FILED March 31,2014 11:44 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	
Complaint as to the Conduct of	OSB Case No. 12-111
DAVID HERMAN,	SC S061840
Accused.	

OREGON STATE BAR'S RESPONDENT'S BRIEF

Mary A. Cooper, OSB No. 910013
Assistant Disciplinary Counsel
Oregon State Bar
16037 SW Upper Boones Ferry Road
Post Office Box 231935
Tigard, OR 97281-1935
Telephone: (503) 620-0222, Ext. 321
Email: mcooper@osbar.org

Attorney for Oregon State Bar

Lawrence W. Erwin, OSB No. 730850
221 NW Lafayette Avenue
Bend, OR 97701
Telephone: {541) 317-0520
Email: lwerwin@Jwerwin.com

Counsel for Accused

March 2014

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

I. Statutory Provisions

II. Rules of Procedure

III. Disciplinary Rules

IV. Oregon Rules of Professional Conduct

V. Case Law

VI. Secondary Authority

VII. Other

INDEX OF EXCERPT OF RECORD

INDEX OF APPENDIX

I. STATEMENT OF THE CASE

The Bar supplements the Accused's Statement of the Case as follows:

A. Nature of the Proceeding.

The Bar filed a Formal Complaint against the Accused, David Herman, on September 5, 2012. He answered on January 13, 2013.

A trial panel heard the matter on August 18 and 19, 2013, and filed its Opinion on November 15, 2013. The panel found the Accused guilty of the sole violation alleged by the Bar – RPC 8.4(a)(3) – and disbarred him. The Accused timely sought review by this court pursuant to BR 10.1 and BR 10.3. The record of proceeding was filed with the State Court Administrator on February 6, 2013. BR 10.4.

B. Nature of Judgment Sought to be Reviewed.

The Accused asserts that the trial panel erred by finding him guilty and imposing disbarment.

C. Statutory Basis for Appellate Jurisdiction.

This matter comes before the court pursuant to ORS 9.536(1), BR 10.1, and BR 10.3. Pursuant to DRS 9.536(2) and BR 10.6, the court shall consider this matter de novo on the record.

II. RES PONSE TO ACCUSED'S QUESTIONS PRESENTED ON REVIEW

A. Whether the trial panel erred by finding that the Accused made misrepresentations and engaged in dis honest conduct in violation of RPC B.4(a}(3).

Response: The trial panel correctly found that by creating and filing misrepresentative documents to dissolve a corporation, stealing

business opportunities from his partners, and transferring and diverting corporate assets to entities that he alone controlled, the Accused engaged in misrepresentation and dishonesty, in violation of RPC 8.4(a)(3).

B. Whether the panel erred by disbarring the Accused.

Response: Disbarment is the only appropriate sanction.

III. STATEMENT OF FACTS

(" a scientist with Professional Service Industries ("PSI"), conceived the idea to develop and market portable "cubes" that lumber mill owners could use to test their composite wood products to determine whether the level of formaldehyde complied with government regulation. (253-54.) In early 2008, approached f' a welder and fabricator, for help manufacturing the testing cubes. (256; 212-13.) also approached the Accused (who he knew through about providing financial and legal services for the venture. (252.)

At the time, the Accused was admitted to practice law in Oregon in 1990 (Ex. 4) and Washington in 1991, but had been suspended in both states (as of 2003) for failing to pay annual Bar dues (Ex. 4). [1] As a lawyer and as a businessman, the Accused had formed and been involved with a number of corporate entities and was experienced with complex business transactions. (Ex. 3, pp. 10-12, 30.)

---

[1] Even while suspended a lawyer must compl'lwith all P-ertinent ethics rules. *In re Devers,* 328 Or 239-r 238.-i 974 P2d 1'91n196 (1999); *see also, In re Coe,* 302 Or 553, 557-573• P2d 1028 (1 87} [suspension from the Bar aoes not terminate the court's JUrisaiction over a lawyers conduct].

, and the Accused decided to form a company called "Blue Q Labs,to manufacture, sell, rent, and service the testing cubes. (Ex. 18; 253.) As envisioned, each partner would contribute his particular area of expertise in exchange for an equal share in the venture. (254; Accused 47.) would design and fabricate the testing chamber they decided to call the "Blue Cube" (252; 212-13); would create the software and controller, market the device through his employment at PSI, install the units, and train the customers (253, 256, 258); and the Accused would incorporate the business, manage the finances, draft customer contracts, and provide other services as needed (254-56; Accused 40).

