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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

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| In re: | |
| Complaint as to the Conduct of | OSB Case No. 11-17 |
| STEVEN M. McCARTHY, | SC S060882 |
| Accused. | |

# OREGON STATE BAR'S ANSWERING BRIEF

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June 2013

## TABLE OF CONTENTS

# TABLE OF CASES AND OTHER AUTHORITIES

## I. Statutory Provisions



## II. Rules of Procedure



## III. Disciplinary Rules



## IV. Oregon Rules of Professional Conduct



## V. Case Law

## VI. Secondary Authority



## VII. Other

## INDEX OF EXCERPT OF RECORD

## INDEX OF APPENDIX

# I. STATEMENT OF THE CASE

The Bar supplements Steven M. McCarthy's statements of Introduction and Jurisdiction as follows:

## A. Nature of the Proceeding.

In this lawyer disciplinary proceeding, the Oregon State Bar ("Bar") filed a Formal Complaint against Steven M. McCarthy ("McCarthy") on April 7, 2011, alleging the following misconduct:

1. Failure to provide competent representation, in violation of RPC 1.1;

2. Failure to comply with reasonable requests for information and to keep his client reasonably informed about the status of the matter, in violation of RPC 1.4(a);

3. Failure to explain the matter to the extent reasonably necessary to allow his client to make informed decisions, in violation of RPC 1.4(b);

4. Failure to safeguard client funds in violation of RPC 1.15-1(a) and failure to deposit and maintain client funds in a trust account, in violation of former RPC 1.15-1(c).[1] ER 1-7.

McCarthy filed his Answer on May 18, 2011. ER 8-12. A trial panel heard the matter on July 25 – 26, 2012. In its opinion filed September 26, 2012, the panel found that McCarthy violated RPC 1.1, RPC 1.4(a), RPC 1.4(b) and former RPC 1.15-1(c). The panel did not address the alleged violation of RPC 1.15-1(a). The panel imposed a 90-day suspension. ER 13-37.

McCarthy timely sought review of the trial panel decision and on April 8, 2013, filed his Petition for Review and Opening Brief.

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[1] RPC 1.15-1(c) was amended effective December 1, 2010.

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

McCarthy asserts that the trial panel erred in finding him guilty of the charges alleged in the Formal Complaint.

On review, the Bar asks the court to:

1. Adopt the panel's findings and conclusions on the violations found;

2. Find that McCarthy also violated RPC 1.15-1(a); and

3. Adopt the 90-day suspension imposed by the panel.

## C. Statutory Basis for Appellate Jurisdiction.

This matter comes before the Supreme Court pursuant to ORS 9.536(1), BR 10.1 and BR 10.3. This court should consider the matter *de novo* on the record. ORS 9.536(2); BR 10.6.

## D. Questions Presented on Review.

The Bar submits that McCarthy's Issues and Arguments could be framed as Questions Presented, with the Bar's Responses to each, as follows:

**1. <u>Does the record support the panel's findings of fact and conclusion that McCarthy violated RPC 1.1?</u>**

Response: The panel correctly found that McCarthy violated RPC 1.1.

**2. <u>Does the record support the panel's findings of fact and conclusion that McCarthy violated RPC 1.4(a) and RPC 1.4(b)?</u>**

Response: The panel correctly found that McCarthy violated RPC 1.4(a) and RPC 1.4(b).

3. **Does the record support the panel's findings of fact and conclusion that McCarthy failed to properly deposit and maintain client funds in a lawyer trust account, in violation of former RPC 1.15-1(c)?**

Response: The trial panel correctly found that McCarthy violated former RPC 1.15-1(c).

4. **Was the 90-day suspension imposed by the panel warranted?**

Response: The 90-day suspension is warranted by the violations found and is supported by the ABA Standards and Oregon case law.

5. **Does the record support a finding that McCarthy violated RPC 1.15-1(a)?**

Response: Although the trial panel opinion does not address the Bar's RPC 1.15-1(a) charge, the record provides clear and convincing evidence that McCarthy violated this rule by failing to deposit an advance fee into his trust account on receipt. Pursuant to BR 10.5(c), the Bar asks the court to modify the trial panel decision accordingly.

## II. SUMMARY OF ARGUMENTS

McCarthy undertook to represent a client without researching applicable law or understanding the risks involved in the course of action he took on her behalf. As a result, his client was exposed to significant potential liability for deficiency judgments on two trust deeds that had previously been subject to non-judicial foreclosure. When he informed her of this predicament, his client asked for an explanation and further advice, but he did not respond fully to her requests and eventually decided not to communicate further with her while she contemplated settlement of some of her claims. He failed to keep her informed of the subsequent dismissals of her claims

McCarthy's client paid him a non-refundable retainer at the outset of the representation. Although the written fee agreement did not designate the fee as "earned upon receipt, he did not deposit the retainer into trust but treated it as his own property.

## III. STATEMENT OF FACTS

With limited supplementation, the following statement reflects facts found by the trial panel. TP Op. at 3-12; ER 13-37.

In May 2008, McCarthy was admitted to the practice of law in Oregon. Prior to that time, he had lived in California and practiced law in that state for 30 years. Tr. 289.

In 2007, Bend resident Dottie Robertson ("Robertson") invested in real estate development through Don Loyd and Kevin Loyd and their company, Aspen Tree Homes ("Aspen"). She invested $5,000 each (a total of $10,000) toward the building of two houses near Bend. Tr. 14-17. The homes were to be built on lots known as "Turquoise" and "O'Connor;" Robertson thought that she might move into one, but fully intended to sell the other for a profit. Tr. 168. Robertson signed two promissory notes (for $346,000 and $308,000) and construction note riders with West Coast Bank ("WCB"), Aspen's preferred construction lender. The notes and riders were secured by trust deeds on each of the two properties to be developed. Ex. 32. Don Loyd ("Loyd") drew on the construction loans without her consent but did not complete the construction. Tr. 18-19. Loyd also failed to pay material suppliers and other vendors involved in the construction, leaving Robertson and the other investors facing foreclosure and huge debts. Tr. 17-19. When the promissory notes Robertson signed came due and were unpaid, WCB commenced foreclosure proceedings in late June 2008. Ex. 11; Tr. 61.

At least one of the trust deeds Robertson gave WCB was for investment purposes and thus may not have been considered a "residential trust deed" as defined in ORS 86.705(3). Had WCB elected to foreclose by judicial procedure, it could have obtained deficiency judgments against her if the lots were not sufficient to pay the loan balances, interest, attorney fees and costs. ORS 86.770(3). Ex. 3, § 2.8; Tr. 62. The potential deficiency amounts on the two trust deeds exceeded $500,000. Ex. 32, p. 23-27. Despite the availability of that remedy, WCB had elected to foreclose the trust deeds through non-judicial foreclosure sale, thereby waiving its claim to a deficiency judgment. Tr. 61-62. At the time she retained McCarthy, Robertson was therefore not exposed to the risk of a deficiency judgment. ORS 86.770(2). Ex. 3, § 2.8.

Believing that WCB had wrongfully disbursed funds to and had colluded with Loyd, a property appraiser and a title company to defraud her, Robertson contacted "Strikeback," an organization purporting to assist consumers defend against mortgage foreclosures by establishing violations of the federal Truth in Lending Act (15 USC § 1601 *et seq*) ("TILA") and Real Estate Settlement Procedures Act (12 USC § 2601 *et seq*) ("RESPA"). Tr. 19-22. Strikeback referred Robertson to a California attorney named Lyndsey Heller ("Heller"), who referred Robertson to McCarthy. Tr. 22-24, 293-94.

