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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

In re:

Complaint as to the Conduct of

STEVEN M. McCARTHY

Case No. SC S060882

PETITION FOR REVIEW AND OPENING BRIEF

Linn Davis, 032221
Susan Roedl Cournoyer, 863381
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
PO Box 231935
Tigard, OR 97281-1935
ldavis@osbar.org
scournoyer@osbar.org

Steven M. McCarthy, 081030
McCARTHY LAW OFFICES
1265 Highway 51
Independence, OR 97351
(503) 763-1888/2888 fax
Steve@McCarthyLegal.com
Petitioner in Propria Persona

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TABLE OF CONTENTS

Steven M. McCarthy herewith Petitions the Oregon Supreme Court for a reversal of the decision of the trial panel.

I INTRODUCTION

A. Summary of the Case

This matter arises out of the Oregon State Bar's prosecution of the failed attempt by Mr. McCarthy to help the complainant, Dottie Robertson, recover $10,000 she lost a fraud scheme perpetrated by Don Loyd and others. The trial panel found McCarthy in violation of the Oregon Rules of Professional Conduct, Rules 1.1 (competence), 1.4(a, b)(informing client), an 1.151(c)(fee deposits).

B. Factual and Procedural Background

In 2003, Mrs. Robertson became a member of a small real estate investing group led by Don Loyd. She paid him a "development fee" for three parcels of real estate in Bend, which she "flipped" by lease options to people with problematic credit,[1] at a profit of $25,000-30,000 apiece. She started the same thing again in 2007, not foreseeing the oncoming real estate crash, and paid Mr. Loyd another $5,000 apiece for two more lots, upon which residences were to be built. The lending institution involved was West Coast Bank ("WCB"), which funded the construction loans for the properties. Neither home was completed

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[1] Such devices, designed by lenders for borrowers who have a hard time producing income and asset verifying documents, such as prior tax returns, or who have untraditional sources of income, such as tips, or a personal business, are commonly referred to as "liar loans."

because Loyd misappropriated the money in the construction escrows and contractors were not paid on their monthly draws.

Mrs. Robertson discovered the unauthorized withdrawals of her loan escrow funds in January, 2008, and complained to Jeff Sprague, a loan officer at WCB, who declined any help. She then complained to a WCB Vice President in Vancouver, WA. Federal and state investigations began as to reports of misappropriated funds by, among others, employees at WCB. Thirteen persons, including Jeff Sprague and another WCB employee, were charged by federal indictment in 2009, for bank fraud resulting in $16 million in specious residential loans and losses exceeding $10 million suffered by the lending institutions involved.[2]

Mrs. Robertson hired a former DOJ financial crimes investigator, Darren Gooding, to track down Loyd and the disposition of her funds. She contemplated legal action, but could find no other lawyers to take the case[3] because the time and complexity involved was too much and the actual loss too little to justify the

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[2] These indictments were collectively known as the "Desert Sun" cases, after Desert Sun Development, run by Tyler Fitzsimmons, CEO and principal defendant in *U.S. v. Fitzsimmons, et al.*, USDC no. 09-CR-60167, still pending in the US District Court in Eugene, for the misappropriation of approximately $16,000,000 in the "Desert Sun" cases. Trial in that matter is presently set for June 10, 2013.

[3] Mrs. Robertson consulted with Gary Berne at Stoll Berne, Kathryn Miller, Amir Tajedin, and Kerry Shepherd. (RT 169:5-172:13).

Mrs. Robertson had a relationship with Don Loyd since 2002, when she started attending his real estate investment classes (RT 14:1-8). Loyd charged a "development" fee of $5,000 per lot (RT 14:19-21), which she paid to him on three previous occasions (RT 15:8-13). On these three properties, which she sold by a lease options, she made $25-30,000 on each (RT 15:21-16:5).[9] She referred to herself and the others involved with Don Loyd/Aspen Tree Homes as "players" (RT 23:23, 26:12, 28:18, 48:7, 57:15, 202:8).

She understood that she had been defrauded just as in the "Desert Sun" cases,[10] and believed Don Loyd had taken all of the bank's money (RT 17:15-19:5). Before seeking legal help, she asked Jeff Sprague at WCB to stop allowing Loyd access to the money (RT 19:6-20, 161:7-12).

In January, 2008, Ms. Robertson also contacted Mr. Sprague's superiors at WCB, including a person she believed was a Vice President, advising them in writing of the unauthorized withdrawals (RT 162:20-163:8).

> Finding 3. When the Promissory Notes signed by Robertson came due and were unpaid, WCB commenced foreclosure proceedings on the two lots. Because the trust deeds securing WCB's interest were not "residential" for purposes of ORS Chapter 86, WCB had the right to pursue judicial foreclosure, making Robertson potentially subject to a deficiency judgment if the lots were not worth enough to cover the loan balances. The potential deficiency judgment was in excess of $500,000. Despite the

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[9] See fn. 1, ante.
[10] See fn. 2, ante.

> availability of that remedy, WCB commenced non-judicial foreclosure proceedings in June, 2008, with ultimate foreclosure sale dates in December of that year.

Undisputed evidence contradicts this finding. Mrs. Robertson intended to live in one of the residences (RT 168:3-9). As stated regarding Fact 2, WCB was on notice as of January, 2008, that there its money was being drained from her escrow accounts (RT 162:20-163:8), and that there were substantial problems with the construction liens (RT 385-11-387:24). Thus, at all times relevant to the within matter, WCB had knowledge of the problems occurring in its own house.

> Finding 4. Robertson contacted an organization called "Strikeback" based on her belief that WCB had wrongfully disbursed funds to Loyd and colluded with Loyd, and possibly the property appraiser and title company, to defraud her. Strikeback referred Robertson to a California attorney named Lyndsey Heller, who referred them to the Accused.

Undisputed evidence contradicts these findings. Mrs. Robertson's testified that she and members of her group thought that a TILA audit might attract the attention of WCB. (RT 20:8-25). She thought that 50% of the loans had errors, and that would force the Bank to renegotiate the loans (RT 174:1-20). Mrs. Robertson was never "referred" to Mr. McCarthy. The first contact she had with him was when the Strikeback lawyer, Lindsay Heller, arranged for a meeting between them in her home in July, 2008 (RT 22:20-24:9, 24:19-25:6, 176:11-24).

> Finding 5. On July, 9, 2008 the Accused met Robertson at her home in Bend, along with several other individuals who had

> invested in real estate development through the Loyds and the Loyds' company, Aspen Tree Homes.

This was the undisputed first contact the Mrs. Robertson had with Mr. McCarthy (RT 24:5-7). By this time, Mrs. Robertson had already hired a financial crimes investigator[11] and had consulted with four other lawyers.[12]

> Finding 6. At the July 9, 2008 meeting, Robertson hired the accused and they each signed a Professional Services Agreement prepared by the Accused (Exh. 1). The Agreement provided for "non-refundable retainer for attorney fees" of $3,000. Robertson paid that sum upon signing the Agreement. The Agreement did not state when the minimum fee would be regarded as earned and did not state that the minimum fee was "earned upon receipt." The Agreement also provided for the Accused to be paid on a contingent fee basis for any recovery against any Defendants.

