IN THE SUPREME COURT OF THE
STATE OF OREGON

In Re:	)	Case No. 12-111
	)	
Complaint as to the Conduct of,	)	SC S061840
	)	
DAVID HERMAN, OSB #902901,	)	
	)	
Accused-Petitioner on Review.	)	
	)	

PETITION FOR REVIEW, OPENING BRIEF AND EXCERPT OF RECORD OF ACCUSED, DAVID HERMAN

Petition for Review from the decision of the Oregon State Bar Trial Panel dated November 14, 2013.

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December, 2013

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PETITION FOR REVIEW

Pursuant to BR 10.5(a) and (b), the accused petitions the Oregon Supreme Court for review of, and requests this court to reject in whole, and alternatively to modify, the Trial Panel's decision and recommended sanction of disbarment imposed in this case. The accused further seeks review pursuant to BR 10.1 and BR 10.3. The accused's Opening Brief, follows this Petition for Review.

PETITIONER'S BRIEF

STATEMENT OF THE CASE.

1. The Nature of the Proceeding and Relief Sought.

This is a Petition for Review of a Trial Panel's decision recommending disbarring the accused, as was requested by the Oregon State Bar.

The accused had requested dismissal, and an award of costs under BR 10.7.

Since 2006 the accused was, and is, an inactive member of the Oregon State Bar (hereinafter, "OSB"). So, the result of the panel's decision, if affirmed, prohibits application by the accused for reinstatement to active status, forever. *See*, BR 6.1(d), *Effect of Disbarment*:

"*** An attorney disbarred as a result of a disciplinary proceeding commenced by formal complaint after December 31, 1995, shall never be eligible to apply and shall not be considered for admission under ORS 9.220 or reinstatement under Title

8 of these rules."

2. The Nature of the Decision to be Reviewed.

This is a Petition for Review of a final decision by the Trial Panel imposing a sanction of disbarment.

3. Statement of the Statutory Basis of Appellate Jurisdiction.

This Court has jurisdiction over this matter pursuant to ORS 9.536.

4. Statement of Filing Dates - Appellate Jurisdiction and Petition for Review.

The Trial Panel's Decision was mailed on November 14, 2013. The Request for Review was filed on November 22, 2013, within 60 days as required under BR 10.1. Petition for Review is further hereby made pursuant to ORS 9.536, and procedurally under ORAP 11.25(2)(a), BR 10.3, and BR 10.6.

5. Questions Presented on Review.

A. Did the Trial Panel err in concluding that the specific acts that the OSB pleaded, were proven by clear and convincing evidence, that the accused violated RPC 8.4(a)(3) (*i.e.*, engaged in dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law)?

B. If the above conclusion is not wholly rejected (or if partially rejected), did the Trial Panel err in concluding that disbarment was an appropriate sanction, applying and considering this court's decisional precedents and the applicable ABA standards for discipline? (App 1-7).

6. Concise Summary of Arguments.

A. Due process considerations in disciplinary proceedings require that the issues are to be limited to the allegations specifically pled by the OSB. The OSB alleged essentially two things in one cause, to which the accused responded:

(1) The accused *inter alia* without notice to or [fraudulently] diverted "Blue Q [Labs], Inc.'s.," receivables (fka "Vintrack, Inc.," hereinafter referred to as, "Blue Q1") meaning Mr. and Mr. share of profits, to a different corporation wholly owned by the accused (Equine Mgmnt., Inc.). The OSB further contended that assets of Blue Q1 were improperly transferred to Carbcert, Inc., the accused's wholly owned corporation.

The accused denies he engaged in any dishonest or fraudulent conduct, and furthermore, asserts that the OSB did not prove by clear and convincing evidence that he engaged in any deceitful or fraudulent conduct, failed to prove the accused wrongfully or dishonestly transferred any Blue Q1 "profits" or assets, or that the accused engaged in conduct warranting sanctions of any sort.

(2) Secondly, the OSB alleges, that the accused knowingly filed a false certificate of dissolution of a corporation with the Nevada Secretary of State. This involved the corporation which was employed in a start-up business venture with the accused's former associates, and It was alleged that the

accused knew the filing was false, because he wasn't the sole corporate officer, he wasn't the sole director, the accused falsely stated that no Blue Q1 stock had been issued, and the accused falsely stated that there had been a director's meeting on 02/24/2009 during which the board approved a resolution to dissolve Blue Q1.

The accused agrees he filed a certificate of dissolution for Blue Q1, but denies it was false, and denies it was filed dishonestly or deceitfully; and,

(3) The Trial Panel's finding at page 8 of its decision, that this was a single course of conduct was correct. And most importantly, as the Trial Panel found to be true, is the fact that:

> "**The Bar has not proven money was owed to either Mr. nor Mr. The bar's own expert did not identify [any] an amount of money that should have been paid to either person**." (Boldface added)

The statement of the panel, at page 4 of its decision, that, "*If* the Trial Panel is correct that the accused was the sole shareholder of Blue Q Labs, Inc....," demonstrates the panel engaged in guess work, applied the wrong standard, and did not require the OSB to prove its allegations by clear and convincing evidence (emphasis added). Rather, the panel engaged in speculation and conjecture in concluding the accused engaged in conduct violating RPC 8.4(a)(3).