On July 9, 2008, McCarthy met at Robertson's home with Robertson and several other investors who had lost money through Loyd and Aspen. Tr. 24. At this meeting, Robertson hired McCarthy pursuant to a Professional Services Agreement McCarthy prepared. Ex. 1; Tr. 28. The agreement provided for a $3,000 "non-refundable retainer for attorney fees," which Robertson paid that day. Tr. 28. The

agreement did not state when the minimum fee would be regarded as earned or that the minimum fee was "earned upon receipt." The agreement provided that McCarthy would be paid a contingency fee for any recovery against any defendants. At the time the agreement was signed, McCarthy did not know that he was required to state, in writing, that a non-refundable fee paid as a retainer was "earned upon receipt" if he intended to treat the funds as fully earned when received. Tr. 326. Robertson expected to receive a monthly accounting for expenditures from the retainer. Tr. 218-21.

On August 12, 2008, McCarthy filed a complaint in Deschutes County Circuit Court on behalf of Robertson against WCB, Loyd, Kevin Loyd, Aspen, Mortgage Professionals of Central Oregon, Inc., First American Title Company of Oregon, Mid-Columbia Appraisal Service and certain employees of the later three entities, including Heather Smailys ("*Robertson v. WCB et al*"). Ex. 4. The complaint alleged violations of TILA and RESPA, as well as claims of fraud, deceit, misrepresentation, breach of contract, intentional interference with contract and prospective advantage, conversion, restitution and constructive trust, unfair trade practices and negligence. Ex. 4. The complaint asserted claims against several additional individual defendants in the text who were not named in its caption. Tr. 253, 378; Ex 26. McCarthy filed substantially similar complaints against the same defendants for three other clients he had met at Robertson's home (Larisa Giacomini, Robert Stull, and John Harrold). Exs. 26–29. McCarthy believed that it was essential to try the cases in state court. Tr. 371.

When he filed the complaints, McCarthy had no prior experience with the Oregon Trust Deed Act or in analyzing or litigating TILA or

RESPA cases. Tr. 308-09, 313, 348, 388. He did not research TILA or RESPA statutes or rules before filing the complaints. Instead, he relied solely on sample pleadings supplied by Strikeback. Tr. 305-07. He believed that Strikeback would provide backup legal counsel to him as needed as the legal action progressed. Tr. 304. However, he did not associate Heller or any other TILA specialist on the case and had already severed his relationship with Strikeback before filing the complaint. Tr. 334-37, 401.

Before filing the actions, McCarthy did not know and thus did not advise Robertson or the other clients that suing WCB on the loans created the risk that WCB would counterclaim for judicial foreclosures and deficiency judgments against them. Tr. 34, 55, 56, 153, 156-58, 371, 373-74. McCarthy also did not know and did not inform them that, by including claims for relief under TILA and RESPA, he had established a federal question basis for the cases to be removed to federal court. Tr. 397.

On September 9, 2008, Robertson sent an email to McCarthy asking for status of the case, including service on the defendants. Ex. 6. When she received no reply, she sent another email on October 20, 2008. Ex. 8. In reply, McCarthy stated that the sheriff's office had the complaint and that he had been contacted by WCB's attorney about the case. Ex. 9.

WCB had independently learned of the lawsuit and obtained a copy of the *Robertson v. WCB et al* complaint in October 2008. Even though the complaint had not been served, WCB's counsel, Kerry J. Shepherd ("Shepherd") filed notices to remove Robertson's and the other three civil actions McCarthy had filed to U.S. District Court on

November 7, 2008. Ex. 15. At that time, McCarthy had not served any defendants. Exs. 15, 24.

Shepherd informed McCarthy that the bank intended to assert a counterclaim against Robertson for judicial foreclosure and deficiency judgment, a difficulty McCarthy had not foreseen. Ex. 20; Tr. 34, 54-56. On February 5, 2009, in response to an inquiry by Robertson regarding the status of her case, McCarthy informed her for the first time that filing *Robertson v. WCB et al* had exposed her to the possibility of a deficiency judgment and that she might be required to accept a settlement wherein WCB would take deeds in lieu of foreclosure for the two properties. Robertson was shocked by this news and, in her email response, expressed confusion and asked to have a conversation with McCarthy. Ex. 21; Tr. 55. McCarthy replied that she should talk to her accountant about tax implications but did not explain the reasons for these developments. Tr. 58.

One month later, on March 9, 2009, McCarthy filed a joint status report with the federal court acknowledging that no defendant had been served and that he had undertaken no discovery. Ex. 24. McCarthy did not send a copy of the joint status report to Robertson or otherwise inform her of this lack of progress. Tr. 119, 408. Later that month, McCarthy sent proposed waivers of service to some of the defendants named in all four lawsuits relating to the Loyd investments. Exs. 25-29, 31. Shepherd promptly waived service for WCB. Tr. 67-69; Ex. 25.

In early April 2009, McCarthy received a letter from Terrence O'Sullivan ("O'Sullivan"), counsel for defendants Mortgage Professionals of Central Oregon ("MPCO") and two of its employees, identifying several defects in each complaint McCarthy had filed but agreeing to waive service on each defendant if the defects were corrected. Ex. 26;

Tr. 254. On April 13, 2009, McCarthy received a similar letter from Brian MacRitchie ("MacRitchie"), attorney for defendants Mid-Columbia Appraisal Service ("MCAS") and Roger Fadness. Ex. 27. On April 24, 2009, McCarthy received a letter from attorney Kyle Schmid ("Schmid"), counsel for defendant Heather Smailys ("Smailys"), pointing out defects in the timeliness and form of the proposed waiver. Ex. 28. The defendants refused to waive service in three of the four legal cases unless McCarthy corrected the defects. McCarthy did not respond to the various defendants' counsel or inform Robertson of the developments. Tr. 120-21, 409-11, 413-14, 417.

For several months following their last contact in February 2009, Robertson attempted unsuccessfully to contact McCarthy by telephone and email. When McCarthy did not answer his phone, Robertson frequently could not leave a message because his message box was full. Tr. 53, 133, 136, 138, 203. McCarthy did not initiate any communication with Robertson during these months, until he sent her an email on June 2, 2009, which consisted entirely of the following sentence: "Apparently there is a tree ...". Ex. 35; Tr. 125-27. As of this date, WCB had already filed its answer and counterclaims for judicial foreclosure and deficiency judgments against Robertson. Ex. 32. Robertson immediately replied to McCarthy's cryptic email, requesting information about her case. Ex. 36; Tr. 126. Three days later, McCarthy sent Robertson an email stating to her that WCB intended to counterclaim for judicial foreclosure and deficiency judgment and advised that she drop her claims against WCB and grant the bank deeds in lieu of foreclosure. Ex. 37. This June 5, 2009 email also suggested that Robertson consult a tax professional regarding the tax ramifications of granting the deed in lieu. Robertson replied that day requesting

instructions on the deed in lieu form. Ex. 38; Tr. 129-30. McCarthy did not respond to her request because "she knew what to do." Tr. 431.

Also on June 5, 2009, Robertson sent a complaint to the Bar regarding McCarthy's lack of response to her inquiries. Ex. 61. McCarthy was notified of Robertson's complaint by letter dated June 15, 2009 (Ex. 62), but did not acknowledge Robertson's June 5 email until June 26, 2009. Ex. 39. His response to Robertson largely repeated verbatim his June 5, 2009 email, including his assurance that if Robertson settled with WCB, McCarthy would still pursue her claims against the other defendants. Ex. 37.

