

IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	)	
	)	OSB Case Nos. 12-38, 12-39,
Complaint as to the Conduct of	)	and 12-77
	)	
PETER M. SCHANNAUER,	)	SC S061343
	)	
Accused.	)	
_____	)	

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**OREGON STATE BARJS PETITION FOR REVIEW;  
OPENING BRIEF; AND EXCERPT OF RECORD**

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Accused

June 2013

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IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	OSB Case Nos. 12-38, 12-39,
Complaint as to the Conduct of	)	and 12-77
	)	SC S061343
PETER M. SCHANNAUER,	)	
	)	PETITION FOR REVIEW
Accused.	)	

Pursuant to BR 10.5(a), the Oregon State Bar (hereinafter, "a Bar") petitions the Oregon Supreme Court for review of the decision of the Disciplinary Board Trial Panel filed with the Disciplinary Board Clerk on March 28, 2013, concerning the conduct of Peter M. Schannauer (hereinafter, "Accused").

The Bar seeks review pursuant to BR 10.1 and BR 10.3. This petition is accompanied by the Bar's Opening Brief, with Excerpt of Record and Appendix attached thereto.

Because the Accused defaulted, the factual allegations of the Formal Complaint are deemed to be true (BR 5.8(a)). The Trial Panel found that the factual allegations established violations of g!! of the charged Rules of Professional Conduct and imposed a 1-year suspension. On appeal, the Bar asks the Supreme Court to reject the suspension and disbar the Accused.

Respectfully submitted this 28th of June, 2013.

OREGON STATE BAR

By: a?sf 'coopir, oss¥o.S10013  
As 1stant DisciplinaJCounsel



## **I. STATEMENT OF THE CASE**

### **A. Nature of the Proceeding.**

The Bar filed a Formal Complaint (ER-1) against the Accused, Peter M. Schannauer, on August 30, 2012. The Accused did not respond and, after due notice, the Bar moved for an order of default.

The Trial Panel Chairperson signed the Default Order on November 14, 2012. Pursuant to BR 5.8(a), upon filing and service of the Default Order, the allegations of the Bar's Formal Complaint are deemed to be true. In lieu of hearing testimony regarding sanctions, the Trial Panel invited the parties to submit memoranda. In December 2012, and January 2013, the Accused submitted two letters that admitted the factual allegations of the Formal Complaint, acknowledged his misconduct, and asked the panel to exercise leniency.

On March 28, 2013, the panel filed a Trial Panel Opinion (ER-11) imposing a 1-year suspension with several conditions for reinstatement.

The Bar timely filed a Request for Review on May 22, 2013, and on June 21, 2013, filed the Record with the Court. The Court acknowledged receipt of the Record by letter dated June 21, 2013.

### **B. Nature of Judgment Sought to be Reviewed.**

The Complaint alleged seven causes of complaint, corresponding to three client matters.

The First through Third Causes of Complaint alleged that the Accused violated the following rules in his representation of

RPC 1.1 [lack of competence], RPC 1.3 [neglect], RPC 1.4(a and b) [failure to communicate adequately with client], RPC 1.5(a) [collecting clearly excessive fee], RPC 1.15-1(a, c, and d) [failure to maintain client property separately and in trust, to render an accounting, and to return

client property promptly upon request], and RPC 8.4(a)(3) [conduct involving dishonesty or misrepresentation reflecting adversely on lawyer's fitness to practice law]. After [redacted] complained to the Bar, the Accused failed to respond to the Bar's inquiries, in violation of RPC 8.1(a)(2) [failure to respond to inquiry by disciplinary authority].

The Fourth Cause of Complaint alleged that the Accused violated RPC 8.1(a)(2) by failing to respond to the Bar's inquiries with respect to a Bar complaint filed by [redacted].

The Fifth through Seventh Causes of Complaint alleged that the Accused violated the following rules in his representation of [redacted]:

RPC 1.3 [neglect], RPC 1.4(a) [failure to respond to client inquiries], RPC 1.5(a) [collecting a clearly excessive fee], RPC 1.15-1(a, c, and d) [failure to maintain client property separately and in trust, to render an accounting, and to return client property promptly upon request], and RPC 8.4(a)(3) [conduct involving dishonesty]. After [redacted] complained to the Bar, the Accused failed to respond to the Bar's inquiries, in violation of RPC 8.1(a)(2).

