweighed the aggravating circumstances. Here, the aggravating circumstances, even only considering the DR 5-101(A) violation in Mura, far outweigh the mitigating circumstances.

In *In re Howser*, 329 Or 404, 987 P2d 496 (1999) the court imposed a public reprimand because the mitigating circumstances, including a long career with no prior disciplinary offense, outweighed the aggravating circumstances. Lack of a prior record is a strong mitigating circumstance. *Schaffner I*, *supra* at 480.

Instead, the court should rely upon *In re Wittemyer*, 328 Or 458, 980 P2d 148 (1999) [lawyer who committed three violations of DR 5-101(A), one violation of DR 5-104(A), and one violation of DR 5-105(E) in connection with a loan from him and a client to another client and subsequent efforts to pursue payment on that loan, was suspended for four

months]; *In re Gildea*, 325 Or 281, 936 P2d 975 (1997) [lawyer who, among other things, prepared a trust deed for a client that constituted a gift to the lawyer, who failed to obtain his client's consent before transferring title to her vehicle to the lawyer's professional corporation, and who failed to make full disclosure to the client regarding assigning a trust deed on her property to the lawyer, was suspended for four months]; and *In re Baer*, 298 Or 29, 688 P2d 1324 (1984) [lawyer who violated DR 5-101(A), DR 5-104(A), and DR 5-105(C) when he represented both his wife who was the purchaser and the sellers in a real estate transaction without disclosing to the sellers in detail the nature of the conflict of interest, was suspended for not less than 60 days and until he had taken and completed the professional responsibility examination]. Based upon this case law, the court should suspend the Accused for 60 days, 30 for each DR 5-101(A) violation.

3. Probation.

The Trial Panel imposed a one-year suspension, 9 months of which was stayed pending two years of probation. Trial Panels have the authority to stay a suspension, in whole, or in part, and place a lawyer on probation. BR 6.2(a). However, the probationary conditions must track the disciplinary violations. In other words, the remedial steps of a probation must make sense in light of the misconduct at issue. *See In re Haws*, 310 Or 741, 752, 801 P2d 818 (1990).

For example, in *In re Butler, supra*, the Trial Panel found that because the lawyer was having personal problems, he should be suspended for three years with all but six months stayed, subject to the lawyer seeking a mental health evaluation and counseling for professional office practice and management. In setting aside that sanction and imposing a one-year suspension, this court found an insufficient correlation between the acts of misconduct and the probationary conditions.

> "The record does not persuade us that a mental health condition or simple carelessness in office management caused the Accused to engage in the misconduct shown here. 324 Or at 75."

In this case, there is no evidence that the Accused neglected legal matters or engaged in improper conflicts of interest because of careless office management. In fact, the Trial Panel found the Accused's assertion that his conduct was caused by a breakdown in office procedures not credible.

In this case, there is also no evidence that the Accused neglected legal matters or engaged in improper conflicts of interest because of a mental health condition. In order to consider a lawyer's mental disability, condition, or impairment in mitigation of a disciplinary rule violation, the Accused must present:

(1) medical evidence that the lawyer is affected by the condition;

(2) evidence that the condition caused or contributed to the underlying misconduct;

(3) evidence that the lawyer's recovery from the condition is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) evidence that the recovery arrested the misconduct and recurrence of that misconduct is unlikely. *In re Cohen II, supra*; *Standards* § 9.32(i).

Under that standard, the Accused presented no evidence whatsoever regarding the existence or affect of any mental disability, condition, or impairment.

At hearing, the Accused testified that at the time he represented Mura, Loitz, and Bridge, he worked 15-16 hours a day for 364 days a year. (Tr. 214, 220-221.)[7] The Accused denied that the hours he worked caused or contributed to the situation. (Tr 221.) There is no evidence that the Accused has any medical or other condition that caused or contributed to the conduct at issue in the proceedings.

Probation is not an appropriate sanction in this matter.

VII. CONCLUSION

Lawyer discipline is intended to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly

[7] Contrary to his assertion, the Accused did not testify that he has cut back "in the last few years." He only testified that he has cut back in the "last year" for reasons unrelated to what happened in these matters. (Tr. 214 and 221.)

discharge their professional duties to clients, the public, and legal system, and the legal profession. *Standards*, p. 17.

Despite two prior disciplinary proceedings, the Accused is still not able to discharge his ethical obligations. The Accused's conduct in this proceeding is more disturbing because he violated his ethical obligations to three different clients. In order to protect the public, the court should suspend the Accused from the practice of law for at least six months.

Respectfully submitted this 22nd day of August 2003.

OREGON STATE BAR

By: _____
Stacy J. Hankin, OSB No. 86202
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing OREGON STATE BAR'S RESPONDENT'S BREIF on the 22nd day of August, 2003, by mailing the original and fifteen copies by first class mail with postage prepaid through the United States Postal Service to:

State Court Administrator
Case Records Division
Supreme Court Building
1163 State Street NE
Salem, OR 97310-1331

I further certify I served the foregoing OREGON STATE BAR'S RESPONDENT'S BREIF on the 22nd day of August, 2003, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

Peter R. Jarvis, Esq.
Stoel Rives LLP
900 S.W. 5th Ave., Ste. 2600
Portland, OR 97204

Stephen F. English, Esq.
Bullivant Houser Bailey PC
888 S.W. 5th Ave., Ste. 300
Portland, OR 97204

DATED this 22nd day of August, 2003.

OREGON STATE BAR

By _____
Stacy J. Hankin, OSB No. 86202