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IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	Supreme Court No. S49996
Complaint as to the Conduct of	OSB Case Nos. 01-9, 01-121, and 01-122
ALLAN F. KNAPPENBERGER,	
Accused.	

ACCUSED'S OPENING BRIEF

Review of the Decision of the Oregon State Bar Trial Panel

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I. STATEMENT OF THE CASE

A. Nature of the Action

Allan F. Knappenberger ("Knappenberger") is a member of the Oregon State Bar (the "Bar"). The Bar instituted disciplinary proceedings against him under ORS chapter 9; this case is an appeal from those proceedings.

B. Nature of the Judgment

A three-person trial panel (the "Trial Panel") of the Disciplinary Board conducted a hearing on October 8, 2002. The Trial Panel issued its opinion (the "TPO") on November 27, 2002, and the Bar served Knappenberger with the TPO on December 3, 2002. Based upon its findings of two violations of DR 5-101(A) (personal conflicts of interest) and DR 6-101(B) (neglect of a legal matter), the Trial Panel ordered that Knappenberger be suspended for one year, with nine months stayed pending satisfactory compliance with certain conditions. The Trial Panel also imposed a 24-month probationary period to follow Knappenberger's three-month active suspension.

C. Petition for Review and Statutory Basis for Appellate Jurisdiction

Knappenberger petitions this Court to review the decision of the Trial Panel pursuant to BR 10.1, 10.5, and 10.6. In light of the Trial Panel's sanction, this Court must exercise de novo review under ORS 9.536(1) and BR 10.1, 10.5 and 10.6.

D. Questions Presented on Review

1. Has the Bar proved by clear and convincing evidence that Knappenberger's violation of DR 5-101(A) while representing Patrick Mura ("Mura"), as alleged in the First Cause of the Bar's Amended Formal Complaint, was more than a minor and negligent violation?

2. Has the Bar proved by clear and convincing evidence that Knappenberger violated DR 6-101(B) while representing Frank Loitz ("Loitz"), as alleged in the Second Cause of the Bar's Amended Formal Complaint?

3. Has the Bar proved by clear and convincing evidence that Knappenberger violated DR 5-101(A) and DR 6-101(B) while representing Barbara Bridge ("Bridge"), as alleged in the Third Cause of the Bar's Amended Formal Complaint?

4. To what extent should Knappenberger be sanctioned for any violations that are found to exist?

E. Summary of Argument

The Bar has not established that Knappenberger's violation of DR 5-101(A) in the Mura matter was other than a negligent violation that consisted of a failure to include with other written disclosures a recommendation to consult independent counsel.

The Bar has not established a violation of DR 5-101(A) in the Bridge matter, because, among other things, Knappenberger's error was harmless error.

The Bar has not established violations of DR 6-101(B) in the Loitz and Bridge matters, because there was no course of neglectful conduct.

Any violations were the result of negligence and did not materially injure Knappenberger's clients. The Trial Panel's sanctions decision seems to have been based primarily on the fact that Knappenberger was or is among the hardest-working members of the Bar. That is not a permissible aggravating factor. Depending upon the violations found, the proper range of sanctions varies from a reprimand to a 60-day suspension.

F. Summary of Facts

1. The Accused: Knappenberger

Knappenberger was admitted to the Bar in 1973. At all times material hereto, he was a sole practitioner, although he sometimes employs contract attorneys to assist him. (Tr. 129-30, 211.) Although he is principally known as a domestic-relations lawyer, he also has experience in criminal law and other matters. (Tr. 167-68.)

Knappenberger was and is a hard worker. He testified that during the years at issue, he regularly worked 15- or 16-hour days, seven days per week, and billed over 2,500 hours per year. On the other hand, he has cut back on the amount he has worked in "the last few years." (Tr. 214, 220-21.)

Before the hearing, Knappenberger had received one public reprimand and two letters of admonition. As is discussed below in the sanctions analysis, these three instances are not germane to the present proceedings.

2. The Mura Matter

In June 1993, Mura was convicted of one count of third-degree sexual abuse of his young daughter. At that time, Mura was represented by a public defender who, according to Mura, advised him to plead guilty to this one charge in order to avoid conviction and incarceration for more serious offenses. (Tr. 33 ("He said if I went to trial without a doubt I would be convicted."); Ex. 1.) In October 1993, Mura retained Knappenberger to represent him in postconviction relief proceedings. The primary basis for seeking relief was the alleged recantation by Mura's daughter. (Tr. 127, 159; Ex. 2.) Knappenberger explained to Mura that it would be difficult to obtain postconviction relief. (Tr. 159.) At all material times, Mura appeared to Knappenberger to be a reasonably capable individual. (Tr. 110-11, 154-56.)