Because the factual allegations establish that the Accused knowingly converted client funds, the Bar asked that he be disbarred. Instead, the Trial Panel imposed a 1-year suspension and required the Accused, as conditions of reinstatement, to attend at least 10 hours of Continuing Legal Education in ethics, to provide full restitution to the complainants (including interest), to reimburse the Client Security Fund for amounts it might have paid as a result of his conversion, and, upon returning to practice, to be mentored by another Oregon attorney for six months.

C. Statutory Basis for Appellate Jurisdiction.

This matter is before the Court pursuant to ORS 9.536, BR 10.1, BR 10.3. The Court considers the matter *de novo* on the record. ORS 9.536(2), BR 10.6.

## II. QUESTIONS PRESENTED ON REVIEW

- A. Whether the factual allegations in the \_\_\_\_\_ matter (First through Third Causes of Complaint) establish that the Accused violated RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(3).
- B. Whether the factual allegations in the \_\_\_\_\_ matter (Fifth through Seventh Causes of Complaint) establish that the Accused violated RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(3).
- C. Whether the factual allegations in the \_\_\_\_\_, and \_\_\_\_\_ matters establish that the Accused violated RPC 8.1(a)(2).
- D. Whether the Court should reject the Trial Panel sanction and disbar the Accused for his violations of the Rules of Professional Conduct.

## III. SUMMARY OF ARGUMENTS

- A. The facts deemed true in the \_\_\_\_\_ matter establish that the Accused violated RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(3).

- B. The facts deemed true in the \_\_\_\_\_ matters establish that the Accused violated RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(3).
- C. The facts deemed true in the \_\_\_\_\_ and \_\_\_\_\_ matters establish that the Accused violated RPC 8.1(a)(2).
- D. Because the Accused knowingly converted client funds, he should be disbarred.

#### IV. STATEMENT OF FACTS

By reason of the Accused's default, the following facts are deemed true. BR 5.8(a); *In re Koch*, 345 Or 444, 198 P3d 910 (2008).

##### 1. First through Third Causes of Complaint – the \_\_\_\_\_ Matter.

In October 2009, \_\_\_\_\_ hired the Accused to prepare and file an adoption petition, paying him a flat fee of \$600 and an additional \$200 for filing fees. There was no written fee agreement allowing these sums to be treated as earned on receipt. Nevertheless, the Accused deposited them into his business account and knowingly converted them to his own use.

For the next two years, the Accused did nothing to advance \_\_\_\_\_ cause. He did not file the adoption petition, seek guidance from other practitioners about the adoption process, notify \_\_\_\_\_ that he was not competent to handle her matter, or respond to \_\_\_\_\_ inquiries about the status of the petition.

In October 2010, \_\_\_\_\_ tried to fire the Accused and demand a refund. He dissuaded her by saying that he had filed the adoption petition but the court had denied it. This was a knowing misrepresentation. The Accused also promised to contact \_\_\_\_\_ to

advise her of her options; however, he never communicated with her again and continued doing nothing on her case.

After another year, in September or October 2011, [redacted] hired a new attorney, Tim Brewer. When Brewer requested [redacted] file, the Accused told Brewer that he had filed [redacted] adoption petition in 2009. This was a misrepresentation. The Accused promised to send Brewer the file and refund [redacted] unearned fees but he never did so.

The Bar's Disciplinary Counsel's Office ("DCO") made at least two inquiries concerning [redacted] complaint. The Accused did not respond. On January 31, 2012, DCO referred the matter for investigation by the Region 1 Local Professional Responsibility Committee ("LPRC"). On February 14, 2012, the Accused told the LPRC investigator that he would contact DCO to respond to its inquiries. He never did so. He thereafter failed to respond to the LPRC investigator's telephone calls and correspondence, forcing the LPRC investigator to subpoena him.

## **2. Fourth Cause of Complaint-the [redacted] Matter.**

On November 1, 2011, [redacted] I [redacted] complained to the Bar about the Accused's representation of [redacted] grandson in a domestic relations matter. DCO made at least two inquiries to which the Accused did not respond.

On January 31, 2012, DCO referred the matter to the LPRC for further investigation. On February 14, 2012, the Accused told the LPRC investigator that he would contact DCO to respond to its inquiries. He never did so. He thereafter failed to respond to the LPRC investigator's telephone calls and correspondence, forcing the LPRC investigator to subpoena him.



3. Fifth through Seventh Causes of Complaint – the Matter.

On August 11, 2011, [redacted] retained the Accused to bring an enforcement action in a domestic relations matter, paying him a \$750 retainer. There was no written fee agreement allowing the Accused to treat the retainer as earned on receipt. Nevertheless, the Accused did not deposit the funds into his lawyer trust account but instead converted them to his own use.