Here again the trial panel simply ignored the uncontradicted evidence presented. The retainer was a "true" non-refundable retainer within the meaning of *In re Fadeley*, 342 Or. 403, 409-10, 153 P.3d 682 (2007). The language of the Oregon Rules of Professional Conduct, Rules 1.5(c) and 1.15(c) did not require any language indicating a non-refundable retainer is "earned upon receipt" before October 28, 2010.[13] Despite the innuendo of the trial panel, Ms. Robertson had

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[11] See Finding 17, infra.

[12] Robertson at RT 169:5-172:13.

[13] As an elected member of the House of Delegates, representing Region 6, Mr. McCarthy voted for the amendment at its annual meeting of October 28, 2010, both to eliminate the vagueries of *In re Fadeley* and its progeny, and to prevent the same OSB claim of impropriety from befalling other Oregon practitioners. Under then existing State Bar rules, such was not required to be, nor was, deposited in Defendant's IOLTA account. Complainant never request either an accounting or

(continued...)

no misunderstanding that the minimum retainer was a non-refundable fee (RT 195:10-199:23).

> Finding 7. At the time the Agreement was signed, the Accused did not know that he was required to state, in writing, that non-refundable funds paid as a retainer were "earned upon receipt" if he intended to treat them as fully earned when received. Robertson expected to receive a monthly accounting for the expenditures from the retainer.

The first sentence imports a patent falsity. Mr. McCarthy certainly did not know of any such requirement, because there simply was none, and the undisputed evidence was also that there was none. There was simply no evidence offered that Mrs. Robertson ever expected an accounting of the fee paid (RT 144:6-21, 231:23-232:9, 240:3-241:1, 243:7-10) because she knew the minimum retainer was a non-refundable fee (RT 195:10-199:23). She also knew what "costs" included.

> Finding 8. On August 12, 2008, the Accused filed a Complaint (Robertson v. WCB, etc.) on behalf of Robertson in Deschutes County Circuit Court against WCB, the Loyds, Aspen Tree Homes, Mortgage Professionals of Central Oregon, Inc., First American Title Company of Oregon, Mid-Columbia Appraisal Service and certain employees of the latter three entities. The Complaint alleged violations of the federal Truth in Lending Act ("TILA"), and the Real Estate Settlement Procedures Act ("RESPA"), fraud, deceit, misrepresentation, breach of contract, intentional interference with contract and prospective, advantage, conversion, restitution and constructive trust, unfair trade practices,

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[13](...continued)
a refund, nor did OSB agents Scott Morrill, Sylvia Stevens, or Helen Hierschbiel. Only upon the request of Susan Conoyer on December 9, 2009 (Exh. 72), was there any request for any accounting of the 61.7 hours expended or the $3,000 retainer made (Exh. 2).

> and negligence. The complaint included several individual defendants in the text who were not named in its caption. The Accused subsequently filed similar complaints against the same defendants on behalf of three other plaintiffs. The Accused believed that it was essential to try the case in state court.

Again, the trial panel is groping for any possible errors. The complaint (OSB Exhibit 3) was finished and signed by Mr. McCarthy on August 1, 2008, 23 days after the first meeting with Mrs. Robertson on July 9, 2008. Mr. McCarthy was well aware of the usual Rule 21 motions in state court (RT 305:4-306:13), and anticipated the same. The basic reason for state court jurisdiction was a local jury that would have a stake in the outcome (RT 371:2-16). Additionally, the other civil actions for mechanics' liens were not subject of federal jurisdiction and would have been consolidated with a state court fraud case.

> Finding 9. At the time the Accused filed the Complaint, the Accused had no prior experience with TILA or RESPA matters. He did not read the entire TILA or RESPA statutes or rules before filing the complaints. He relied primarily on sample pleadings he obtained from the Strikeback organization. He also believed that Strikeback would provide backup legal counsel to him as needed as the lawsuit progressed. He did not associate Heller or any other TILA specialist on the case and severed his relationship with Strikeback before filing the complaint.

While it is true that Mr. McCarthy had no TILA or RESPA experience, he did read the statutes (RT 308:6-309:14) and the bar books (RT 350:15-351:10); and his understanding of the basics of it was undisputed.[14] The material provided

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[14] Save that the trial panel concluded, contrary to undisputed testimony, that Robertson's (continued...)

by Strikeback was relied upon only for the style of the TILA and RESPA allegations, the rest being drafted from substantial experience in similar efforts (RT 311:6-312:9). There was never any suggestion by any witness, the prosecutor, or the trial panel, that the actual loan audits of either expert TJ Henderson or Loansafe Solutions were incorrect, inadequate, or otherwise suspect; or that the allegations of Plaintiff's first cause of action were inaccurate, incomplete, or otherwise lacking merit in any respect.

Apparently the trial panel, insisted that because the Bank removed the matter, that was the end of the issue. But the panel's inference that therefore Mr. McCarthy was remiss in some respect is wholly inconsistent with the testimony of Kerry Shepherd, who testified that he *also* had no such experience and relied on experts in that area (RT 105:24-106:8, 112:4-9, 114:19-115:1), exactly as did Mr. McCarthy in relying on the experience of Strikeback (RT 364:19-365:19), the audits by T.J. Henderson (RT 303:14-21, 323:25-324:15), and by Loan Safe Solutions (RT 401:10-24).

Further, there was no evidence that Mr. McCarthy was required to "associate" any other lawyer. Both Mr. Shepherd and Mr. McCarthy were employed by lawfirms. The trial panel had to have meant a formal association of outside counsel on the record, otherwise the finding makes no sense. Mr.

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[14](...continued)
efforts were exclusively for investment purposes and not as a residence for herself (RT 168:3-9).

McCarthy had not terminated any relationship with Strikeback before the complaint was filed on August 12, 2008. The uncontradicted testimony was that Mr. McCarthy had no formal agreement with Strikeback or its attorney, Lindsay Heller (RT 337:9-25) and only by the time of the filing of the motion to remand did he reach the conclusion that they were "useless" (RT 400:14-401:19), although Ms. Heller approved of the filing (RT 505:14-16).

> Finding 10. Before filing the Robertson complaint, the Accused did not know and did not inform Robertson or the other plaintiffs that by filing the lawsuits he created the risk that WCB could pursue a deficiency judgment against them. He also did not inform them that by including in the complaint a claim for relief based upon a federal statute (the TILA allegations) he created the possibility that the cases could be removed to federal court by any defendant.

While Mr. McCarthy was not obligated either under the Oregon rules of professional conduct to defer procedural decisions to the client (OR RPC 1.2), it was unlikely that the bank would succeed in the face of knowledge of the wrongdoing of its employees, and were sufficient facts capable of being developed despite the unavailability of the principal defendants either by their unknown whereabouts or by the 5th Amendment, those facts would have stood as defenses to the foreclosures whether or not in state court. Mrs. Robertson understood this (RT 184:2-186:10), and kne that her claims depended upon proving the fraud and misappropriation of the loan escrow funds by Loyd, Sprague, and whomever else was involved. The point of the entire litigation was to "get" Don Loyd (RT

337:18-342:14), with the TILA violations as a lesser form of leverage (see Finding 16; RT 174:1-20).

