IN THE SUPREME COURT OF THE STATE OF OREGON

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

ACCUSED'S REPLY BRIEF

Review of the Decision of the Oregon State Bar Trial Panel

PETER R. JARVIS, OSB No. 76186
HINSHAW & CULBERTSON
101 SW Main Street, Suite 915
Portland, OR 97204
(503) 243-3243

LETA E. GORMAN, OSB No. 98401
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
(503) 224-3380

Attorneys for Accused

STEPHEN F. ENGLISH, OSB No. 73084
BULLIVANT HOUSER BAILEY PC
888 SW Fifth Avenue, Suite 300
Portland, OR 97204
(503) 499-4411

STACY J. HANKIN, OSB No. 86202
Oregon State Bar
5200 SW Meadows Road
PO Box 1689
Lake Oswego, OR 97035
(503) 620-0222

Attorneys for Oregon State Bar

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REPLY TO THE BAR'S STATEMENT OF FACTS

Allan F. Knappenberger stands by the Summary of Facts in his Opening Brief, and his failure herein to contradict any particular assertion of the Oregon State Bar (the "Bar") should not be understood as an agreement with such assertion. Knappenberger also submits that the Bar's failure to challenge critical factual assertions is highly significant.

A. The Mura Matter.

The Bar asserts that Mura never received a copy of Knappenberger's response to the State of Oregon's (the "State") motion to dismiss, which response contained Knappenberger's clearest and most extended admission of fault. In support of its position, the Bar asserts that Mura never testified that he received a copy and asserts that Knappenberger's billing records do not show a separate time entry for mailing the response to Mura. (Oregon State Bar's Respondent's Brief ("Bar Br.") 4.) The Bar, which has the burden of proof by clear and convincing evidence,[1] is incorrect:

- Knappenberger testified that he sent the response to Mura. (Tr. 112.)
- Mura did not deny, because he was never asked, that he received the response. Furthermore, he testified that he understood his lawyer's error. (Tr. 39.)
- The lack of a specific reference in a time sheet entry to the mailing of a copy of a filed pleading to a client does not mean that the pleading was not mailed. This Court can also take judicial notice of the fact that a notation such as "with a copy to client" does not regularly appear after all time entries in all attorney billings.[2]

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[1] *See, e.g., In re Gildea*, 325 Or 281, 295, 936 P2d 975 (1997).

[2] OEC 201(b)(1), (d). In addition, Knappenberger testified during a colloquy with Stephen English that he has not always noted and billed for all of his work. (Tr. 197-202.)

In short, the record reflects that Knappenberger kept Mura informed about his mistake and about its potential consequences.

The Bar also asserts that Knappenberger's February 1, 1994 conversation with Mura included a deliberate attempt to cause Mura to drop the case so that Knappenberger could avoid potential malpractice liability. (Bar Br. 4, 8-9.) This is speculation, not proof by clear and convincing evidence. As is stated in Accused's Opening Brief ("Opening Br.") at 4 n 1:

> "When Knappenberger spoke to Mura on February 1, * * * [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."

Without abandoning these and other differences between his and the Bar's recounting of events, Knappenberger wishes to emphasize here that the Bar has not taken issue with his assertions that Mura would not have hired other counsel even if Knappenberger had expressly recommended that Mura do so and that, at the time, Knappenberger was unaware of the duty to make disclosure and obtain client consent in these circumstances. (Opening Br. 5-6, 14.)

B. The Loitz Matter.

The Bar contends that Knappenberger neglected Loitz's legal affairs from September 22, 1999 through January 27, 2000. (Bar Br. 5.)[3] Knappenberger notes two things:

- In the ordinary course, there is typically little or nothing for a lawyer to do after a case has been briefed and argued on appeal and before it is decided. There is, for example, no testimony in the record showing that lawyers regularly check appellate court dockets of

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[3] The legal significance of a single period of inaction during a long matter that was otherwise not neglected is discussed in a subsequent section of this brief.

cases that have been pending for only a few months, to see if their filing systems may have missed a decision.

- Knappenberger did not do nothing. On November 17, 1999, for example, Knappenberger reviewed a memorandum from his assistant regarding the Loitz bond and dictated a letter to Loitz regarding the same. (Tr. 138; Exs. 28, 36.) On December 13, 1999, Knappenberger's assistant spoke with Loitz regarding the bond, which was Loitz's responsibility to pay if it was to be paid. (Tr. 70, 72, 171.)