The next day, McCarthy received a letter from Anthony Kuchulis ("Kuchulis"), new counsel for defendants MCAS and Fadness, confirming that McCarthy had agreed on June 16, 2009, to dismiss Robert Stull's action against those defendants and informing McCarthy that he would move for summary judgment against Robertson's complaint if McCarthy did not confirm the intent to dismiss within 10 days. Ex. 40; Tr. 272-73. McCarthy did not respond to this letter or Kuchulis's multiple attempts to contact him throughout the following months, or inform Robertson of these communications from defense counsel. Tr. 132, 140, 274, 436, 440; Ex. 45. McCarthy also did not inform Robertson when he dismissed her claims against MCAS and Fadness in August 2009. Exs. 49, 52; Tr. 140, 143-44. Robertson learned of the dismissal from the Bar. Tr. 143-44.

In fact, McCarthy had intentionally ceased all communications with Robertson in late June or early July 2009 because he believed that she had left him a hostile phone message and considered her to be his "adversary." Tr. 515; Ex. 70. Nevertheless, he continued to represent Robertson in the action. Tr. 437-38, 515.

Having received no communications from McCarthy since early July, Robertson eventually signed the deeds in lieu of foreclosure and settlement agreement with WCB in October 2009. Ex. 55; Tr. 71-72, 130, 145-48. The settlement terms included WCB's release of any deficiency judgment against Robertson. Shepherd informed McCarthy of the resolution. Tr. 439.

During the course of the representation, McCarthy made some effort to locate Loyd for service, following up on information he had received from Robertson. Tr. 391, 451, 467. When these efforts failed, McCarthy did not undertake to serve Loyd or Kevin Loyd by publication, partly because he did not wish to incur additional fees and partly because he believed he could not reasonably assure notice by that method. Tr. 509-10. He also believed that the value of the case declined without Loyd. Tr. 467. McCarthy did not subpoena any persons he thought might be able to help him locate Loyd. Tr. 515.

On April 28, 2010, McCarthy moved to dismiss *Robertson v. WCB et al* in its entirety because he had been unable to accomplish service on any remaining defendant. Tr. 514. He did not inform Robertson. Tr. 513.

## IV. ARGUMENTS

### A. McCarthy failed to provide competent representation to Robertson.

RPC 1.1 obligates lawyers to provide their clients competent representation, which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1. In evaluating whether an attorney has provided competent representation, this court has repeatedly returned to its analysis in *In re*

*Gastineau,* 317 Or 545, 857 P2d 136 (1993) (analyzing former DR 6-101(A), the predecessor to RPC 1.1).

> The question whether a lawyer has competently represented a client is, of course, a fact-specific inquiry. A review of this court's cases shows that incompetence often is found where there is a lack of basic knowledge or preparation, or a combination of those factors. See, e.g., *In re Spies,* 316 Or 530, 534, 852 P2d 831 (1993) (accused found incompetent for representing a client "in a matter outside her area of expertise without acquiring adequate knowledge or skill"); *In re Odman,* 297 Or 744, 750, 687 P2d 153 (1984) (accused found incompetent where facts showed improper and late filings of estate documents; "accused did not know basic steps in administering and closing decedent's insolvent estate"); *In re Chambers,* 292 Or 670, 678, 642 P2d 286 (1982) (accused guilty of incompetent representation where record showed accused "tried the criminal case 'by the seat of his pants'").
>
> In contrast, lawyers have been found not guilty of providing incompetent representation where the lawyers showed experience and professional ability to perform the work, *In re Walker,* 293 Or 297, 647 P2d 468 (1982), or where the Bar failed to prove that a position taken by the lawyer was "advanced in pretence or bad faith, or in culpable ignorance," *In re Rudie,* 290 Or 471, 622 P2d 1098 (1981). In sum, competence or incompetence can thus be measured on a case-by-case basis using the standards stated in DR 6-101(A) itself.

*In re Gastineau, supra,* 317 Or at 553-54.

The standard to determine whether an attorney has provided competent representation is an objective one; an accused attorney's mental state is not relevant. *In re Bettis,* 342 Or 232, 237, 149 P3d 1194 (2006). Furthermore, whether an attorney may have neglected a particular task is not the focus. Instead, the issue is whether an attorney's conduct in the broader context of the representation reflects the requisite knowledge, skill, thoroughness and preparation. *In re Obert,* 352 Or 231, 250, 282 P3d 825 (2012), citing *In re Magar,* 335 Or 306, 320, 66 P3d 1014 (2003).

McCarthy had practiced law in California since 1979 before he was admitted in Oregon in May 2008. Tr. 289, 292-93. His California practice largely focused on plaintiff tort litigation. Tr. 292. Hoping to build up a practice in Oregon, McCarthy responded to a Strikeback's online solicitation for attorneys to represent consumers facing foreclosure. Answer ¶ 6A (ER 10); Tr. 293-94; Ex. 63, page 2.

Prior to undertaking representation of Robertson and the other three clients, McCarthy had briefly advised only one client on a real estate foreclosure in California. It was not similar to the Robertson matter. Tr. 297-99. McCarthy had no prior experience with claims under TILA (15 USC § 1601, *et seq*) or RESPA (12 USC § 2601, et seq). Ex. 87 at 101; Tr. 308. McCarthy had no prior experience in Oregon real estate foreclosure and no experience with the Oregon Unlawful Trade Practices Act. Tr. 312-13, 419-20.

At the time McCarthy met with Robertson and other investors at Robertson's home on or about July 9, 2008, WCB had already initiated non-judicial foreclosures on the Turquoise and O'Connor properties. Robertson's objective in hiring an attorney was to obtain relief from the construction debts Loyd had incurred, even though she knew that she would lose the Turquoise and O'Connor lots in which she had invested $5,000 each. Tr. 57.

McCarthy believed that he could prove fraud against Loyd and Aspen, at least by default, as long as he could serve them. Tr. 338-41. However, he was aware that Loyd had already fled the jurisdiction and that his whereabouts were unknown. Tr. 318. He did not try to ascertain whether Loyd or Aspen had any available bond, insurance or assets that might make the costs of pursuing a lawsuit worthwhile. Tr. 345. McCarthy believed that if he could establish fraud by Loyd or Aspen,

Robertson's obligations to WCB would be voided. Tr. 338, 344; Ex. 87 at 82-85, 90-91. McCarthy failed to conduct sufficient research or apply sufficient legal knowledge to understand that the non-judicial foreclosure WCB had already commenced would have the same effect, even for trust deeds on property Robertson did not intend to make her principal residence. ORS 87.770(2).

McCarthy knew that Robertson had borrowed money from WCB to construct at least one of the houses solely for investment purposes and that neither trust deed in foreclosure encumbered Robertson's residence. However, he acted on the erroneously-held belief that deficiency judgments are not allowed on any residential real estate in Oregon. Ex. 77, item 2; Tr. 440-41. He took no care to verify whether that was correct and failed to conduct research to inform himself of the law in this area new to him. Had McCarthy reviewed basic CLE materials about foreclosure such as *Foreclosing Security Interests* § 2.8 (OSB CLE 1997 & Supp 2005) or to read ORS 86.770, he would have learned that deficiency judgments are in fact possible when a trust deed that is not a "residential trust deed" is foreclosed by judicial foreclosure. ORS 86.770(3). Ex. 3. A review of the statute, alone, would have led him directly to ORS 86.705(3), which defines a "residential trust deed" as a trust deed on property upon which one of the residential units is occupied as the principal residence of the grantor, the grantor's spouse or a dependent at the time the foreclosure is commenced.