On October 21, 1993, Knappenberger filed a Petition for Post-Conviction Relief on Mura's behalf. (Ex. 2.) Unfortunately, as a result of a computational error, Knappenberger filed it 121 days after Mura's conviction had become final, rather than within 120 days, as was required by former ORS 138.510(2) (1991) (Or Laws 1989, ch 1053, §§ 18, 20). The State filed a motion to dismiss on January 26, 1994. (Ex. 7.)

a. Knappenberger's Response to the State's Motion

Knappenberger sent Mura a copy of the State's motion on January 30, 1994. (Tr. 112-13; Ex. 8.) At that time, Knappenberger believed that his mistake would not be fatal to the case and that he would be able to resolve the problem by explaining to the court that the mistake was entirely his, by asking the court not to punish the client for the lawyer's mistake and by further pleading to establish these facts. (Tr. 112-13, 154.)[1]

On February 11, 1994, Knappenberger researched the State's motion. (Tr. 122-23; Ex. 17.) On February 13, 1994, he filed his memorandum in opposition to the motion to dismiss. (Ex. 11.) Among other things, Knappenberger asserted that the filing "error resides solely with Petitioner's Counsel, and cannot be attributed to the Petitioner. Petitioner's sworn proof should satisfy the rule of [*Morrow v. Maass*, 109 Or App 694, 820 P2d 1374 (1991)], and this Court should therefore deny Defendant's Motion to Dismiss." (*Id.* at 3.) Similarly, Knappenberger's simultaneously filed affidavit asserted that "the Petitioner should not be denied the relief requested in the Petition based on an error, which is solely attributable to my office." (*Id.* at 6.)

[1] Thus, when Knappenberger spoke to Mura on February 1, 1994 and told him "that I needed to spend some time preparing for [defense of the State's motion] and I needed some assurances of getting paid" and that "I wouldn't blame him for dismissing the case at this time and cutting his losses," Knappenberger believed that he would be able to defeat the State's motion. (Tr. 153-54; Ex. 10.) Knappenberger's point about cutting Mura's losses was that the proceedings would be expensive and that Mura still did not have the "main ingredient"--written documentation of his daughter's alleged recantation, which would be essential to any chance for success. (Tr. 126-27.)

Knappenberger sent a copy of these filings to Mura, who received and read them. (Tr. 38-39, 44, 112-13.) As Knappenberger stated, "I felt that the statements in the petition and the statements in the affidavit, as well as my motion and memorandum, gave [Mura] a clear indication that he was at risk." (Tr. 112-13.)

b. Knappenberger's Response to the Trial Court's Dismissal

Although Knappenberger had expected to prevail, the State's motion was granted following a hearing on February 14, 1994. (Ex. 12.) On February 21, 1994, Knappenberger expressly informed Mura in writing of the "Bad news!" and of the trial court's dismissal of the petition "because it was not filed within the time allowed by the statute of limitations." (Ex. 13.) Knappenberger also called Mura's attention to the fact that there was a 30-day period in which Mura could file a notice of appeal and concluded by stating, "Please give me a call so we can discuss this further." (*Id.*)

Mura received and understood this correspondence. (Tr. 38-39, 44.) He did not, however, contact Knappenberger within 30 days to discuss or authorize an appeal. (Tr. 156.) Mura presumably knew that he could switch to other counsel, just as he had previously switched to Knappenberger and just as he subsequently switched to another lawyer. (Tr. 33, 36, 161.)[2]

In other words, Knappenberger timely and fully informed Mura in writing of the mistake Knappenberger had made, of his sole responsibility for that mistake and of its consequences. And, as noted above, Mura read and understood Knappenberger's disclosures. Knappenberger did not, however, recommend that Mura consult independent counsel. (Tr. 40.)

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[2] Mura never testified that he was unaware of this option. He also testified that he would not have gotten other counsel at that point even if Knappenberger had recommended it. (Tr. 42.)

c. Concluding Remarks Regarding Mura

Three final points deserve mention. First, Knappenberger did not believe that his interests and Mura's interests differed with regard to the handling of the matter once the mistake had been made. In Knappenberger's view, his interests and Mura's interests were aligned when Knappenberger asserted, truthfully and in good faith, that it was he and not his client who had made a mistake and that his client should not be punished for his mistake. (Tr. 112-13.) Second, throughout his representation of Mura, Knappenberger was unaware that the Bar interpreted DR 5-101(A) to require a conflicts waiver letter in this type of circumstance, and he believed that his written disclosures to Mura met his obligation to keep his client informed. (Tr. 113, 197.)[3] Third, Knappenberger did not give up on Mura. By letter dated June 13, 1994, Knappenberger confirmed "my numerous phone messages and our telephone conversation on June 12, 1994," to the effect that as a result of a 1993 amendment to ORS 138.510, Mura might be able to file a new petition. (Tr. 156-58; Ex. 14.) Knappenberger then worked with Mura and his brother to develop the information necessary for a new petition. (Tr. 158-61; Exs. 15, 16.) After Knappenberger and Mura finally obtained the necessary documentation of the daughter's recantation, Mura switched to other counsel. Upon request of that counsel, Knappenberger forwarded the case file and released his security interest in Mura's automobile. (Tr. 161-62; Ex. 102.)[4]

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[3] The Bar has not charged Knappenberger with incompetent representation under DR 6-101(A) in any of these matters.

