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IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	
Complaint as to the Conduct of	OSB Case No. 98-59
JAMES E. LEUENBERGER,	SC S50178
Accused.	

OREGON STATE BAR'S RESPONDENT'S BRIEF AND EXCERPT OF RECORD

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding

The Bar filed a formal complaint against the Accused on August 29, 2000. The Accused filed his answer on September 18, 2000. The first day of trial was held on March 13, 2002, after which the Bar filed an amended formal complaint on March 20, 2002. The Accused answered the amended formal complaint on May 15, 2002.

The second day of trial in this matter took place on July 11, 2002. On December 11, 2002, the trial panel issued an opinion, finding the Accused guilty of all of the charged disciplinary violations and suspending him for 90 days.

The Accused timely filed a petition for review on January 24, 2003, pursuant to BR 10.3 and 12.8. The record of this proceeding was filed with the State Court Administrator's Office on April 1, 2003, and was acknowledged on April 3, 2003. Review is *de novo* pursuant to ORS 9.536(3) and BR 10.6.

B. Nature of Judgment Sought to be Reviewed

The Bar's amended formal complaint alleged violation of seven disciplinary rules in connection with the Accused's representation of Rodney and Cynthia Kerber: DR 1-102(A)(4), DR 7-102(A)(1); DR 7-102(A)(2); DR 7-106(C)(7); DR 7-110(B)(2); DR 7-110(B)(3); and DR 5-101(A).

The trial panel found the Accused guilty of violating all of the charged disciplinary rules except for DR 7-110(B)(3).

The panel imposed a 90-day suspension.

C. Statutory Basis for Appellate Jurisdiction

This matter is before this court pursuant to ORS 9.536 and BR 10.3.

II. QUESTIONS ON REVIEW

A. Whether the Bar proved by clear and convincing evidence that the Accused's conduct with respect to two separate *ex parte* motions in the *Taylor v. Kerber*

matter violated DR 1-102(A)(4), DR 7-102(A)(1), DR 7-102(A)(2), DR 7-106(C)(7), and DR 7-110(B)(2), as alleged in the first and second causes of complaint.

B. Whether the Bar proved by clear and convincing evidence that the Accused violated DR 5-101(A) in connection with his representation of the at a hearing on May 28, 1998, as alleged in the third cause of complaint.

C. Whether the sanction imposed by the trial panel (a 90-day suspension) is appropriate given the facts and circumstances of this case.

III. SUMMARY OF THE BAR'S ARGUMENTS

A. The Bar proved by clear and convincing evidence the Accused violated DR 1-102(A)(4), DR 7-102(A)(1), DR 7-102(A)(2), DR 7-106(C)(7), and DR 7-110(B)(2), as alleged in the first and second causes of complaint.

B. The Bar proved by clear and convincing evidence that the Accused violated DR 5-101(A), as alleged in the third cause of complaint.

C. Under the circumstances of this case, a 90-day suspension is the appropriate sanction.

IV. STATEMENT OF FACTS

The parties agreed that factual findings in the appellate case of *Taylor v. Kerber and Leuenberger*, 171 OrApp 301, 15 P3d 93 (2000) should be adopted as true. (Tr. 11-12.)[1] Most of the following facts were recited in the *Taylor* case.

On August 5, 1996, attorney Christine Kosydar ("Kosydar") obtained a judgment of foreclosure on behalf of her client, Charles Taylor ("Taylor"), against Rodney and Cynthia ("the , who were represented by the Accused. (*Taylor, supra*, 171 OrApp at 303.) Supplemental judgments were entered against the on January 2, 1997 and June 13, 1997. (*Taylor*, 171 OrApp at 303.) A sheriff's sale of the house was set for July 30, 1997. (*Id.*)

On July 29, 1997, the Accused personally presented a written *ex parte* motion to vacate the June 13, 1997 amended supplemental judgment. (*Taylor*, 171 OrApp at 304.)

[1] See the Motion to Supplement the Record filed concurrently with this brief (Exhibit A ¶ 8, to said motion).