Because McCarthy did not familiarize himself with the applicable law, he did not foresee that suing WCB on the loans could put Robertson at risk of losing much more than the $5,000 she had invested in each property should the bank counterclaim for judicial foreclosure. McCarthy's failure to research the fundamental law controlling his

client's objectives showed a basic and culpable lack of legal knowledge and preparation reasonably necessary to represent her.

Instead, McCarthy thought "in a vague way" that suing WCB for TILA or RESPA violations might provide some leverage to work with the bank on the terms of Robertson's debt. Ex. 87 at 110. He considered the TILA claims against WCB to be "a token" "throw-away issue" in his larger strategy to prove fraud against Loyd and Aspen. Tr. 366. However, McCarthy was not familiar with TILA or RESPA claims and he made no effort to obtain assistance from either Heller or Strikeback beyond obtaining sample pleadings. Tr. 302-05, 308, 336-37, 402. In fact, the record suggests that McCarthy did not conduct even basic research into these federal statues; if he had consulted basic resources such as *Consumer Law in Oregon* § 7.10 (OSB CLE 1996 & Supp 2005), he would have discerned that TILA applies only to consumer credit transactions "primarily for personal, family or household purposes" (15 USC § 1602(i))[2] and that RESPA does not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes. 12 USC § 2606(A)(1)(a). Because Robertson incurred the debts to WCB for business investment rather than for the purchase or construction of her own dwelling, TILA and RESPA likely did not apply to the WCB loan. *See, e.g, Thorns v. Sundance Properties,* 726 F2d 1417, 1419 (9th Cir. 1984).

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[2] *See also* 15 USC § 1602(x) ("residential mortgage transaction" is limited to transactions in which a security interest is "created or retained against the consumer's principal dwelling to finance the acquisition or initial construction of said dwelling"); 15 USC § 1603(1) ("This subchapter does not apply to . . . (3) credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer . . . ").

McCarthy had access to CLE materials such as the Bar's publications specific to foreclosures but did not research the basic provisions necessary to inform himself or to advise his client that TILA and RESPA may not apply to her as a residential real estate investor. He told the trial panel, "The knowledge that I had, that I applied to these cases, didn't come from studying any books." Tr. 316. As a result, McCarthy failed to comprehend that suing WCB for "token" TILA and RESPA violations would allow the bank to counterclaim for judicial foreclosures and deficiency judgments against Robertson, a completely unnecessary risk in light of the fact that WCB had already elected not to pursue judgments. McCarthy did not exercise the legal knowledge or skill reasonably necessary to understand his client's existing liabilities or to devise a strategy that could avoid magnifying her exposure unnecessarily.

A lack of thoroughness and skill are also reflected in the *Robertson v. WCB et al* complaint McCarthy filed. Ex. 4. He failed to name in the caption as defendants a number of the parties he described as defendants in the body of the complaint (specifically, David Swisher, MCAS and Robert Fadness). The prayer for relief mentioned only some of the many defendants.

More significantly, McCarthy pled facts that he should have known would establish that Robertson was not entitled to relief under TILA and RESPA. He asserted that Robertson had previously invested in a business opportunity to build homes and "decided to purchase two additional properties." Ex. 4, ¶ 15. The complaint documents McCarthy's lack of understanding whether Robertson's status as an investor might be relevant to her ability to obtain relief under TILA or RESPA. Tr. 365-67. By pleading that Robertson was making a series of business

investments and failing to plead that Robertson intended to reside in one of the properties, McCarthy's conduct revealed a lack of legal knowledge or preparation necessary to obtain even the "mere sideline bargaining chip" (Tr. 429) he sought against WCB.

Rather than creating a tactical advantage for Robertson, suing WCB increased her exposure from the $10,000 loss (representing her $5,000 investment on each property) she faced in the pending non-judicial foreclosures to a $500,000 liability in the event deficiency judgments were obtained through a judicial foreclosure. Shepherd confirmed that, "but for the lawsuits," the foreclosures would have remained on the non-judicial track.[3] Tr. at 96. An attorney who had taken steps to become familiar with Oregon trust deed foreclosure would have been aware of this danger. However, the record shows that McCarthy never understood the basic law relating to this matter. He became aware of the potential for deficiency judgments against his client only after WCB's counsel Shepherd explained it to him after the case was removed to federal court. Tr. 349; 373-74; 407-08. Before the trial panel, McCarthy contended that WCB was permitted to pursue deficiency judgments against Robertson only because the case was removed to federal court, and not because he had sued WCB on the loans.[4] Tr. 370-72, 374.

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[3] Shepherd also observed that some of the claims McCarthy filed for Robertson were "a little bit naïve" in light of the bank's likely response. Tr. 109.

[4] When asked to state his understanding why WCB could seek deficiency judgments, McCarthy replied, "Because [WCB] was authorized to as a matter of law." When pressed, McCarthy admitted that he did not know what law and had not researched "that part of it." However, he explained that Robertson was subject to a potential deficiency judgment "because [WCB] removed it to federal court." Tr. 373-74.

On May 26, 2009, Shepherd filed WCB's Answer, which included counterclaims against Robertson for judicial foreclosure and deficiency judgments on both properties, with interest, late charges, attorney fees and costs. Ex. 32. Only after WCB had filed the counterclaims and McCarthy had further conversations with Shepherd did he recognize that Robertson was exposed to deficiency judgments and that the costs of litigation, coupled with the danger of an adverse award of fees and costs, were too high to continue pursuing the case against the bank.

At this point McCarthy contacted Robertson, apologizing for not remaining in good communication, recommending that she settle with WCB by giving deeds in lieu of foreclosure ("deeds in lieu") and assuring her that he would continue to pursue Aspen, Loyd and their "cohorts." Ex. 37. When Robertson asked for further advice about the settlement, he did not respond. Tr. 129-30. Three weeks later, McCarthy contacted Robertson by email, repeating his settlement recommendation and assurance to continue against the other defendants. Ex. 39. Again, Robertson quickly responded with questions about the settlement agreement and its ramifications, but McCarthy did not reply to her emails or subsequent phone calls. Tr. 134. As argued herein *infra*, this failure to respond to his client's substantive inquiries evidences a violation of RPC 1.4(a). However, it also suggests an extremely casual attitude toward counseling a client on arguably the most significant aspect of her legal matter at a critical juncture. Competent representation would have required a more thorough and substantive response than McCarthy provided.

During this same time period, McCarthy's opposing counsel were also having difficulty reaching or obtaining a response from him despite letters, phone calls and email. Exs. 40, 45, 48; Tr. 269-76. On March 26,

2009, McCarthy mailed Notices of Lawsuit and Request to Waive Service of a Summons to MPCO, David Swisher, Judy McClurg, MCAS, Fadness and Smailys, several of the parties named in the caption or identified in the body of the complaint as defendants. The service waivers McCarthy provided bore an incorrect case number and attorneys representing these defendants immediately notified him that they would not accept service on behalf of their clients until this and other defects were corrected. Exs. 26 – 31. Although over seven months had passed since the lawsuit had been filed and Smailys's attorney asserted that the deadline for completing service had already expired, McCarthy decided not to make any of the needed corrections or otherwise complete service. Tr. 410. For the most part, he ignored their efforts to contact him for "absolutely strategic" reasons. (McCarthy eventually told the most persistent opposing attorney that he would dismiss his clients from the case. Tr. 277; Exs. 49, 52.) Two of the attorneys testified that McCarthy did not respond to their emails, phone messages or letters raising these concerns. Tr. 254-56, 269-72, 273-75; Exs. 45, 48.

