IN THE SUPREME COURT OF THE STATE OF OREGON

In re: **Complaint as to the Conduct of JAMES C. JAGGER,** **Accused.**	**OSB Case No. 13-53** **SC S061978**

ACCUSED'S REPLY BRIEF

Susan Roedl Cournoyer
Assistant Disciplinary Counsel
OREGON STATE BAR
PO Box 231935
Tigard, OR 97281-1935
Phone: (503) 620-0222, Ext. 324
OSB #863381
Email: scournoyer@osbar.org

Attorney for Oregon State Bar

John C. Fisher
Attorney at Law
767 Willamette St. Ste. 302
Eugene, OR 97401
Phone: (541) 485-3153
OSB #771750
Email:
johncfisher@qwestoffice.net

Attorney for Accused

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I. INTRODUCTION

Did the Bar prove by clear and convincing evidence that the Accused violated RPC 1.1 or 1.2(c)? To be clear and convincing, evidence must be of "extraordinary persuasiveness", *State v. Gjerde*, 147 Or App 187, 191, 935 P2d 1224 (1997).

II. STATEMENT OF ADDITIONAL FACTS

A. RPC 8.1(a)(2) [Knowing failure to provide information].

The initial correspondence from the Bar came from Scott Morrill. TR 79, Ex. 22. The Accused had a good working relationship with Morrill, TR 81, and despite the imposition of short deadlines by the Bar, he thought he was still dealing with Morrill and he felt comfortable because of his history with Morrill. TR 87-89.

The first correspondence from Bar counsel was sent to the attorney for the Accused. It is Ex. 28, dated July 19, 2011. It requested information by August 9, 2011.

On August 25, 2011, Disciplinary Counsel wrote directly to the Accused stating she had learned that John Fisher, at that time, was not representing the Accused and requested a response by September 1, 2011. Ex. 30. This was received in the office of the Accused on August 26, 2011. Ex. 30, P. 2.

The Accused did not see these letters until sometime around the middle of September. TR 84. That is because he had taken his father on a trip to Yellowstone. They returned on about August 11. His father then fell and broke his hip and was hospitalized. TR 86. When his father was released from the hospital, the Accused then committed to his father and his father's physician that he would provide 24 hour care for his father for the next 30 days, which he did. His office had called and told him there was something from the Bar sometime around September 1, but did not mention a deadline to him. During this period of time, he still knew he had a good working relationship with Mr. Morrill and knew Mr. Morrill would have empathy and understand his commitment to his father. He anticipated that he would be able to respond in a timely fashion at the end of the 30 day

commitment. TR 87. The Accused actually responded to Disciplinary Counsel on September 16, 2011, Ex. 32, and explained the situation with his father. On September 21, 2011, the Accused sent a follow-up letter to Disciplinary Counsel containing a further explanation and expanding upon his earlier letter. Ex. 34. The Accused faxed both of these letters to Disciplinary Counsel. Disciplinary Counsel responded to the Ex. 32 fax with a letter dated September 20, 2011, sent ordinary mail, advising the Accused to contact the Lane County LPRC. Ex. 33. As this was sent ordinary mail, the Accused did not receive it prior to sending Ex. 34. TR 91.

All of the documents requested by the LPRC were ultimately produced. It took a while because some of the phone records they were looking for were things that did not come with the bill and he had to get them from an ex-provider. He had delegated the task of rounding the records up to Loretta Bike, his bookkeeper. TR 92-93. The Accused testified that he made no effort to withhold the records, and that they were acquired as quickly as they could be. TR 95.

Loretta Bike was called as a witness by the Bar, but was not asked any questions about the delay issues. TR 239.

She only works on Mondays and fills in if someone else is gone on vacation. TR 241.

Jane Yates, the LPRC representative, did ultimately receive everything she requested. Additionally, at one point the Accused appeared at her office voluntarily and answered all of the questions she had. She acknowledged that he was cooperative. TR 469.