[4] Knappenberger never received any funds from Mura after Mura's original $1,000 deposit, and he never pursued a fee claim against Mura. (Tr. 115; Ex. 105.)

3. The Loitz Matter

Loitz was a social friend of Knappenberger. (Tr. 146.) Beginning in 1997, Knappenberger also represented Loitz in the preparation and trial of a motion to modify the spousal support award in a prior marital dissolution decree. Knappenberger obtained an order reducing Loitz's monthly spousal support obligation, albeit not by as much as Loitz and he had hoped. (Oregon State Bar Trial Memorandum at 3; Tr. 165-67; Ex. 22.) Thereafter, Knappenberger filed an appeal and then briefed and argued the case before the court of appeals. (Oregon State Bar Trial Memorandum at 3-4.)

The Bar does not seek discipline for any aspect of Knappenberger's handling of the trial. The Bar also does not seek discipline for any aspect of Knappenberger's briefing or handling of the argument on appeal, nor does it seek discipline on the ground that Knappenberger failed to maintain adequate contact with Loitz throughout the trial and pretrial process or through that portion of the appellate process up to and including oral argument. And although Loitz testified at one point that he found Knappenberger and his office difficult to reach on several occasions after oral argument when Loitz had sought to initiate contact, he retracted these assertions once he was shown his own notes of conversations. (Tr. 64-72; Ex. 37.) Nevertheless, the Bar charges that Knappenberger engaged in a course of neglectful conduct in violation of DR 6-101(B) because of his failure to initiate contacts with Loitz about several letters from the bonding company asking for payment of the renewal premium on Loitz's supersedeas bond, about the court of appeals' decision affirming the trial court and about the opposing party's attorney fee petition.

a. The Court Bonds Correspondence

On September 26, 1999 and October 15, 1999, Court Bonds, which had issued the supersedeas bond for the Loitz appeal, wrote letters to Knappenberger requesting payment of $300 to keep the bond in force. (Exs. 23, 26.) These letters were received by Knappenberger's office but, as reflected by the absence of related time-sheet entries, did not come to his personal attention. (Tr. 132, 141; Ex. 36.)[5] Loitz had paid directly for the original bond and would necessarily have paid for the renewal. (Tr. 171.)

By November 17, 1999, however, Knappenberger had become aware that a premium was due on the Loitz supersedeas bond, and his secretary confirmed as much by memorandum. (Tr. 138; Ex. 28.) Also on November 17, 1999, Knappenberger dictated on tape a letter to Loitz about the need to renew the bond, but that tape was inadvertently not transcribed. (Tr. 138; Ex. 36.)

The first that Loitz heard about nonpayment of the renewal fee was when he received a November 30, 1999 letter from Court Bonds, which gave him additional time to pay. (Exs. 31, 32.) Loitz faxed this letter first to Knappenberger and then to Knappenberger's primary assistant, Lisa Maddocks. (Tr. 70; Exs. 31, 32, 37.)[6] After discussing the matter with Ms. Maddocks, Loitz dealt directly with Court Bonds. There is no evidence in the record that

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[5] Although the September 26, 1999 letter (Ex. 23) reflects an earlier invoice mailed to Knappenberger on August 9, 1999, the Bar did not assert and there is no evidence in the record to support that Knappenberger ever received the first notice.

[6] Although Loitz wrote to Knappenberger and his assistant that "I thought we cancelled this [supersedeas bond] sometime back," he conceded at trial that he understood the supersedeas bond was necessary to prevent his former wife's interim collection of support payments, that the bond would therefore be needed until the appeal was resolved and that all that Knappenberger had said was that he would look into whether the bond could be cancelled. (Tr. 80-81.)