In October 2009, having received no communication from McCarthy since June 2009, Robertson signed and submitted the settlement agreement and deeds in lieu directly to WCB's attorney. Ex. 55; Tr. 71-72, 145-148. Although Shepherd notified McCarthy that he had received Robertson's settlement agreement and provided Robertson a form of order for a stipulated dismissal, McCarthy did not seek dismissal until January 2010, when the court issued an order to show cause. Tr. 72-75. In April 2010, McCarthy eventually dismissed the entire case without consulting Robertson about the action. Ex. 57-58; Tr. 147-49.

Fortunately for Robertson, WCB was willing to revert to its original position and forego its claim for a judicial foreclosure and deficiency judgment. By granting the two deeds in lieu without further liability to the bank, Robertson realized her best possible scenario: WCB forgave her obligation on both loans, even if it meant losing her $10,000 investment in the two properties. Tr. 57. However, the outcome of the matter in which a lawyer has acted incompetently or neglectfully is not a pertinent consideration. *In re Magar,* 335 Or 306, 319-20, 66 P3d 1014 (2003) citing *In re Gastineau,* 317 Or 545, 555, 857 P2d 136 (1993) ("If a lawyer does a poor job, but the client fortuitously or through the efforts of others obtains a good result, that does not excuse the lawyer from providing competent representation . . . "). That Robertson's outcome was reached only after McCarthy took $3,000, exposed her to extremely onerous liability and put her and the many defendants through unnecessary litigation.

This court has found violations of RPC 1.1 or its predecessor, former DR 6-101(A) when, like McCarthy, attorneys take on matters in which they are inexperienced and fail to acquaint themselves with the applicable law. In *In re Spies,* 316 Or 530, 852 P2d 831 (1993), an attorney undertook to represent a client in a domestic relations case outside of her area of expertise without acquiring adequate knowledge or skill and repeatedly failed to file adequate or timely documents, delaying resolution of the matter. In *In re Odman,* 297 Or 744, 687 P2d 153 (1984), an attorney who handled a probate without ascertaining the basic steps in administering and closing a decedent's insolvent estate was found to have provided incompetent representation. Similarly, in *In re Roberts,* 335 Or 476, 71 P3d 71 (2003), the court found incompetent representation when, in representing a conservator, an attorney failed to

comply with procedural and substantive rules, failed to address substantive issues and failed to give the requisite attention to the case.

The court has also found incompetent representation when attorneys take too casual an approach to matters in which they are well-versed. In *In re Bettis*, 342 Or 232, 149 P3d 1194 (2006), an experienced criminal defense lawyer advised his client to sign a waiver of jury trial before he (the lawyer) had reviewed the charging instruments or discovery or had conducted any factual or legal investigation on his own. The attorney failed to devote the minimal amount of effort to the case before concluding that waiving a fundamental constitutional right was in his client's best interests. Noting that the attorney's testimony at trial "evidences complete ignorance of the factual or legal issues that might have been germane to . . . the case" at the time he had his client sign a jury waiver, the attorney's representation failed to meet the standard of competence required by the rule. *Bettis,* 342 Or at 239-240.

This matter presents elements of both types of cases: an experienced litigator confident in his ability to "tool up" (Tr. 485, 508) in a new area of the law undertook a matter that presents issues that he fails to perceive. Ignoring his lack of knowledge about non-judicial foreclosure, the availability of deficiency judgments in judicial foreclosure and a lender's likely counterclaims to a TILA or RESPA action, McCarthy failed to research the law or take steps to determine whether his recommended course would serve his client's interests. Once filed, an ill-conceived legal action exposed McCarthy's client to enormous liability on a deficiency the bank had previously relinquished, but McCarthy displayed a cavalier attitude toward counseling his client once that became apparent. Finally, McCarthy's testimony before the trial panel revealed a continued lack of understanding of the fundamental

legal issues Robertson faced. The trial panel correctly found that McCarthy failed to apply the legal knowledge, skill, thoroughness and preparation reasonably necessary to advise Robertson and thus failed to provide her competent representation.

**B. McCarthy failed to maintain adequate communication with his client in violation of RPC 1.4(a) and RPC 1.4(b).**

RPC 1.4 provides:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

This court has long recognized an attorney's duty to communicate with his clients. Even before adopting RPC 1.4, this court held that where a lawyer completed the representation of his client satisfactorily in all other respects, he acted unethically if he failed to communicate with his client about the matter. *In re Bourcier,* 325 Or 429, 939 P2d 604 (1997) (finding a violation of former DR 6-101(B) (neglect of a legal matter)). In *In re Coyner,* 342 Or 104, 149 P3d 1118 (2006), the court found that a four-month delay in informing a client that his appeal was dismissed constituted neglect of a legal matter, in violation of former DR 6-101(B).

More recently, this court has found that a lawyer violated RPC 1.4(a) when he failed to keep his client, a personal injury claimant, informed about the status of the matter and of his communication with the other parties, and failed to respond to the client's reasonable requests for information. *In re Snyder*, 348 Or 307, 316, 232 P3d 952

(2010). The court also found that the attorney violated RPC 1.4(b) by failing to ensure that his client had the type of information necessary to make informed decisions about his legal claims (such as whether the client was medically stationary or settlement negotiations would be premature, as well as the attorney's judgment that the client's case was much weaker than the lawyer had previously believed). *Snyder,* 348 Or at 315-16.

A lawyer's obligation to keep a client reasonably informed exists regardless of the merits of a client's claim or position. *In re Groom,* 350 Or 113, 249 P3d 976 (2011). In *Groom*, the court noted that deciding whether an attorney has violated RPC 1.4 requires a "careful examination of all the facts." *Groom*, 350 Or at 124. Factors relevant to that inquiry include: the length of time between a lawyer's decision and the lawyer's communication of that decision to the client; whether the lawyer failed to respond promptly to reasonable requests for information from the client; and whether the lawyer knew or a reasonable lawyer would have foreseen that a delay in communication would prejudice the client. *Id.*

McCarthy filed *Robertson v. WCB et al* August 12, 2008. Ex. 4. On September 9, 2008, Robertson inquired as to the status of McCarthy's service efforts. Ex. 6. There is no record that McCarthy responded, and neither Robertson nor McCarthy recalls any response. Tr. 40-41. This silence led Robertson to inquire of McCarthy's other clients; upon hearing that another client had reached him, she was somewhat reassured. Tr. 41.

Robertson became concerned again upon being contacted directly by a WCB representative at a time when she expected the bank would be communicating with McCarthy instead. Tr. 42-43. On October 20,

2008, Robertson emailed McCarthy asking about his service efforts and notifying him of the phone call she had received. Ex. 8. This time McCarthy responded, stating that he had forwarded the summons and complaint to the sheriff for service on Loyd and that "WCB also has your case." Ex. 9. However, McCarthy did not inform Robertson that he had not attempted service on WCB or any of the other defendants, although the case had been filed well over 63 days before. (*See*, UTCR 7.020 allowing dismissal for want of prosecution where service is not accomplished within 63 days of filing). Thus, while McCarthy's email suggested that he had served WCB, the truth was that WCB had learned about the case through monitoring court records. Tr. 62. The fact that McCarthy had taken no steps to effect service on the other defendants should have been communicated in order to keep Robertson—who was asking about that very subject—reasonably informed.