She did not recall any problems caused by the fact that the Accused at one point responded to her a few days late. TR 471.

B. RPC 1.15-1(d) [Failure to account for and deliver client property].

The Bar points out the Accused was previously suspended for six months for failure to maintain client funds in trust and failure to return client property promptly upon request and render an accounting. Answering Brief, p. 30.

The opinion of the trial panel in that case is found at Ex. 5F. It needs to be pointed out that in that case there was either no written agreement or no agreement that provided that a flat fee would be earned upon receipt or was non-refundable. The Accused learned from that misadventure. The retainer agreement in this case, ER-38 to the Bar's Answering Brief, makes it very plain that the fee was

"considered earned" and that the consideration was the attorney agreeing to represent the client through completion of the service or until he was discharged.

There was also uncontradicted expert testimony that the fee was in any event fully earned. TR 233, and that the flat fee was "on the low end". TR 231, 233. The same witness, Bob Schrank, also testified that if an attorney was terminated prior to completion of the service that it did not void a flat fee agreement. TR 236-237. The Bar took the position before the trial panel that the reasonableness of the initial flat fee was irrelevant. TR 230-231.

III. ARGUMENT

A. Violation of RPC 1.1 (Restraining Order)

It is of some significance that the Bar does not discuss any of the cases cited by the Accused at all. The Accused will not simply repeat the arguments made in his opening brief.

The Bar argues that the precatory language on the first page of Ex. 9, ER-30, is of significance because of the language that "you must obey all of the provisions of this Restraining Order even if the Petitioner contacts you or gives you permission to contact him/her." A better reading of that language is to remind a respondent who is forbidden

from contacting a petitioner, even if the petitioner contacts him, that he is still not free to intimidate, molest, or menace the petitioner, as set forth at ER-32. In fact, that language suggests on its face that it is permissible for a respondent to accept a call from a petitioner without being in violation of the restraining order, since it does not say "you must hang up" if a petitioner attempts to call you.

The Bar further argues that as a result of the telephone contact, Mr. Fan was sentenced to 30 days in jail. Answering Brief, p. 7. This makes it sound worse than it was. The 30 day jail sentence received by Mr. Fan was concurrent with a number of other contempts, including several he had pled guilty to. Further, it appears Mr. Fan did in fact violate the restraining order because the subject call between him and Ms. Yang was interrupted and he called her back. TR 190-191 (a portion of the transcript of the contempt proceeding).

The Bar argues that the language of the statute authorizing the restraining order controls, ORS 107.718, because it permits an order "that the respondent have no contact with the petitioner." It is important to note that the statute merely sets the parameters of the permitted

order. The statute is not the order. This is not a "no contact" order, although it easily could have been. It is a "you make no contact" order.

On page 11 of its brief, the Bar argues that no witness could identify any case where a defendant charged with contempt for violating a "no contact" provision had prevailed by arguing that the victim had initiated the contact. That completely ignores the testimony of attorney Donald Diment, who testified that although he could not give a specific case, he could testify to what he had heard "from the mouth of a judge." TR 218.

Finally, the Bar relies upon "local practice." Answering Brief, p. 11. Presumably the "local practice" relied upon is testimony from two lawyers that they would not advise their client to have any contact with the victim. One of those attorneys was Donald Diment, who testified that such contact would not be illegal or unethical but might lead the client into a situation that was not good because of the possibility the victim would claim intimidation. TR 217.

The other attorney who testified, Larry Roloff, was asked only if he would feel comfortable personally calling a victim for a variety of reasons, even assuming it was not

violating a restraining order. TR 474-475. Other than that, there was no evidence in the record of any "local practice."

B. Violation of RPC 1.2(c) (Restraining Order)

It is respectfully submitted that the Bar continues to misread RPC 1.2(c). That rule requires on its face that the lawyer know the conduct is illegal. The accused reiterates that his conduct cannot be both knowing and negligent.