The panel's conclusion and requested disbarment of the accused, should be rejected in total, and this case should be dismissed.

However, should this court disagree that dismissal is not the appropriate

disposition in this matter, the sanction of disbarment is unwarranted and is designed by the OSB and the panel to unduly punish the accused, not to protect the public:

a) There is no evidence of prior discipline of the accused;

b) Negligence, even gross negligence, is not sufficient to result in sanction of disbarment. *See, e.g., Jones*, 326 Or 195,198, 951 P2d 149 (1997). And see ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2002); Terminology, "Fraud: Conduct having a purpose to deceive but not merely negligent misrepresentation." The evidence in this case at most showed negligence in some particulars, not intentional conduct causing injury;

c) There is no evidence that the accused in this case engaged in conduct that adversely reflects on his fitness to practice law, nor that the accused would engage in, or become embroiled in, a similar business venture in the future. Blue Q1 was an isolated venture;

d) The events complained of occurred six years ago without any further OSB contact by any complainant regarding the accused. The record is devoid of any evidence that the accused intends to engage in the practice of law or any similar business ventures in the future, at all. Mitigating factors outweigh aggravating factors and warrant at most a sanction of public reprimand.

If a suspension sanction is deemed appropriate by this court, imposition of a maximum thirty day prohibition from applying for reinstatement, should be considered as adequate protection for the public. It should be considered and remembered that the accused has not applied for return to active status for the approximate six years which have already passed since these events occurred and he has been inactive for eight years.

7. Statement of facts.

David M. Herman, OSB #902967, "the accused," is accused by the Complaint of violating RPC 8.4(a)(3): "It is professional misconduct for a lawyer to: *** (a)(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."

This is alleged to have occurred in 2008-09 in connection with what evolved into a somewhat complicated private business transaction ("Blue Q Labs, Inc., a Nevada Corporation," fka "Vintrack Info. Systems, Inc.").[1]

The other principals, again, were Mr. (Professional

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[1]"Blue Q Labs, Inc. [1]" will, again, be referred to as, "Blue Q1." It was the initial Nevada Corporation intended to be used for the subject business venture.

"Blue Q Labs, LLC," is an Oregon, LLC, that Mr. Herman's accuser, and former business associates, formed by their attorney, Mr. Paul Meadowbrook. (ER-1-6). It will be referred to as, "Blue Q2." After Mr. Meadowbrook corresponded with the accused in February or March 2009, the Blue Q2 Articles were filed with the Oregon Secretary of State on 06/10/2009. It is relevant as it relates to the obvious knowledge of the parties, of the February 2009 meeting of the parties, and the agreement for and date of dissolution of, Blue Q1.

Services Industries or "PSI") and Mr. Mr. Paul Meadowbrook, OSB #793226, was at the time of the subject events, and is now, the complainant attorney, including in *v. Herman* in his U.S District Court action pending in Eugene.

Mr. s testimony at hearing was that he did not know he was demanding $300,000 in the Complaint he has filed in U.S. District Court against the accused, Mr. Herman. Nor did he know whether he had even brought a claim for anything arising out of the Blue Q1 business venture against the accused. Tr. 240.[2] Mr. thought he was suing only for something in connection with an unrelated Santiam Mill site, environmental clean-up. In any case, they are continuing to litigate their claimed differences involving the venture(s) in U.S. District Court, *v. David Herman*, Case #6:10-cv-06147-TC. Exs. 27-39.

The business venture involved the development, construction, and sale of certain testing "cubes," at least in part in response to California's enactment of a formaldehyde wood products testing requirement, to allow foreign composite wood products to be approved for import.

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[2] It is also noteworthy as relates to the dissolution of Blue Q1, that Mr. attorney filed and backdated from September, 2009, Blue Q2's "Articles of Amendment," to artificially reflect the withdrawal of Mr. from Blue Q2, effective 06/12/09. Those amended articles were, again, signed and filed in September of 2009, with the Oregon Secretary of State. testimony, Tr. 288, Ex. 103; ER1-6.

Mr. Herman is, more specifically, accused of three things:

1) One, contracting to have others produce the product, then withholding of funds from contract proceeds from sale of the cubes;
2) Two, transferring Blue Q1's assets to "Carbcert.com, LLC," and, "diverting Blue Q1's receivables to his corporation, Equine Management, Inc.," and
3) Three, filing a Certificate of Dissolution of Blue Q1 with the Nevada Corporation Commissioner that was knowingly false;

Additional facts as may be relevant, and which may be contested and in dispute, will also be addressed in argument below.

Mr. Herman was not and is not actively practicing law, and his status is administratively, "Suspended-Non-disciplinary" – "No Disciplinary Sanctions for this member." He was not alleged to be and did not act as attorney for the other principals involved in Blue Q1. It should be remembered that no attorney client relationship is alleged in the Complaint in this case to have existed between the parties or entities, (despite Mr. belated effort to create an attorney-client relationship). Tr. 296.

FIRST ASSIGNMENT OF ERROR.

The trial panel erred in ruling the OSB had proven by clear and convincing evidence that the accused converted profits or financial assets of Blue Q Labs, Inc. (impliedly and presumably meaning and

share of profits) for his own use.

Standard of Review.

Under ORS 9.536(2) the Court shall review the matter *de novo*; BR 10.6.