Further, as a matter of law, while any defendant may remove even upon a federal claim against another defendant, no judgment could have been had if any other defendant objected to the removal. While the removing defendant cannot be required to obtain the consent of unserved parties, all defendants in a state action must join in the notice of removal. *Doe v. Kerwood* (5th Cir. 1992) 969 F2d 165, 168; *Parrino v. FHP, Inc.* (9th Cir. 1998) 146 F3d 699, 703. The burden is on the removing defendant to explain the absence of the other defendants and may cure the defect by obtaining joinder of other defendants prior to entry of judgment. *Destfino v. Reiswig* (9th Cir. 2011) 630 F3d 952, 955. Here, WCB, obviously in its own interests, jumped in with the removal before any party defendant, including itself, accepted service.

> Finding 11. Beginning on September 9, 2008, Robertson attempted to get information about the case from the Accused. She sent an email on that date inquiring about service, and another on October 20, 2008. The Accused replied to the October 20 email stating that the sheriff's office had the complaint and that he had contacted WCB's attorney about the case.

The inquiry about service on the defendants (presumably referring to OSB Exh 6) was a continuation of the conversation that Mrs. Robertson began about a domestic violence issue which she resolved by her own legal research (Exh. 5). On October 8, 2008, she forwarded the TILA/RESPA audit from Loansafe

Solutions (Exh. 7). She had been contacted by someone at Saalfeld firm about appraisals and wanted to know in an email of October 20, 2008, if that was some response to being served (Exh. 8). By that time, an effort was being made by non-parties to sell the properties and Mr. Shepherd, whom Mrs. Robertson knew (RT 45:10-20) had received the complaints two weeks previously.

> Finding 12. WCB's counsel independently learned of the pending lawsuit against its client and obtained an electronic copy of the Robertson complaint on October 22, 2008. Even though it had not been served, WCB filed a motion to remove the Robertson lawsuit and the lawsuits the Accused filed on behalf of the other three plaintiffs to federal court on November 7, 2008. At that time, the Accused had not completed service of process on any defendants named in the complaints.

Mr. Shepherd testified that he learned from "a marketing person" at his firm of "a slew of cases" against WCB (RT 63:7-14), but on further inquiry on cross-examination, invoked the attorney-client confidential communication privilege on the issue of what he knew, from whom, and when (RT 77:15-85:6), when it was patently clear from WCB oppositions to quash Sprague subpenas duces tecum (McCarthy Exhibits 3, 4) that the bank knew of the fraud and misappropriation problems occurring as early as May, 2007. There is little doubt but that WCB was acting in its own interests by rushing into the case. The risk it faced was obviously the disclosure of whatever it was trying to hide from Sprague.

> Finding 13. On December 7, 2008, the Accused filed a Motion to Remand the Robertson lawsuit to state court. That motion was denied on January 21, 2009.

> Finding 14. On October 27, 2008 the Accused received a schedule showing the foreclosure sale dates for all of the properties securing loans made by each of the plaintiffs. The Accused did not provide that document to Robertson.

Mrs. Robertson testified only that she did not remember receiving it or the information it contained (RT 46:11-47:4). She also did not remember the lawfirm that was foreclosing on her properties (RT 47:5-12), Saalfeld-Griggs. There was by this time, notice to Eric Paetsch at Saalfeld, that the construction liens in some respects were not legitimate (RT 385:11-387:24). At that time, there was little risk that these foreclosures would proceed, as both Eric Paetsch at Saalfeld and Kerry Shepherd at WCB knew something of Mrs. Robertson, of the defenses available to her,[15] and would continue with the pressure to avoid them by the threat of consequences of removal jurisdiction.

> Finding 15. On January 30, 2009, Robertson requested an update on the case. On February 5, 2009, the Accused responded by email, informing Robertson for the first time that his filing of the lawsuit exposed her to deficiency judgments. He advised her that she might have to accept a settlement wherein WCB would accept a deed in lieu of foreclosure for the Turquoise and O'Connor properties. Robertson responded by email on the same date, requesting a conversation with the Accused. The Accused did not respond to that request.

Mrs. Robertson testified that she and Mr. McCarthy had telephone discussions about the prospects of foreclosure and how to proceed (RT 157:23-

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[15] Fn. 12, ante.

158:21). Mrs. Robertson fully understood the purpose of the litigation, both as she originally conceived it, to force the Bank to renegotiate the loans (RT 174:1-20), and as having the potential to recover against Loyd, only if he could be found (RT 57:6-24; 337:22-338:24).

> Finding 16. On March 9, 2009, the Accused filed a Joint Status Report along with the attorney representing WCB, Kerry Shepherd . In that report, the Accused acknowledged that as of that date, no defendant had been served and that he had undertaken no discovery. The Accused did not send a copy of the Joint Status Report to Robertson. Following entry of the Joint Status Report, the Accused sent proposed waivers of service to the attorneys representing some of the defendants named in all four lawsuits relating to the Loyd investments. In all but one case, the waiver requests were untimely because the deadlines to complete service on the defendants had expired.

Unlike state courts, lawyers in federal court cannot as easily play games with service of process, and it is not only an error for the court to make assumptions about facts not in the record, but if the Court was referring to FRCP 4, it is simply inaccurate, and bespeaks the court's animus. FRCP Rule 4(m) requires a district court to grant an extension of time if the plaintiff shows good cause for the delay and may, in its discretion, grant an extension even in the absence of good cause *Efaw v. Williams* (9th Cir. 2007) 473 F3d 1038, 1040, relying on *Mann v. American Airlines*, 324 F.3d 1088, 1090, n.2 (9th Cir.2003); and considering a variety of equitable factors such as: a statute of limitations bar; prejudice to the defendant; defendant having actual notice of the lawsuit;

defendant evading service; defendant concealing defect in attempted service; and length of delay before eventual service.

> Finding 17. The Accused made some efforts to locate the Loyds for service, following up on information he had received from Robertson. When those efforts failed, he did not undertake to serve either Loyd by publication, partly because he did not wish to incur additional costs and partly because he believed that he could not reasonably assure notice by that method. The Accused did not subpoena any persons he thought might be able to help him locate Don Loyd.

Again, the court mis-states the facts and ignores the testimony. Mr. McCarthy continued with the services of Darin Gooding, a former DOJ financial crimes investigator, to find Don Loyd (RT 343:20-344:7), until he quit when the clients would not pay his bill.[16] He had already been paid $1,200-1,500 by Mrs. Robertson. (RT 177:16-178:19). Further, Mr. McCarthy made substantial efforts at locating Don Loyd, finding him in Colorado, but with no success at determining any particular location there (RT 453:18, 454:19).

A deposition subpena could have been issued to WCB operatives, which would have been potentially elucidating if the guarantees of the 5th Amendment did not exist, as Mr. McCarthy so testified (RT 507:18-508:15). Presumably no

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At this juncture in the case, Mr. McCarthy could, but did not, seek leave of the court to withdraw pursuant to Oregon RPC 1.16(c); ORS 9.380; UTCR 3.140; LR 83-11, so long as he provided reasonable notice pursuant to Oregon RPC 1.16(b)(5) and took the steps required to avoid prejudice to Client pursuant to Oregon RPC 1.16(d), *In re Martin*, 328 Or 177, 970 P2d 638 (1998); *In re William F. Thomsen*, 262 Or 496, 499 P2d 815 (1972); *State v. Schmick*, 62 Or App 227, 660 P2d 693 (1983). Ethics Opinion 2005-1. There likely *still* would have been a bar complaint.

practitioner would permit their client to incriminate themselves. Unquestionably, however, WCB would have barred the door to this discovery as it is was doing in *US v. Fitzsimmons* (RT see Exhibits 103, 104), largely and in part because of the knowledge of WCB principals, including a vice-president, who were put on notice as Ms. Robertson testified (RT 161:7-163:7) and as the motion to quash the Sprague subpena in Fitzsimmons admitted. All that would be accomplished in such an effort is the useless expenditure of precious time and resources. the almost certain evidentiary objections which would have rendered subpena efforts useless, not to mention the obvious and continuous futility of getting Ms. Robertson to either (1) "understand" anything about what was going on or (2) pay any costs incurred.