The focus of the Bar is incorrect. In its Answering Brief, p. 14, the Bar relies upon the Accused having actual knowledge of the FAPA order and its terms. That does not mean he knew the conduct he assisted in was prohibited, which is the proper focus.

The Bar also argues that the Accused's position is "simply not credible". Answering Brief, p. 14. Disbelief is not evidence. Disbelief is not even a permissible inference. *Tolbert v. First National Bank of Oregon*, 312 Or 485, 495, 823 P2d 965 (1991); *Blandino v. Fischel*, 175 Or App 185, 192, 39 P3d 258 (2002). The Bar is simply speculating, and speculation likewise is not evidence. *Woodtek, Inc. v. Musulin*, 263 Or 644, 653, 504 P2d 735 (1972). Likewise, suspicion alone is not sufficient. *Howard v. Sloan*, 264 Or 247, 256, 503 P2d 677 (1972).

There is certainly no evidence that would rise to the

level of "clear and convincing" evidence. To be "clear and convincing", evidence must be of "extraordinary persuasiveness". *State v. Gjerde*, 147 Or App 187, 191, 935 P2d 1224 (1997).

C. Violation of RPC 8.1(a)(2) (Delay)

The trial panel implicitly found the Accused to be a credible witness. ER-22, ER-23. Although the review in this court is de novo, to the extent the underlying factual findings were based on the credibility of witnesses, those findings are entitled to "substantial weight" in this court. *Union Cemetery Association of Crawfordsville v. Coyer*, 214 Or App 24, 34, 162 P3d 1072 (2007), rev. den. 343 Or 691; *Bogle v. Paulson*, 185 Or 211, 228, 201 P2d 733 (1949); *Meads v. Stott*, 193 Or 509, 541, 238 P2d 256, 239 P2d 594 (1952); *Empire Building Supply, Inc. v. Eko Investments, Inc., et al.*, 40 Or App 739, 745, 596 P2d 593 (1979). This is true whether the findings of credibility are express or implied. *Warren v. Warren*, 19 Or App 671, 674, 528 P2d 1088 (1974).

As the trial panel pointed out, RPC 8.1(a)(2) does not contain a time requirement, and there is no authority that delays such as were present in this case comprise a violation of the rule. The panel further found that the Accused "offered reasonable explanations for the delays, and

he did ultimately respond and fully address the inquiries." If the Bar disbelieved the testimony of the Accused, it had the opportunity to question his bookkeeper but did not do so. We are warranted in concluding that if the testimony of the Accused was false, the Bar would have called her to impeach him. *Larison-Frees Co. v. Payne,* 163 Or 276, 293, 96 P2d 1067 (1939). She was not present during the testimony of the Accused; they did not even testify on the same day. TR 23, 194, 199, 239. The trial panel further found that he satisfied the plain language of the rule. ER-23. This is not a situation where the Accused failed to respond at all to Bar inquiries. *In re Rhodes*, 331 Or 231, 237, 13 P3d 512 (2000).

This Court has recognized that RPC 8.1(a)(2) does not by its terms include a particular deadline for responding to requests for information. It also recognizes that BR 2.6(a)(1) provides that Disciplinary Counsel may request a lawyer respond to ethical violation allegations within 21 days. There is nothing providing for a shorter period. *In re Obert*, 352 Or 231, 248, 282 P3d 825 (2012). On many occasions, the Bar attempted to impose shorter deadlines on the Accused. *See*, for example, Ex. 30 (sent August 25, requiring a response by September 1); Ex. 37 (sent November

10, requiring a response within 10 days); Ex. 38 (dated November 23, requiring a response by November 30).

Further, there is no question that the exhibits demonstrate the Accused fully responding to inquiries from Mr. Morrill prior to the situation involving his father. The initial letter from Mr. Morrill (Ex. 22) was dated June 15 and requested a response on or before July 6. On July 8, the Accused faxed a response to Mr. Morrill.