On September 9, 2011, [redacted] paid the Accused \$220 for filing fees. The Accused did not deposit this sum into his lawyer trust account but instead knowingly converted it to his own use.

The Accused did not file [redacted] petition, take any other substantial action to advance her cause, or respond to her numerous inquiries about the status of her petition.

On December 22, 2011, [redacted] fired the Accused and demanded he provide an accounting, a refund of the unearned portion of her retainer, and her file. The Accused did not respond to or comply with any of these demands.

After [redacted] complained to the Bar on February 12, 2012, DCa made at least two inquiries to which the Accused did not respond. On April 20, 2012, DCa referred the matter to the LPRC for further investigation. The Accused failed to respond to the LPRC investigator's telephone calls and correspondence, forcing the LPRC investigator to subpoena him.

## v. ARGUMENTS

- A. The facts deemed true in the matter establish that the Accused violated RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(3).

The Trial Panel correctly found that the facts alleged in the First through Third Causes of Complaint establish violations of RPC 1.1, RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 8.4(a)(3).

1. Failure to provide competent representation.

RPC 1.1 requires lawyers to competently represent their clients. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The court has found incompetence when a lawyer has failed to adequately discuss or review the records with a client, failed to obtain sufficient information from a client to make decisions, failed to sufficiently investigate an issue or prepare a case, and failed to acquire the legal knowledge necessary to represent the client. In re Magar, 296 Or 799, 681 P2d 93 (1984); In re Rudie, 294 Or 740, 662 P2d 321 (1983); In re Greene, 276 Or 1117, 557 P2d 644 (1976); In re adman, 297 Or 744, 687 P2d 153 (1984).

The Accused admits that he did not familiarize himself with the adoption process in Oregon. His January 21, 2013 letter to the Trial Panel (ER-17) states that in 2009, when he began representing he was unfamiliar with family law practice in Oregon, found it to be "new and deceptively difficult," and "naively believed that [his] years of family law practice in Pennsylvania would transfer." His failure to consult or

associate with other counsel or take steps to familiarize himself with this area of law, choosing instead to let                    matter languish, was a failure to provide competent representation. See *In re Odman, supra*.

## **2. Neglect, failure to communicate, and misrepresentation.**

RPC 1.3 prohibits lawyers from neglecting legal matters entrusted to them. Neglect is evaluated over a temporal continuum (*In re Magar*, 335 Or 306, 66 P2d 1014 (2003)) and is present in this case. For two years- between October 2009 and October 2011 -the Accused neither filed                    petition nor took any other action on her behalf. Such prolonged inaction violated RPC 1.3. *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (attorney's failure to complete a child support arrearage matter for a client for nearly two years was serious neglect].

During this same two year period, the Accused failed to communicate adequately with                    He did not respond to her inquiries or keep her reasonably informed about the status of her matter, as required by RPC 1.4(a); he also failed to supply her with information that would have allowed her to make informed decisions concerning the representation (specifically that he had not filed the adoption petition and that she should consider hiring more experienced counsel), in violation of RPC 1.4(b). *In re Koch, supra*.

In fact, the only information the Accused gave                    about her case was disinformation. 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. An inaccurate statement violates this rule if it is made knowingly (that is, with knowledge of its falsity), pertains to a material fact (that is, a fact that could significantly influence the recipient's decision-making process), and reflects adversely on the lawyer's fitness as a lawyer. *In re Eadie*,

333 Or 42, 36 P3d 468 (2001), *In re Kluge*, 332 Or 251, 255, 19 P3d 938 (2001).

The Accused told \_\_\_\_\_ in October 2010, that he had filed the adoption petition but the court had denied it; he told Brewer in October 2011, that he had filed the petition in 2009. The Accused knew these statements were false; they were material in that they were intended to conceal the inadequacy of the Accused's representation; and they reflected adversely on the Accused's fitness to represent clients. The Trial Panel correctly found that the Accused violated RPC 8.4(a)(3). See *In re Obert*, 352 Or 231, 282 P3d 825 (2012) [attorney violated rule by misrepresenting the state of the case to his client]; *In re Butler*, 324 Or 69, 921 P2d 401 (1996) [attorney violated rule by assuring clients on several occasions that he was working on the clients' case although the case had been dismissed for lack of prosecution].

### **3. Excessive fee and failure to return client property.**

RPC 1.5(a) prohibits lawyers from entering into an agreement for, charging or collecting an illegal or clearly excessive fee or a clearly excessive amount for expenses.