Loitz had to pay more due to Knappenberger's conduct. In fact, it is unclear whether Loitz ultimately paid the renewal premium. (Tr. 170.)

b. The Court of Appeals' Decision and the Attorney Fee Petition

The court of appeals affirmed the decision below on October 6, 1999, and opposing counsel filed her petition for attorney fees on October 12, 1999. (Exs. 25, 33, 38.) Neither the affirmance nor the fee petition came to Knappenberger's attention at the time. (Tr. 134.) This is clear, among other things, from the absence of pertinent time-sheet entries for Knappenberger and from the fact that Knappenberger and Ms. Maddocks were reviewing the supersedeas bond issue on November 17, 1999. The October 6, 1999 affirmance mooted the need to renew the bond. (*Cf.* Tr. 170-72; Ex. 26.)[7] Similarly, there would have been no reason for Ms. Maddocks not to tell Loitz of the affirmance if she had known of it when they spoke on December 13, 1999. (Tr. 69-70; Ex. 37.)

c. Concluding Remarks Regarding Loitz

Information "fell through the cracks," but it is not fully clear why this happened. (Tr. 135-36.) In part, some documents were belatedly or improperly filed. (Tr. 133-38, 141, 219.) Also in part, Knappenberger was then using a daily mail log system that he subsequently rejected as cumbersome and sometimes unreliable. (Tr. 219.) As Knappenberger conceded, this was not his or his office's finest hour. (Tr. 174, 208-09.) What is clear, however, is that there was no epidemic of misfiled, improperly filed or otherwise unnoticed time-sensitive documents.

4. The Bridge Matter

Before she met or employed Knappenberger, Bridge had married after signing a prenuptial agreement in which she was not separately represented. The prenuptial agreement

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[7] There is no evidence or argument by the Bar that the fee petition submitted by opposing counsel was in any way objectionable.

arguably extinguished her rights to a property division or spousal support. She therefore sought Knappenberger's assistance at trial, and then on appeal, to overturn the prenuptial agreement or to have it declared wholly or partially inapplicable to the circumstances at hand. (Tr. 100-01.)

The Bar does not seek discipline for any aspect of Knappenberger's handling of the trial of this matter or for any aspect of Knappenberger's briefing or handling of the argument on appeal. The Bar also does not seek discipline on the ground that Knappenberger failed to maintain adequate contact with Bridge throughout the trial and pretrial process. In the Bar's view, Knappenberger violated DR 5-101(A) because he failed to adequately inform Bridge about a mistake he allegedly made in serving the notice of appeal and subsequently violated DR 6-101(B) by failing to keep Bridge adequately informed as this issue unfolded.

a. The Notice of Appeal

After the trial court had entered its judgment, Knappenberger filed a timely notice of appeal and served it upon counsel for the opposing party at trial, who filed a timely notice of cross-appeal several days later. Knappenberger then prepared and filed his client's opening brief. (Tr. 187-89; Exs. 42-44.)

Several months later, opposing counsel filed his brief containing his response to Knappenberger's brief and his argument on cross-appeal. As a part of this brief, opposing counsel also moved to dismiss Knappenberger's appeal on the ground that during the few days after the trial judgment had been entered and before the cross-appeal was filed, opposing counsel had not actually been counsel for his client and that Knappenberger's notice of appeal was therefore defective because it was not served on the opposing unrepresented party. (Ex. 45.)

Knappenberger believed that the motion to dismiss was contrary to long-established practices and had no realistic chance of success. (Tr. 193-94.) Although the trial court's

judgment in this case had discharged counsel, such provisions are not uncommon and, to Knappenberger's knowledge, had never before been given this effect. Moreover, the pertinent statutes provide for the discharge of counsel after a judgment is entered, even if the judgment does not expressly so state. Thus, this would be the rule in all cases. (Ex. 53 at 9.)

Knappenberger sent Bridge a copy of opposing counsel's brief, which included the motion to dismiss, with a transmittal letter. (Ex. 57.) The transmittal letter did not call particular attention to the motion. (*Id.*) Knappenberger also briefly discussed the status of the case with Bridge on August 11, 1999 and January 5, 2000, while the case was under advisement. (*Id.*) The record does not affirmatively indicate whether the motion was discussed. There is, however, no evidence in the record that Bridge questioned Knappenberger about the motion.

There is also no evidence in the record that in serving the notice of appeal on opposing trial counsel, Knappenberger failed to meet the standard practice or standard of care generally followed by reasonably prudent and similarly situated lawyers.

b. The Court of Appeals' Decision

To Knappenberger's surprise, the court of appeals granted the motion to dismiss in its April 12, 2000 decision. As the court's opinion recognized, however, it had to consider the merits of each of Knappenberger's affirmative appellate arguments in order to reach the issues raised on cross-appeal. When the court did so, it rejected Knappenberger's arguments. (Tr. 182-87; Ex. 53.) In other words, the alleged error in mis-serving the notice of appeal was legally harmless error.

Knappenberger was, however, concerned about the court's decision on the notice-of-appeal issue. At his own expense, he hired appellate attorney Jim Westwood to prepare a

petition for review. (Tr. 182; Ex. 53.)[8] Although Mr. Westwood told Knappenberger that he thought the petition was "a winner," this Court disagreed. (Tr. 184; Exs. 55, 103; *see also* Tr. 92-94 (Bridge's recollection of this information).)

c. Concluding Remarks Regarding Bridge

There is some conflict in the record concerning the extent to which Knappenberger kept Bridge informed of these later developments, but the facts show the following:

(i) Bridge testified that with only one exception, (May 5, 1999) she was able throughout all stages of the matter to reach Ms. Maddocks, Knappenberger's primary assistant, when she could not reach Knappenberger himself. (Tr. 102 ("I always got to talk to Lisa.").) On that one occasion, Bridge called Knappenberger and Ms. Maddocks on one day and received a return call from Knappenberger the next evening. (Tr. 91, 102-03; Ex. 104 at 2.)