On July 14, Mr. Morrill wrote to the Accused and indicated he was referring the matter to Disciplinary Counsel for consideration. Ex. 25. Mr. Morrill indicated that the Accused should expect to hear from Disciplinary Counsel within 14 days. Prior to that letter being mailed on July 13, the Accused faxed more information and documents to Mr. Morrill. Ex. 26.

The Accused advised Mr. Morrill that he was going to be out of state from August 1 through August 15, 2011, and invited anyone who wished to speak with any member of his office. That was sent on July 21, 2011. Ex. 29. This was dictated but not read.

This was sent to Mr. Morrill after Ex. 28, which was the first letter from Disciplinary Counsel. That is the letter that was sent to the lawyer for the Accused. It

obviously crossed with Ex. 29.

In summary, the record does not reflect any attempt to avoid his ethical responsibilities. Rather, it indicates an attempt to fully respond to the Bar's inquiries despite the Accused being out of the office caring for his father during the relevant period of time.

D. Violation of RPC 1.15-1(d) (Client Funds)

The central issue on this claim is whether or not the funds or client funds belonged to the Accused. The Bar's position requires a strange reading of the fee agreement. It recites that the agreement is a "flat fee" agreement, relates that the fee is "fixed in the sum of $4,500", reflects that "the minimum and maximum fee is $4,500", that the fee is "considered earned", and in consideration of that the Accused agreed to represent the client for all issues relating to the matter prior to appeal or retrial, through and including completion of that service "or through and including the attorney be discharged by client." The Accused suggests this makes it very clear that the funds were fully earned upon payment. The consideration was the agreement of the Accused to represent the client. The client was the one who terminated the relationship, not the Accused. The law is very clear that a lawyer is not required to deposit lawyer's

money, as opposed to "client funds," into a trust account or to account to the client. *In re Balocca*, 342 Or 279, 287, 151 P3d 154 (2007); *In re Hedges*, 313 Or 618, 623, 836 P2d 119 (1992).

The trial panel phrased the issue a little differently, and treated the issue as if it was an excessive fee issue. It found the fee was not excessive for the amount of service performed up to the time of termination. ER-23, 24. That determination is not challenged on appeal. It is also consistent with the general rule that although a client has an absolute right to terminate a lawyer, if the termination is in breach of the agreement then the client is still liable for damages. In contingent fee cases, even cases that have not been resolved, the amount of damages is the contingent fee that turns out to have actually been earned once the case is resolved. That is true even in cases where the actual complaint for damages has not been filed. *Jones v. Kubalek*, 215 Or 320, 329, 334 P2d 490 (1959); *Dolph v. Speckart*, 94 Or 550, 565, 186 P 32 (1920).

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IV. CONCLUSION

The decision of the Trial Panel should be reversed on appeal and affirmed on cross-appeal.

Respectfully submitted,

/s/ John C. Fisher
John C. Fisher, OSB No. 771750
Attorney for Accused

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

Brief Length

I certify that (1) this reply 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 5.02(2)(a)) is 3,411 words.

Type Size

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).

By: /s/ John C. Fisher
John C. Fisher, OSB #771750
Attorney for the Accused

CERTIFICATE OF FILING

I hereby certify that on July 3rd, 2014, I filed the original of this ACCUSED'S REPLY BRIEF with the Appellate Court Administrator, via the ECF filing system.

By: /s/ John C. Fisher
John C. Fisher, OSB No. 771750
Attorney for the Accused

CERTIFICATE OF SERVICE

I hereby certify that on July 3rd, 2014, I served ACCUSED'S REPLY BRIEF via the Appellate Court ECF on the individual listed below:

Susan Roedl Cournoyer
Assistant Disciplinary Counsel
OREGON STATE BAR
PO Box 231935
Tigard, OR 97281-1935
Telephone: (503) 620-0222, Ex. 324
Email: scournoyer @osbar.org

By: /s/ John C. Fisher
John C. Fisher, OSB No. 771750
Attorney for the Accused