As to credibility determinations, from *Obert*, 352 Or 231, 244, 282 P3d 825 (2012):

> " '[t]his court gives weight to the panel's express credibility assessment.' *In re Hostetter*, 348 Or 574, 596, 238 P3d 13 (2010). When the trial panel's credibility determination is based on the witness's demeanor and supported by explicit findings on that subject, this court will give deference to the credibility determination. *Id.*
>
> If, however, the panel's credibility determination, ' "is based on the objective factors involving the intrinsic believability of competing inferences or evidence *** this court owes no deference to that assessment, but the panel's discussion may be enlightening and have persuasive force." ' *Id.* (quoting *In re Fitzhenry*, 343 Or 86, 103-04 n. 13, 162 P3d 260 (2007))."

Argument.

In Oregon, "The purpose of lawyer discipline is not to penalize the accused. *Glass*, 308 Or 297, 304, 779 P2d 612 (1989). Rather, the purpose is to 'protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.' ABA Standard 1.1." *Hostetter*, 348 Or 574, 598, 238 P3d 13 (2013).

In, *Ruffalo*, 390 U.S. 544, 549 (1968), the court held disbarment invokes due process rights (including notice of the specific charge(s)) at the State and Federal levels, but also obviously results in a punishment of the lawyer:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380, 18 L.Ed. 366; *Spevack v. Klein*, 385 U.S. 511, 515, 87 S.Ct. 625, 628, 17 L.Ed.2d 574. He is accordingly entitled to procedural due process, which includes fair notice of the charge. *See In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682. It was said in *Randall v. Brigham*, 7 Wall. 523, 540, 19 L.Ed. 285, that when proceedings for disbarment are 'not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence.' Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.' *Selling v. Radford*, 243 U.S. 46, 51, 37 S.Ct. 377, 379, 61 L.Ed. 585."

In *Peterson*, 348 Or 325, 334, 232 P3d 940 (2010) the court held:

> "Because an actor who mistakenly believes that his or her conduct is legal still can commit conversion, not all conversions implicate the prohibition in RPC 8.4(a)(3) against 'conduct involving dishonesty.' *Id.* at 184–85, 970 P.2d 638. Acts of conversion that are 'intentional or knowing' violate RPC 8.4(a)(3); acts that are 'merely negligent, unknowing or innocent' do not. *Id.* at 186, 970 P.2d 638. Stated differently, the Bar must prove, by clear and convincing evidence, that the accused either (1) intended to convert property, or (2) knew 'that his conduct was culpable in some respect.' *In re Skagen*, 342 Or. 183, 203, 149 P.3d 1171 (2006) (evaluating the mental state required for 'conduct involving dishonesty' under former DR 1–102(A)(3))."
>
> *****
>
> *** the Bar has the burden of establishing the accused's misconduct by clear and convincing evidence. BR 5.2. Clear and convincing evidence is evidence establishing that the truth of facts asserted is

> highly probable. *In re Johnson*, 300 Or. 52, 55, 707 P.2d 573 (1985)."

See also, *Obert*, *supra*, 352 Or at 231 (2012).

From *Lesiure*, 338 Or 508, 510, 113 P3d 412 (2005): "The bar must establish, by clear and convincing evidence, the alleged misconduct. BR 5.2. 'Clear and convincing evidence means evidence establishing that the truth of the facts asserted is highly probable.' *Eakin*, 334 Or at 240."

In W*alton*, 352 Or 548, 554, 287 P3d 1098 (2012), the court recited the applicable burden of proof, and standards for discipline, where the lawyer was accused of dishonest conduct – theft - and violations of RPC 8.4(a)(3), and RPC 8.4(a)(1) and (2). The lawyer was previously sanctioned by the Hawaii Bar for the alleged misconduct. The court considers the duty violated, the accused's mental state, and actual or potential injury. If violated the court then considers the ABA standards for sanctions:

> "ABA Standards for guidance in determining an appropriate sanction for conduct involving dishonesty, fraud, deceit, or misrepresentation. ABA Standard 5.1 provides, in part:
> **557* 'Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
> '5.11 Disbarment is generally appropriate when:
> '(a) a lawyer engages in serious criminal conduct[,] a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or

> importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
> '(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.'
> '5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 [disbarment] and that seriously adversely reflects on the lawyer's fitness to practice.
> '5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.' "

What the assets consisted of that were misappropriated by the accused, or what the profits, funds, or profits were that were not distributed to Mr. or Mr. was not proven. The panel specifically found the accused was not proven to have misappropriated any profits that should have been paid to Mr. or

The OSB did not quantify the alleged misappropriated profits or funds. The OSB's expert accountant did not quantify nor even estimate the amount of any such funds. And the trial panel, again, specifically found, that in fact, misappropriation was not proven. The OSB simply failed to prove this allegation.[3] It was the OSB's burden to prove by clear and convincing evidence,

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[3] The accused's counsel would note, that the 2008, 1120S Tax return (Ex. 34) showed $16,648 ordinary income, but it also had other debts, $82,458 in, "loans from [Herman] shareholders" (Ex. 34, page 4), and carried accounts payable of $88,276. Form 4797, Statement 9, shows a sales loss of cubes of a negative, <$554>.

what they pled in their Complaint in this case.

