

IN THE SUPREME COURT OF THE STATE OF OREGON

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

OREGON STATE BAR'S ANSWERING BRIEF

Susan Roedl Cournoyer
Bar No. 863381
Assistant Disciplinary Counsel
Oregon State Bar
16037 SW Upper Boones Ferry Road
Post Office Box 231935
Tigard, OR 97281-1935
Telephone: (503) 620-0222, Ext. 324
Email: scournoyer@osbar.org

Attorney for Oregon State Bar

John Fisher
Bar No. 771750
767 Willamette Street, Suite 302
Eugene, OR 97401
Telephone: 541 485-3153
Email: johncfisher@qwestoffice.net

Counsel for Accused

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding.

In this lawyer disciplinary proceeding, the Oregon State Bar (hereinafter, "Bar") filed a Formal Complaint against James C. Jagger (hereinafter, "Jagger") on May 18, 2012; Jagger filed his Answer on June 29, 2012. On June 11, 2013, the Bar filed its First Amended Formal Complaint (ER 1 - 10), alleging the following misconduct:

- (1) failure to provide competent representation, in violation of RPC 1.1;
- (2) counseling or assisting a client to engage in conduct the lawyer knows to be illegal or fraudulent, in violation of RPC 1.2(c);
- (3) failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, in violation of RPC 4.1(b);
- (4) improper communications with a represented party, in violation of RPC 4.3;
- (5) knowing failure to respond to a lawful demand for information from a disciplinary authority, in violation of RPC 8.1(a)(2);
- (6) failure to promptly account for or return client property, in violation of RPC 1.15-1(d);
- (7) neglect of a legal matter, in violation of RPC 1.3;
- (8) failure to keep a client reasonably informed and to respond to reasonable requests for information, in violation of RPC 1.4(a); and
- (9) failure to communicate sufficiently to allow client to make informed decisions regarding the representation, in violation of RPC 1.4(b).

Jagger filed his Answer to the First Amended Formal Complaint on June 28, 2013. (ER 11 - 17).

A trial panel heard the matter October 14 - 16, 2013. In its opinion filed November 25, 2013, the trial panel found that Jagger violated RPC 1.1 and RPC 1.2(c). The trial panel dismissed the remaining charges and imposed a 90-day suspension. (ER 18 - 29).

Jagger timely sought review of the trial panel decision and filed his Petition for Review and Opening Brief on March 14, 2014.

B. Nature of Judgment Sought to be Reviewed.

Jagger asserts that the trial panel erred in finding him guilty of RPC 1.1 and RPC 1.2(c), and urges this court to dismiss the case against him.

On review, the Bar asks the court to:

- (1) adopt the trial panel's findings and conclusions that Jagger violated RPC 1.1 and RPC 1.2(c);
- (2) find that Jagger also violated RPC 8.1(a)(2) and RPC 1.15-1(d); and
- (3) impose a suspension of at least six months.

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.

II. RESPONSE TO JAGGER'S QUESTION PRESENTED ON REVIEW

A. Did the Bar prove by clear and convincing evidence that Jagger violated RPC 1.1 and RPC 1.2(c)?

Response: The trial panel correctly found that Jagger violated RPC 1.1 and RPC 1.2(c) when, knowing that his client was subject to a FAPA restraining order, he facilitated telephone contact between his client and the abuse victim.

III. ADDITIONAL QUESTIONS ON REVIEW

Pursuant to BR 10.5(c), the Bar submits the following additional questions on review:

A. Does the record establish that Jagger violated RPC 8.1(a)(2)?

Response: The Bar proved by clear and convincing evidence that Jagger knowingly failed to comply with requests for information during the Bar's investigation of a complaint regarding his conduct in violation of RPC 8.1(a)(2).

B. Does the record establish that Jagger violated RPC 1.15-1(d)?

Response: The Bar proved by clear and convincing evidence that Jagger failed to promptly account for and deliver client property (the unearned portion of an advance fee), in violation of RPC 1.15-1(d).

C. Was the 90-day suspension imposed by the Trial Panel appropriate?

Response: Given Jagger's disciplinary history, the ABA *Standards for Imposing Lawyer Sanctions* and Oregon case law support a suspension of at least six months.

IV. SUMMARY OF ARGUMENTS

A. Jagger violated RPC 1.1 and RPC 1.2(c).

Jagger knew that his client was restrained by a FAPA order from contacting the FAPA petitioner by telephone or other means. Nevertheless, when Ms. Yang unexpectedly appeared in Jagger's office, Jagger invited her to speak with his client from his office telephone without weighing the significant risk to which violating the FAPA order would expose his client. The client spoke to Ms. Yang at length and was later charged and convicted of contempt. By facilitating prohibited contact between his client and a domestic violence victim, Jagger failed to exercise the legal skill and knowledge reasonably necessary to protect his client's interests, violating RPC 1.1 and causing injury to his client. By knowingly assisting his client to violate a court order, Jagger caused injury to Ms. Yang and to the legal system in violation of RPC 1.2(c).