Although and resided and worked in Oregon (Ex. 10, p. 1), the cubes would be manufactured in Oregon (213, 215), and the business used an Oregon address (Ex. 54), the Accused proposed (and his partners agreed) to use a dormant corporation he had already formed in Nevada called "Vintrak Information Systems." (253-44; 214; Ex. 8.) The Accused told his partners that "Vintrak" would be renamed "Blue Q Labs, Inc.," and that they would be equal owners and directors of the company. (254; 213.)

Vintrak's business ("business information services" – Ex. 8) was unrelated to Blue Q's business (254). Vintrak's original articles of incorporation (which the Accused had prepared in 2007) named the Accused as its sole director/trustee, authorized the issuance of 1,000 shares of stock, and attached an initial list of officers and directors naming the Accused to all officer posi.tions (president, secretary, and treasurer). {.Exs. 8 and 9.) On March 1, 2008, the Accused filed a

Certificate of Amendment with the Nevada Secretary of State (Ex. 10). The Certificate of Amendment changed:

- the corporate name from Vintrak to "Blue Q Labs, Inc.;
- the directors to include and as well as the Accused; and
- the business purpose to "engag[ing] in any lawful activity related to the construction, rental, modification, repair and sale of environmental test chambers and associated equipment and training, certification, consulting and other work related to product evaluation and compliance with various standards that may from time-to-time be established or sought by product manufacturers:" (Ex. 10.)

The Accused did not, however, issue any shares to and or file any document that identified them as Blue Q Labs' corporate officers; the Accused remained the corporation's president, secretary, and treasurer. (Ex. 10; 258.)

The Accused opened a bank account for Blue Q Labs at US Bank in Lebanon, Oregon. (Accused 51-52.) On the account application, he identified and as Blue Q's president and vice-president; he identified himself as its secretary/treasurer. (Ex. 19.) The account was accessible by all three partners and was intended to pay for supplies and services needed to construct the Blue Cubes and also to receive customer deposits and payments. (Ex. 32; 259; Accused 57-58, 217.)

The company was busy "right out of the gate." (Accused 58.) In July 2008, six customers ordered Blue Cubes and wired deposits totaling $38,030 into Blue Q's bank account. (Ex. 36, p. 1.) Between August and December 2008, customers deposited an additional

$275,000+ (Ex. 36, pp. 1-2). When the Accused or notified of a customer order, he would build, box, and ship a Blue Cube – which would then install at the customer's facility. (215-16.) installed between 35 and 50 Blue Cubes. (258, 286-87.)

On August 2, 2008, the Accused began transferring money from the Blue Q bank account to Equine Management, Inc. ("EMI"), which was a company his wife owned and he controlled that provided no goods or services to Blue Labs' customers. (Exs. 2, p. 10; Exs. 14-17; Ex. 36, p. 1.) and were unaware of these transfers, which eventually totaled over $150,000. (Ex. 36, pp. 2-3; 273-75.)

In or about October 2008, without notifying (232-33; Accused 62-64) or accurately explaining the reason to (261-62; Ex. 73), the Accused contracted with two companies in Idaho to manufacture the Blue Cubes, thereby cutting out of the process. (Ex. 18, p. 7.) The Accused took name off the Blue Q bank account (218, 221; Ex. 19) and began directing customers to make their payments to EM/, (Accused 113-14.) When one of these customers copied with emails that revealed that the customer was paying EMI rather than Blue Q (Exs. 84-85). The Accused assured that "[the Accused] was the lawyer and there was some advantage to doling] that." believed him. (273.)

The Accused also told that the business was doing well and making money. (267-68.) However, the Accused never distributed any proceeds to or nor did he ever give

them an accounting. (Schutfort 267, 275; Accused 70-71; 222.)