Without abandoning these and other differences between his and the Bar's recounting of events, Knappenberger wishes to emphasize that the Bar has not taken issue with his assertions that his handling of proceedings at or before trial in all respects and his handling of the appeal in all respects, other than notifying Loitz about the bond matter (as to which Knappenberger drafted a letter that was not sent) and about the decision (of which Knappenberger himself was unaware), were without fault. (Opening Br. 7.)

C. The Bridge Matter.

Contrary to the Bar's assertion, Knappenberger was not "incensed by the Court of Appeals' decision." (Bar Br. 12.) Page 181 of the transcript, the page cited by the Bar, reflects Knappenberger's testimony that he was "astounded," which is something altogether different. The Bar's subsequent assertion, citing the same transcript page for authority, that the reason Knappenberger was "incensed at the Court of Appeals' decision [was] most likely because it faulted him for failing to properly serve the notice of appeal" is again speculation rather than proof.

Similarly, the Bar's assertion that Bridge tried but was unable to initiate contact with Knappenberger in the weeks after April 27, 2000, the date she learned of the Court of

Appeals' decision from her friend, is not even supported by Bridge's own testimony. (Bar Br. 14.)[4] Bridge testified first that she had "no way of remembering" if she had contacted Knappenberger before he contacted her on May 22, 2000. (Tr. 92.) Although she subsequently testified that she "must have" contacted Knappenberger (*id.*), her contemporaneous notes, which she attempted to make complete, do not reflect any attempt to contact Knappenberger between April 27 and May 22, 2000. After reviewing those notes, Bridge testified that she did not know whether she had contacted Knappenberger between April 27 and May 22, 2000. (Tr. 102-03 ("If it's not [in the logbook] I don't know * * *. It's a long time ago and my memory is not great.").)[5]

Without abandoning these and other differences between his and the Bar's recounting of events, Knappenberger wishes to emphasize that the Bar has not taken issue with the following assertions:

- Knappenberger's handling of the proceedings at or before trial in all respects and his handling of the appeal in all respects, other than the service issue, were without fault. (Opening Br. 10.)
- At the time, Knappenberger thought it extremely unlikely that the Court of Appeals would hold that his service of the notice of appeal upon the opposing party's trial counsel, who was also the opposing party's counsel on appeal, was insufficient. (Opening Br. 10-11.)

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[4] (*See also* Tr. 102 (Bridge was consistently able to make contact with Knappenberger or his assistant when she wished to do so).)

[5] In addition, Knappenberger testified that he affirmatively initiated contact with Bridge to discuss the Court of Appeals' decision and would have provided her with documents she did not then have. (Tr. 150-52; Ex. 57.)

- There is no evidence in the record on which to base a conclusion that Knappenberger's assessment of the matter at the time was unreasonable or that his handling of the appellate service issue violated any potentially applicable standard of care. (Opening Br. 11, 15.)
- Knappenberger's handling of the appellate service issue was harmless error. (*Id.*)
- When she wanted or needed to reach Mr. Knappenberger's office, Bridge was always able to do so. (Opening Br. 12.)
- Although Bridge was aware (through other means) of the matters that Knappenberger ostensibly did not timely disclose to her, these matters apparently did not cause her enough concern at the time for her to ask him for an explanation. (*Id.*)
- At the time, Knappenberger was unaware that the Bar would require a conflicts waiver in a situation such as this. (Tr. 197.)

REPLY TO THE BAR'S LEGAL ANALYSIS

A. The Mura Matter.

The parties agree that Knappenberger violated DR 5-101(A) but disagree about the extent of the violation. Knappenberger submits that the record reflects that he kept Mura aware of critical developments and that Mura understood his communications and the effect that Knappenberger's error could or would have on the case. (Opening Br. 5, 13.) Knappenberger concedes, however, that he did not send a conflicts waiver letter as such and that he did not recommend that Mura consult other counsel before deciding whether to proceed with Knappenberger. And although ignorance is not an excuse here, Knappenberger has asserted, and the Bar has not denied, that the reason he did not prepare a conflicts waiver letter was that he was unaware that he had a duty to provide one.