B. Jagger violated RPC 8.1(a)(2).

During the Bar's investigation of a complaint regarding his conduct described above, Jagger did not timely or fully comply with the Bar's requests for information, resulting in a referral to the LPRC. Although he was suspended from the practice of law and occupied with attending to his elderly father's medical needs during part of this period, he was aware that the bar had sent him letters in connection with an investigation but did not take steps to acknowledge or respond to the inquiries until the reasonable deadlines had passed. Given Jagger's history of ethics complaints, LPRC referrals and then-imposed discipline for not cooperating with the Bar, his failure to respond timely or completely in this matter constitutes knowing misconduct.

C. Jagger violated RPC 1.15-1(d).

Perry Cheney paid Jagger a \$4,500 flat fee to represent him through trial in a criminal matter. Because the fee agreement did not contain a clear and unambiguous statement that the \$4,500 was non-refundable and earned upon receipt, Jagger was required to treat the funds as client funds, rather than his own, and to afford Cheney the protections outlined in RPC 1.15-1(d). When Cheney terminated representation before the criminal matter was concluded, Jagger was required to promptly account for the funds upon request and to promptly refund the unearned portion of the fee. Jagger's failure to do so violated RPC 1.15-1(d).

D. The court should impose a significant suspension.

If the court adopts the trial panel's findings that Jagger violated only RPC 1.1 and RPC 1.2(c), the 90-day suspension imposed by the panel is adequate. However, if the court finds that Jagger committed the additional violations described in this brief, a suspension of at least six months is appropriate given his prior discipline for similar misconduct and substantial experience in the practice of law.

V. STATEMENT OF FACTS

Jagger was admitted to the Bar in 1970 and has practiced law in Eugene for over 30 years, primarily in the areas of criminal law, domestic relations and personal injury. Tr. 23.

In December 2009, a Bar disciplinary board trial panel found Jagger guilty of several rule violations arising from two client complaints, including failure to refund an unearned portion of a flat fee when his client terminated the representation before the legal services had been completed and knowingly failing to comply with the Bar's requests for

information in its investigation of the complaints. *In re Jagger*, 25 DB Rptr 113 (2011); Ex. 5F. That trial panel ordered a six-month suspension and restitution. Although Jagger sought Supreme Court review of the trial panel opinion, he did not challenge the findings that he had violated RPC 8.1(a)(2) by failing to cooperate with the Bar investigations. In May 2011, Jagger dismissed his appeal and stipulated to all of the rule violations found and to the six-month suspension, effective August 1, 2011. Ex. 5F.

A. The Yang/Fan matter (Case No. 11-103).

On March 21, 2011, Yi Yang (hereinafter, “Ms. Yang”), a university exchange student from China, obtained a Family Abuse Prevention Act restraining order (hereinafter, “FAPA order”) against Xiao Hu Fan (hereinafter, “Mr. Fan”) in Lane County Circuit Court. (Ex. 9; ER 30 - 37.) The domestic violence that formed the factual basis for the FAPA order also resulted in criminal charges against Mr. Fan for coercion, assault and strangulation. Exs. 6, 10, 14.

Jagger undertook to represent Mr. Fan, also a student from China, in the criminal case and with respect to the FAPA order. Ex. 3, p. 9; Exs. 13, 16; Tr. 24.

Jagger knew that the FAPA order prohibited Mr. Fan from contacting or attempting to contact Ms. Yang in person, by mail or email, or by telephone. Ex. 9; ER 33. The FAPA order also prominently warned Mr. Fan that he must obey all of the order’s provisions, even if Ms. Yang contacted him or gave him permission to contact her. Ex. 9; ER 30. In their first meeting, Jagger learned that Mr. Fan had already called Ms. Yang from jail, contrary to the FAPA order. Tr. 36. Mr. Fan directed

Jagger to encourage Ms. Yang to dismiss the FAPA order and to contact Mr. Fan's parents in China for bail money. Tr. 36-37, 63, 187.

On March 23, 2011, Jagger called Ms. Yang on the telephone to discuss the FAPA order and the possibility that she would help Mr. Fan contact his parents. Ex. 12A; Tr. 33-34, 44-45. Later that afternoon, Ms. Yang came to Jagger's office, unannounced. Tr. 47, 186. Jagger testified that as a coincidence, he was talking to Mr. Fan on the telephone when Ms. Yang arrived. Tr. 50-52. Jagger invited Ms. Yang to talk to Mr. Fan on Jagger's telephone and, when she agreed, he put her on the phone with Mr. Fan and left the room. Tr. 54-56, 63-64, 66. Mr. Fan and Ms. Yang were on the telephone for over 30 minutes. Ex. 12A.

As a result of the telephone contact Jagger facilitated between Mr. Fan and Ms. Yang, Mr. Fan was charged and convicted of contempt and sentenced to 30 days in jail. Exs. 13, 17, 18, 21.