(ii) Bridge first received word of the appellate decision from her friend Lois on April 27, 2000, and she received a copy of the court's decision from Lois two days later. (Tr. 91; Ex. 104 at 2.) She also received news of her former husband's collection efforts from Lois. (Tr. 90, 92; Ex. 104 at 2.) Bridge did not, however, contact Knappenberger or his assistant to ask questions or seek clarification on these matters. (Tr. 92.)

(iii) On May 17, 2000, Knappenberger filed a motion for extension of time to file a petition for review, and he sent a copy of the motion to Bridge. (Ex. 49.) Knappenberger testified that he believes he must have sent Bridge a copy of the decision or at least discussed it with her before that time. (Tr. 148-51; Ex. 49.) In any event, Bridge agrees that she spoke with Knappenberger on May 22, 2000 and they discussed Knappenberger's "plans to appeal the appeal." (Tr. 92-94; Ex. 104; *see also* Tr. 183 (Bridge did not ask Knappenberger to send her any documents she had not received in May 2000).)

(iv) Knappenberger sent Bridge a copy of the petition for review, which necessarily contained a copy of the court of appeals' decision, when the petition was filed on June 14, 2000. (Tr. 184; Ex. 54.)

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[8] Stoel Rives is able to proceed on Knappenberger's behalf due to Bridge's (and Knappenberger's) conflicts waivers. (*See, e.g.*, Tr. 186.)

(v) Bridge concedes that she may have had additional discussions or communications with Knappenberger that she cannot remember. (Tr. 103, 106.)

FIRST ASSIGNMENT OF ERROR: CONTRARY TO THE TRIAL PANEL'S OPINION, KNAPPENBERGER'S VIOLATION OF DR 5-101(A) IN THE MURA MATTER WAS A MINOR AND NEGLIGENT VIOLATION[9]

DR 5-101(A) provides in part that

> "[e]xcept with the consent of the lawyer's client after full disclosure, * * * a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

If the conflicts provision of DR 5-101(A) is triggered, a lawyer can proceed only with client consent based upon "full disclosure" as defined in DR 10-101(B). This requires

> "an 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 * * * [and] a recommendation that the recipient seek independent legal advice to determine if consent should be given[, which recommendation] shall be contemporaneously confirmed in writing."

With regard to the Mura matter, Knappenberger agrees that he violated DR 5-101(A) but wishes to point out the relatively minor nature of his violation. In contemporaneous writings that were understood by his client, Knappenberger fully disclosed the mistake he had made and its actual or potential consequences. In fact, his disclosure was sufficient to cause Mura to doubt whether he should continue with Knappenberger. (Tr. 42.) The only respect in which Knappenberger fell short was that he failed also to recommend that Mura consult independent counsel. (Tr. 40.) This was a violation, but it was a minor one. *Compare In re Alstatt*, 321 Or

[9] The Trial Panel found that Knappenberger violated DR 5-101(A) by failing to fully explain the existence of a conflict of interest between himself and Mura and by failing to explain that "Mura should seek independent legal advice regarding whether and how to proceed." (TPO at 6.)

324, 330, 897 P2d 1164 (1995) (no recommendation to consult counsel), *with In re Brandt/Griffin*, 331 Or 113, 137, 10 P3d 906 (2000) (finding fraud in conflicts waiver letters). In addition, Knappenberger's uncontested reason for not going further with disclosure was that he did not believe that DR 5-101(A) applied to the situation before him. (Tr. 197.) Although Knappenberger now concedes he was mistaken, this was a negligent and good-faith mistake rather than a purposeful or knowing one.

SECOND ASSIGNMENT OF ERROR: CONTRARY TO THE TRIAL PANEL'S OPINION, KNAPPENBERGER DID NOT VIOLATE DR 5-101(A) IN THE BRIDGE MATTER[10]

As noted above, DR 5-101(A) provides in part that

> "[e]xcept with the consent of the lawyer's client after full disclosure, * * * a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

Client consent based upon full disclosure comes into play only if the conflicts standard of DR 5-101(A) is first triggered.