Notice of the motion was faxed to Kosydar at 7:40 a.m., only half an hour before the Accused presented it in court. (*Id.*) Kosydar did not receive the motion until five minutes before the hearing. (*Id.*) The court declined to hear or rule on the written motion and required that it be set for hearing the following day, on July 30, 1997, one hour before the scheduled sheriff's sale. (Ex. 4, p. 2.)

At that hearing, the court set the Accused's motion for hearing on August 14, 1997. (Ex. 4.) The sheriff's sale was postponed until August 25, 1997. (Ex. 6, ¶ 6—but note typo describing sale being set for August 5, a clear error given the context.)

At the August 14, 1997 hearing, the court (Judge Nachtigal) asked the Accused about the last minute notice he had for a motion that should never have been brought *ex parte* in the first place. (Ex. 3.) The transcript of the hearing (Ex. 3, pp. 45-47.) reflects the following exchange:

Leuenberger: Your honor, my notice to opposing counsel is of record. I've got the fax transmittal. She is there. It was before the hearing. When—

The Court: How long before the hearing?

Leuenberger: About half an hour.

The Court: Half an hour before the hearing? Do you think that's adequate notice?

Leuenberger: Before—your honor, I was doing my best to get—

The Court: Whatever gave you the idea that you could come here and do that *ex parte* in the first place?

Leuenberger: I was driven to—by a desperation—

The Court: Desperation doesn't cause us to do things that there's no legal basis to do. What gave you the right to go in, *ex parte*, and try to set aside a judgment with half an hour notice when you know the other side's represented?

Kosydar: Your honor, they have had seven and a half weeks to file a motion.

The Court: Besides that. I mean, where—where in any of the rules does it say that you can do that?

Leuenberger: I didn't know it was forbidden.

The Court: I will take that as an answer under pressure. That's an affront to the court. This is the file. No one nobody is going to do anything *ex parte* on a valid judgment on a case like this. Nobody. Half an hour notice on that kind of matter is, I believe, unethical, at a minimum. It is not reasonable notice. You can't even get an *ex parte*.

This file is full of at the last minute your client doing everything in their power to stop the judgment that's been entered. At some point it simply has to stop. I don't know what it's going to take. You've lost at every turn. You've been sanctioned at every turn. . . . This is an appropriate case for sanctions. There never should have been an effort to try and set aside *ex parte*.

The court denied the Accused's motion and awarded sanctions against the Accused and his clients. (Ex. 4.) The court found that the Accused had made an improper *ex parte* contact with the court, failed to provide adequate notice to opposing counsel, and had filed a motion to delay and hinder the sheriff's sale. (Ex. 6, p. 2-3.)

The sheriff's sale was reset for Monday, August 25, 1997. (*Taylor*, 171 OrApp at 305.) After the close of business on Friday, August 22, 1997, at 5:14 p.m., the Accused faxed to Kosydar a copy of another *ex parte* motion to stay the sheriff's sale. (Ex. 6, ¶ 8.) This motion did not even specify when the Accused intended to present the motion. (Ex. 6, ¶ 8.) On August 25, 1997, at 8:45 a.m., the Accused appeared in court to personally present his motion, which asked that the sale be stayed so that the trial court could determine the amount of money defendants owed on the note. (*Taylor*, 171 OrApp at 305.) Without oral argument on the motion's merits, the court (Judge Alexander) granted the stay. (*Id.*) The court set a hearing date of October 1, 1997, for the parties to argue the merits. (Ex. 5.) Kosydar filed a motion for sanctions regarding the Accused's actions. (*Taylor*, 171 OrApp at 305.)

At the October 1, 1997 hearing, the court (again, Judge Nachtigal) found that the Accused had intentionally appeared before Judge Alexander *ex parte* on August 25, 1997,

had presented a motion for the improper purpose of delay,[2] and had presented a motion not warranted by existing law. Judge Nachtigal expressed her surprise that the Accused had repeated the conduct for which she had chastised him at the August 14, 1997 hearing. (Ex. 5.) She stated:

> The Court: Well, when I heard that a stay had been issued under almost identical facts to the previous stay that had been issued that I sanctioned you for, I was speechless. I'm not very often speechless. I absolutely couldn't believe that as an officer of the court you did exactly what I had told you not to do. That you did precisely what I had sanctioned you for before. I was dumbfounded that you would do that.
>
> In fact, I went to Judge Alexander to verify that he had signed such a stay because I couldn't believe that it had happened. I don't know how much plainer I could have made it at the last hearing that I found your behavior of faxing after hours for an *ex parte* hearing the very next morning, knowing that there was an objection, knowing that there was no way that the attorney would get the fax and be able to respond, and knowing that the other side vehemently objected to your position—. And on top of it, there was no basis for your stay, none. I was amazed to say the least.
>
> I'm going to sanction you. I'm going to turn you in to the Bar because I think your behavior is unethical, and I think as an officer I am required to do that, and I will.
>
> The explanation that you gave me for your behavior is inadequate. I've never dressed down an attorney before in my courtroom in front of his client, and hope I never, ever have to do this again. (Ex. 5, pp. 25-26.)

For the second time, the court awarded sanctions against the Accused and his client. (Ex. 5, p. 26.)

The Accused appealed both of Judge Nachtigal's sanctions awards against him and his client. (*Taylor*, 171 OrApp at 303.) He argued that his motions were based on colorable legal claims, and therefore, Judge Nachtigal's findings that he acted with an improper

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[2] In fact, in his deposition (Ex. 1), the Accused admitted that he filed both motions in order to delay the foreclosure sale and buy the more time:

> Q: The purpose of stopping ... the foreclosure process, the sole purpose of stopping it was to allow the some more time to try to refinance their house, right?
>
> A (the Accused): Yes. (Ex. 1, pp. 32-33.)

purpose were wrong. (*Id.* at 307.) On appeal, the court in *Taylor v. Kerber*, found—with respect to the first motion—that:

> On this record, at least three factors support the trial court's finding that defendants filed their motion for an improper purpose. First, defendants' actions since the beginning of the case established a pervasive pattern of needless delay. Second, defendants waited until the day before the foreclosure sale to file their *ex parte* motion and even then effectively gave plaintiff's attorney no notice. Third, when asked at the hearing on sanctions why they had resorted to such a tactic, defendants' attorney's only answer was "desperation." The record supports the trial court's finding that defendants and their attorney's primary purpose in filing the motion to vacate was an improper one. . . . *Taylor*, 171 OrApp at 309.

The appellate court also looked at whether the trial court had erred in determining that the Accused had acted for an improper purpose with respect to the second motion. The court found that:

> When defendants filed a second *ex parte* motion the day of the scheduled foreclosure sale and did so without adequate notice, they acted in direct contravention of the trial court's ruling less than two weeks earlier. . . . The record supports the trial court's finding that defense acted for an improper purpose in filing their August 25, 1997 motion to stay. . . . Neither sanction the trial court imposed was an abuse of discretion. *Taylor*, 171 OrApp at 30--10.

On May 28, 1998, a hearing was held to determine how money collected from the sheriff's sale should be applied toward various judgments held by Taylor. The primary judgment of approximately $72,000 was accruing interest at 13.89% (Ex. 3, p. 25)), while the two judgments for sanctions and related costs accrued interest at 9%. (Exs. 4, 6.) The [redacted] were solely liable for the primary judgment, while the [redacted] and the Accused were jointly liable for the sanction judgments. (Exs. 4, 6.)

At the May 28, 1998 hearing, the Accused argued that the sanction judgments should be satisfied first. (Ex. 7; Ex. 1, pp. 51-52.) The court advised the Accused that by seeking to have the judgment against himself satisfied first, even though the primary judgment accrued at a higher rate of interest, he was engaged in an actual conflict of interest with his clients. (Ex. 1, p. 52; Ex. 7.) The Accused denied that there was any conflict of interest between him

and his clients because (1) the difference in interest owed on the amount of money involved was "*de minimis*, absolutely *de minimis*" (Ex. 1, pp. 51-52); and (2) the were candidates for bankruptcy (they had filed several times before—Ex. 1, pp. 17, 52), and in that event, the primary judgment (whatever was left) might be discharged while the sanctions judgments might not be. (Ex. 1, pp. 51-52.)