In June 2011, a representative of the Oregon Crime Victims Law Center submitted a complaint to the Bar regarding Jagger's conduct with respect to Ms. Yang. Ex. 22. The Bar undertook to investigate the complaint, and in July and August 2011, requested that Jagger respond to specific questions and provide phone records relating to his contact with Ms. Yang and Mr. Fan. Exs. 28, 30, 31. Jagger responded to the Bar's initial inquiry (Ex. 24), but he failed to timely acknowledge or respond to the Bar's subsequent inquiries, even though he knew that the Bar was attempting to contact him. Tr. 84, 87; Ex. 3, p. 35. Based upon Jagger's lack of response, the Bar referred the complaint to the Lane County Local Professional Responsibility Committee (hereinafter, "LPRC") for investigation on August 25, 2011. Ex. 30. Although Jagger was aware that the LPRC continued to request a complete set of his

telephone records, he was still in the process of seeking them from his phone carrier as of November 30, 2011. Exs. 37, 38, 39; Tr. 469, 472.

B. The Lipskey/Cheney matter (Case No. 13-53).

In August 2009, Perry Cheney paid Jagger a \$4,500 flat fee to represent him through trial on criminal charges in Douglas County. Tr. 258; Ex. 40 (ER 38-39). The fee agreement provided Jagger's fee "shall be fixed" and "shall be . . . considered earned" but did not clearly or specifically state that the fee was non-refundable and earned upon receipt. Cheney terminated Jagger's representation in late July 2010, before the case went to trial or was resolved. Tr. 263. Jagger knew that he owed Cheney a partial refund of the flat fee but he did not attempt to determine the amount Cheney was entitled to receive for several more months. Tr. 263, 287-89, 291. During this six-month delay, Cheney's new defense attorney and Cheney's sister, Leslie Lipskey, requested an accounting of Cheney's fee and a refund (Tr. 296-298; Ex. 41) and Cheney's mother submitted a request to the Bar for a fee arbitration. Ex. 42; Tr. 273, 298. Jagger received a copy of the fee arbitration request, which reiterated Cheney's desire for an accounting. Ex. 42. Jagger did not communicate with Lipskey or Cheney and did not provide the requested accounting. Tr. 299, 302, 305. On January 31, 2011, Jagger's office bookkeeper wrote a \$2,250 check to Cheney. Tr. 271-72, 246-47. However, there is no record that Jagger mailed the check, which never cleared his checking account.

In August 2011, Lipskey complained to the Bar about Jagger's failure to account for or to refund the unearned portion of the fee. Ex. 43. On November 1, 2011, Jagger's bookkeeper wrote a \$2,250 check to Cheney and mailed it to Cheney's mother. Ex. 47; Tr. 252.

VI. ARGUMENTS

- A. The trial panel correctly found that Jagger violated RPC 1.1 and RPC 1.2(c) when he assisted his client to communicate with the petitioner in violation of a FAPA order prohibiting that conduct.

When Mr. Fan hired him (on March 21 or 22, 2011), Jagger learned of the existence and terms of the FAPA order (Ex. 3, p. 12; Tr. 24, 26, 35, 188), including its prohibition of Mr. Fan from:

Contacting, or attempting to contact, [Ms. Yang] **in person**.

Contacting, or attempting to contact, [Ms. Yang] **by mail or email, or any other electronic transmission**, except for mailing court ordered emergency monetary assistance, checks or money orders.

Contacting, or attempting to contact, [Ms. Yang] **by telephone, including cell phone or text messaging**.

[Emphasis in original.] Ex. 9, ¶¶ 5A, 5B and 5C; ER 33. In addition, printed prominently on the front page of the FAPA order was the following:

NOTICE TO RESPONDENT:

- 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.

Ex. 9; ER 30.

At the outset of the representation, Mr. Fan directed Jagger to ascertain whether Ms. Yang would dismiss the FAPA order. Tr. 187. He gave Jagger “marching orders” to open a line of communication with Ms. Yang to try to encourage her to cooperate with Mr. Fan. Tr. 63. Mr. Fan was in jail at the time and Jagger’s other priority was to achieve his client’s release. Tr. 36, 63. Mr. Fan, a University of Oregon exchange

student from China, feared that he would be deported. He could not call his parents from jail to ask for bail money. Tr. 36. Mr. Fan wanted Jagger to ask Ms. Yang to call his parents for him. Tr. 36 - 37.

Jagger was also aware that Mr. Fan had already called Ms. Yang from the jail after the FAPA order had been issued; Jagger was concerned that a contempt complaint would be filed against Mr. Fan for these communications. Tr. 36.

On March 23, 2011, Jagger telephoned Ms. Yang and spoke with her for 24-25 minutes in two calls. Ex. 12A; Tr. 33-34, 44-45. Jagger's main purpose in calling was to convince Ms. Yang to dismiss the FAPA order (Ex. 3, pp. 17, 20; Tr. 44-45) but when Ms. Yang told him that she wanted it to remain in place, Jagger told her that he would prepare a dismissal for her to consider in case she changed her mind. Ex. 3, p. 23; Ex. 17A; Tr. 44-45, 189. Jagger asked Ms. Yang to come to his office sometime, but they did not set an appointment. Tr. 45-46. A few hours later, Ms. Yang arrived at Jagger's office. Tr. 47, 186. Jagger testified that he was coincidentally talking to Mr. Fan on the telephone in the conference room adjacent to the office reception area. Tr. 50-52. Jagger placed Mr. Fan on hold and went out to the lobby to introduce himself to Ms. Yang. Tr. 53.