The Bar need not prove that a lawyer's judgment was actually impaired but "must show only that the lawyer had an interest that reasonably might have affected the lawyer's professional judgment." *In re Kluge*, 335 Or 326, 335, 66 P3d 492 (2003). On the other hand, remote or purely theoretical conflicts do not trigger DR 5-101(A). *In re Stauffer*, 327 Or 44, 48 n 2, 956 P2d 967 (1998); *In re Samuels/Weiner*, 296 Or 224, 230, 674 P2d 1166 (1983); OSB Legal Ethics Op No 1991-61 (depending upon circumstances, potential pendency of malpractice claim

[10] The Trial Panel found that Knappenberger violated DR 5-101(A) by failing to fully explain the existence of a conflict of interest between himself and Bridge and by failing to explain that "Bridge should seek independent legal advice regarding whether and how to proceed." (TPO at 7.) The Trial Panel also mistakenly asserted that Knappenberger conceded a violation of DR 5-101(A) in the Bridge matter. (TPO at 5.) This is not so. (*See, e.g.*, Tr. 184-86, 192-93.)

against lawyer may or may not trigger DR 5-101(A)). The legal touchstone is whether there is clear and convincing evidence that a lawyer's exercise of independent professional judgment in a particular set of circumstances may reasonably be expected to be impaired. *In re Tonkon*, 292 Or 660, 642 P2d 660 (1982) (holding that attorney's exercise of independent professional judgment was unlikely to be adversely affected by $75,000 gift under particular circumstances of that matter).[11] As applied to the Bridge matter, the question is not even close, for at least three reasons.

First, and as the Bar did not deny, the alleged service-of-process error was a legally harmless error.

Second, there is no evidence in the record, let alone clear and convincing evidence, that Knappenberger would have had any liability to Bridge for alleged malpractice even if the error had not been harmless. Malpractice liability exists only when a lawyer fails to conform his or her conduct to the standard of care of other similarly situated lawyers. *Vandermay v. Clayton*, 328 Or 646, 655, 984 P2d 272 (1999); *Vendevender v. Thierolf*, 172 Or App 331, 337, 18 P3d 473 (2001). In the present case, there is no evidence that Knappenberger acted inconsistently with any pertinent standard of care. *Cf. In re Magar*, 335 Or 306, 323-24, 66 P3d 1014 (2003) (rejecting as equivocal Bar's expert testimony on similar issue). In other words, there is no evidence of any material risk of malpractice liability and, again, no reason to believe that Knappenberger's exercise of independent professional judgment was at risk.

Third, Knappenberger's interests and the interests of Bridge were united in wishing to make the best possible arguments once the mistake was recognized. Given the positions of the

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[11] As applied to gifts from nonfamily members, *Tonkon* was legislatively overruled by DR 5-101(B) in 1986, but *Tonkon* is still good law with regard to the independent professional judgment standard. *See, e.g., The Ethical Oregon Lawyer* § 8.3 (OSB CLE 2003).

parties and the stage of the proceedings at issue, Knappenberger was not in a position to pursue a different course of action that might have downplayed or avoided the consequences of his actions. In other words, there was nothing for Knappenberger to do other than what he did. Once again, therefore, there was no reason for his exercise of independent professional judgment to differ based on whether he was pursuing "his" or "his client's" interests.

This Court should also consider that there is a real danger in going too far to require conflicts waiver letters whenever a lawyer may have done something that may damage a client. Lawyers must make decisions all the time, and many (if not most) of these decisions can be second-guessed. If a lawyer had to write conflicts waiver letters to clients whenever an act took place that "might" result in future harm to a client, there would be little time left for the practice of law. Moreover, client trust in lawyers would be undermined by this constant stream of self-imposed second-guessing. The application of DR 5-101(A) to lawyer mistakes must therefore be limited to cases in which the lawyer's error and the resulting prospect of harm to a client are both clear and present.

THIRD ASSIGNMENT OF ERROR: CONTRARY TO THE TRIAL PANEL'S OPINION, KNAPPENBERGER DID NOT VIOLATE DR 6-101(B) IN THE BRIDGE MATTER[12]

FOURTH ASSIGNMENT OF ERROR: CONTRARY TO THE TRIAL PANEL'S OPINION, KNAPPENBERGER DID NOT VIOLATE DR 6-101(B) IN THE LOITZ MATTER[13]

These two assignments of error involve the same legal issues and are therefore discussed together.

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[12] The Trial Panel found that Knappenberger violated DR 6-101(B) by failing to keep Bridge "informed of the progress of her case." (TPO at 7.)

[13] The Trial Panel found that Knappenberger violated DR 6-101(B) by failing to keep Loitz "informed of the progress of his case" and by failing to "pursue dissemination" of appellate bond information. (TPO at 6-7.)