Mr. and Mr. both testified that they contributed no money to the enterprise, and purchased no stock (Tr.285- and that they were reimbursed for any expenses. Tr.281. (See checks to "RA Leasing" Tr. 224-225, 227-30, "Not sure if I got the money but that's my signature on the check," and the check Mr. issued to himself deposited to his account, likely also supplying David Herman's signature to the check. Check 1001, $15,000, Ex. 107, Tr. 281. Again, when asked what Mr. was suing David Herman for, he believed it was just for, "sale of the mill property." Blue Q1, as far as knew, was not involved in his U.S. District Court Complaint against the accused. Tr. 238.

When asked to quantify in dollars, his allegations to the OSB, of what Mr. thought the amount "wrongfully taken" consisted of, it was defined as some unquantified electronics and two chambers (in unspecified condition as to state of manufacture). Tr. 293. Tr. 126. He of course did not testify as to the substantial loans that were made by the accused and Equine Mgmnt. Inc. to the corporation, nor that Blue Q1 - Mr. Herman - might have incurred substantial expenses in connection with the venture. Those were likely the two chambers

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The 2009, 1120S Tax Return, (Ex. 37), the "Final Return," showed $1,532 ordinary income, but accounts payable of $88,276 and loans from shareholders of $82,458. Form 4797 shows three chambers were sold at a cost of $4,200 each, for a gross sales price each of $3,085, *i.e.* all at a loss.

and Herman removed from the shop after the February 24, 2009, meeting, also being the last time did anything or was asked to do anything for the benefit of Blue Q1. Tr. 293.

Although in contact with Mr. Meadowbrook, Mr. did not bring any claim for any money claimed to be owed, against Mr. Herman. Tr. 277.

The accused's business associates did not and could not quantify even a ballpark amount that Mr. Herman is claimed to have "stolen" from them.

The panel nevertheless, while finding no "theft" was committed, acquiesced to the OSB's request to conclude that the accused was somehow dishonest and committed fraud, and that it was established by clear and convincing evidence. Tr. 206.

The accused and the undersigned, disagree with the panel's conclusions and bar counsel's arguments, and respectfully submit to this court, that there was no evidence that the accused misappropriated any profits or funds in this case. Certainly, no proof of such exists by clear and convincing evidence.

As to the change of bank account issue, what is important, as regards the allegations in the subject Complaint, as to the accused's claimed fraudulent intent, is that Mr. Herman copied Mr. with the E-Mail, advising him of the change in bank account to the Equine account. That very E-Mail to a Blue Q1 customer was copied to Mr. which he in turn, provided to the OSB.

That information about use of the new bank account, the change to the use

of the Equine account, was specifically contained in the E-Mail to Mr. Tr. 117-19. This in fact proves a lack of the requisite mental state. This allegation was not proven to be actionable as being concealed, nor done dishonestly, deceitfully, or fraudulently.

Wholly unproven was the allegation (Complaint, para. 8) that the accused, "improperly transferred Blue Q's corporate assets to Carbcert.com, LLC***." Carbcert was an online testing-certification company created by Mr. Luben and the accused, after start-up of Blue Q1. Neither nor had any right to, nor did they claim any interest in that company.

The problem that had arisen, which this court really need not resolve, was that a foreign wire transfer, actually more than one, was claimed to have been sent to, but was not received by Blue Q1. Obviously there was no evidence of receipt on Herman's end, of a payment that was not received. Absent tracing documents that only the sender could request and sender's bank could generate, there was nothing Mr. Herman would have to evidence the failure of transfer of the funds from a foreign customer (even if it were the accused's burden to prove the reason these funds did not show up in this case). It was an issue that was verbally discussed with the bank and the customer. Tr. 126.

The point here is that it wasn't somehow concealed from Mr. (who was then the partner/co-member with Mr. in the LLC that their attorney Mr. Meadowbrook had formed, Blue Q2, to solicit Blue Q1's

customers).

There is a lack of clear and convincing evidence and factual support for this disciplinary action. There is a lack of any allegation, not to mention a lack of evidence at hearing, that any funds in the Blue Q1 checking account ($42 approximately in March 2009) were those of Mr. or Mr. Ex. 32, the bank statements, show that of the $32,000 deposited in February 2009, that $31,623 was paid out just by the conventional checks (none to the accused). The account was repeatedly over-drafted when closed March 9, 2009.

Funds advanced or loaned for this venture were the accused's or Equine Management, Inc.'s, not Mr. nor Mr. No funds were diverted to Equine that had not been first advanced by Equine or paid to an Equine vendor for benefit of Blue Q1. Tr. 337. There is no evidence that the thousands of dollars spent on materials and electronics, vacuum pumps, shipping, overseas travel, and fabrication for these cubes reflected in the bank statements, Exs. 32-33, were made other than by Herman/Equine, or by loss sales. They were not made by or (excepting for the reimbursements they received). And what profits were wrongfully, "siphoned," to Mr. Herman was not proven by the OSB - because there weren't any.

There is no dispute the OSB offered no evidence, contrary to its argument, that any creditor of Blue Q1, went unpaid by the accused (excepting the accused for the accused's loans to Blue Q1).

There is no evidence that is contrary to the OSB's own expert's testimony, as the panel found, that Mr. Herman took no wages or distributions from Blue Q1. Tr. 206.