Additionally, by the summer of 2008, the IRS and the FBI were involved in the Desert Sun issues, and Mr. McCarthy was unable to get any information from them or the DOJ, as they would not comment about ongoing investigations (RT 484:24-485:14)

> Finding 18. On April 1, 2009 the Accused obtained waivers of service from WCB's counsel in all four lawsuits. On April 2, 2009, the Accused received a letter from Terrence 0 'Sullivan, the attorney for The Mortgage Professionals of Central Oregon and two of its employees, identifying several defects in each complaint filed by the accused, and agreeing to waive service on each defendant if the defects were corrected. On April 13, 2009, the Accused received a letter from Brian MacRitchie, attorney for defendants MidColumbia Appraisals and Roger Fadness, identifying several defects in each complaint filed by the accused,

> and agreeing to waive service if the defects were corrected. On April 24, 2009, the Accused received yet another letter from Kyle Schmid, the attorney for defendant Heather Smailys, pointing out defects in the form of the waiver request and the timeliness problem. The defendants refused to waive service in three of the four cases.
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> Finding 19. The Accused did not respond to the letters from the various defendants' attorneys, nor did he provide copies of that correspondence to Robertson.

Again, the court is advocating for the OSB, implying that for some reason clearly not part of the record, Mr. McCarthy was under an obligation to supply Mrs. Robertson with copies of correspondence. There is no authority for any such proposition.

> Finding 20. For several months following their last exchange of emails in February, 2009, Robertson attempted to communicate with the Accused by email. Robertson mis-addressed several of her communications to the Accused by using an incorrect email address. The Accused did not initiate any communications with Robertson during those months, until he sent an email on June 2, 2009 which consisted entirely of the following sentence, "Apparently there is a tree ... " Robertson immediately responded asking for information about her case.

That Mrs. Robertson used an incorrect email address, where all of Mr. McCarthy's contact information was in her possession, is incomprehensible except in the context of her drinking (RT 77:6-20, 460:16-461:18) her intercession in domestic violence issues (OSB Exh 5), her memory failures (RT Robertson testimony, passim), and her attitude toward her testimony on Mr. Brown's sua sponte inquiry, where she admitted that she was being "flippant" (RT 229:20-

231:5). OSB Exhibit 3 is a communication to Mr. McCarthy about a fallen tree on the Turquoise lot. It was clear that Mrs. Robertson was aware of the problem, (RT 122:22-123:1) and as indicated in her response to Mr. McCarthy's email (OSB Exhibit 36, RT 126:17-24). That the trial panel issued this finding out of context is another and further indication of its bias and refusal to fairly consider this case.

> Finding 21. Three days later, on June 5, 2009, the Accused sent an email to Robertson containing a request for reimbursement of some of his costs. The email also discussed a deed in lieu of foreclosure form and suggested that Robertson consult her tax professional regarding the consequences of signing the deed. Although the text of the Accused's email referenced an attached deed in lieu form, none was attached to the email. Robertson responded by email that day asking for additional information about the deed in lieu form.

The questioning about Mrs. Robertson's receipt of the deeds in lieu reveal again her less than sincere and honest responses. Again the trial panel finds that the deeds in lieu were not sent, when three days later, Mrs. Robertson asks Mr. McCarthy what to do with them and finally admitting she had them (OSB Exh 38, RT 128:19-132:22). It would normally be highly unlikely, especially given the trial panel's deference to Mr. Shepherd, that WCB and its counsel, all of whom knew Mrs. Robertson was represented, breached their ethical duties by contacting her directly, yet, according to her, that's what happened.

> Finding 22. Also on that date, but before receiving the email from the Accused, Robertson sent a letter to the Oregon State Bar ("OSB ")complaining of the Accused 's lack of response to her many inquiries. The Accused was notified of Robertson 's

> complaint by letter from OSB dated June 15, 2009. The Accused did not answer Robertson's June 5 email until June 26, 2009.

There was no evidence that Mrs. Robertson sent Mr. McCarthy any email or other communication on June 5, 2009.

> Finding 23. On June 27, 2009, the Accused received a letter from the successor attorney (Anthony Kuchulis) for two of the defendants (Mid-Columbia Appraisals and Roger Fadness) regarding prior discussions they had about dismissing the cases against those defendants and informing him of those defendants' intent to file summary judgment motions against Robertson 's complaint. The Accused did not respond to this letter, nor did he send a copy to Robertson.

Again, the court is advocating for the OSB, implying that for some reason clearly not part of the record, Mr. McCarthy was under an obligation to supply Mrs. Robertson with copies of correspondence. There is no authority for any such proposition.

> Finding 24. 0n July 17, 2009, the Accused received another letter from Kuchulis requesting a response by July 22, 2009. The Accused did not respond to this letter, nor did he send a copy to Robertson. Kuchulis followed up by telephone and by email on at least three different occasions between July 20 and July 24, 2009. The Accused did not disclose these communications to Robertson, nor did he inform her that he ultimately agreed with Kuchulis to dismiss Robertson's claims against Mid-Columbia Appraisals and Fadness. The Accused filed a Notice of Dismissal against those two Defendants on August 31, 2009.

Again, the court is advocating for the OSB, implying that for some reason clearly not part of the record, Mr. McCarthy was under an obligation to supply

Mrs. Robertson with copies of correspondence. There is no authority for any such proposition.

> Finding 25. The Accused ceased all communications with Robertson in late June or early July 2009 because he believed that she left a hostile voicemail message on his answering machine. He continued to represent Robertson until dismissing her case in April, 2010.

Here the trial panel again finds facts without any evidence. Ms. Robertson provided copies of emails purportedly sent to Mr. McCarthy, dated June 29, July 6, 7, 10, 20, 21, and August 31, September 1, 3, 4, and 10, 2009 (OSB Exh 72), none of which were received (OSB Exh 74) because of her use of an incorrect email address, as OSB's Susan Cournoyer acknowledged in her letter to Ms. Robertson of December 31, 2009 (OSB Exh 75).

> Finding 26. Robertson ultimately obtained Deeds in Lieu of Foreclosure from WCB, prepared by its attorney. She signed the Deeds and entered into a settlement agreement dismissing her claims against WCB and its employees with prejudice on October 9, 2009 . The settlement terms included a release of any deficiency judgment against Robertson by WCB. Robertson took those actions without further consultation with the Accused.

Again, these "facts" are characterized without regard to the facts. Mrs. Robertson had her deeds in lieu of foreclosure by June 8, 2009, (not "ultimately") when Mrs. Robertson asked Mr. McCarthy what to do with them and finally admitting she had them (OSB Exh 38, RT 128:19-132:22). Further, the testimony

is undisputed that Kerry Shepherd faxed the executed deeds to Mr. McCarthy on October 22, 2009 (RT 437:22-439:12).