This rule is violated when a lawyer retains the entire amount of a flat fee after failing to complete the agreed-upon representation. *In re Gastineau*, 317 Or 545, 551, 857 P2d 136 (1993). Not only did the Accused not complete \_\_\_\_\_ representation, there is no evidence that he even began it. By keeping \_\_\_\_\_ entire flat fee, he thereby collected a clearly excessive fee.

The Accused's failure to refund the unearned portion of retainer also violated RPC 1.15-1(d), which requires lawyers to promptly deliver to the client any funds or other property that the client is entitled to receive. See *In re Obert*, *supra*.

#### 4. **Mishandling of client funds and knowing conversion of client funds.**

Although the Accused and \_\_\_\_\_ agreed on a flat fee, they did not sign a written fee agreement. The court has said many times that a lawyer can treat a retainer as "earned on receipt" only if there is a written agreement allowing him to do so. Otherwise, funds paid in advance of being earned must be treated as client funds, subject to the rules set forth in RPC 1.15-1. *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007).

\_\_\_\_\_ gave the Accused a \$600 fee and an additional \$200 for filing fees. RPC 1.15-1(a) and (c) required him to deposit those funds into trust and withdraw them only as earned or expended. *In re Biggs*, 318 Or 293, 864 P2d 1310 (1994). Instead, he immediately deposited them into his business account. He never did earn or expend them.

The Accused's mishandling of \_\_\_\_\_ money also constituted conversion – that is, an exercise of control over it that so seriously interfered with her right of control that he could justly be required to repay it. *In re Martin*, 328 Or 177, 970 P2d 638 (1998). While not every conversion is dishonest (e.g., a negligent conversion resulting from bookkeeper error), a knowing or intentional conversion is a dishonest act that violates RPC 8.4(a)(3). *In re Claussen*, 331 Or 252, 260, 14 P3d 586 (2000). *In re Holman*, 297 Or 36, 57-58, 682 P2d 243 (1984).

The Accused took the \$600 fee knowing he had not earned it. Indeed, he never earned it. And even if he mistakenly believed that he could treat \_\_\_\_\_ flat fee as "earned on receipt" without a written agreement, that does not explain why he took for himself the \$200 he received from her for filing fees.

In *In re Martin, supra*, a lawyer accepted a \$500 retainer and, knowing he had not yet earned it, used it to pay his personal expenses.

Even though the lawyer eventually spent time on the case sufficient to earn the amount he had taken, the court found him guilty of dishonesty.

- B. The facts deemed true in the \_\_\_\_\_ matter establish that the Accused violated RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 8.1(a)(2) and RPC 8.4(a)(3).

The Trial Panel correctly found that the facts alleged in the Fifth through Seventh Causes of Complaint establish violations of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 8.1(a)(2), and RPC 8.4(a)(3).

1. Neglect and failure to communicate.

\_\_\_\_\_ retained the Accused on August 11, 2011 to file an enforcement motion against her ex-husband. The Accused prepared a draft motion, obtained \_\_\_\_\_ comments, finalized the motion, and had \_\_\_\_\_ sign an accompanying declaration on September 9, 2011. But after that, he stopped working on the case. \_\_\_\_\_tt never heard from him again, despite her numerous inquiries, and he never filed the motion. \_\_\_\_\_ fired the Accused on December 22, 2011.

The Accused's failure to file \_\_\_\_\_ motion or take any other action to advance her cause between September 9, 2011, and December 22, 2012, constituted neglect within the meaning of RPC 1.3.

The Accused's failure to respond to \_\_\_\_\_ inquiries during this time period violated RPC 1.4(a).

2. Clearly excessive fee and failure to refund unearned fee.

\_\_\_\_\_ gave the Accused a \$750 retainer in August 2011, and paid him another \$220 for filing fees in September 2011. He never filed the petition, never incurred filing fees, and never refunded any part of the money he had paid her. At the very least, his retention of the filing fees

constituted a clearly excessive amount for expenses, in violation of RPC 1.5(a).

demanded a refund when she fired the Accused in December 2011. When he did not provide one promptly (or at all), he violated RPC 1.15-1(d) (requiring prompt delivery of client property].

### **3. Improper handling of client funds and conversion.**

Because the Accused had no written fee agreement with he was required to treat the sums she gave him as client property until earned or expended. However, instead of depositing the \$750 and \$220 amounts into trust, the Accused converted them to his own use.