In the reception area, Jagger told Ms. Yang that Mr. Fan was on the telephone and invited Ms. Yang to speak with him. Ex. 26; Tr. 54-56. According to Jagger, Ms. Yang expressed willingness to talk to with Mr. Fan, so Jagger escorted her into the conference room, resumed the telephone call with his client and put Ms. Yang on the phone. Tr. 54-56, 63-64. Jagger then left the conference room and was not present during his client's conversation with Ms. Yang. Tr. 66. Jagger thus facilitated his client's direct contact with Ms. Yang.

Jagger contends that Ms. Yang willingly consented to speak with Mr. Fan and that she, not Mr. Fan, committed the act of contacting. In his view, the FAPA order prohibited Mr. Fan from *initiating* contact but not from *accepting* contact initiated by Ms. Yang. Jagger offered testimony of a fellow lawyer (Donald D. Diment, Jr.) and a tenured English professor (Henry W. Wonham) as to the reasonableness of his interpretation of the FAPA order's language. Tr. 207-13, 314-15. Jagger urges this court to find that he reasonably concluded that the contact he facilitated did not violate the FAPA order.

The interpretation Jagger advances is not reasonable in light of Oregon's Family Abuse Prevention Act (ORS 107.700 *et seq*), local practice or the language of the FAPA order itself. In relevant part, ORS 107.718(1)(i) requires the circuit court, upon a showing that the petitioner has been the victim of abuse in the past 180 days, that there is imminent danger of further abuse and that the respondent poses a credible threat to the petitioner's physical safety, to order appropriate relief, including "that the respondent have no contact with the petitioner in person, by telephone or by mail." (Emphasis added.) The statute allows only two exceptions: when the FAPA order's own parenting-time provisions allow for contact or when lawful service of process on the petitioner requires it. ORS 107.718(12). The statute does not create an exception for contacts initiated by the petitioner or other third party, consistent with the goal of protecting domestic abuse victims from further exposure to or influence by their abusers.

Jagger's claimed reading of the FAPA order is also inconsistent with local practice. As the trial panel noted, 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. Tr. 123-24, 477. In fact, Lane County Deputy District Attorney Katherine Green testified that to her knowledge, Lane County judges had never acquitted a respondent on contempt charges because the victim initiated the contact, although that defense is frequently raised. Tr. 123.

Finally, the FAPA order itself put Mr. Fan (and Jagger) on explicit, bold-type, front-page notice that Mr. Fan was required to obey all of the provisions of the order even if Ms. Yang contacted him or permitted him to contact her. Ex. 9; ER 30. The FAPA order clearly prohibited Mr. Fan from speaking with Ms. Fang on Jagger's office phone.

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." Whether a lawyer has competently represented a client is a fact-specific inquiry. *In re Gastineau*, 317 Or 545, 553, 857 P2d 136 (1993) (analyzing former DR 6-101(A), the predecessor to RPC 1.1). The standard is an objective one: the attorney's mental state is not relevant. *In re Bettis*, 342 Or 232, 237, 149 P3d 1194 (2006). 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).

This court has found violations of RPC 1.1 or former DR 6-101(A) when attorneys take on matters in which they are inexperienced or fail to acquaint themselves with applicable law. See, e.g., *In re McCarthy*, 354 Or 697, 318 P3d 747 (2013); *In re Roberts*, 335 Or 476, 71 P3d 71 (2003); *In re Spies*, 316 Or 530, 852 P2d 831 (1993); and *In re Odman*, 297 Or 744, 687 P2d 153 (1984). However, this 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 had reviewed the charging instruments or discovery or had conducted any investigation. The court noted that the attorney had 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 "evidence[d] 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 court concluded attorney's representation failed to meet the standard of competence required by the rule. *Bettis*, 342 Or at 239-240.

Like *Bettis*, Jagger advised and assisted his client to take action that was clearly contrary to his interests. Jagger did not apply his legal knowledge to consider the implications or weigh the risks of arranging for his client to speak with Ms. Yang. Aware that his client had already called Ms. Yang in apparent violation of the FAPA order, Jagger did not use his legal skills to protect his client from the risk of further violation; instead, he recklessly encouraged further prohibited. Jagger knew that his client's paramount objective was to be released from jail and avoid deportation, yet he facilitated conduct by his client that constituted a FAPA order violation, for which arrest is mandatory. ORS 133.310(3) (an officer "shall arrest and take into custody a person without warrant" when probable cause exists that the person has violated a FAPA order).

More importantly, the experienced criminal defense attorneys called to testify stated that they would never advise or permit a client to communicate with a FAPA order petitioner; such communication would

expose their client to the risk of being accused of intimidation or to criminal liability. Tr. 217, 219, 475. In fact, Mr. Fan was charged with and convicted of contempt and sentenced to 30 days in jail for engaging in the very conduct Jagger facilitated. Exs. 13, 17, 18, 21.