On November 3, 2008, Robertson again inquired about the case status. Ex. 13. On November 7, 2008, WCB removed the case to federal court and McCarthy reported the removal to Robertson that day. Ex. 16. McCarthy's report suggested that he did not know the basis for removal, even though the removal notice clearly stated the basis as federal question jurisdiction based on the TILA claims and that the failure to serve the other defendants meant that no consent was required from them. Ex. 15. When Robertson inquired why the defendants would want the case removed to federal court (Ex. 17), McCarthy did not reply or forward the notice of removal containing that information. Tr. 48-53. He never sent Robertson a copy of his motion to remand (Tr. 51) and did not address Robertson's questions or provide additional information until February 2009. (In fact, other than the complaints filed in August 2008,

McCarthy did not provide Robertson or his other clients copies of any pleadings or correspondence in their cases. Tr. 404.)

On January 30, 2009, after hearing nothing from McCarthy since November 7, 2008 in spite of several phone calls to him, Robertson emailed another request for a status update. Ex. 19; Tr. 51-53. In his February 5, 2009 reply, McCarthy told Robertson the basis for removal to federal court (the TILA allegations) and informed her that the court had denied a motion to remand he had filed. Ex. 20. McCarthy's email to Robertson also raised for the first time that WCB might seek judicial foreclosures, which presented difficulties he had not contemplated and that she may be required to grant deeds in lieu of foreclosure in order to avoid deficiency judgments. Ex. 20; Tr. 54-56. Extremely confused and concerned, Robertson asked McCarthy to contact her to explain what was happening (Tr. 55-57); she does not recall receiving a response from McCarthy. Tr. 235. McCarthy did not send Robertson a copy of the joint status report he filed a few weeks later that would have provided some of that information. Tr. 119-120. Specifically, that document would have revealed that he had made no effort to serve most of the defendants until March 9, 2009,[5] and that none had yet been served. Ex. 24.

Over the next two months, Robertson heard nothing from McCarthy. Tr. 123. During the same period (April 1 through May 29, 2009), in response to his waiver of service notices, McCarthy received communications and correspondence from attorneys for most of the defendants. Exs. 26, 27, 28, 29, 30, 31, 40. McCarthy also received WCB's Answer asserting counterclaims against Robertson. Ex 32.

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[5] The document states "2008," a typographical error.

McCarthy neither forwarded nor disclosed any of this correspondence to Robertson except to describe WCB's position in very general terms. Tr. 120-123. As a result of his failure to inform or provide Robertson copies of the correspondence or WCB's answer, Robertson had no idea of the status of the service efforts, the asserted defects in the complaint and proposed waivers of service, or that WCB had now filed counterclaims for judicial foreclosures and deficiency judgments against her. Ex. 28.

Robertson became exasperated with McCarthy's failure to respond to her inquiries and, on May 29, 2009, she sent an email demanding information. Ex. 34. Unfortunately, McCarthy did not timely receive it because Robertson had mistakenly addressed it to an incorrect email address. By coincidence, WCB's lawyer Shepherd had notified McCarthy earlier the same day that a tree had fallen on one of Robertson's properties and asked for a prompt reply regarding Robertson's plans for dealing with it. If not, WCB would take action and charge Robertson for it. Ex. 33. McCarthy attempted to forward this email to Robertson on June 3, 2009, but all she received was his puzzling message, "Apparently there is a tree . . . " Ex. 35. From Robertson's perspective, this was McCarthy's only response to her complaint the week before (that he had not received). Incensed, she sent a terse reply to his correct address. Ex. 36; Tr. 123-127. McCarthy never responded to WCB's attorney regarding the fallen tree. Tr. at 70.

McCarthy sent Robertson an apologetic email ("I have been . . . remiss in not maintaining good contact") on June 5, 2009. Ex. 37. He advised her to give WCB deeds in lieu of foreclosure to avoid deficiency judgments and to consult an accountant about any tax consequences. He assured Robertson that he would continue to pursue Loyd, Aspen "and their cohorts," who "will remain defendants in the action."

This advice raised questions for Robertson, who had previously received deed in lieu forms from WCB. Tr. 124. She was unsure about her options or what would happen if she did not sign the deeds. Tr. 124, 133. She promptly replied, asking McCarthy what she should do with the forms (Ex. 38) but McCarthy neither acknowledged nor responded to her question. Tr. 127-130.

By this point, Robertson had already complained to the Bar that, due to McCarthy's lack of communication, she had "no idea what was going on" in her case. Ex. 61 (enclosing a copy of Ex. 34, Robertson's May 29 email to McCarthy). By letter dated June 15, 2009 (Ex. 62), the Bar forwarded to McCarthy a copy of Robertson's misaddressed email (Ex. 34), which expressed confusion about the status of her case, questions about the proposed settlement and frustration over her inability to leave a phone message or receive answers to her questions. Upon receipt of this correspondence, McCarthy was aware that Robertson was asking him to explain what was happening in her case and to advise her about her options.

On June 26, 2009, after receiving a proposed settlement agreement and deeds in lieu of foreclosure from WCB's lawyer, McCarthy emailed them to Robertson without any new information; instead, he created a "cut and paste" duplicate of his earlier email. Ex. 39 (*compare*, Ex. 37); Tr. 432. He asked her to let him know whether she agreed to settle with WCB and assured her again that he would continue to pursue her claims against Loyd, Aspen and "their cohorts." However, by this time McCarthy was already ignoring multiple communications from counsel for the "cohorts" regarding his request that they waive service.

Robertson called McCarthy and left a message asking to talk to him about the settlement agreement and the subcontractors' liens WCB had paid. Tr. 124, 127. When she eventually spoke to him after the July 4 holiday, she asked him to determine whether WCB would agree to show her loans as paid in order to protect her credit rating. Tr. 134. McCarthy told her he would talk to the bank and report back to her, but she never heard from him again. Tr. 134, 137. He did not respond to her telephone messages asking whether he could speak to her accountant, who had questions for him. Tr. 130.

Because McCarthy did not respond to her inquiries during this critical juncture in her case, Robertson began emailing him increasingly frustrated messages. Unfortunately, he did not receive them because they were misaddressed. Exs. 42-44, 46-47, 50-51, 53-54; Tr. 137-145. However, McCarthy knew of Robertson's repeated requests during this period because the Bar transmitted them to him in connection with its investigation of Robertson's complaint. For example, in early August 2009 the Bar forwarded to McCarthy copies of Robertson's July 6 – 20 emails urgently seeking specific information (including an appraisal number and whether WCB was willing to entertain an offer by a third party buyer on one of the properties or to report her loans as paid in full if she signed the deeds in lieu). Exs. 42-44, 46-47, 76.

Nevertheless, McCarthy took no action to communicate with Robertson, despite the need to conclude the agreement with WCB and to consult regarding Robertson's claims against the remaining defendants. In fact, in July 2009 he had made the decision not to communicate further with his client because he considered her hostile. Tr. 515. Nevertheless, McCarthy continued to make decisions on Robertson's behalf without informing her about the developments or

confirming whether she agreed. McCarthy did not inform Robertson that counsel for defendants Fadness and MCAS was insisting that McCarthy produce an expert or dismiss the case. Ex. 40, 45; Tr. 132, 136. He did not talk to Robertson about whether her claims against Fadness and MCAS should be dismissed before he agreed with their counsel to do so on August 5, 2009, or when he actually dismissed them one month later. Ex. 49, 52; Tr. 140-141; 143-144. Later, McCarthy failed to consult with Robertson when he moved to dismiss her claims against all remaining defendants except the Loyds and Aspen in January 2010 (Ex. 14; Tr. 72-75) or when he moved to dismiss the entire case in April 2010. Ex. 57-58; Tr. 147-149.