Even if the Accused misunderstood that he could not treat retainer as earned on receipt – or even if he thought he had put in enough hours to earn the fee on an hourly basis when he took the \$750 for himself- he certainly knew he was not entitled to the \$220 she gave him for filing fees. The Accused's mishandling of money therefore violated RPC 1.15-1(a), RPC 1.15-1(c), and RPC 8.4(a)(3).

### **4. Failure to provide an accounting.**

asked the Accused for an accounting when she fired him. He never provided one, thereby violating RPC 1.15-1(d).

### **C. The facts deemed true in the and matters establish that the Accused violated RPC 8.1(a)(2).**

The Trial Panel correctly found that the facts alleged in the Third, Fourth, and Seventh Causes of Complaint establish the Accused's violations of RPC 8.1(a)(2) in the and matters.

RPC 8.1(a)(2) requires lawyers to cooperate and respond fully and truthfully to inquiries from and comply with the reasonable requests of the Bar, subject only to the exercise of any applicable right or privilege.

The court has adopted a no-tolerance approach for a violation of this rule, regardless of whether the underlying ethical violation is ever charged or proven. "The failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation." *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000); *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997); *In re Miles*, 324 Or 218, 222-23, 923 P2d 1219 (1996).

DCO inquired at least twice of the Accused after receiving, in turn, the [redacted] and [redacted] complaints. The Accused failed altogether to respond and was similarly unresponsive to the LPRC's inquiries until it subpoenaed him. The Accused thereby violated RPC 8.1(a)(2). See *In re Kluge*, 335 Or 326, 66 P3d 492 (2003).

VI. SANCTION – Because the Accused converted client funds, he should be disbarred.

The Trial Panel imposed a 1-year suspension and placed conditions upon the Accused being reinstated. However, in cases where the lawyer is found to have knowingly converted client funds, disbarment is almost invariably the appropriate sanction.

In attorney discipline cases, and in addition to Oregon case law, the court looks for guidance to the American Bar Association's Standards for Imposing Lawyer Sanctions ("Standards"). *In re Biggs*, supra. *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993).

A. ABA Standards.

The Standards set out four factors that impact the appropriate sanction to be imposed: (1) the duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating factor. Standards § 3.0.



## 1. Duties Violated.

The Trial Panel found that the Accused violated duties to his clients, the public, and the profession.

The most important ethical duties are those owed to clients. *Standards* at 5. The Accused violated his duties to and to preserve and return their property (*Standards* § 4.1) and to represent and communicate with them with reasonable diligence and promptness (*Standards* § 4.4). The Accused also violated his duty of candor to when he affirmatively misrepresented the status of her matter. (*Standards* § 4.6).

By converting and funds, the Accused also violated his duty to the public to maintain his personal integrity (*Standards* § 5.1). By collecting excessive fees and failing to respond to the Bar's inquiries, he violated duties owed to the profession. (*Standards* § 7.0).

## 2. Mental State.

The Trial Panel found the Accused's conduct was either knowing or intentional.

"Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards* at 7.

The facts deemed true by reason of the Accused's default support the panel's findings. *In re Kluge, supra; In re Phelps*, 306 Or 508, 513, 760 P2d 1331 (1988). The Accused treated client funds as his own, taking them when he knew he had not earned them and was not entitled

to reimbursement for filing fees. His intentional or knowing mental state is further demonstrated by the fact that he never refunded any of or money even after they fired him and complained to the Bar. The Accused's January 21, 2013 letter states that after he began private practice in Oregon, he accepted cases from clients who could not pay much and "was forced to take on too many clients in order to have a chance to meet my financial needs." He admittedly sacrificed his clients' interests to his own financial needs. He presumably took and kept and money for the same reason.

The Accused intentionally and knowingly misrepresented the status of Olive's case to her and her new attorney. The Accused also knowingly failed to respond to the Bar's numerous inquiries. The rest of the Accused's unethical conduct was committed either negligently and knowing. For example, the Accused might initially have been negligent in failing to communicate with his clients, but following repeated messages, his failure to communicate became knowing.

### 3. Actual or Potential Injury.

For purposes of determining an appropriate disciplinary sanction, the court may consider both actual and potential injury. Standards at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The Accused's conversion caused and monetary injury. His failures to act and to communicate, and his misrepresentations to and Brewer about the status of adoption matter, caused further actual injury in terms of anxiety and frustration. *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000).

The Accused's failure to cooperate with the Bar's investigation of his conduct caused actual or potential injury to the legal profession. *In re Gastineau*, *supra* [lawyer's failure to respond made the Bar's

investigation more time-consuming and expensive and diminished public respect for the profession].