Particularly in light of the DR 5-101(A) issue in the Loitz matter, a further point about personal or business conflicts under DR 5-101(A) is appropriate to note here. DR 5-101(A) does not require that a lawyer notify a client of all actual or potential errors that a lawyer may make. In other words, it is not a general client communications rule such as proposed Oregon RPC 1.4(a)(3). By its express terms, DR 5-101(A)(1) requires disclosure only if and when "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." At the moment, for example, when Knappenberger informed the trial court (in response to the State's motion) that the error was entirely his fault and that it therefore should not be visited upon his client, he was taking the only course available to him or his client, and a DR 5-101(A) conflict therefore did not exist. In the Mura matter, such a conflict existed only at the point when there were reasonable choices to be made and the decision between those choices could reasonably be affected by Knappenberger's mistake.

B. The Loitz Matter.

The Bar's analysis of the Loitz neglect claim effectively ignores the fact that *In re Magar*, 335 Or 306, 321, 66 P3d 1014 (2003), changed the law under DR 6-101(B) and expressly held that what was required was not a course of negligent conduct, but proof by "clear and convincing evidence of a course of *neglectful* conduct." (Emphasis in original.) The Bar also effectively ignores the express holding in *Magar* that the Bar must "view a lawyer's conduct along a temporal continuum, rather than as discrete, isolated events." 335 Or at 321. These failures in the Bar's analysis, plus the factual differences between the cases cited by the Bar and the facts of this matter, are fatal to the Bar's neglect claim.

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For example, the Bar cites *In re Meyer (II)*, 328 Or 220, 970 P2d 647 (1999), for the proposition that a DR 6-101(B) violation can exist even "where the time period involved is relatively short." (Bar Br. 10.) As the Bar goes on to note, however, the lawyer in that case "took no constructive action to advance or protect his client's position." (*Id.*) The wholesale failure of representation in *Meyer* is vastly different from the well-tried and well-appealed representation here. 328 Or at 225 (this Court characterized *In re Thies*, 305 Or 104, 750 P2d 490 (1988), as involving lawyer who, after promising to perform specific tasks, "did nothing to accomplish those tasks, other than to give his client false assurances over the telephone").

Similarly, this Court characterized *In re Purvis*, 308 Or 451, 457-58, 781 P2d 850 (1989), as involving a lawyer who, after being "paid a $100 retainer to file a dissolution decree modification[1] * * *, proceeded to do absolutely nothing on the case" in one matter and who failed to either file a bankruptcy petition or return fees and documents in another matter.

In other words, the case law that the Bar deems most applicable, even before the change effected by *Magar*, involved far more gross and persistent failures, far less positive work by the accused attorneys, and, in many cases, affirmative misrepresentations by the accused attorneys about what they were and were not doing. *See also In re Recker*, 309 Or 633, 789 P2d 663 (1990) (involving failure to take virtually any steps on range of matters); *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997) (in which, among other things, "[t]he accused never contacted [his client] about the appeal" and "the accused acted knowingly in failing to communicate with [his client] regarding his appeal"; in fact, accused lawyer never responded to Bar and was defaulted at hearing); *In re McKee*, 316 Or 114, 127, 849 P2d 509 (1993) (involving not only clerical error but also, among other things, initial failure to contact witnesses before first trial, failure to determine whether witnesses would be available before second trial, and failure "throughout the

entire course of his representation * * * to keep [his client] informed of the progress of the case").

C. The Bridge Matter.

The Bar's analysis of the Bridge neglect claim adds only one citation to its analysis of the Loitz neglect claims. At page 13 of its brief, the Bar cites *In re Dixson*, 305 Or 83, 88, 750 P2d 157 (1988), for the proposition that "[a] lawyer violates DR 6-101(B) by failing to timely file a client's claim" and that Knappenberger therefore "violated DR 6-101(B) when he failed to properly serve the notice of appeal." *Dixson* involved far more than a "mere" failure to serve the correct party with a single document, and such a construction of *Dixson* would not survive *Magar*'s requirement of a course of neglectful conduct.[6] Indeed, there is no evidence that Knappenberger was negligent in not figuring out in advance what the Court of Appeals would hold or that Knappenberger failed to meet any standard of conduct or standard of care. Even if negligent conduct violated DR 6-101(B) (and *Magar* says it does not), nonnegligent conduct cannot do so. The remaining portion of the Bar's Bridge neglect claim fares no better because, among other things, it ignores the requirement in *Magar* that any arguably improper conduct be viewed on a continuum and in light of Knappenberger's handling of the matter, and communications with his client, as a whole.