DR 6-101(B) provides that "[a] lawyer shall not neglect a legal matter entrusted to the lawyer." Neglect under DR 6-101(B) is a "subset of incompetence" under DR 6-101(A) and as such "is not interchangeable with negligence." *In re Magar*, 335 Or at 320-21 & n 6. A line must therefore be drawn between a course of neglectful conduct on the one hand and acts of ordinary negligence on the other. As this Court has stated:

> "Neglect in the context of DR 6-101(B) is the failure to act or the failure to act diligently. It requires this court to view a lawyer's conduct along a temporal continuum, rather than as discrete, isolated events. To avoid confusion, however, we restate the Bar's burden under DR 6-101(B) as requiring clear and convincing evidence of a course of *neglectful* conduct." *Id.* at 321 (emphasis in original).

For example, this Court noted that

> "[c]onsidering all the foregoing factors together, as well as the record as a whole, the Bar has demonstrated that the accused should have rested his initial theory of the case on a stronger foundation. The Bar, however, has failed to prove that it is highly probable that the accused's legal conclusions or the manner in which he came to them were so unreasonable as to support a determination of either incompetence or neglect." *Id.* at 322.

This Court then went on to consider Magar's conduct in terms of the continuum of his representation of the client:

> "For its part, the Bar points to actions that the accused did not undertake and takes issue with the manner in which the accused carried out some of the tasks that he did undertake. Those arguments are tenable. On balance, however, when those shortcomings are viewed along the continuum of the representation, we disagree with the Bar that this record demonstrates neglect of a legal matter. The accused did not miss deadlines, and the case did not languish. In short, there was no course of neglectful conduct. The accused did not neglect a legal matter in violation of DR 6-101(B)." *Id.* at 323.

The Bar's failure to meet this standard is clear in the Bridge matter. All that can be said is that if Bridge's testimony is believed and Knappenberger's testimony is rejected, he was a

month to six weeks late in informing her about the court of appeals' decision and its consequences. (*See* pp. 11-13 above.) As this Court noted in *In re Magar*, Knappenberger "did not miss deadlines, and the case did not languish. In short, there was no course of neglectful conduct." 335 Or at 323.

There was also no course of neglectful conduct in the Loitz matter. Knappenberger and his office unquestionably lost track of the Court Bonds correspondence for a while, and he did not become consciously aware of either the court of appeals' decision or the related attorney fee petition when they were initially received. (*See* pp. 7-9 above.) On the other hand, the case did not languish, and, when this conduct is viewed on a continuum of the handling of the whole matter, no course of neglectful conduct has been shown.

FIFTH ASSIGNMENT OF ERROR: CONTRARY TO THE TRIAL PANEL'S OPINION AND DEPENDING UPON THE VIOLATIONS FOUND, THE PROPER RANGE OF SANCTIONS IS BETWEEN A REPRIMAND AND A 60-DAY SUSPENSION[14]

"[T]he purpose of a sanction is not to penalize the accused, but to protect the public and the integrity of the profession." *In re Stauffer*, 327 Or at 66. In considering the appropriate sanction in a disciplinary proceeding, this Court first refers to the American Bar Association's Standards for Imposing Lawyer Sanctions (1992) ("ABA Standards"), which provide for consideration of (1) the duty violated, (2) the accused's mental state, (3) the actual or potential injury caused by the accused's conduct and (4) the existence of aggravating or mitigating circumstances. *In re Kluge*, 335 Or at 348. The Court then evaluates the appropriate sanction in light of Oregon case law.

[14] The Trial Panel ordered Knappenberger suspended for one year, with nine months stayed if Knappenberger (1) sought office management procedure counseling and guidance during the three months of active suspension and (2) submitted to psychological screening and counseling. (TPO at 10.)

A. A Reprimand Is the Appropriate Remedy for a Minor Negligent Violation of DR 5-101(A)

The only ethical rule violated was DR 5-101(A) in the Mura case, and the violation was minor. As noted at pp. 13-14 above, Knappenberger fully disclosed his mistake in writing to Mura, and Mura understood exactly what was happening. Knappenberger simply made a good-faith mistake regarding the application of the conflicts rule to this situation, and he therefore did not also recommend that Mura consult independent counsel. (Tr. 40, 113.) Moreover, Knappenberger fully cooperated with the Bar throughout its investigation of all three matters. (TPO at 9.)

The additional aggravating factors asserted by the Bar are not relevant to the Court's determination here. Knappenberger's prior discipline was for matters unrelated to the current Bar complaints and occurred some time ago. *In re Dugger*, 334 Or 602, 625, 54 P3d 595 (2002); *In re Cohen*, 330 Or 489, 8 P3d 953 (2000). In addition, the conduct does not demonstrate any meaningful patterns. *Cf. In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001) (pattern found in willful failure to file tax returns for three years); *In re Davenport*, 334 Or 298, 49 P3d 91 (2002) (no pattern found even though repeated instances of similar conduct were present).