The Accused maintains that he discussed the issue with his clients, but he does not have a written copy of said disclosure. (Tr. 15-16, 164-65.)

V. ARGUMENTS

A. The Accused's conduct violated DR 1-102(A)(4), DR 7-102(A)(1), DR 7-101(A)(2), DR 7-106(C)(7), and DR 7-110(B)(2), as alleged in the first and second causes of complaint.

DR 1-102(A)(4)

DR 1-102(A)(4) prohibits lawyers from engaging in conduct prejudicial to the administration of justice. This rule is violated by improper conduct by a lawyer—either of a repeated nature that causes some harm to the administration of justice, or a one-time occurrence that causes substantial harm to the administration of justice. *See, In re Haws*, 310 Or 741, 801 P2d 818 (1990). "Administration of justice" consists of either the procedural functioning of the proceeding or the substantive interests of parties to the proceeding. A lawyer's conduct can have a prejudicial effect on either component or both. *Id.*

In this case, the panel found that the Accused engaged in repeated wrongful conduct that caused significant injury both to the court's process and to the litigants seeking resolution of their dispute through the legal system. By filing the first inappropriate *ex parte* motion, the Accused used the judicial system as a tool to delay the court-ordered sheriff's sale. Even after being sanctioned by the court, the Accused repeated his wrongful conduct, resulting in yet another sanction. Each of these actions were prejudicial to the administration of justice.

The panel's finding is correct. The Accused had no basis to believe that either motion was appropriate to bring *ex parte*. Neither motion concerned scheduling or administrative

matters, stipulations, or emergencies not concerning the merits of the case, and neither motion was authorized by law. See, Judicial Rule 2-102(B)(C), discussing what matters judges may hear *ex parte*. When asked by Judge Nachtigal what made him think the first motion was appropriate, the Accused stammered: "I was driven to—by a desperation—" and then "I didn't know it was forbidden." That is a far cry from reasonably (but wrongfully) believing a motion was appropriately brought *ex parte*. *See, In re Gillis and Carstens*, 297 Or 493, 686 P2d 358 (1984).

The Accused had even less justification for bringing the second motion *ex parte*, having been informed—strenuously—by Judge Nachtigal that the first was inappropriate.

The Accused admitted that his motive in bringing both motions was not to obtain the substantive relief he purported to ask for (to vacate the supplemental judgment and for an accounting respectively), but to delay the sheriff's sale and "buy time" for his clients. (Ex. 1, pp. 32-33.) He knew perfectly well that the opposing party would object strongly to these motions, so he sought them—twice—in a way that precluded argument. The Accused's motions were successful in that they caused the sheriff's sale to be stayed twice. The Accused's wrongful conduct wasted the court's time and significant amounts of the litigants' money, and thereby violated DR 1-102(A)(4).

DR 7-102(A)(1)

DR 7-102(A)(1) prohibits lawyers from filing a suit, asserting a position, conducting a defense, delaying a trial, or taking other action on behalf of client when the lawyer knows or when it is obvious that such actions serve merely to harass or maliciously injure another.

The panel found that the Accused violated this rule by making two *ex parte* motions for the purpose of delaying a court-ordered sheriff's sale. In response to the judge's question at the first sanction hearing, the Accused stated that he filed the *ex parte* motion because his clients were "desperate" to save their house from the sheriff's sale. The Accused's course of conduct served the sole purpose of harassing a judgment creditor.

The panel's findings were correct. In an analogous case, a lawyer filed a dissolution petition on behalf of their client's wife, seeking an award of all of the marital property. At the

time, the client was facing a large and imminent judgment against him. This court concluded that the petition was merely an attempt to defraud creditors and was an unwarranted action designed to delay and harass the judgment creditor. *See, In re Gooding and Ricker*, 254 Or 38, 456 P2d 998 (1969).

DR 7-102(A)(2)

DR 7-102(A)(2) prohibits lawyers from knowingly advancing unwarranted claims or defenses.

The trial panel found that the Accused violated this rule in connection with the second *ex parte* motion. At this point, his conduct with respect to the first *ex parte* motion had already been found improper by the court, yet he repeated it.