> Finding 27. After the claims against WCB were dismissed, the Accused sought, and obtained, additional time to attempt to serve the remaining defendants in Robertson's case, the Loyds and Aspen Tree Homes. On April 28, 2010, the Accused filed a motion to dismiss the Robertson lawsuit because he had been unable to accomplish service on any remaining defendant.

The testimony was clear that motions for summary judgment were imminent (RT 271:22-273:6) and that such would be used by the moving parties not for properly adjudicating any claim as a matter of law, but improperly, as a discovery device (RT 276:13-277:2). Regardless of the propriety, a summary judgment motion would expose the plaintiff to defense costs (RT 328:22-329:6). Given the unlikelihood of any success without service on Loyd and the testimony of Sprague, and absent abatement of the entire proceeding, the matter would simply have to be dismissed.

IV-B
MR. McCARTHY EXHIBITED A HIGH LEVEL OF COMPETENCE, PRACTICAL LITIGATION SKILLS AND EXPERIENCE, AND AVOIDED ANY DOWNSIDE RISKS TO HIS CLIENT

1. Burden of Proof. The Bar must establish misconduct by clear and convincing evidence, BR 5.2, which is "evidence establishing that the truth of the facts asserted is highly probable." *In re Cohen*, 316 Or 657, 659, 853 P2d 286 (1993). If the trial panel's credibility determination is based on the objective

factors involving competing inferences or evidence, the Supreme Court owes no deference to that assessment. *In re Hostetter*, 348 Or 574, 596, 238 P3d 13 (2010).

2. Competence under Oregon Law and Rules of Professional Conduct

It is axiomatic that unlike criminal cases, there is no constitutional right to competent counsel in civil cases. However, competence is required under both the 6th Amendment to the US Constitution and the Oregon Rules of Professional Conduct, Rule 1.1, which provides that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The dilemma presented by the present formulation of the rule is that in a literalist construction, a lawyer is precluded from undertaking legal services without being "competent" in the particular subject matter or in the vernacular, cannot deliver his or her first baby. The effect is to limit, or in the unfettered discretion of the Bar, to sanction any effort by a lawyer to obtain experience by undertaking new and difficult challenges, whether or not any actual harm was caused.[17] This restricts not only the advancement of any lawyer's competence, but

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[17] Mrs. Robertson not only could not get anyone else to take her case RT 169:5-172:13, was not willing to pay any costs RT 195:10-199:23, suffered no actual harm by the conduct of Mr. McCarthy, as she so testified. RT 208:5-209:17. Even "excusable neglect" is ground for relief from a final judgment in federal court. FRCP 60(b)(1), yet here, no malpractice lawsuit nor motion to reopen the underlying case has been attempted by Mrs. Robertson.

progress in the advancement of the law and the public access to justice by so limiting practitioners.[18]

While the Oregon comments to RPC 1.1 correctly indicate that it is the same as the ABA Model Rule 1.1, unless this Court addresses the issue, the bar will remain unrestrained from ignoring the relevant ABA Comments:

> "[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
>
> "[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided

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[18] This issue was presented to the Oregon State Bar House of Delegates on November 2, 2012; however, that body refused to consider any changes because the proponent of the changes was attacked on the floor of the assembly by Hugh Whitson, a delegate from Seattle, who admitted being instructed by BOG members to challenge the legitimacy of these issues by impeachment of Mr. McCarthy on the record with the within proceeding, as he did.

> through the association of a lawyer of established competence in the field in question.
>
> "[3] [Emergency situations omitted]
>
> "[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2." ABA Model Rule 1.1

3. Argument

Petitioner has addressed each of the findings of fact determined by the trial panel. Although there is some redundancy in the following as to the trial panel's discussion and conclusions of law, Petitioner contends that the facts do not support the conclusions by clear and convincing evidence or as to many particulars, at all.

a. The trial panel's conclusion that "the Accused filed his complaint without doing adequate research" is simply inconsistent with the evidence. See discussion of finding of fact nos. 8, 9, and 10. Mr. McCarthy read the statutes (RT 308:6-309:14) and the bar books (RT 350:15-351:10); his understanding of the basic principles of truth in lending, and the other aspects of the case, was undisputed. Like Kerry Shepherd, he had no experience in these areas and relied on experts (RT 105:24-106:8, 112:4-9, 114:19-115:1) and just as competently relied on the experience of Strikeback (RT 364:19-365:19), the audits by T.J. Henderson (RT 303:14-21, 323:25-324:15), and by Loan Safe Solutions (RT 401:10-24). The materials provided by Strikeback were relied upon only for the

style of the TILA and RESPA allegations, the rest being drafted from substantial experience in similar efforts (RT 311:6-312:9). The substantive allegations of the complaint as to this part, were clearly not available anywhere else but by the loan audits, to wit: WCB and Mortgage Professionals violated TILA requirements by the failure of early disclosures, no TILS (Truth in Lending Disclosure Statement), the APR on the O'Connor loan was overstated by 30.6803% and on the Turquoise loan by 23.3725%, and the finance charge on the O'Connor loan was understated by $36,821.86 and on the Turquoise loan by $39,799.00. These allegations were also verified by Mrs. Robertson. (OSB Exh 4). Ms. Heller approved of the work (RT 505:14-16)

b. The trial panel either misconceived, had no conception of, or ignored the facts regarding the purpose of the litigation. The client's purpose, which is within the client's exclusive control, was to try to achieve some positive result in the recovery of damages for the conduct of Don Loyd, which purpose was understood by all the participants (RT 337:22-338:24) including Mrs. Robertson (RT 57:6-24). That foreclosures were involved were incidental; that contractors, appraisers, and materialmen had engaged in bad acts was also incidental. Likewise, it failed to see, as Mr. McCarthy knew, that service by publication would not accomplish the same goal as personal service because the test for publication in both state and federal is whether the method for service is likely to

give notice (RT 509:15-510:15). In a federal action, service of process is a federal question to be determined according to federal law *Dodco, Inc. v. American Bonding Co.* (8th Cir. 1993) 7 F3d 1387, 1388, including in removed cases 28 USC §1448; FRCP 81(c); *Wallace v. Microsoft Corp.* (10th Cir. 2010) 596 F3d 703, 706.

. There is no way that any research would have disclosed what WCB would not, even against the federal subpena by its employee, Jeff Sprague. (See discussion of fact no. 12, supra). The suggestion in finding of fact no. 17 that any subpena would have aided in the discovery of the whereabouts of Mr. Loyd is simply devoid of any practical merit under the circumstances. There was no way to stop any defense counsel from attempting to extricate its client while Plaintiff sought to locate the principal defendant, and those processes, which could have resulted in the exposure to substantial defense costs, were avoided once the object of the litigation was defeated.

c. The trial panel refused to apply the ABA concept. The definition of competence under Oregon law is squarely at issue in this case. Whether a lawyer has provided competent representation "is a fact-specific inquiry" *In re Eadie*, 333 Or 42, 60, 36 P3d 468 (2001) and an objective standard is applied. *In re Bettis*, 342 Or 232, 237, 149 P3d 1194 (2006). This court's cases concerning incompetence of representation show that incompetence is found "where there is a

lack of basic knowledge or preparation, or a combination of those factors. The focus is not on whether a lawyer may have neglected a particular task, but rather whether his or her representation in the "broader context of the representation" reflects the knowledge, skill, thoroughness, and preparation that the rule requires. *In re Obert*, 352 Or. 231, 282 P.3d 825 (2012).