In February 2009, without notifying or the Accused closed Blue Q's bank account. (Ex. 19, p. 1; Ex. 3, 156-57; Accused 64.) He transferred the remaining balance to a company he had just created, that he alone owned and controlled, called Carbcert. (Accused 65; Ex. 3, p. 157-58; Ex. 32 (February and March 2009).) The Accused also told customers that Blue Cube Labs had just changed its name to Carbcert. (Ex. 95, p. 0005.)

On March 19, 2009, without notifying or (Ex. 19, p. 2; 271}, the Accused dissolved the Blue Q Labs (formerly Vintrak) corporation by submitting a Certificate of Dissolution to the Nevada Secretary of State. The Certificate of Dissolution (Ex. 11) represented that the Accused held all officer positions in the company; it also misreQresented that he was the only director. (Ex. 11, p. 1.) The Certificate of Dissolution attached a Corporate Resolution (Ex. 11, p. 2}, signed by the Accused as president, purportedly on February. 2009, that certified that:

- A quorum of the Board of Directors had met on February 24, 2009[2]; and
- The Board had authorized the Accused to dissolve the corporation.

In fact, there had been no such meeting- on February 24, 2009, or any other date. (Ex. 11, p. 2; Ex. 95 p. 0004; 298; 220-21) Blue Q directors and never authorized the

[2] At trial, the Accused could not explain the discrepancy in dates. (Accused 129-30.)

Accused to dissolve Blue Q Labs, Inc. and were unaware that he had done so. (299;

The Accused continued to divert Blue Q's receivables by instructing customers to make their payments (usually by wire transfer) to EMI. (Ex. 2, p. 10:3-7; Ex. 3, pp. 181, 214.) The Accused also entered contracts for his own corporation, Carbcert, to provide Blue Q testing units. (Exs. 87-89, 91, 92.)

On May 25, 2010, complained to the Bar (Ex. 19), and on June 14, 2010, filed a lawsuit against the Accused in the U.S. District Court. (Ex. 20.) who now lives and works in New Caledonia, chose not to join in that litigation but corroborates allegations. (252, 276; Ex. 95.)

IV. ARGUMENTS

A. The trial panel correctly found that the Accused violated RPC 8.4(a)(3).

RPC 8.4(a)(3) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law.

The trial panel found that the Accused violated RPC 8.4(a)(3) by making two false statements in the documents dissolving Blue Q Labs, Inc. The Certificate of Dissolution (Ex. 11, p. 1) falsely stated that the Accused was the only director when in fact, the Certificate of Amendment (Ex. 10) had made and directors of the corporation. The Corporate Resolution (Ex. 11, p. 2) also misrepresented that there had been a lawful meeting of the Board of Directors on February 24, 2009, at which a quorum of directors elected

to dissolve the corporation; the panel concluded that there had been no such meeting or agreement.

The panel further found that the Accused had engaged in a course of dishonest conduct by: diverting Blue Q's funds to EMI; closing Blue Q's bank account without authority and without telling his partners; diverting Blue Q's assets; and contracting with another company to fabricate additional cubes without notifying The panel found that the Accused's actions were dishonest, deceitful, and consciously disregarded the rights of his partners.

The panel specifically rejected the Accused's assertions that had angrily walked away from the business in February 2009; that the Accused had filed the corporate dissolution documents in good faith; that EMI was entitled to receive proceeds from the sale of Blue Cubes; and that the Accused closed the Blue Q bank account because it had experienced bank fraud. The panel set forth its subjective and objective reasons for rejecting the Accused's testimony. A more complete discussion of the panel's credibility findings and their relevance to this case is included infra at pp. 12-16.

B. The Accused made knowing misrepresentations to the Nevada Secretary of State when he filed to dissolve Blue Q.

Representations by attorneys violate RPC 8.4(a}(3} if they are (1) false; (2) material; (3) made knowingly; and (4) reflect adversely on the lawyer's fitness to practice law. In re Summer, 338 Or 29, 105 P3d 848, 852 (2005). The Bar must prove each of these required elements by clear and convincing evidence – that is, evidence demonstrating that the truth of the facts asserted is "highly probable." BR 5.2; In re Taylor, 319 Or 595, 600, 878 P2d 1103 (1994).