At trial, McCarthy testified that he did not need to confer with or inform Robertson about the dismissals because she had known from the outset that all of her claims would fail if service on Loyd could not be achieved.[6] Tr. 433-34, 513. However, his last communications with her on this subject unequivocally stated that he would continue to pursue Loyd, Aspen and their "cohorts" (McCarthy's June 5 and 26, 2009 emails, Exs. 37, 39). Because he deliberately ceased communicating with her shortly after conveying this message, he did not inform her that he had taken no further steps to complete service (or secure waivers

[6] McCarthy also stated that he expected the Bar to send out "fixers" to remedy the situation. Tr. 469-70. This testimony is consistent with his earlier explanation why he did not respond to Robertson's concerns when they were brought to his attention by the Bar in 2009: "My understanding was that the . . . Bar has 'fixers" or "cleaners" that intercede in any complaint made against an Oregon practitioner. I don't know if anyone involved has contacted me in such capacity, but I am advised that my responses entail necessary limitation, as they would be forwarded to [Robertson]. . . . My guess is that she got some independent opinion as to the efficacy of settlement with WCB." Ex. 77, ¶11.

thereof) on any of the remaining defendants. Had McCarthy simply told her that her case was not proceeding because there was no longer a reason to move forward, she would have been satisfied. ("[I]f we could have sat down and had a 30-minute conversation where you . . . explained to me what was . . . happening, that . . . without spending "X" amount of money, we can't do this, . . . I would have accepted that." Tr. 213.) However, McCarthy withheld from his client the information from which she could have concluded that service efforts had indeed failed and that her case was no longer viable.

During the course of his representation, McCarthy failed to keep Robertson reasonably informed about his progress (or lack thereof) in pursuing her claims against the majority of the defendants. To the extent he made an effort to inform her, he frequently withheld details in such a way that was almost misleading and failed to respond to follow-up questions or, more importantly, Robertson's requests for guidance relative to the settlement with WCB. In July 2009, he intentionally stopped communicating with her altogether because he considered her to be "an adversary." Tr. 515. Nevertheless, McCarthy continued to make substantive decisions about her case without informing her.

McCarthy engaged in a course of failing to promptly reply to his client's reasonable requests for advice or information and made decisions regarding service of defendants and eventual dismissals her claims without consulting or advising her. The trial panel correctly found violations of RPC 1.4(a) and RPC 1.4(b).

**C. McCarthy violated former RPC 1.15-1(c) when he treated Robertson's $3,000 non-refundable retainer as if it had been fully earned when the written agreement did not provide that the retainer was earned upon receipt.**

**D. McCarthy violated RPC 1.15-1(a) when he failed to deposit into his trust account upon receipt Robertson's $3,000 non-refundable retainer.**

Former RPC 1.15-1(c) requires lawyers to deposit into a trust account all legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.[7] It is well-established by this court that, in the absence of a written agreement that expressly designates a fee as "non-refundable" and "earned upon receipt," funds paid by a client to a lawyer remain the client's funds until the fee is earned. As client funds, these advance fees must be afforded all of the safeguards guaranteed to client property in an attorney's possession. *In re Hedges,* 313 Or 618, 623-24, 836 P2d 119 (1992). Arguably the most important of these safeguards is the duty to hold client funds in trust until the attorney has earned them. *See, e.g., In re Peterson,* 348 Or 325, 334, 232 P3d 940 (2010); *In re Fadeley,* 342 Or 403, 153 P3d 682 (2007); *In re Balocca,* 342 Or 249, 287-88, 151 P3d 154 (2007); and *In re Biggs,* 318 Or 281, 293, 864 P2d 1310 (1994).

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[7] As amended, current RPC 1.15-1(c) creates an exception to this requirement if the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with current RPC 1.5(c)(3). RPC 1.5(c)(3), also amended in December 2010, now prohibits attorneys from collecting fees denominated as "earned on receipt," "non-refundable" or similar terms unless a written agreement signed by the client explains that the funds will not be deposited into the lawyer's trust account and that the client may discharge the lawyer at any time, in which event the client may be entitled to a full or partial refund if the services for which the fee was paid are not completed.

At their first meeting, Robertson paid McCarthy $3,000 pursuant to a written agreement whereby she agreed to pay him on a contingency fee basis supplemented with a minimum "non-refundable retainer for attorney fees." Ex. 1; Tr. 28-32; 325. The agreement did not indicate whether or when the non-refundable retainer for fees would be regarded as earned and did not specify that McCarthy could treat the retainer as "earned upon receipt." Robertson did not understand that McCarthy intended to treat her funds as if he had earned them merely by agreeing to represent her. Tr. 188-190; 238-240.

McCarthy did not deposit the funds into his lawyer trust account but instead immediately negotiated the check. [8] Tr. 331-334; Ex. 74, item 3; Ex. 77, item 15.

Because the agreement did not provide that the $3,000 retainer was earned upon receipt, the funds constituted payment of an advance fee or costs that belonged to Robertson until McCarthy earned the fee or incurred expenses. At the time he collected the funds, McCarthy had taken no substantial steps to earn the fee.

RPC 1.15-1(a) provides in relevant part that "a lawyer shall hold property of clients . . . that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses . . ., shall be kept in a separate 'Lawyer Trust Account' maintained in the jurisdiction where the lawyer's office is situated." As

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[8] On review, McCarthy suggests that his actions were appropriate under *In re Fadeley, supra,* 342 Or 403, 409-10, 153 P3d 682 (2007) (recognizing a "true" non-refundable retainer). While *Fadeley* recognizes the practice of collecting a non-refundable retainer earned upon receipt, the court made clear that "non-refundable" and "earned upon receipt" are not synonymous. A lawyer must clearly address both terms before he may treat as his own property upon receipt those funds paid in advance by the client.

stated above, the $3,000 non-refundable retainer Robertson delivered to McCarthy constituted property of a client that he was required to deposit into trust and keep separate from his own property. "Only if a lawyer enters into a written agreement explicitly denominating fees as 'earned on receipt' may the lawyer be excused from depositing funds received from the client into a trust account." *In re Obert,* 352 Or 231, 246, 282 P3d 825 (2012).

By failing to deposit the $3,000 advance fee he collected from Robertson into his trust account and to maintain it in trust until fees had been earned or costs had been incurred, McCarthy violated both RPC 1.15-1(a) and former RPC 1.15-1(c).

## V. SANCTION

The trial panel correctly concluded that a 90-day suspension is the appropriate sanction for McCarthy's misconduct.

In considering appropriate discipline for attorney misconduct, this court refers to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) ("*Standards*") to determine a preliminary sanction after considering the duties violated, the attorney's mental state and any injury caused by the misconduct. *Standards* § 3.0. The court then considers aggravating or mitigating circumstances and relevant case law. *In re Bettis, supra,* 342 Or at 240.

### A. ABA Standards.

#### 1. Duties Violated.

The trial panel correctly found that McCarthy violated several duties owed to his client: the duty to provide competent representation; the duty to keep his client reasonably informed and to provide adequate

information to her; and the duty to preserve her property. *Standards* §§ 4.1, 4.4, 4.5.

**2. Mental State.**

The record shows that in failing to provide competent representation, McCarthy acted knowingly, defined as "the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result." *Standards* at 7. He was aware that he did not have experience in the relevant areas of law but knowingly did not take steps to research applicable statutes or associate with counsel for help. McCarthy also acted knowingly in failing to keep Robertson reasonably informed and failing to provide adequate information to her. In fact, after July 2009, McCarthy deliberately ceased communicating with his client because he viewed her as his adversary, thus intentionally leaving her without the benefit of legal advice for the several months in which she considered whether to settle with WCB and uninformed while her remaining claims against the other defendants languished in the federal docket.