The testimony of these attorneys demonstrates that Jagger's advice that Mr. Fan talk to Ms. Yang exposed Mr. Fan to the clearly foreseeable risk of criminal liability, as confirmed by Mr. Fan's contempt conviction. The record is clear that Jagger failed to apply the legal knowledge, skill, thoroughness or preparation reasonably necessary to advise a client who was subject to a "no-contact" FAPA order and thus failed to provide his client competent representation.

RPC 1.2(c) prohibits attorneys from counseling a client to engage, or assisting a client, "in conduct that the lawyer knows is illegal or fraudulent." "Knows" denotes actual knowledge of the fact in question, but knowledge may be inferred from the circumstances. RPC 1.0(h).

Jagger had actual knowledge of the FAPA order and its terms when he counseled and assisted Mr. Fan to talk to Ms. Yang on his (Jagger's) law office telephone. While Jagger claims that he believed that the FAPA order permitted Mr. Fan to speak with Ms. Yang if she initiated the contact, Jagger's asserted position is simply not credible under the circumstances, the most significant of which is the explicit **NOTICE TO RESPONDENT** on the FAPA order's front page. Ex. 9; ER 30.¹ Also significant are the facts that Jagger knew that his client actively

¹ Jagger also argues that RPC 1.2(c) offers a "safe harbor" by allowing a lawyer to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." The trial panel correctly noted, however, that there is no evidence that his client had any desire to determine or test the order's validity, scope, meaning or application. ER 21-22.

sought contact with Ms. Yang after the FAPA order had been issued; Mr. Fan had asked Jagger to encourage Ms. Yang to help him obtain bail money and to dismiss the FAPA order; and Mr. Fan had already called Ms. Yang from jail in violation of the order. These facts clearly put Jagger on notice that his client was highly motivated to contact Ms. Yang notwithstanding the court's prohibition.

Finally, Jagger has extensive legal experience, especially in criminal and domestic relations matters. Tr. 23, 99. Jagger's 30 years of practice and the other attendant circumstances support the trial panel's finding that he knew that the contact he facilitated was prohibited by the FAPA order and that he was assisting his client in illegal conduct when he invited Ms. Yang to speak with Mr. Fan on the telephone in his conference room. The court should find that Jagger violated RPC 1.2(c).

B. Jagger knowingly failed to respond to the Bar's requests for information in violation of RPC 8.1(a)(2).

In June 2011, the Bar received a complaint from Hayley Weedn (hereinafter, "Weedn"), a representative of the Oregon Crime Victim's Law Center, regarding Jagger's conduct in connection with Mr. Fan's telephone contact with Ms. Yang. Ex. 22. The Bar's Client Assistance Office (hereinafter, "CAO") sent Jagger a copy of the complaint and asked him to provide a response by July 6, 2011. Ex. 22.

Jagger faxed responsive materials on July 11 and 15, 2011. Exs. 24, 26. CAO referred the matter to the Disciplinary Counsel's Office (hereinafter, "DCO") and by letter dated July 19, 2011, DCO requested additional information² from Jagger by August 9, 2011. Ex. 28.

² DCO asked Jagger to provide a timeline of his services and contacts related to his representation of Mr. Fan; a detailed account of all contacts and communications with Ms. Yang; Jagger's office telephone

Jagger promptly faxed a letter to CAO, stating that he was willing to speak to the Bar about Weedn's complaint but that he would be out of his office from August 1 through 15, 2011. Ex. 29. Jagger did not respond to DCO's inquiry prior to August 1, 2011. Ex. 30. On that date, Jagger was suspended from the Bar for six months for ethical misconduct. Tr. 83; Ex. 5F; *In re Jagger*, 25 DB Rptr 113 (2011). He did not arrange for his office mail to be forwarded during his suspension. Tr. 83.

Ten days after Jagger's projected return date, DCO reiterated on August 25, 2011 its request for Jagger's response to its July 19, 2011 letter, this time by September 1, 2011. Ex. 30. Jagger's staff signed for the certified letter on August 26, 2011 but Jagger did not respond.

Around September 1, 2011, Jagger learned from his office that that he had received a letter from the Bar. Tr. 87. He assumed from past experience that he would have 14 to 21 days to respond. Tr. 87. He did not, however, contact DCO to confirm or request additional time and did not personally read the letter until mid-September 2011. Tr. 84; Ex. 3, p 35.

Having heard nothing from Jagger by September 15, 2011, DCO referred the complaint to the LPRC with notice to Jagger. Ex. 31. Jagger's staff signed for the certified letter on September 16, 2011. Ex. 31. That same date, Jagger faxed DCO an apology letter and asked for additional time to respond. Ex. 32. He indicated that he had not seen DCO's July 19, 2011 letter until "just recently," because he had been out of his office providing round-the-clock care to his 93-year old father who

records for March 23, 2011; and Jagger's office calendar for the week of March 21 through 25, 2011.

had recently undergone surgery. Jagger testified that before receiving the September 16, 2011 letter, he had not been aware of any deadlines. Tr. 89.

Jagger asked for additional time to respond. Ex. 32. DCO asked Jagger to contact the LPRC investigator, Jane M. Yates (hereinafter, "Yates") about his response. Ex. 33.