There were, at least to the undersigned, very confusing records for the business enterprises created by the corporate accountants. But lacking is any clear and convincing evidence of what it is that Mr. Herman is contended to have done, or wrongfully diverted from Mr. or Mr.

We know that Mr. didn't even know whether he was or if he is claiming anything involving the Blue Q-1 business from Mr. Herman. And Mr. thinks maybe, "some electronics" and "two cubes" taken at the February 2009 meeting at shop, should be accounted for, but offers no evidence they were sold at a profit or sold at all. He and the OSB offer no testimony as to what costs were incurred by the accused in trying to meet production times, and what the accused's costs of production, travel, overseas and other shipping costs were for the few that were constructed vs. what was received from any Blue Q1 customers.

What Mr. Herman knew and believed, and the tax returns demonstrate, was that Blue Q-1/Mr. Herman was significantly, financially, upside down. Tr.96. Mr. stated the shipping container cube wasn't completed for the reason, "No money."

Nowhere, at no time, did Mr. request to see or be denied access

to any bank accounts or financial information. As a signatory he could get any Blue Q1 bank records he wanted as could Mr. And Mr. testified he has never asked for any such information, Tr. 287, and as to Equine Tr. 292, "I never asked him." Nor is there any evidence Mr. requested Blue Q1, Carbcert, or Equine records, and was denied. The accused freely supplied the bank records and tax returns to the OSB, and bar counsel introduced the ones that OSB counsel thought were helpful to its position.

Mr. advised Mr. Herman he would, "manage all communications with Mr. after the February 2009 meeting, and the accused had no further inquiries or calls from, or communications with Mr. after the meeting (other than promptly from Mr. Meadowbrook). Tr. 112.

What the net losses of Blue Q-1 were in February 2009 and in winding up under NRS 78.585, *Continuation of corporation after dissolution for winding up and liquidating its business and affairs; limitation on actions by or against dissolved corporation*, remains unproven and open only to pure speculation on this record. Mr. Herman has testified Blue Q1 was not profitable. No one has testified and therefore it could only be based upon conjecture, guesswork, and speculation, that Blue Q1 was profitable. Tr. 96-97; Tr. 356-57.

The OSB nor its expert, interviewed anyone at the Blue Q1's accountant's offices about the accounting records and returns for Blue Q1. Nor about the accountant's General Ledger entries. Nor about Blue Q1's, Mr. Herman's, or

Equine's claimed, "profits."

The accused had to and did make every reasonable effort to meet Blue Q1's customer's contractual expectations, before and after the February meeting. This is neither illegal nor dishonest. It in fact saved Mr. Mr. and Blue Q1 from substantial and immeasurable damage claims for product that remained in customers' hands that could not be marketed, awaiting promised testing facilities, due to and failure to timely manufacture and install properly functioning testing cubes.

SECOND ASSIGMENT OF ERROR.

The accused did not file a false certification of dissolution of Blue Q1 with the Nevada Corporation Commissioner. No fraudulent intent to do so was proven by clear and convincing evidence.

Argument.

As to the allegation of a, "false document," being filed with the Nevada Secretary of State, the issue is not whether all corporate niceties were strictly followed and met by these three parties in this business venture, (and the accuser's attorney, Mr. Meadowbrook), or if they were negligently disregarded. All "normal" documents were not contemporaneously created as Mr. Herman testified. Tr. 361, testimony of accused. Under RPC 8.4(a)(3), acts that are, "merely negligent, unknowing or innocent," do not violate the rule. *Peterson, supra.* And *see, Skagen*, 342 Or 183, 203, 149 P3d 1171 (2006) (evaluating the

mental state required for conduct involving dishonesty).

The issue, also, is not whether the undersigned's observation and closing argument, that the "corporate niceties were not followed," and thereby, counsel, "demeaned the system," as the panel commented, or appears to have been focused upon.

Rather, the issues are, one, was it established by clear and convincing evidence that the accused intentionally and with requisite mental state, knowingly filed a false certificate, that he knew to be false, falsely stating he was the sole Blue Q1 officer, director, that no Blue Q-1 stock had been issued, that a meeting occurred February 24, 2009, and the director(s) had resolved to dissolve Blue Q1?

Two, does this event involve, conduct involving serious "dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law," (if he should ever elect to return to active status)? That he may have been negligent or sloppy in handling his own affairs five to six years ago, does not automatically mean the accused would be "unfit" to practice in handling other client's affairs that might retain him.

And three, is it so serious, as OSB counsel urged, as to justify disbarment (or some other sanction)?

The accused, again, agreed that no organizational meeting, adoption of any new or amended Vintrack by-laws, issuance of Blue Q1 stock, or formal election

of directors occurred, upon the name change from, "Vintrak Information Systems, Inc.," to "Blue Q Labs, Inc." Tr.110. Mr. Herman would have in fact remained the sole shareholder of Vintrack-Blue Q1, if any stock had issued under Vintrak Info. Systems, Inc. This is a question the undersigned does not believe was asked nor answered in the record.

If Mr. Manne's view is correct, (the expert corporate lawyer testifying for the OSB), if David Herman was the sole shareholder of Vintrack, as such, David Herman could "meet with himself," elect himself, and as directors, (as was reflected on the initial Nevada filing changing the Vintrack name to Blue Q Labs, Inc.). And he could vote to change the corporate name, with reissuance of stock to Herman, and to follow.