The Accused was an experienced businessman and an attorney skilled in forming and managing corporate entities. (Ex. 3, pp. 10-12, 30.) The corporate amendment by which he created Blue Q Labs, Inc. named all three partners as directors. Yet less than a year later, he submitted paperwork to dissolve Blue Q Labs, Inc. that represented that (1) that he was the only director (Ex. 11, p. 1), and (2) that Blue Q's Board of Directors had met and adopted a resolution authorizing him, as president, to dissolve the corporation. (Ex. 11, p. 2.) The Accused knew that both statements were inaccurate: he was not the only director, there had been no meeting of the Board of Directors, and neither of his partners had authorized him (or even knew about his plan) to dissolve the corporation.

Misrepresentations are material if they are likely to affect the decision-making process of the recipient. In re Gustafson, 327 Or 636, 968 P2d 367 (1998). Nevada Revised Statute 78.580 requires that if a corporation has commenced business, to dissolve it requires a signed certificate to be filed with the Secretary of State attesting that the dissolution has been approved by the board of directors. The Accused's misrepresentations in the Certificate of Dissolution and the Corporate Resolution were material in that they would (were intended to) make the Secretary of State and anyone else who reviewed Blue Q's corporate records believe that the corporation had been dissolved in compliance with Nevada law.

The misrepresentations reflected adversely on the Accused's fitness to practice law because they furthered his dishonest attempt to cheat his business partners. In re Renshaw, 353 Or 411, 421, 298 P3d

1216 (2013}. They also reflected adversely because they were made to a government agency to achieve a result that the law did not authorize. In *In re* Glass, 309 Or 218, 784 P2d 1094 (1990}, an attorney was found guilty of unethical misrepresentation after he registered himself with the Corporation Commission under a contractor's assumed business name in order to prevent the contractor from collecting a debt against him.

C. The Accused acted dishonestly by excluding from the business; closing the Blue Q bank account; diverting proceeds and customers away from Blue Q; and dissolving the corporation without notice to the other directors.

RPC 8.4(a}(3} also prohibits attorneys from engaging in dishonest conduct, which the court has defined as evidencing a disposition to lie, cheat, or defraud, as well as a lack of trustworthiness or integrity. *In re Claussen,* 331 Or 252, 260, 14 P3d 586 (2000}; *In re Kluge,* 335 Or 326, 66 P3d 492 (2003}.

A lawyer need not be acting in a representative capacity to violate this rule. *See, e.g., In re Strickland,* 339 Or 595, 124 P3d 1225 (2005} [attorney, upset about a construction project in his neighborhood, acted dishonestly by asserting that construction workers had threatened and assaulted him]; *In re Carpenter,* 337 Or 226, 95 P3d 203 (2004} [attorney dishonestly assumed the name of a high school teacher and posted a suggestive message on-line].

The Accused owed his business partners · and a fiduciary duty to act candidly and fairly:

> "Although there is no explicit rule requiring lawyers to be candid and fair with the1r partners...such an obligation is implicit in the prohibition [in the ethics rules]. Moreover, such conduct is a violation of the duty of loyalty owed by a lawyer...based on their contractual or

> agency relationshjp." *In re Murdock,* 328 Or 18, 968 P2d 1270 (1998).

See also, *In re Renshaw, supra* [the fiduciary duties that partners or shareholders in a professional corporation owe to one another are breached when one partner or shareholder takes funds in which the others have an interest]; *Starr v. International Realty,* 271 Or 396, 402-03, 533 P2d 165 (1975) [quoting Justice Cardozo, "Joint adventurers [and] copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty."].

Instead, after developed the idea, the software, and the market; after · developed the product; and after customers developed an interest, the Accused developed a plan to steal it all. To that end, without his partners' knowledge, he transferred Blue Q's funds to EMI, entered separate contracts with fabricators, closed the Blue Q bank account and diverted its remaining assets to Carbcert, made misrepresentations to the Nevada Secretary of State to dissolve Blue Q Labs, Inc., and formed another corporation (Carbcert) to usurp the business for himself.

In *In re Brown,* 326 Or 582, 956 P2d 188 (1998), an attorney structured a business transaction so that he would obtain full ownership of a shopping center at the expense of his business partner. Finding that the attorney's conduct was dishonest and fraudulent, the court disbarred him. *In re Brown,* 326 Or at 595.