Thereafter, Jagger sent at least two responses to DCO. Exs. 34, 35. Jagger, through his attorney John Fisher, eventually responded to the LPRC's requests, but delayed providing his complete telephone records for March 23, 2011. Yates reiterated the request for these records by letters of November 10, 23 and 30, 2011. Exs. 37- 39. As of November 30, 2011, over four months after DCO first requested them, Jagger was still in the process of seeking some of the records from his carrier. Tr. 472.

RPC 8.1(a)(2) provides in part

[A] lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Although RPC 8.1(a)(2) does not state a particular deadline for responding to the Bar's requests, this court has interpreted the rule to include reasonable deadlines. *In re Obert*, 352 Or 231, 248-49, 282 P3d 825 (2012). An attorney may not avoid a violation of RPC 8.1(a)(2) by *eventually* responding to a Bar request for information. *Obert, supra*, citing *In re Rhodes*, 331 Or 231, 237, 13 P3d 512 (2000) ("the accused did not remedy his failure to respond to the Bar's or the LPRC's initial letters by eventually cooperating with the LPRC"); and *In re Schaffner II*, 325 Or 421, 425, 939 P2d 39 (1997) ("partial cooperation, such as

responding only when and if the matter escalates to an LPRC investigation, reduces the extent of the violation but does not absolve a lawyer from his or her obligation under the rule").

Jagger admits that he knew as of September 1, 2011 that the Bar was investigating the Weeden complaint and had sent additional inquiries to him but that he did not read DCO's letters until mid-September 2011. Tr. 84. Prior to sending his September 16, 2011 letter to DCO (Ex. 32), Jagger claimed he was not aware of any deadlines. This claim is not credible in light of his testimony that past experience as the subject of Bar investigations had taught him that he usually had 14 to 21 days to respond to letters from the Bar.

It is important to note the context in which these events unfolded. As of December 2009, Jagger knew that a disciplinary board trial panel had found that he had knowingly failed to timely respond to DCO's inquiries in two investigations (the Joseph and the Gonzalez complaints). Ex 5F; *In re Jagger*, 25 DB Rptr 113 (2011).³ On the Joseph complaint, Jagger failed to timely respond to multiple DCO inquiries in 2006-2007, explaining that DCO's requests had not been docketed on his calendar and that he had assumed that he had already responded. Jagger also failed to provide all of the requested documents (bank statements and client trust account ledger cards) and faxed non-substantive responses to DCO explaining that he was "not sure why I did not see your letter in my office," resulting in a referral to the LPRC for investigation in March 2008. Jagger repeated this conduct in connection with the Gonzalez complaint, in which he did not respond to DCO's

³ Jagger sought Supreme Court review of the trial panel opinion but he did *not* challenge the panel's findings that he violated RPC 8.1(a)(2) in both matters. Jagger eventually dismissed his appeal and the 6-month suspension was imposed effective August 1, 2011, 19 months after the panel issued its opinion finding the violations.

requests for specific documents and explanations in 2008, resulting in a referral to the LPRC in September 2008. In that matter, Jagger did not cooperate until the LPRC subpoenaed him to appear at deposition and provide documents in November 2008. That trial panel noted that although Jagger eventually cooperated with the LPRC, his failure to respond to DCO's inquiries violated RPC 8.1(a)(2).⁴ Ex. 5F; *In re Jagger*, 25 DB Rptr 113 (2011).

⁴ That trial panel recited Jagger's "collective pattern of failing to adequately respond to disciplinary inquiries":

Ackerman Complaint – 1998

By letter dated August 26, 1998, DCO requested information from Jagger by September 16, 1998. Jagger responded on September 24, 1998. On November 11, 1998, DCO requested additional information by November 24, 1998. When no response was received, DCO again wrote Jagger on December 15, 1998, advising it would decide the issue on the record received. On December 16, 1998, DCO received Jagger's written excuses as to why he had not previously responded: "Thanksgiving break" delayed his receipt of DCO's November 11, 1998 letter until November 16, 1998 and his staff had been busy but one secretary would work over the weekend to get his response mailed the following Monday. DCO did not receive a response until January 4, 1999, when Jagger wrote that one of his secretaries had been on an extended vacation and the other could not work due to depression but that Jagger had personally typed an enclosed one-page response.

Rennie Complaint – 2000

By letter dated February 17, 2000, DCO requested information (including an accounting of client funds) from Jagger by March 9, 2000. On April 27, 2000, DCO received Jagger's response with an explanation that his typist had been sick. On May 16, 2001, DCO requested further information by June 1, 2001. When no response was received, DCO sent Jagger a certified letter on June 11, 2001, requesting a response by June 18, 2001. Jagger responded on the requested date with a letter explaining that a new billing and accounting secretary had recently been hired and a new billing system had just been installed, which prevented easy access to the requested financial information. Jagger eventually responded on July 5, 2001, again explaining his personal problems and inability to locate the requested data. On July 10, 2001, DCO requested for a third time an accounting of the client's money by July 17, 2001. On July 20, 2001, Jagger submitted his response to the merits of the complaint.