The US Supreme Court in a 6th Amendment case, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), observed that:

> "Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. at 693.

d. The prosecution's star witness admitted to no greater expertise and was therefore also in violation of RPC 1.1. If, and only if the undertaking of the representation of Dottie Robertson amounted to an ethical violation because additional expertise in the subject matter was necessary to do the work, then Kerry

Shepherd, defense counsel for WCB and one of Oregon's finest, a partner with Markowitz, Herbold, Glade & Mehlhaf (RT 60:10-11) by reason of the testimony he gave under oath, is guilty of precisely the same thing. He testified, in pertinent part, as follows:

> "Ms. Wood: What was the federal question that was the basis for your removal?
>
> THE WITNESS: The basis for the federal question would be the TILA claims.
>
> MS. WOOD: And what is required to bring a TILA claim?
>
> THE WITNESS: You know, I'm honestly not certain because I'm not a TILA expert. And in this instance the bank hired a specialist to assist me with all of the TILA issues".... (RT 105:24-106:8, emphasis added)
>
> "MS. WOOD: Mr. Shepherd, the WCB answer and the motion to remove, were those the documents where you had the assistance of the TILA expert?
>
> THE WITNESS: Yes. I -- that and I also had the assistance of Eric Paetsch as well".... (RT 112:4-9, emphasis added).
>
> MR. McCARTHY: Were you able to conclude at any point whether or not there were, in fact, any TILA or RESPA violations with regard to any of the paperwork in this?
>
> A. No.
>
> Q. -- but you and your expert.
>
> A. No. I mean, we did have an expert on that, and we didn't reach any conclusions in that regard." (RT 114:19-115:1, emphasis added).

Mr. Shepherd admitted the realities of his practice as much as Mr. McCarthy did, and described the same facts of his situation as that with which Mr. McCarthy was charged. The rest of the story is in his extremely cautious corroboration (RT 77:24-85:24; see Exhibits 103, 104) of the effort of his client to resist the disclosure of the knowledge of WCB executives higher up the food

chain than Jeff Sprague and Barbara Hotchkiss, (as to which Mrs. Robertson testified). That their operation in Bend had serious "problems" which I suspect may come out in *US v. Fitzsimmons* to exonerate Sprague and Hotchiss in a Nuremburg styled defense.

e. Mr. McCarthy is Not Held to a Standard of Omniscience. As is inscribed on the front of the Mark Hatfield courthouse, "The boisterous sea of liberty is never without a wave." It appears that the process of determining whether or not any measure of incompetence attended Mr. McCarthy's representation of Mrs. Robertson amounted essentially to a challenge to imagine any conceivable error made as to any subject matter, tactic, or as to whether any particular tactic or procedure might have better been deployed or not been deployed; such that, in essence, any error would justify the charges of unethical conduct. The assertions and speculations are perhaps the privilege bestowed upon the prosecutor; but do not amount to any substantive evidence of incompetence.

f. The trial panel unjustifiably discounted the problems presented by the tandem criminal proceeding. The record is replete with the OSB and the trial panel's effort to marginalize or preclude testimony about the context of the Don Loyd efforts, the role of WCB, and the problems with obtaining information by anyone or from anyone who is actually or legally unavailable under these

circumstances, all of which were known to Mrs. Robertson (RT 119:22-120:3 and passim). The invocation of the confidentiality privilege by Kerry Shepherd was no different than that which would have been invoked on behalf of any employee of his client, including Jeff Sprague; but the trial panel had no interest in the explanation (RT 90:16-95:3) and determined fact no. 17 without it, and despite Mrs. Robertson's testimony regarding her interaction with Mr. Sprague and WCB to stop allowing Loyd access to the money (RT 19:6-20, 161:7-12, 162:20-163:8).

IV-C
THE CLIENT WAS AT ALL TIMES FULLY INFORMED ON THE SUBSTANTIVE DETAILS IN ACCORDANCE WITH RPC 1.4(B)

The trial panel determined on the facts it found that Mr. McCarthy did not adequately communicate important information to Mrs. Robertson sufficient to enable her to make informed decisions; but nowhere was there presented any evidence about what decisions those were. Instead, the trial panel opinion ignored the fact that Ms. Robertson had substantial experience in real estate, made her own decisions, on her own initiative, and based upon her own experience and presumably the advice of her tax accountant as Mr. McCarthy recommended, executed the deeds in lieu of foreclosure.

1. <u>The trial panel failed to make distinctions between the allocation of responsibility in the relationship</u>. No evidence or argument was presented which

differentiated the obligations of a lawyer and the obligations of the client. Instead, the OSB simply attempted to elevate each of McCarthy's efforts and opinions into some kind of negligent misfeasance; that he "wasted the resources" of Mrs. Robertson (despite Exhibit 2) and an adversary. The bar's contention that the lawsuit was "ill-advised" fails to consider the value of it had (1) Loyd been amenable to service and (2) WCB did not rush in to stamp it out before the indictment in *U.S. v. Fitzsimmons*..

The trial panel decided that based on the facts it found, Mr. McCarthy failed to provide Mrs. Robertson with information sufficient to enable her to make informed decisions. But neither the trial panel nor the evidence presented demonstrated what the decisions were for which she was not informed or ill-informed. Neither the OSB nor the trial panel articulated any outcome which was not acceptable to Mrs. Robertson.

2. Mrs. Robertson was very sophisticated in real estate and legal issues. Mrs. Robertson was a very well educated witness, holding an MA in Education (RT 13:2-3), and one of the participants in the real estate feeding frenzy (Exhibit 113). Her testimony, aside from the theatrics, presented throughout a clear picture of a trained (RT 13:23-14:4, 172:19-3), experienced (RT 14:13-17:14) and knowledgeable (RT 17:15-23:25 and passim 159:22-192:24) real estate investor, who simply came out on the losing end of an effort to get something for nothing.

She had several properties (RT 14:13-17:14) and was clear on the principles of real estate investing (RT 14:2-4, 17:15-23:25). Only on cross examination (see RT19:25-20:7) did she admit of her previous and unsuccessful efforts to find an attorney (169:5-172:13). She had obtained the services of her own investigator (RT 177:16-22), "looking for a paper trail of where the money may have gone." (RT 178:10-11). Her recollection of the fallen tree on one of her properties was at best, scanty considering her professed concern (RT 205:5-231:5).

She clearly understood what was and what wasn't a cost (RT 189:1-190:7) and admitted that they were well defined in the fee agreement (RT 194:20-195:5). She had no misunderstandings about the "non-refundable" fee identified in the fee agreement, yet she equivocated about her the bills she did not pay except with a state bar complaint (RE 195:10-199:23). Mrs. Robertson admitted that she didn't get saddled with any defense costs (RT 208:5-209:17).

She referred to herself and the others involve with Don Loyd/Aspen Tree Homes as "players" (RT 23:23, 26:12, 28:18, 48:7, 57:15, 202:8). There is no doubt but that Mrs. Robertson had a lot of "game." While she knew all of Mr. McCarthy's contact information from the pleadings, cards, emails, and obviously her computer skills were adequate to find him on the OSB website (RT 209:19-211:19), she "didn't remember" whether or not she ever clicked on to Mr.