This leaves the Bar's assertion of a DR 5-101(A) violation in the Loitz matter. Knappenberger submits that as a matter of law, there are two primary dispositive questions:

- Is DR 5-101(A) triggered whenever opposing counsel files a motion that could have adverse effects if granted, even though the lawyer has not acted negligently or violated

[6] It would also make no sense here in light of the Bar's failure to charge that what turned out to be a mistake in service was a failure of competent representation pursuant to DR 6-101(A).

any applicable standard of conduct or care, has no particular reason to believe that the motion will be granted, and reasonably thinks it highly unlikely (in light of the particular circumstances of the motion and past practice by the lawyer and others) that the motion will be granted?

- Is DR 5-101(A) triggered when a court rules in a way that transforms an attorney's prior nonnegligent error (or even a negligent error, if one did exist here) into legally harmless error?

Neither of these questions can or should be answered in the affirmative, yet that is exactly what a ruling in the Bar's favor here would require. On the facts of this case, there was never a point in time at which Knappenberger was, objectively speaking, at a sufficiently reasonable risk of civil liability to Bridge to create a DR 5-101(A) violation. Moreover, members of the public would hardly be protected by requiring their lawyers to send them letters announcing the need for conflict waivers in the event of any and all nonnegligent or legally harmless errors. It is far more likely that, when presented with such letters, the public would conclude that lawyers had collectively lost whatever sense we had left.

REPLY TO THE BAR'S SANCTIONS ANALYSIS

The parties agree that probation, psychological screening, and counseling are not appropriate in this case. (Opening Br. 25-27; Bar Br. 14-21.) The parties also agree that the purpose of attorney discipline is to protect the public. (Opening Br. 18; Bar Br. 21.) In fact, a good portion of the disagreement on sanctions is the result of different starting points in terms of the number of violations that should be found and the seriousness of those violations.

If this Court agrees with Knappenberger that the only violation established by clear and convincing evidence is the Mura DR 5-101(A) violation, then nothing more than a reprimand is

required. Among other things, Mr. Knappenberger is now aware of the Bar's position with regard to lawyer mistakes and DR 5-101(A) conflicts in a way that he was not before, and this makes it highly unlikely that he will make a similar mistake in the future.

Even if both DR 5-101(A) and DR 6-101(B) violations are found, however, nothing more than a 60-day suspension would be appropriate. (*See* Opening Br. 20 (and sources cited therein).) Although there may be no such thing as a "good" violation of the Disciplinary Rules, each of the alleged violations here is on the relatively minor end of the scale, none involve selfish motives, and none involve purposeful, as distinct from negligent, mistakes.

CONCLUSION

This Court should dismiss all of the charges except for the DR 5-101(A) charge in the Mura matter and should order a public reprimand as the only sanction. Even if additional violations are found, however, the sanction should not exceed a 60-day suspension.

DATED: October 23, 2003.

Peter R. Jarvis, OSB No. 76186
HINSHAW & CULBERTSON
101 SW Main Street, Suite 915
Portland, OR 97204
(503) 243-3243

Lata E. Gormah, OSB No. 98401
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
(503) 224-3380
Attorneys for Accused

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing **ACCUSED'S REPLY BRIEF** on October 23, 2003, by hand delivering the original and 15 copies thereof to:

State Court Administrator
Records Section
1163 State Street
Salem, OR 97310

I further certify that I served the foregoing **ACCUSED'S REPLY BRIEF** on October 23, 2003, by messenger, two correct copies thereof to:

Stephen F. English
Bullivant Houser Bailey PC
300 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204

Stacy J. Hankin
Oregon State Bar
5200 SW Meadows Road
PO Box 1689
Lake Oswego, OR 97035

Attorneys for Oregon State Bar

DATED: October 23, 2003.

STOEL RIVES LLP

Lora E. Gorman, OSB No. 98401

STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
(503) 224-3380

Attorneys for Accused