McCall Complaint – 2000

By letter dated May 16, 2000, DCO asked Jagger to respond to a complaint by June 6, 2000. Jagger did not respond. On June 13, 2000, DCO sent Jagger a certified letter requesting a response by June 20, 2000 and advising that if he did not respond, the matter would be

The Bar acknowledges that this is not the worst example of an attorney's failure to cooperate with disciplinary authorities. However, during much of the time he was slow to respond on the Weedn complaint, Jagger was suspended in part for similarly failing to timely respond to DCO and the LPRC in prior matters. Given Jagger's extensive experience as the subject of disciplinary investigations,

referred to the LPRC. Jagger did not respond. DCO referred the investigation to the LPRC on July 27, 2000. On August 1, 2000, Jagger faxed a response to DCO explaining that he was sorry for the delay in responding but one of his secretaries had been "out of the office for awhile."

Overdraft Complaint – 2002

On February 20, 2002, DCO notified Jagger of a trust account overdraft notice it had received and requested an explanation by March 13, 2002, together with copies of Jagger's trust account statements for the last 90 days. Jagger did not respond. On March 18, 2002, DCO sent a certified letter to Jagger requesting a response by March 25, 2002 to avoid a referral to the LPRC and reminding Jagger of possible discipline for a violation of former DR 1-103(C). Again, Jagger did not respond until March 29, 2002, but failed to include with his narrative response the requested trust account statements. On April 8, 2002, DCO requested detailed information regarding the overdraft and requested trust account bank statements be provided by April 22, 2002. When no response was forthcoming from Jagger, DCO, on April 30, 2002, sent him a letter reminding him of his duty to comply by May 10, 2002. No response was received. On May 14, 2002, a letter to Jagger set forth a new deadline for his response by May 21, 2002. Finally, on May 28, 2002, Jagger faxed a one-page letter listing various check numbers and amounts but failing to include any of the requested documents or bank statements.

Lanning Complaint – 2008

On July 10, 2008, CAO requested that Jagger respond to a client complaint by July 24, 2008. After receiving no response from Jagger, CAO sent a certified letter requesting a response by September 10, 2008. After receiving no contact from Jagger, on September 16, 2008, CAO wrote Jagger advising that the matter was being referred to DCO who thereafter contacted Jagger on September 19, 2008, requesting Jagger's response by October 10, 2008. On October 22, 2008, Jagger had not responded to DCO, resulting in another certified letter being sent to Jagger advising that the matter would be referred to the LPRC if no response was forthcoming by October 29, 2008. Jagger responded on November 6, 2008, advising that his account of what transpired between him and his client would be forthcoming the following Monday, November 10, 2008. When Jagger had not responded by November 25, 2008, DCO advised that the matter would be referred to the LPRC if no response was forthcoming by December 2, 2008. On December 10, 2008, the Bar received Jagger's response.

multiple LPRC referrals and the 6-month suspension *then in effect*, Jagger's claims not to have known that deadlines applied or that he had an obligation to timely and fully respond are not compelling. The court should find clear and convincing evidence that Jagger knowingly failed to respond to lawful demands for information in violation of RPC 8.1(a)(2).

C. Jagger failed to promptly account for and return property belonging to his client in violation of RPC 1.15-1(d).

In early August 2009, Jagger undertook to represent Perry Cheney (hereinafter, "Cheney") in a Douglas County criminal matter. Tr. 258. Cheney paid Jagger a flat fee of \$4,500 to handle the case through trial. Tr. 258-59. The retainer agreement Cheney signed provided as follows:

The minimum and maximum fee for representation of client in this matter shall be the sum of \$4,500, considered earned and the attorney for consideration does agree to represent the client for all issues relating to this matter prior to appeal or retrial through and including the completion of that service or through and including the attorney be discharged by client.

Ex. 40; ER 38-39. In March 2010, new criminal charges were brought against Cheney in Lane County and Cheney hired Jagger to defend him in that proceeding as well, paying an additional flat fee of \$2,000. Tr. 262. Despite their filing order, the Lane County case proceeded to trial first and Cheney was convicted and sentenced to 60 months in prison. Tr. 266, 295. Cheney and his family believed it would not be in Cheney's best interest to have Jagger continue to represent him in the Douglas County proceeding and Cheney terminated Jagger's representation in

late July 2010. Tr. 263, 293-296. The Douglas County criminal case had not yet been resolved or gone to trial.⁵ Tr. 263.

When the representation ended before the case was completed, Jagger recognized that he had an obligation to assess whether he should refund a portion of Cheney's \$4,500 advance fee. Tr. 263, 289. He did not doubt that he owed Cheney money. Tr. 287. The case he had been hired to handle was not concluded and if another attorney were going to handle the case, returning something to his client was "a fair thing to do." Tr. 288. However, Jagger did not return any of the money or communicate to Cheney that he intended to do so. Tr. 291.

In August 2010, Cheney retained new counsel, Jason Short, to defend him in the Douglas County case; Short notified Jagger that he had taken over the matter and asked for a statement of account and Cheney's files. Ex. 41; Tr. 297. Jagger did not respond. Tr. 297. In December 2010, Cheney's sister and attorney-in-fact, Leslie Lipskey, asked Jagger for a statement of account and the unearned balance of Cheney's \$4,500. Ex. 41. Jagger did not respond. Tr. 298. Cheney's mother, Carmen Cheney, submitted a fee arbitration petition to the Bar in January 2011. (Ex. 42; Tr. 298.) Jagger did not respond.⁶ Lipskey filed a Bar complaint on August 5, 2011. Ex. 43; Tr. 299. On November 1, 2011, Jagger mailed Cheney's mother a \$2,250 check.⁷ Ex. 47; Tr. 247, 300.