The Accused's sustained effort to cheat his business partners manifests "the disposition to lie, cheat, or defraud, as well as a lack of trustworthiness or integritl' that the court has stated constitutes dishonesty. See *In re Renshaw, supra,* 353 Or at 420-21 [lawyer's intentional misrepresentations and embezzlement from his law partners

was dishonest and seriously adversely reflected on his fitness to practice law].

D. The Accused's Defenses.

On appeal, the Accused argues that he although he may have failed to follow all the corporate "niceties," his mental state was at most negligent. He reiterates the claim disputed by and and rejected by the trial panel that quit Blue Q at a February 24, 2009 meeting, that the Accused and thereafter agreed to dissolve the corporation, and that the Accused reasonably believed when he filed the Certificate of Dissolution that he was the only director. He further argues that the money he diverted from the Blue Q bank account was to reimburse himself and his entities for sums he claims (without corroborating documentation) he and they loaned Blue Q.

The only evidence offered for these excuses/defenses is the Accused's testimony – which the panel rejected as unreliable, unpersuasive, contradictory, "a sham," evasive, tangential, and non-responsive. (ER 19, pp. 4-6.)

The court typically defers to credibility assessments that panels base on subjective factors that they alone can observe – such as the demeanor of witnesses and their manner of testifying. *In re Fitzhenry,* 343 Or 86, 103, 162 P3d 260 (2007). The court will consider, but not defer, to credibility assessments that panels base on objective factors involving the intrinsic believability of competing inferences or on a combination of subjective and objective factors. *Id.*

1. The trial panel's subjective observations .

The trial panel wrote of the Accused's demeanor and manner of testifying:

> "The Accused rarely looked at either his own counsel or the trial panel when he answered questions. He acted in a manner that did not evoke trust in what he said. He looked furtive. He did not answer questions completely or fully, was tangential and provided unnecessary detail *(citmg to pp. 20-2of the transcriPt).* His answers were unnecessanly long, as 1f the longer he talked, the more likely the questioner would forget the questions. *(citing to p. 309 et seq. of the transcnpt).* He quibbled over unnecessary details....[\tvhile] the Trial Panel understands the right of ttie Accused to give a full and complete xpl nati9n of .t.charges against him….in JUdging h1s cred1b1lity 1n th1s case, the length and unnecessary detail presented here crosses the line from explanation to obfuscation and reflects adversely on his credibility." (ER-20.)

These subjective observations support the panel's finding that the Accused's testimony was not credible.

2. The Accused's inconsistent testimony also reflects on his credibility.

The panel also noted that the numerous inconsistencies in the Accused's testimony and statements, on matters large and small, impeached his credibility as a witness. (ER-21.) The court will draw its own inferences from these inconsistencies, which include:

(i) *Where the Accused was born, lives, and is licensed to practice law.*

In May 2011 -while trying to defeat diversity jurisdiction in federal court based on his residence in Nevada (Ex. 30)- the Accused asserted that he was and always has been an Oregon resident. He stated in a sworn affidavit (Ex. 23) that he was born in Portland, Oregon, where he owned a home and rental property; he was licensed to practice law in Oregon and no other jurisdiction[3]; he was a long-standing member of

[3] Again, the Accused is an inactive member of the Washington State Bar.

the Multnomah Athletic and the University Clubs; Oregon was where his children attended school and where he himself maintained his bank accounts, business interests, and health care relationships. He concluded:

> „1 have never resided outside the state, with the intention not to return. My family and home are in the state of Oregon. I have no where else to live, and no intention of takiog u_p resjpence elsewhere, for any purpose." (Ex. 23, p. 1.)

Contrasting sharply with these "Oregon forever" avowals, is the Accused's April 2013 deposition testimony. When the Bar asked why he incorporated Blue Q in Nevada, he testified that .primarily [Nevada] was my state of residence....That's where my house was. It's where my locus of operation was." (Ex. 3, p. 28:7.) Upon inquiry, the Accused renounced his 2011 affidavit in most of its particulars-even that he was born in Oregon – and blamed his former attorney, Philip Emerson, for drafting it with many ..errors" that the Accused failed to notice before signing. (Ex. 3, p. 200-02.)