The trial panel decision is correct. The court in *Taylor v. Kerber, supra*, found that both *ex parte* motions were filed for an improper purpose. Even if the Accused had a subjective (but incorrect) belief that the first *ex parte* motion was appropriate, he knew that there was no reasonable basis to file the second motion *ex parte*. In the first hearing, Judge Nachtigal made it clear that the motion was improper, and the Accused's notice to opposing counsel was inadequate. Despite the court's tongue lashing (and sanctions), the Accused turned around only 8 days later and did the exact same thing (*ex parte* motion with grossly inadequate notice to opposing counsel), for exactly the same improper purpose: to delay the sheriff's sale. He therefore knew that there was no lawful basis to present the second *ex parte* motion and therefore knowingly advanced unwarranted claims in violation of DR 7-102(A)(2). *See, In re White*, 311 Or 573, 815 P2d 1257 (1991).

DR 7-106(C)(7)

DR 7-106(C)(7) prohibits lawyers from intentionally violating rules of procedure. Under ORCP 14, all written motions must comply with ORCP 17C, which requires that the moving lawyer certify that the pleading is not made for purposes of delay and that the legal position is warranted. If the court finds that the lawyer has made false certification under the rule, it may impose sanctions on the lawyer. ORCP 17D.

The panel found that the Accused intentionally violated Oregon Rules of Civil Procedure (ORCP 14 and 17C) when he filed the second (if not the first) *ex parte* motion. The Accused's true purpose was to delay the proceedings and neither *ex parte* motion was warranted under existing law. In addition, the Accused's decision to deprive opposing counsel of adequate notice of these matters was unprofessional conduct and rose to the level of inadequate service.

The panel's finding is correct. In the *Taylor* case, the appellate court affirmed Judge Nachtigal's findings that the Accused made both *ex parte* motions for an improper purpose—to delay and hinder the scheduled foreclosure sale—in violation of ORCP 17C(2). The *Taylor* court agreed as a factual matter that the Accused had an improper state of mind. 171 OrApp at 308-09. The Accused's violation of DR 7-106(C)(7) is therefore fully established by the *Taylor* decision, through stipulation of the parties and the application of the doctrine of issue preclusion.[3]

Even if the *Taylor* decision did not establish the Accused's improper state of mind, the Accused admitted in his deposition (Ex. 1) that his motive in filing both motions was to delay the sheriff's sale. See footnote 2, *supra*. The Accused therefore violated ORCP 17C, and consequently DR 7-106(C)(7).

DR 7-110(B)(2)

DR 7-110(B)(2) prohibits lawyers from communicating on the merits of the cause with a judge before whom the proceeding is pending except in writing if the lawyer promptly delivers a copy of the writing to opposing counsel.

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[3] The parties stipulated that issue preclusion applies in this case and that the facts found by the court of appeals in the *Taylor v. Kerber* decision are therefore binding. *See*, Motion to Supplement the Record, Exhibit 1, ¶ 8. *See also, In re Rhodes*, 331 Or 231, 13 P3d 512 (2000) [doctrine of issue preclusion applicable to disciplinary matters].

An issue may be established through the doctrine of issue preclusion if:

1. The issue in the two proceedings is identical.
2. The issue was actually litigated and essential to the decision in the first matter.
3. The party against whom application of the doctrine is sought had an opportunity to be heard in the first matter.
4. That party was a party to the prior proceeding.
5. The party was a party or in privity with a party to the prior proceeding. Nelson v. Emerald People's Utility Dist., 318 Or 99, 862 P2d 1293 (1993).

All of these requirements are met in this case.

The trial panel found that the Accused violated this rule by twice sending opposing counsel facsimile notices of motions, at extremely short notice, at times when he knew that opposing counsel was not likely to receive them in a timely manner or be able to respond to them quickly enough to be effective.

The Accused continues to contend (despite trial court and appellate rulings in *Taylor v. Kerber*, and the trial panel's opinion in this case), that giving opposing counsel 30 minutes facsimile notice on one occasion and sending her a facsimile after hours the business day before going to *ex parte* on another, was fully compliant with DR 7-110(B)(2). He contends that DR 7-110(B)(2) requires only "prompt" service, not "adequate" service, and that he therefore complied with the letter, if not the spirit, of the rule. (Appellant's Br. p. 2.)