The initial Nevada Blue Q1 filing, showing the three as directors, was thereby legally and factually accurate. This document was not charged as false.

A lawyer engages in conduct involving misrepresentation when the lawyer makes a representation that the lawyer knows is false and material. *Davenport*, 334 Or 298, 308, 49 P3d 91, *adh'd to as modified on recon.,* 335 Or 67, 57 P3d 897 (2002).

As to the alleged false certificate of dissolution, the OSB offered no evidence on the issue so we don't know the answer, as to whether Vintrack had an organizational meeting and had issued stock, had a shareholder's meeting, elected directors, and the directors elected officers, and whether the sole

shareholder, director, and officer was David Herman in all capacities. If so, even after the name change to Blue Q1, he would have remained as the sole officer, shareholder, and director, after and resigned/bailed out of Blue Q1. The certificate of dissolution when filed with the Nevada Secretary of State was not false for this reason, because the accused was the sole director and *it was not disputed that no* Blue Q1 shares of stock had ever been issued.

In addition, and it is submitted the focus should be, *Mr. Herman* certainly believed that had quit, that he and Mr. were a quorum of directors, and that they recognized and had agreed they needed to, and they all in fact did end Blue Q1 at the meeting at shop in late February, 2009.

There was no direct or circumstantial evidence that any stock was issued under the name Blue Q Labs, Inc. to anyone, including by stock transfer ledger. The bar's expert testified he did not know the answer, but stock certificates are no longer required in Oregon under ORS 60.161, "Shares may be but are not required to be represented by certificates." Nevada's NRS 78.235(4) and (5), is a similar statute:

> "4. Unless otherwise provided in the articles of incorporation or bylaws, the board of directors may authorize the issuance of uncertificated shares of some or all of the shares of any or all of its classes or series. The issuance of uncertificated shares has no effect on existing certificates for shares until surrendered to the corporation, or on the respective rights and obligations of the stockholders. Unless otherwise provided by a specific statute, the rights and obligations of stockholders are identical whether or not their shares of stock are represented by certificates.

> 5. Within a reasonable time after the issuance or transfer of shares without certificates, the corporation shall send the stockholder a written statement containing the information required on the certificates pursuant to subsection 1. At least annually thereafter, the corporation shall provide to its stockholders of record, a written statement confirming the information contained in the informational statement previously sent pursuant to this subsection."

ORS 60.211, *Action without meeting*, and NRS 78.320 provide that shareholder action may be taken, to be evidenced including in the future, by consent minutes.

ORS 60.341 and NRS 78.315 likewise provide that actions by directors may be taken without meeting, and the consent minutes may reflect an earlier or an even later effective date.

No minutes were kept, nor consent minutes created after the parties' separation. Tr. 111. However, it is also obviously very unlikely that Mr. or Mr. would have signed anything, even if requested to do so by the accused, after February 24, 2009.

But whether Nevada law applies, or Oregon's similar statutory counterparts apply, or whether consent or other minutes were created or not, is not the issue pled by the OSB, nor what this court is to decide. And the issue is *not* whether the accused was negligent in failing to prepare consent minutes, or in completing documents filed with the Secretary of State of Nevada. Pursuant to *Carpenter*, 337 Or 226, 95 P3d 203 (2004), under former DR 1-102(A)(3 and *Gygi*, 273 Or 443, 447-48, 541 P2d 1392 (1975), the court held it must be

fraudulent, "highly probable," not an isolated incident. And negligent conduct, again, is not enough to warrant sanction or disbarment. Lawyers have some latitude to be human and not perfect, without being subject to disbarment for every error that may occur in life or practice.

The issue is whether the OSB proved that the accused, with the requisite mental state, engaged in such fraudulent, deceitful, dishonest and egregious conduct, as to reflect on his fitness to practice law, warranting disbarment, not if he was negligent or even grossly negligent. "Knowing" conduct is defined in BR 1.0(h) and requires and denotes actual knowledge of the fact in question, and not what the lawyer should have known (excepting in circumstances not here in issue).

After the meeting, in February or March of 2009, Mr. Meadowbrook asked for and was given the receipts and the letter from Mr. Herman, (dated March 6, 2009). Ex. 106. Obviously this was precipitated by the ending of Blue Q1.

And Mr. and Mr. Herman are now engaged in relatively normal discovery procedures in U.S. District Court. The point is that all the parties recognized Blue Q1 was at an end and was to be dissolved.

Mr. wasn't the inexperienced businessman the bar would have had the panel or this court to believe. He had formed and dissolved several LLCs, Tr. 284. Neither he nor his attorney insisted on "minutes," or meeting of

corporate formalities in this case.

Mr. and the accused had several business dealings in the past without them ending in litigation. His attorney, Mr. Meadowbrook, again, didn't request any such formalities in this case either. Mr. Meadowbrook and his clients rather promptly formed Blue Q2, and Mr. and Mr. started contacting Blue Q1's customers (and including selling Blue Q1's products with Blue Q2 retaining the proceeds).

Mr. Herman trusted his associates. He trusted them to perform as they had promised. He at least expected Mr. to allow the fabricator he hired at his expense (Mr. to meet production and Blue Q-1's contractual obligations, since Mr. would not. That misplaced trust by the accused does not warrant disbarment or sanction.