McCarthy's website (RT 242:4-16). She confirmed that the opinion of Mr. Morrill at the OSB, that her ethical claims had no merit were unsatisfactory to her (RT 241:17-25, Exh. 65), so she, without admitting she had bungled her own communications by an incorrect email address (Exh. 66, 69), simply took it to the next level (RT 241:17-242:3). But she wanted her pound of flesh wherever and however she could get it; plus, it was free for the taking, and the bar went along with it even after it noticed, or in the exercise of reasonably diligence should have noticed, that Mrs. Robertson, quite conveniently, had the wrong email address (Exh. 75). By then, however, reputations at the bar were clearly at stake.

While she admitted that she could be "flippant" in her testimony (RT 231:2-5), she also candidly admitted at RT 215:4-22:

> "Q: From the beginning did you trust me enough to know that I would do the right thing by you as to your interests in the litigation, in the claims that you had against Loyd and the TILA issues with the bank?
>
> A. I did trust you in the beginning, yes.
>
> Q. Okay. Okay. Now, the way this turned out would you still say that I acted fairly on your behalf with regard to those interests although I didn't maybe perhaps tell you partly because the communication broke down? But is there anything different that should have worked out from your point of view?
>
> A. It's not the fact that the outcome came out to what it came out to be.
>
> Q. Okay.
>
> A. It was the fact that I kept having to chase you down --
>
> Q. All right.
>
> A. -- to get information."

Yet after June 29, 2009, knowing she had difficulties with her email situation (209:18-211:19), she nonetheless started using an incorrect email address (RT 124:22-125:2, see Exhibits 42, 43, and 44) to communicate. Further, she neither delivered all of her email to the OSB (RT 184:19-25); nor produced any phone records of her alleged contact (RT 202:1-4). Her testimony that Mr. McCarthy's voicemail was full was an abject fabrication, as Mr. McCarthy's voicemail system could not be full (RT 354:5-359:19).

As a practical matter, neither Mrs. Robertson nor Mr. McCarthy had any more information about the actual conduct of the defendants than she did in the summer of 2008, and probably will not have any more until the dust settles in *US. v. Fitzsimmons*, given the refusal of WCB to reveal the level of its awareness of the issues.[19] She was, at all times, fully informed and knowledgeable about the case, understood what the deeds in lieu of foreclosure were and that they were the only acceptable result given the way the case developed, and, despite that she started using an incorrect email address and otherwise did not contact Mr. McCarthy, she followed his directions, got tax advice, signed them, and sent them to Mr. Shepherd (RT 71:19-72:17). Her inquiry of June 5, 2009, to Mr.

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[19] Of note, but not part of the record, is that a tip received by Mr. McCarthy on 2/21/13 from Lisa Kempt, an attorney in Redmond, advised that Don Loyd would be meeting with other potential victims on Saturday, February 23, 2013, at 11 am, at 10198 SW Riggs Road. Mr. McCarthy immediately notified Gary Lorin at the FBI and Matt Dougherty of the IRS of this development.

McCarthy about what do to with the deeds in lieu was after she had made her bar complaint. While her frustration was real at losing her opportunity to get something out of the transactions with Don Loyd, her testimony was disingenuous. That Ms. Robertson didn't "understand" anything about what was going on defies credulity; that she wouldn't honor her contract by paying any costs incurred became a certainty.

Mrs. Robertson learned from her previous lawyers and repeated herself at the trial that "fraud is probably one of the most difficult things to prove. (RT 172:7-8).

IV-D
NO CLIENT FUNDS WERE MISHANDLED

The retainer paid by Mrs. Robertson was a "true" non-refundable retainer within the meaning of *In re Fadeley*, 342 Or. 403, 409-10, 153 P.3d 682 (2007); that is, a written fee agreement identifying the fee as "non-refundable." Under then existing RPCs, the language now required ("earned upon receipt') was not required to be, nor was, in the agreement, and therefore was not deposited in Mr. McCarthy's IOLTA account. Mrs. Robertson never request either an accounting or a refund, nor did OSB agents Scott Morrill, Sylvia Stevens, or Helen Hierschbiel. Only upon the request of Susan Cournoyer on December 9, 2009

(Exh. 72), was there any request for any accounting of the 61.7 hours expended on behalf of Mrs. Robertson or the $3,000 retainer made (Exh. 2).

The language of the Oregon Rules of Professional Conduct, Rules 1.5(c) and 1.15(c) as of December, 2010, depart from the ABA Model Rules by requiring that an Oregon fee agreement specifically state, in addition to any language indicating a retainer is non-refundable, that the fee is "earned upon receipt." As an elected member of the House of Delegates, representing Region 6, voted for the amendment at its annual meeting of October 28, 2010, both to eliminate the vagueries of *In re Fadeley* and its progeny, and to prevent the same fiasco from befalling other Oregon practitioners. Again, Ms. Robertson had no real misunderstanding that the minimum retainer was a non-refundable fee (RT 195:10-199:23).

IV-E
ADDITIONAL ARGUMENT

1. Trial Counsel Admitted He Had No Authority

A federal court may require that a party or its representative be present or reasonably available by telephone or other means to consider settlement FRCP 16(c)(1). Courts have inherent power to make such orders; e.g., to direct appearance of corporate officers with settlement authority. *G. Heileman Brewing Co. v. Joseph Oat Corp.* (7th Cir. 1989) 871 F2d 648, 651; *In re Novak* (11th Cir.

1991) 932 F2d 1397, 1408; *Lucas Automotive Engineering, Inc. v. Bridgestone Firestone, Inc.* (9th Cir. 2001) 275 F3d 762, 769 [Rule 16(f) sanctions upheld against corporate president for unintentional failure to attend mediation session; see also Adv. Comm. Notes to 1993 Amendments to Rule 16(c)].

In any kind of trial, arbitration, or adjudicative proceeding, the parties are expected to bring with them authority to resolve the matter. Failure to do so is simple and abject bad faith and/or deliberate interference with the processes of the forum. More than once Mr. McCarthy had seen courts *sua sponte* call a lawyer's employer and demand someone with authority appear forthwith where this issue has arisen. Here, the simple fact that Mr. Davis, as trial counsel, is and was under the direction of somebody else, which is the doorjamb that keeps open grievous concerns about the integrity of this process in the prosecutor's office. Mr. Davis admitted that he came into the proceeding with no authority to settle the case.

The Bar Rules of Procedure do not address the subject of the authority of trial counsel in any concrete, identifiable; however, ORS 9.330, et seq., does: "An attorney has the authority to bind the client in any proceeding". The problems this issue poses, aside from the foregoing, subvert the validity of these proceedings under the 14th Amendment.

2. Mr. McCarthy has Earned the "Special Attention" of the OSB

Without regurgitating each and every instance as appears in the transcript of the record herein, each notion raised as to how Mr. McCarthy should have, could have, or might have proceeded, or how the case could have been managed, regardless of any ethical moment thereof, was met with the coherent, practical, and legally substantiable reasoning a lifetime of trial work brought to it, just as did Kerry Shepherd in artfully fulfilling his role in protecting his client's interests by jumping into the lawsuit to end its exposure by quickly threatening summary judgment before anyone could find out what has yet to be found out.