(ii) *The Accused's areas of practice as an attorne .*

In his April 2013 deposition, the Accused testified that when his Oregon and Washington Bar licenses were active, he handled some urather significant...large business transactions, complex business transactions for a few clients." (Ex. 3, p.10:2.)

At the disciplinary hearing, the Accused minimized his business experience. He disavowed his previous answer ("I don't think my answer

---

[4] The federal court found that diversity jurisdiction was appropriate, g_iven that (among _other reasons) the Accused voted severar times in Nevada, listed a Nevada address on coq:: orate documents and filed Oregon nonresident income tax returns for four years (2006-2009). (Ex. 30.)

was exactly that [I did mostly complex business transactions]" – Accused 11), and testified that he:

> "... did a variety of things. I was a general counsel at a couple of compames. I did real estate work. I administered some environmental cleanups for DEQ. I negotiated – have a variety of land transactions with Metro, and that P.rogram came in on behalf of landowners. I did a variety of things." (Accused 11.)

(iii) *The Accused's former business relationship with*

On September 24, 2003, the Accused responded to a Bar complaint filed against him by attorney (Ex. 47.) Although the Accused was not under oath, DR 1-103(C) required him to respond truthfully. His response stated:

> "Mr. Alexander and I have been business partners in a variety of businesses since 1994, including but not limited to the installation of a large network wireless area network (sic) at Port Huememe, California, reclamation and environmental cleanup of a sawmill [Santiam Venture], and construction and restoration of aircraft." (emphasis added.) (Ex. 47, p. 1.)

At trial of the present case, however, the Accused sought to minimize his relationship with He denied that he and were ever partners before the Blue Q venture, and specifically denied that they were partners in the Santiam Venture. (Accused 15, 302, 348.)

(iv) *Other contradictory testimony.*

Other examples of the Accused's inconsistent testimony are:

- His trial testimony that he began contracting with Idaho fabricators by the fall of 2008 (Accused 62) vs. his Answer and his deposition testimony that he involved the Idaho

fabricators after the alleged February 24, 2009 meeting with and (Ex. 3, p. 75; Answer – ER 5.)

- His trial testimony that he did not distribute any portion of Blue Q's profits to or (Accused 71, 73) vs. his other trial testimony that he never denied them access to Blue Q profits (Accused 107) vs. his other trial testimony that he could not say whether he withheld profits from his partners because "that would be an accounting question." (Accused 106.)
- His deposition testimony that Blue Q's banker – US Bank – could not handle wires of foreign funds (therefore necessitating payments through his other entities (Ex. 3, p. 216)) vs. his trial testimony (corroborated by bank records) that US Bank routinely received and sent wired funds. (Accused 58 ; Exs. 32, 36.)
- His trial testimony that and used the US Bank account to pay for supplies or expenses (Accused 57) vs. his other trial testimony that he was not sure that and used the bank account to pay for expenses. (Accused 52.)

Taken together, the trial panel's subjective observations, the numerous (and mostly self-interested) inconsistencies in the Accused's testimony, and the dishonesty revealed by the Accused's course of conduct show that he is not a credible witness. The court should not accept his uncorroborated testimony on any disputed point.

V. SANCTION: The Accused should be disbarred

The Oregon Supreme Court refers 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. In re Renshaw, supra, 353 Or at 419.

A. ABA Standards.

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

1. Duty Violated.

The panel correctly found that the Accused violated his duty to the public to maintain his personal integrity. Standards § 5.1. See In re Renshaw, supra, 353 Or at 419.

2. Mental State.

The panel correctly found that by converting Blue Q assets to EMI, submitting false documents to dissolve the corporation, closing Blue Q's bank account and diverting its assets to entities controlled by him, stealing Blue Q's business opportunities, and cheating his business partners, the Accused acted intentionally – which the Standards describe as done with a conscious objective to accomplish a particular result and is the most culpable mental state. Standards at 6.

3. Actual or Potential Injury.

In determining an appropriate disciplinary sanction, the court should consider both actual and potential injury. *Standards* at 6; *In re Williams,* 314 Or 530, 840 P2d 1280 (1992). The panel found that and suffered actual injury because the Accused took from them any possibility of benefitting from the substantial time they invested in the Blue Q venture.

4. Preliminary Sanction.

Before considering applicable aggravating and mitigating circumstances, the *Standards* suggest that the only appropriate sanction is disbarment. *See Standards* § 5.11(b) ["disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."].