#### 4. Preliminary Sanction.

Drawing together the factors of duty, mental state, and injury (and absent aggravating or mitigating circumstances), the following *Standards* appear to apply:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts the property and causes injury or potential injury to a client.

4.41 Disbarment is generally appropriate when:

- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another and causes serious injury or potential serious injury to a client.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

7.2 Suspension is generally appropriate where a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

Considering all of the above, the appropriate preliminary sanction is disbarment or a suspension.

#### 5. Aggravating Circumstances.

The Trial Panel properly found the following aggravating factors: multiple offenses (Standards § 9.22(d)); dishonest and selfish motives—evidenced by the Accused's conversion of client funds (Standards § 9.22(b)); and indifference to making restitution – evidenced by the Accused's failure to return client funds or respond to the Bar's inquiries. (Standards § 9.22U)).

Another applicable aggravating factor is the Accused's substantial experience in the practice of law – he was admitted to the Oregon State Bar in 1996 and the Pennsylvania Bar in 1982. Standards § 9.22(i).

#### 6. Mitigating Circumstances.

The Trial Panel found no mitigating factors. The Accused's January 21, 2013 letter states his intent to "do what is required to make [ ] and whole," but that statement begs the question why he has not done so to date. He has had money since 2009, since 2011. His professed good intentions do not constitute the "timely good faith effort to make restitution" contemplated as a mitigating factor under the Standards. (Standards § 9.32(d)).

The one mitigating factor that does apply is the Accused's lack of a prior disciplinary record. (Standards § 9.32(a)).

Because the aggravating factors far outweigh the single mitigating one, the Standards suggest that disbarment rather than a long suspension is appropriate.

#### B. Case Law.

The court has stated on many occasions that a single instance of misappropriation of client funds to the lawyer's own use will generally

warrant disbarment. *In re Martin, supra*; *In re Whipple*, 320 Or 476, 488, 886 P2d 7 (1994); *In re Laury*, 300 Or 65, 76, 706 P2d 935 (1985); *In re Pierson*, 280 Or 513, 518, 571 P2d 907 (1977); *In re Phelps, supra*. The Accused did not misappropriate large amounts, but he did convert client money that he knew he had not earned and has never repaid it. Disbarment is appropriate.

Even without the finding of conversion, case law supports the imposition of disbarment. In *In re Purvis*, 308 Or 451, 781 P2d 850 (1989), the court disbarred a lawyer found guilty of neglect, failing to return client funds, and misrepresentations. In *In re Thies*, 305 Or 104, 750 P2d 490 (1988), the court disbarred an attorney for neglecting domestic relations matters, lying to clients to cover his neglect, and failing to respond to the Bar. In *In re Dixon*, 305 Or 83, 750 P2d 157 (1988), the court disbarred an attorney for gross neglect and for being deceitful to clients, other members of the Bar, and to state and federal judges.

## VII. CONCLUSION

Although the Trial Panel suspended rather than disbarred the Accused, it would not have imposed conditions on his reinstatement if it did not seriously question his fitness to practice. By failing to cooperate with the Bar's investigation or appear in the disciplinary action, the Accused gave the panel- and this court- no reason for confidence.


In his last minute letter to the panel, the Accused cited various excuses for his misconduct and promised to do better in the future. He asked to be allowed to continue to practice in light of his "desire to make the complainants whole," but did not explain why he had not already done so. But his letter provides a clue. In it, he stated that he is willing to "do what is required" (emphasis added) to compensate his clients. The

suggestion -which the panel heard loud and clear – is that he will only repay his clients if he is compelled to do so.

Lawyers who are fit to practice do not convert client funds and do not need to be compelled to return client funds they have not earned or used for costs. The Accused should be disbarred.

DATED this 28th day of June, 2013.

OREGON STATE BAR

By:   
 Marvin F. Cooper, Bar #46.910013  
 Assistant Disciplinary Counsel

## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S PETITION FOR REVIEW; OPENING BRIEF; AND EXCERPT OF RECORD on the 28th day of June, 2013, 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 PETITION FOR REVIEW; OPENING BRIEF; AND EXCERPT OF RECORD on the 28th day of June, 2013, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

Peter M. Schannauer  
64458 Coyote Run Lane  
Bend, OR 97701

DATED this 28th day of June, 2013.

OREGON STATE BAR

By: \_\_\_\_\_

## **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 5,134 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) — 7 / 7

Mary A. Cooper, 6sB No. 610013