The record reflects in Mr. McCarthy's impeccable ethical credentials (Exh 114) and was completely "on top" of the issues well in advance of the California State Bar Ethics Alert regarding foreclosure assistance groups. (Exh 121). It is also a matter of public record that he is a vigorous advocate for ethical conduct in the justice system, and has enjoyed very substantial successes for his clients in legal malpractice claims,[20] the conduct in all of which also constituted incompetence, under the OSB's application of the rule. He is a public and

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[20] As Jeff Batchelor commented in an email to Mr. McCarthy on 2/10/13, after the settlement of Timm v. Ghirso, et al.: "As best I can tell from our short time in the same game, you are old enough, and have accumulated enough wealth, not to give a s...[expletive deleted] about the consequences of taking on cases no young man or woman with a brain would or could take on. I do not pretend to have you figured out. I do know that we, as a profession, need folks like you. I would not have recognized your importance when I was young."

vigorous advocate against unethical conduct, most notably in lawyers taking interests adverse to their clients; by running and capping,[21] the industry of which has not even yet been recognized by the OSB (481:6-482:22), and with regard to the unethical practices under RPC 3.4, which the OSB continues to tolerate. As an officer of the Court, he has been required, since first learning of what goes on in Oregon with judicial elections, to complain of judges publicly supporting judicial candidates (RT 478:19-480:12), likewise as to specious counterclaims (RT 474:14-475:15, 480:21-481:5). He has attempted to enable the judiciary to reduce the volume of vexatious and frivolous litigation by authoring HB 2520 (2013), to which the OSB objects.

IV-F
SANCTIONS IMPOSED WERE UNWARRANTED

1. Robertson suffered little or no harm.

This Court has held in *In re Redden*, 153 P.3d 113, 342 Or. 393 (2007), that in determining a sanction, it will first consider "(1) the duty violated, (2) the accused's mental state, and (3) the actual or potential injury caused by the misconduct." *In re Rhodes*, 331 Or. 231, 238, 13 P.3d 512 (2000); American Bar Association's Standards for Imposing Lawyer Sanctions (1991) (amended 1992) (ABA Standards). This court then may adjust the sanction if any aggravating or

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[21] Running and capping is proscribed by ORS 9.500 et seq,; but not by RPC 7.3.

mitigating circumstances exist. *Rhodes*, 331 Or. at 238, 13 P.3d 512. Finally, this court reviews Oregon case law for guidance in determining the appropriate sanction. *In re Stauffer*, 327 Or. 44, 66, 956 P.2d 967 (1998). The ABA Standards define injury as:

> "'Injury' is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury; a reference to 'injury' alone indicates any level of injury greater than 'little or no' injury."

Mrs. Robertson knew from the outset that the recovery in the matter was a longshot. She knew that the WCB would either re-negotiate its loans or foreclose. She took a gamble and because of the reasons set forth herein, the gamble failed. Mistakes were made that omniscience could have avoided, but Mr. McCarthy engaged in no unethical conduct.

2. McCarthy was penalized for defending himself.

The resort to *ad hominem* attacks by the trial panel, particularly Ms. Wood, who by reputation and the location of her signature, is the author of the opinion, is so far from any reasonable appreciation of the facts of this case as to warrant serious concern about the process. Mr. McCarthy nowhere "blames" his client for anything. She is what she is, a self-described "player." Further, the trial panel's conception of accepting wrongdoing is entirely at odds with the very concept of due process of law. One cannot coherently admit guilt or consciousness of

wrongdoing and then attempt to defend oneself. This is exactly what the trial panel expected, and simply ignored the evidence presented, or viewed it through the warped lens of irrational, or at least irritated, authority.

3. Egregious Sanctions Have Already Been Imposed

Both the prosecutor in his opening brief and Mr. Hierschbiel in her letter of December 7, 2009 (Exh. 71), paid lip service to the proposition that Mr. McCarthy is not guilty of anything until so proven. The true facts are otherwise. The Oregon State Bar does not honor any such principle insofar as its membership in its lawyer referral service is concerned; and precludes participation therein once a complaint has been made. The justification for this policy is that the OSB does not want to be engaged in negligent referral; yet it does nothing to sanction lawyers who refer their clients to healthcare providers, with no appropriate basis for doing so whatsoever.[22]

As a result of this policy and practice, Mr. McCarthy was precluded, as well as all others similarly situated, from membership in that service since the complaint herein was brought. An established practitioner might not feel the sting of this sanction at all; and many practitioners believe the referrals consume too much time. But to a lawyer new to the jurisdiction, including Mr. McCarthy, that preclusion is a continuing and crippling restriction on the development of any

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[22] It is unknown who among the members of the OSB have any medical credentials.

private practice, and as a result the general development of his practice has suffered, and continues to suffer by this unfair sanction.

V SUMMARY AND CONCLUSION

The matter presented by the Oregon State Bar evinces some serious philosophical difficulties in the letter of the Oregon rules of professional conduct; exhibits equally problematic logical and practical issues; and reveals fiscally wasteful practices in the spirit and conduct of the administration of those rules. Were it rewarded with success, these problems would confound the reasonable efforts of any attorney practicing in this State, inhibit the advancement of the law by specious definitions of competence, and blur the lines between the duties of counsel and those of the client. The reduction of genuine ethical obligations to specious bright line propositions applied under any circumstances are wholly inconsistent with the realities of the actual practice of law, and the application of the ethical tenets of the RPC in this case do not warrant affirmation, but instead invite comment to inform the parameters of the concepts behind the rules and move the profession forward.

This matter represents an effort by a competent lawyer, doing the same things as any other competent lawyer would do, who actually understood what was going on. No neglect, misfeasance, or non-feasance occurred, although obviously

one can find errors; but no error limited or compromised the interests of the client precipitated any untoward result to befall her. Thus, no sanction is appropriate.

WHEREFORE, Petitioner prays that this Court reverse and set aside the opinion and decision of the trial panel.

Dated: April 8, 2013 McCarthy Law Offices

Steven M. McCarthy Digitally signed by Steven M. McCarthy DN: cn=Steven M. McCarthy, o, ou, email=Steve@McCarthyLegal.com, c=US Date: 2013.04.08 17:39:48 -07'00'

Steven M. McCarthy, OSB 081030

VI CERTIFICATE RE BRIEF LENGTH & TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(1) and (2) the word count of this brief as described in ORAP 5.05(2)(a) is 12,083 words. I certify that except for the actual numbers identifying each footnote, the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated: April 8, 2013 McCarthy Law Offices

Steven M. McCarthy Digitally signed by Steven M. McCarthy DN: cn=Steven M. McCarthy, o, ou, email=Steve@McCarthyLegal.com, c=US Date: 2013.04.08 17:40:00 -07'00'

Steven M. McCarthy, OSB 081030

CERTIFICATE OF SERVICE AND FILING

I served the foregoing Respondent's PETITION AND BRIEF by electronic filing on April 8, 2013, using the Appellate e-Filing system, which will send notification of such filing to the following:

Linn Davis, 032221
Susan Roedl Cournoyer, 863381
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
PO Box 231935
Tigard, OR 97281-1935
ldavis@osbar.org
scournoyer@osbar.org

I declare under penalty of perjury under the law of the state of Oregon that the foregoing is true and correct and that this declaration was executed on the date hereinbelow appearing at Independence, Oregon.

Dated: April 8, 2013

McCarthy Law Offices

Steven M. McCarthy
Digitally signed by Steven M. McCarthy
DN: cn=Steven M. McCarthy, o, ou, email=Steve@McCarthyLegal.com, c=US
Date: 2013.04.08 17:40:13 -07'00'

Steven M. McCarthy, OSB 081030