Fiduciary duties run both ways between, "partners." Consistent with the ending of Blue Q1, Mr. Herman later learned Blue Q1's receivables were in fact being paid to Blue Q2/ but were not being remitted to Blue Q1. He did not expect his "partners" to conspire to solicit Blue Q1's customers and then create a new Blue Q2 and take Blue Q1's receivables. Tr. 113. And he expected Mr. to perform his part which was to travel overseas and install the product, not to require the accused to travel to overseas locations, and for the accused to perform Mr. job. Mr. Herman traveled to Asia twice for two weeks with Mr. doing job, while Mr.

chose and preferred to enjoy an, "active social life." Tr. 97; Tr. 100; Tr. 115.

The dissolution certificate was filed after the meeting with Mr. and Mr. at the shop, and after Mr. rescission, and removing himself from Herman and presence, announcing, "I'm not going to listen to this anymore. I'm done with it. I won't discuss it anymore. You bring it up again and you won't like my response." Herman: "Then it's over. We're done. We've got to turn it off, send people their money back, beg forgiveness or whatever." "I don't care what you do I'm not going forward with this. I'm not giving you any commitments, and I'm not going to do anything else." Tr. 93. "I'm done." Tr.111.

And whatever may be their *claimed* recollection five years later at the time of the panel hearing, the point here is that *Mr. Herman* reasonably and certainly believed, understood, and testified, that Mr. had rescinded any affiliation with Blue Q1, he "was done," and that Mr. had advised, that he wanted nothing further to do with Blue Q1. (*See,* BR 1.0(a) defining "belief" or "believes"). Nor did expect compensation from Carbcert. Tr.129-131; Tr. 293. And for that matter, Mr. eventually decided he wanted no participation in Blue Q2 with Mr. either, and Mr. Meadowbrook creatively backdated him out of Blue Q2 (if not totally monetarily, at least on the Oregon Secretary of State filings). Tr. 288; Ex. 103; ER 1-6.

Obviously, Mr. did not think he was still in business with Mr. Herman either after the February meeting. No further work was requested of, nor done by Mr. after February 24, 2009. This court can be certain of this because, by *March 6, 2009*, Mr. Herman was *replying* to Mr. and Mr. attorney's inquiries. Ex. 106, letter Herman to Meadowbrook. Mr. Meadowbrook, nor his Blue Q2 clients, ever demanded any Blue Q1, Equine, Carbcert, or other financial information from Mr. Herman, or from Blue Q1's accountants, Manszer and Davis, LLP, CPAs that they were not provided. They were not denied any such information then, nor later on.

Without factual dispute, what happened was, that Mr. and Mr. surreptitiously decided to, and did in fact, form their own Blue Q2 company, and solicited and engaged the customers of Blue Q1. Ex. 103. Unbeknownst to Mr. Herman, Blue Q1 was, "building equipment that his [/ enterprise [Blue Q2] was selling." Tr.328. Blue Q1 was filing orders at its cost, and Mr. and were getting the product, completing the sales, but zero funds came back to Blue Q1. Tr. 328.

There is no dispute no further Blue Q1 business transpired after end of February 2009, as it was originally planned to be structured, because Mr. had rescinded and withdrawn, and Mr. had conflicts with his PSI employment and wasn't doing installations for Blue Q1 as he had promised. The corporation was then inactive and was properly dissolved by Articles filed

March 19, 2009. Ex. 11, the Articles of Dissolution, reflect it was signed March 14, 2009, and the effective date was February 27, 2009 (it appears to be a "27" but it was overwritten and it is a bit illegible). It was done by the only person with authority to do so, the sole remaining director David Herman, exactly as is stated on the form (and sole shareholder again only *if* Vintrak stock was ever issued). Tr. 108-109.

No Blue Q-1 stock was ever issued, exactly as is stated on the form. It was not false, and as is more important here, Mr. Herman did not believe and in fact knew that no Blue Q Labs, Inc. stock had been issued.

So, in fact, the "false and fraudulent" Nevada Secretary of State filing, Ex. 11, page 2, the Certificate of Dissolution, accurately reflects no stock had been issued. And it is at least clear, and true, and the OSB will not contradict, that there was no evidence that any stock had been issued to any Blue Q1 prospective shareholders, by certificates or Stock Transfer Ledger-Uncertificated shares.

Certainly *Mr. Herman* honestly believed he was acting as the sole remaining officer, and director of Blue Q1, and that no Blue Q1 stock had ever been issued, which is the issue before this court.

Mr. Manne testified: "No. I guess I would have to say it's purporting to – to comply with the 'before issuance of stock' because it only says that board of directors have approved and it doesn't say that – or indicate anywhere that the shareholders have approved." Tr. 175.

Consistent with dissolution of Blue Q1 is Mr. also recalling that he later sold two Blue Q1 cubes, and those funds not being sent by Mr. to Mr. Herman or to Blue Q1. Again, by March 6, 2009, Mr. Herman had responded to Mr. attorney. Ex. 106. The accused only later learned that Mr. and Mr. retained and shipped the chambers to Blue Q1's customers. Tr. 113-15. Apparently, but it is not necessary to resolve, these were the cubes Mr. Herman had paid Mr. to manufacture. Tr. 113.