Finally, in failing to adequately handle Robertson's retainer, McCarthy acted negligently, defined as "the failure to heed a substantial risk that circumstances exist or 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.

**3. Actual or Potential Injury.**

To determine an appropriate disciplinary sanction, the court may consider both actual and potential injury. *Standards*, p. 6; *In re Peterson, supra,* 348 Or at 342.

The trial panel correctly found that McCarthy's misconduct resulted in actual injury to Robertson in that she paid $3,000 for "completely

ineffectual representation." ER 29-30. McCarthy also caused his client a $500,000 potential injury by recklessly taking a course of action that exposed her to deficiency judgments that, prior to his representation of her, WCB had elected not to pursue. McCarthy's lack of communication caused Robertson demonstrable frustration and uncertainty, thus resulting in actual injury. *In re Snyder,* 348 Or 307, 321, 232 P3d 952 (2010) ("Client anguish, uncertainty, anxiety, and aggravation are actual injury under the disciplinary rules.") In failing to deposit Robertson's $3,000 advance fee in trust when he had not yet earned it, McCarthy caused potential injury to a client.

**4. Preliminary Sanction.**

Pulling together the duties violated, mental state and injuries caused, *Standards* provides that suspension is generally appropriate when a lawyer knowingly engages in a pattern of neglect (failing to communicate) and causes injury or potential injury to a client or a party. *Standards* § 4.42. When an attorney knowingly fails to perform services (such as to give requested advice) or engages in a pattern of neglect and causes potentially serious injury, disbarment can be appropriate. *Standards* § 4.41(b). Suspension is also appropriate when a lawyer engages in an area of practice in which he knows he is not competent and causes actual or potential injury to a client. *Standards* § 4.52.

Finally, *Standards* § 4.13 calls for reprimand when a lawyer negligently deals with client property and causes actual or potential injury.

Thus, before applying aggravating and mitigating factors, the preliminary sanction for McCarthy's knowing violations of RPC 1.1, 1.4(a) and 1.4(b) and negligent violations of RPC 1.15-1(a) and former RPC 1.15-1(c) is suspension.

**5. Aggravating Circumstances.**

The trial panel correctly found the following aggravating factors, which may justify an increase in the degree of discipline to be imposed. *Standards* § 9.22:

(a) Multiple offenses. McCarthy violated several rules of professional conduct. *Standards* § 9.22(d).

(b) Substantial experience in the practice of law. Prior to his 2008 admission in Oregon, McCarthy had practiced law in California for over 30 years. *Standards* § 9.22(i).

(c) Refusal to acknowledge wrongful nature of conduct. McCarthy attributed much of his conduct to Robertson, his client. ("She consistently complained of not understanding, not knowing. She was not satisfied with the results she was getting." Tr. 407. "She just plain didn't listen. . . . If she didn't like what I was saying, she didn't understand it." Tr. 426.) Furthermore, McCarthy did not acknowledge any lack of competence, even when confronted with documentation establishing his failure to research the applicable law or to associate competent counsel. *Standards* § 9.22(g).

(d) Selfish motive. McCarthy's interest in building a new practice in Oregon and to generate fees prompted him to knowingly take on a case he was unprepared to litigate without substantial training or association of competent counsel. ER 23-24. *Standards* § 9.22(b).

**6. Mitigating Circumstances.**

The trial panel correctly found the following mitigating factors, which may justify a reduction in the degree of discipline to be imposed:

(a) Absence of a prior record of discipline. *Standards* § 9.32(a).

(b) Lack of dishonest motive. *Standards* § 9.32(b).

The aggravating factors outweigh the mitigating factors which, when considered in conjunction with the presumptive sanction for McCarthy's misconduct, require suspension. To determine the appropriate length of that suspension, the court should consider the following case law.

**B. Case Law.**

A review of the court's cases reveals that several of McCarthy's violations, standing alone, would result in a suspension of 30 to 90 days. For example, violation of the trust account rules can result in suspension for 30 to 60 days. *See Peterson, supra,* 348 Or at 345 (attorney suspended for 60 days for violations of RPC 1.15-1(a) and (c)); *In re Eakin,* 334 Or 238, 257-59, 48 P3d 147 (2002) (60-day suspension for violations of former DRs 9-101(A), (C)(3) and (C)(4), the predecessors of RPC 1.15-1(a) and (c)).

Violation of former DR 6-101(A) (the predecessor to RPC 1.1) has resulted in suspensions of 30 days, or when combined with violations of other rules and aggravating factors, as much as 90 days. *See, In re Bettis, supra,* 342 Or at 242 (30-day suspension for failing to provide competent representation; attorney had substantial experience and prior discipline); *In re Roberts,* 335 Or 476, 71 P3d 71 (2003) (60-day suspension for failure to provide competent representation and for engaging in conduct prejudicial to the administration of justice; attorney had substantial experience in the practice of law and no prior record of discipline); *In re Gresham,* 318 Or 162, 164-69, 864 P2d 360 (1993) (91-day suspension for violations involving neglect, failure to provide competent representation and conduct prejudicial to the administration of justice arising from an attorney's undertaking a probate case without

the knowledge or skill to do so; aggravating factors included a pattern of misconduct and misleading statements to the court; mitigating factors included inexperience and lack of prior discipline).

*In re Snyder, supra,* resulted in a 30-day suspension for an attorney who knowingly failed to communicate with his client and mishandled his client's property (the file). 348 Or at 324. Snyder represented a client with a personal injury claim, a matter he was competent to handle. He failed to communicate to his client the fact that he was waiting further information before filing a complaint and had become concerned that his client's claims had less merit than initially believed, a discussion he was competent to undertake.

In contrast to *Snyder*, McCarthy did not apply the knowledge, skill, thoroughness or preparation reasonably necessary to handle the legal matter he undertook for Robertson. He made little or no effort to research applicable law and was unable to assist his client to make informed decisions about the legal action he proposed. He filed a complaint that revealed a lack of thoroughness and preparation. Throughout the representation he continued to demonstrate a lack of competence and, upon learning that his client was now exposed to liability on a deficiency judgment, McCarthy failed to keep her advised of the status of the matter and intentionally disregarded her reasonable requests for information because he viewed her inquiries as hostile. Finally, he dismissed her case without discussing the decision with his client or obtaining her approval. Coupled with his negligent handling of his client's retainer, McCarthy's knowing failure to provide competent representation and deliberate failure to communicate with his client warrant a more significant suspension than those imposed in *Snyder* or *Bettis.* The 90-day suspension imposed by the trial panel is appropriate.

## VI. CONCLUSION

McCarthy collected his client's retainer before his agreement gave him the right to do so and hastily filed a lawsuit against multiple defendants that was ill-advised for reasons he learned only later from opposing counsel. McCarthy squandered the financial resources of his client and the time of his opposing counsel and their clients. He failed to communicate necessary information to his client about the legal action before it was filed and after it became evident that by filing it he had exposed her to a very real risk of significant adverse judgments against her. Throughout the representation, he failed to respond promptly to his client's reasonable requests for information about how to proceed or to discuss significant actions on the matter before he took them. His negligent mishandling of funds, lack of knowledge, skill, thoroughness and preparation and his knowing failures to communicate with his client warrant the 90-day suspension imposed by the trial panel.

DATED this 10th day of June, 2013.

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S ANSWERING BRIEF on the 10th 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:

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I further certify I served the foregoing ANSWERING BRIEF on the 10th day of June, 2013, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

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DATED this 10th day of June, 2013.

OREGON STATE BAR

By: _____
Susan R. Cournoyer, OSB 863581

## 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 11,129 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).