5. Aggravating Circumstances.

The panel correctly applied the aggravating factor of a *dishonest or selfish motive. Standards§* 9.22(b). Although the panel found that the Accused testified falsely at trial, it did not (but could have) applied *Standards* § 9.22(f) [submission of false statements during the disciplinary process].

The panel should also have applied *Standards* § 9.22(c) [pattern of misconduct] because the Accused committed thefts and misrepresentations over a period of many months in 2008 and 2009, that was part of a plan calculated to benefit himself at and expense. *See In re Renshaw, supra,* 353 Or at 421, applying this aggravating factor under similar circumstances.

Finally, the panel should have applied *Standards* § 9.22(i) [substantial experience in the practice of law] because the Accused practiced law for thirteen years before being suspended.

6. Mitigating Circumstances.

The panel correctly found only mitigating factor: the Accused has no record of prior discipline. *Standards§* 9.32(a).

Because the aggravating factors far out-number and outweigh the mitigating ones, the appropriate sanction according to the *Standards* is disbarment.

B. Case Law.

Oregon case law also supports disbarment.

In *In re Brown, supra,* the court disbarred a lawyer who schemed to obtain full ownership of a jointly owned shopping center for his own personal benefit. In *In re Murdock, supra,* the court disbarred an associate attorney who embezzled from his employer law firm and lied and filed false paperwork to conceal his embezzlement. In *In re Renshaw, supra,* the court disbarred a lawyer who embezzled funds from his law partnership (2013). In *In re Griffith* 304 Or 575, 748 P2d 86 (1987), the court disbarred a lawyer who participated in: a sham transaction designed to circumvent laws regarding loans to insiders, an unlawful bank stock purchase, the submission of overvalued financial statements to banks, and a dishonest scheme to transfer a bad loan from one individual to another.

The court has also disbarred lawyers who, to benefit themselves, create and file false documents. *See, e.g., In re Barber,* 322 Or 194, 904 P2d 620 (1995) [lawyer disbarred for altering evidence of a fee agreement and time records]; *In re Morin* 319 Or 547, 878 P2d 393

(1994) [lawyer disbarred for falsely notarizing will signatures to increase profits].

VI. CONCLUSION

In *In re MurdockJ supra*, this court quoted *In re Stodd,* 279 Or 565, 568 P2d 665 (1977) for the proposition that:

> "Nothing less than the most scrupulous probitY. in dealing with the funds of others is compatible with aamission to the practice of law. Th1s is a standard that does not Rermit drawing a line between an attorney's professional and nis non-professional roles."

The Accused's conduct departed so far from this standard that he should no longer be allowed to call himself an attorney. He should be disbarred.

DATED this 31st day of March, 2014.

OREGON STATE BAR

By. _____
Mary A. Cooper, Bar No. 910013
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 31st day of March, 2014, by submitting the electronic form in Portable Document Format (PDF) that allows text searching and allows copying and pasting text into another document to:

http://appellate.courts.oregon.gov

I further certify I served the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 31st day of March, 2014, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

Lawrence W. Erwin
221 NW Lafayette Avenue
Bend, OR 97701
(Counsel for Accused)

DATED this 31st day of March, 2014.

OREGON STATE BAR

sy:Mr<coo . Oss No. (#i013

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,050 words.

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(4)(f).

MaY.CoopeP, Oss N 0013

Oregon State Bar

March 31,2014

State Court Administrator
Appellate Courts Records Section
1163 State Street NE
Salem,OR 97301-2563

Re: *In re David Herman-SC* 5061840
Case No. 12-111

Dear State Court Administrator:

Please find enclosed bye-filing the Oregon State Bar's Respondent's Brief in the above-entitled matter. Two (2) hard copies of the Respondent's Brief have been mailed by first class mail with postage prepaid through the United States Postal Service to Lawrence W. Erwin, the Accused's counsel.

Thank you for your attention to this matter.

Very truly yours,

M)K'Y A. Looper
fssistant Disciplinary Counsel
Extension 321

MAC:kld
Enclosures
cc: Lawrence W. Erwin (Counselfor the Ac used)
(w/enclosure)

134--12