Again, Mr. acknowledged the removal of two chambers and some electronics from shop at the end of the meeting. Tr. 293. They all knew and had mutually agreed that Blue Q-1 had ended.

After the meeting that was held at Mr. shop, Blue Q1 was dissolved as was correctly reflected in the Nevada Corporation Commissioner's office.

THIRD ASSIGNMENT OF ERROR.

The possible sanction, if any is to be imposed, should be limited to public reprimand or at most 30 day suspension before being allowed to apply for reinstatement to active status.[4]

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[4] Reinstatement would of course also require formal application and compliance with BR 8.1, BR 8.5, BR 8.6, and completion of an investigation by Bar Counsel under BR 8.7, as the accused has been inactive for over five years, which further, "protects the public."

Argument.

Carini, 354 Or 47, 59, 308 P3d 197 (2013) sets forth the methodology for imposition of sanctions; and *see Eadie*, 333 Or 42, 64–65, 36 P3d 468 (2001):

> "We first consider the duty violated, the accused's state of mind [intentional, knowing, negligent, or strict liability], and the actual or potential injury caused by the accused's conduct [actual, potential, or none]. *Kluge*, 332 Or. at 259, 27 P.3d 102; ABA Standard 3.0. We next determine whether any aggravating or mitigating circumstances exist. *Id.* Finally, we consider the appropriate sanction in light of this court's case law. *Id.* [examples include the existence or absence of prior offenses, motive, the number of offenses, the level of cooperation, restitution, experience in practice, whether there was delay in the proceeding]. In determining the appropriate sanction, our purpose is to protect the public and the courts from lawyers who have not discharged properly their duties to clients, the public, the legal system, or the profession. See ABA Standard 1.1."

Counsel of course does not know what the outcome in this case will be at the Supreme Court level. But should this court get to the issue of sanctions, which it is respectfully suggested is an issue this court should not reach, the court is requested to consider that Mr. Herman has not applied for return to active status for eight years, and six years now, since the subject Blue Q1 venture. The factual evidence is that this was an isolated and somewhat unruly business venture, in which the accused found himself embroiled, with irresponsible business associates.

It is a fair conclusion that it is very unlikely that he will ever again become involved in any sort of similar venture, with associates such as Mr. and Mr. whom he cannot trust. In *Carpenter*, *supra,* 337 Or at 245,

> "(a) Disciplinary Proceedings. The dispositions or sanctions in disciplinary proceedings are
>
> (i) dismissal of any charge or all charges;
> (ii) public reprimand;
> (iii) suspension for periods from 30 days to five years;
> (iv) a suspension for any period designated in BR 6.1(a)(iii) which may be stayed in whole or in part on the condition that designated probationary terms are met; or
> (v) disbarment.
>
> In conjunction with a disposition or sanction referred to in this rule, an accused may be required to make restitution of some or all of the money, property or fees received by the accused in the representation of a client, or reimbursement to the Client Security Fund."

Evidencing the failure of proof in this case is the panel's determination that no amount of money was determined to have been misappropriated by the accused, no harm to and was thereby proven, and no restitution could be established, (even if an attorney client relationship was pled and proven to exist by the OSB - which would deny the accused due process - it was not alleged nor an issue in this case). and promptly after the February 2009 meeting, had their attorney, Mr. Meadowbrook, contact the accused and then formed their own Blue Q2 and began soliciting Blue Q1's customers. How this is fraudulent conduct on behalf of the accused is not logically apparent to accused's counsel.

It is submitted that the imposition of disbarment, the most severe sanction that can be imposed, is punishment to the extreme, and is not warranted in this case.

minutes, issue stock certificates, or to later prepare consent minutes after the parties decided to separate.

The Certificate of Dissolution filed with the Nevada Corporation Division was correct, and at the very least was believed by the accused to be correct. It was filed only after the meeting and the accused's associates decided to form their own Blue Q2, and to go their own separate way.

The accused respectfully requests judgment of this court as follows:

1) For dismissal of the Complaint with prejudice;

2) For award of costs and disbursements pursuant to BR 10.7 and ORAP 13.05.

DATED this 30th day of December, 2013.

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CERTIFICATE OFCOMPLIANCE WITH
ORAP 11.25(2)(b); ORAP 5.05 (2)(d)

Brief Length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2)(d)(i) & (ii) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,861.

Type Size:

I certify that 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(2)(d)(ii) & (4)(g).

Dated this 30th day of December, 2013.

/s/ Lawrence W. Erwin, OSB #730850
Lawrence W Erwin, OSB #730850
Law Office of Lawrence W. Erwin
Attorney for David Herman, Accused

CERTIFICATE OF eFILING and
PROOF OF SERVICE

I certify that I submitted the original of David Herman's ("Accused") PETITION FOR REVIEW, BRIEF, and EXCERPT via eFiling on December 30, 2013, so that it may be filed with the Appellate Court Administrator at this address:

Oregon Supreme Court
Court Administrator, Appellate Courts Record Section
1163 State Street
Salem, Oregon 97301

I further certify that on January 3, 2014, I served via eService a true and correct copy of David Herman's, the ("Accused") PETITION FOR REVIEW, BRIEF, and EXCERPT on Mary Cooper at: mcooper@osbar.org

/s/ Lawrence W. Erwin, OSB #730850
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