The purpose of DR 7-110(B) is to prevent the appearance or effect of granting undue advantage to one party. *In re Smith*, 295 Or 755, 759, 670 P2d 1018 (1983). *Ethical Oregon Lawyer* § 7.69, p. 7-43 (2003 Rev.). By giving Kosydar such last minute, after hours notice (and with respect to the second motion, not even informing her when he intended to present it), the Accused virtually guaranteed that he would be appearing in court alone, making his argument without opposition. Such notice did not satisfy DR 7-110(B)(2).

While there are some circumstances where last minute, *ex parte* appearances are authorized by statute (*see, e.g.*, the Family Abuse Prevention Act, ORS 107.710-107.730), this was not one of them. Unlike the accused attorneys in *In re Gillis and Carstens*, 297 Or 493, 686 P2d 358 (1984), the Accused has no basis to believe that his motions were authorized. He therefore violated DR 7-110(B)(2).

B. The Accused violated DR 5-101(A) when he continued to represent his clients although his financial interest in seeing his clients' funds applied first to a joint sanctions judgment was likely to affect his professional judgment.

DR 5-101(A)

DR 5-101(A) prohibits lawyers from accepting or continuing employment if the exercise of their professional judgment on behalf of the client will or reasonably may be affected by their own financial, business, property, or personal interests, except with the

consent of the client after full disclosure. As used in this rule, "full disclosure" means a explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent. Full disclosure must include a recommendation that the recipient seek independent legal advice to determine if consent should be given, and must be contemporaneously confirmed in writing. DR 10-101(B)(1) and (2).

The trial panel found that by appearing at a court hearing to encourage the court to apply the sheriff's sale proceeds first to the sanctions judgments (issued jointly against the Accused and the Accused's clients), the Accused violated this rule. It was in the Accused's best financial interest to have the joint sanction judgments promptly satisfied by his clients rather than himself. The judgment that was solely against the Accused's clients accrued interest at a much higher rate than the joint sanction judgments. It was thus arguably contrary to the clients' best interests to argue that the joint obligations should be satisfied first. The panel found that the Accused did not fully disclose the course of conduct to his clients, nor did he secure their permission to pursue his own financial interest.

The panel's finding is correct. It was clearly in the Accused's own financial interest to hear the sanctions judgments for which he himself was jointly liable, satisfied first out of any proceeds of the sheriff's sale. That distribution was arguably not in the ' best interest since the other judgment (that was solely against them) accrued interest at a much higher rate (13.89% as opposed to 9%)). While the Accused argues that it was in the best interest to satisfy the sanctions judgment first (arguing that that judgment—as opposed to the other—might not be discharged in a bankruptcy that his clients could potentially file in the future), that argument does not negate the fact that the Accused had a personal financial stake in the outcome. If the sanctions judgment was satisfied first, he was off the hook. This was a consideration that was likely to affect his professional judgment. By continuing to represent the , without making a full, written disclosure, he violated DR 5-101(A).

VI. SANCTIONS ANALYSIS

The Oregon Supreme Court defers to the ABA *Standards* for imposing lawyer sanctions ("*Standards*"), in addition to its own case law, for guidance in determining the appropriate sanctions for lawyer misconduct.

A. ABA *Standards*

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

1. ABA factors

a. Duty violated. By taking action merely to harass a party by filing unwarranted *ex parte* motions, the Accused violated his duty to the profession. *Standards* § 7.0. By engaging in conduct prejudicial to the administration of justice and violating a rule of procedure or evidence, the Accused violated his duty to the legal system. *Standards* § 6.0, By engaging in a conflict of interest, the Accused violated his duty to his client. *Standards* § 4.0.

b. Mental state. The Accused acted at least "knowingly" by filing the first *ex parte* motion without giving opposing counsel adequate notice, and "intentionally" by filing the second improper *ex parte* motion. An act is "intentional" if it is done with the conscious objective or purpose to accomplish a particular result. *Standards* at 7. An act is "knowing" if it is done with the conscious awareness of the nature or attendant circumstances of the conduct, but without a conscious objective or purpose to accomplish a particular result. *Id.* The Accused also acted knowingly by failing to obtain his clients' consent after full disclosure to continue his representation at the May 1998 hearing despite his financial interest in the outcome.