A public reprimand is therefore the appropriate sanction. ABA Standard 4.33 ("Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client."). Oregon cases involving DR 5-101 violations are in accord. *See, e.g., In re Howser*, 329 Or 404, 987 P2d 496 (1999) (public reprimand); *In re Cohen*, 316 Or 657, 853 P2d 286 (1993) (public reprimand); *In re Harrington*, 301 Or 18, 718 P2d 725 (1986) (reprimand by way of supreme court decision).

B. Even if the Bar Prevails on All Claims, the Sanction Should Not Exceed a 60-Day Suspension

Even if this Court holds (and it should not) that additional violations were present, the sanction should not exceed a 30-day or 60-day suspension. Among other things, Knappenberger acted negligently and not with a selfish motive. He also did not make any misrepresentations, and his alleged violations did not materially injure his clients.[15]

Even if all four charges were proved, however, Knappenberger's conduct would be no worse than the conduct at issue in *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for neglecting legal matter when attorney had prior disciplinary offenses, acted with selfish motive and had substantial experience in practice of law); *In re Kissling*, 303 Or 638, 740 P2d 179 (1987) (63-day suspension for intentional failure to carry out contract of employment and making false statement of law or fact); *In re Morrow*, 297 Or 808, 688 P2d 820 (1984) (60-day suspension for neglecting client's case and committing misrepresentation); *In re Fuller*, 284 Or 273, 586 P2d 1111 (1978) (60-day suspension failing to correct client's false impression about status of legal matter); and *In re Dugger*, 299 Or 21, 697 P2d 973 (1985) (63-day suspension for misrepresentation and neglect of legal matter).

C. Psychological Screening, Counseling and Probation Are Inappropriate

The Bar introduced no medical or other expert testimony regarding any psychological or psychiatric problem of Knappenberger. Nevertheless, and based solely on its apparent concern about how hard he has worked in the past, the Trial Panel appears to have determined that Knappenberger suffers from psychological or psychiatric problems that justify screening as well

[15] Although the Bar may assert that the missed filing deadline in the Mura matter cost Mura his chance at postconviction relief, the only charge against Knappenberger in the Mura matter is his failure to meet the full-disclosure requirement. There is no evidence that Mura was injured by that failure. Mura also testified that he would not have consulted independent counsel at the time even if Knappenberger had expressly recommended it. (Tr. 42.)

as extended periods of stayed suspension and probation. (TPO at 9-10.) There was absolutely no evidence establishing a relationship between Knappenberger's work habits, his mental health and the violations at issue, and the Trial Panel therefore erred.

This Court may consider a "lawyer's mental state." ABA Standards 3.01(b) and 9.32(i). When, however, the mental state is not something that an ordinary fact finder can determine (*e.g.*, knowing versus negligent conduct), but rather depends on medical evidence and professional diagnostic skills, the Court cannot make adverse findings, let alone findings by clear and convincing evidence, without expert testimony to support them. *See, e.g., Vandermay*, 328 Or at 655 ("[E]xpert testimony is required if the issues are not within the knowledge of the ordinary lay juror."); *State v. Sanchez-Cruz*, 177 Or App 332, 341, 33 P3d 1037 (2001) (medical diagnosis is scientific evidence that requires expert testimony); *State v. Ogden*, 168 Or App 249, 257, 6 P3d 1110 (2000) (same). Moreover, being a particularly hard worker, as distinct from a merely diligent one, is nowhere to be found among the ABA list of aggravating factors.

Furthermore, due process requires that an attorney be informed of the circumstances of the alleged offense and be allowed to offer evidence in mitigation of any penalty to be imposed. *See, e.g., OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 195, 808 P2d 83 (1991) ("The heart of procedural due process is (1) notice of the charge and (2) an opportunity to be heard."); ABA Standard 3.0(d). The Bar's allegations were not such as to place Knappenberger on notice that his mental health might be in question, and Knappenberger had no reason, before his receipt of the Trial Panel decision, to consider the presentation of evidence on this subject. *Cf. In re Devers*, 328 Or 230, 232-33, 974 P2d 191 (1999) (due process generally requires notice and opportunity to be heard); *The Florida Bar v. Centurion*, 801 So 2d 858, 864 (Fla 2000) (accused

"did not have sufficient notice to allow him to offer testimony in mitigation" of sanction that he undergo mental health evaluation).

II. CONCLUSION

Knappenberger violated DR 5-101(A) in the Mura matter, but the violation was minor. The appropriate sanction is a public reprimand.

Nonetheless, and even if additional violations are found, nothing more than a straight 30-day or 60-day suspension is warranted.

DATED: June 9, 2003.

/

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing **ACCUSED'S OPENING BRIEF** on June 9, 2003 by hand delivering the original and 15 copies thereof to:

State Court Administrator
Records Section
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Salem, OR 97310

I further certify that I served the foregoing **ACCUSED'S OPENING BRIEF** on June 9, 2003, by hand delivering two correct copies thereof to:

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