c. Injury. To justify sanctions, the injury need not be actual, only potential, since the purpose of the disciplinary rules is to protect the public. *Standards* at 25. In this case, however, there was substantial actual injury. The Accused's clients had sanctions judgments

imposed upon them (jointly with the Accused) because of the Accused's conduct. Judicial resources were expended to hear groundless motions and impose sanctions on the Accused and his clients. The ability of Taylor, the adverse party in this case and a member of the public, to collect money on his foreclosure judgment was delayed and he was required to incur additional legal fees to oppose groundless motions.

2. Preliminary Sanction

Drawing together the factors of duty, mental state, and injury, but before examining aggravating or mitigating factors, the *Standards* provide that:

> 4.32. Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to the client.
>
> 6.22. Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or party, or causes interference or potential interference with a legal proceeding.
>
> 6.32. Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
>
> 7.2. Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to client, the public, or the legal system.

In sum, before examining aggravating or mitigating circumstances, the *Standards* suggest that suspension is the appropriate sanction.

3. Aggravating or Mitigating Circumstances

The panel found the following aggravating circumstances in this case: the Accused has demonstrated a pattern of misconduct (*Standards* § 9.22(c)); his conduct involved multiple offenses (*Standards* § 9.22(d)); he does not appreciate and is not willing to

acknowledge the wrongfulness of his conduct (*Standards* § 9.22(g)); and he has substantial experience in the practice of law (*Standards* § 9.22(i)).

The panel also found the following mitigating factors: an absence of a prior disciplinary record (*Standards* § 9.32(a)); and delay of disciplinary proceeding (*Standards* § 9.32(i)).

In sum, the aggravating circumstances outweigh the mitigating ones, bolstering the conclusion that the Accused should be suspended.

B. Oregon Case Law

Oregon case is in accord. In *In re Thompson*, 325 Or 467, 940 P2d 512 (1997), an attorney was suspended for 30 days for violating DR 1-102(A)(4) and DR 7-110 when he personally confronted a court of appeals judge regarding the judge's opinion.

In *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995), an attorney defied the court by refusing to represent his client at trial, for the avowed purpose of creating reversible error, in violation of DR 1-102(A)(4). The lawyer also violated DR 5-101(A) by continuing to represent another criminal defense client despite being accused of participating in the same drug transaction as that client, without making full disclosure. Jeffery was suspended for nine months.

In *In re White*, 311 Or 573, 815 P2d 1257 (1991), involved more egregious facts. The accused in that case filed several unwarranted claims, took actions merely to harass, failed to appear at hearings, failed to file an order regarding venue, made false statements to the court, and assaulted a police officer. White was found to have violated DR 1-102(A)(2), DR 1-102(A)(4), DR 2-109(A)(1), and DR 7-102(A)(1) and (2), and was suspended for three years.

VII. CONCLUSION

The Accused sought to gain an improper advantage by twice filing improper *ex parte* motions without giving opposing counsel adequate notice. Though chastised (and sanctioned)

by Judge Nachtigal for the first occasion, the Accused was undeterred, filing the second improper motion only a few days later.

The Accused's purpose in repeating his wrongful conduct was once again to delay—at all costs—the sheriff's sale of his client's house. This was an improper motive, intended to harass the other party.

The Accused's conduct was repeated and greatly inconvenienced the court and the opposing party. He still does not recognize that it was wrong. His conduct warrants the 90-day suspension imposed by the trial panel.

Respectfully submitted this 4th day of November, 2003.

OREGON STATE BAR

By: _____
Mary A. Cooper, Bar No. 91001
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 4th day of November, 2003, by mailing the original and fifteen copies by first class mail with postage prepaid through the United States Postal Service to:

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

I further certify I served the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 4th day of November, 2003, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

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DATED this 4th day of November, 2003.

OREGON STATE BAR

By: _____
Mary A. Cooper, Bar No. 91001P