⁵ It was ultimately resolved through a negotiated change of plea and sentence in July 2011. Tr. 267-68.

⁶ Jagger and his office bookkeeper testified that the bookkeeper wrote a \$2,250 refund check to Cheney on January 31, 2011. Ex. 104; Tr. 246, 247, 271. However, Jagger's office has no transmittal letter or other documentation showing whether, when, or to whom the check was sent, and the check never cleared his bank account. Tr. 242, 247, 272.

⁷ Jagger's office put a stop payment on the first check. Tr. 247.

1. The \$4,500 flat fee was client property.

In *In re Hedges*, 313 Or 618, 836 P2d 119 (1992), this court articulated the law that if a lawyer wants to avoid application of the ethics rules regarding the handling of client funds – that is, to treat a fee as his own when he first receives it – he must first have a “clear and specific written agreement” with the client that the fee is non-refundable. *Hedges*, 313 Or at 623-24. The court further developed that rule in *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994), stating:

Without a clear written agreement . . . that fees paid in advance constitute a non-refundable retainer earned upon receipt, such funds must be considered client property and are, therefore, afforded the protections imposed by [former] DR 9-101(A).

Biggs, 318 Or at 293. Since *Hedges* and *Biggs*, this court has consistently refused to relax the requirements that the agreement be written and that it clearly inform the client that the money belongs to the lawyer upon receipt. See, *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (attorney’s notes on a napkin not a “clear written agreement”); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007) (attorney who failed to produce signed agreement at trial and failed to meet evidentiary burden of proving its existence). This court’s insistence on a clear written agreement is so strict that the rule applies even where the client admits that the lawyer advised her orally that her retainer would be non-

refundable and earned on receipt. See, *In re Peterson*, 348 Or 325, 332-34, 232 P3d 940 (2010).⁸

Jagger's fee agreement does not clearly state that the \$4,500 fee was earned upon receipt and non-refundable. At most, it states that the \$4,500 fee "shall be ... considered earned," but it does not say *when* or under what circumstances. Ex. 40; ER 38. This language leaves open the possibility that the fee will be considered earned upon the occurrence a future event such as receipt, arraignment, plea offer, the first trial setting, the first day of jury selection or entry of judgment. The agreement does not clearly and simply inform a lay person that the \$4,500 would instantly belong to Jagger and he could treat the funds as his own; they do not evidence Cheney's clear and specific agreement that the funds became Jagger's property upon receipt.⁹ Cheney's belief to the contrary (*i.e.*, that he was entitled to receive the portion Jagger had not earned) is plainly expressed in his sister's requests for a billing statement and the remaining balance.

In the absence of a clear specific agreement that the \$4,500 was earned upon receipt, Jagger was obligated to treat the money as Cheney's property consistent with his obligations under RPC 1.15-1(d).

⁸ The court's requirements were essentially codified in December 2010 when RPC 1.15-1(c) was amended to permit attorneys to not treat advance fees as client funds if the fees are denominated as "earned on receipt," "nonrefundable" or similar terms in a written agreement signed by the client, and if the agreement explains that: the funds will not be deposited into the lawyer's trust account; and 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 had not been completed. See, RPC 1.5(c).

⁹ To the extent the terms of Jagger's fee agreement are ambiguous, they should be construed against the drafter. See, *Berry v. Lucas*, 210 Or App 334, 339, 150 P3d 424 (2006). Less recent but more to the point is this court's holding in *In re Irwin*, 162 Or 221, 237, 91 P2d 518 (1939): an ambiguous contract for professional services and the compensation of an attorney who drew it should be construed in favor of the client.

2. Jagger was required to promptly render an accounting of Cheney's funds.

RPC 1.15-1(d) requires attorneys, upon request by the client, to promptly render a full accounting regarding client funds or property in the attorney's possession. Jagger did not render any type of accounting, despite requests by Cheney's new defense counsel Short and his attorney-in-fact Lipskey, a fee arbitration petition and a bar complaint, until November 1, 2011. Ex. 47. This failure, alone, violates RPC 1.15-1(d). *In re Hedges, supra*, 313 Or at 623 (attorney's failure to provide a requested accounting of a flat fee violated former DR 9-101(C)(3) when there was no clear written agreement that the fee was earned upon receipt).

3. Cheney was entitled to prompt delivery of the unearned portion of his funds.

RPC 1.15-1(d) also requires attorneys to promptly deliver to a client any funds or other property in the attorney's possession that the client is entitled to receive. Because Jagger had not completed the legal services contemplated under the fee agreement when the representation ended, he had not earned the entire \$4,500 fee and Cheney was entitled to receive a partial refund.¹⁰ See, *In re Balocca*,

¹⁰ The trial panel found no violation of RPC 1.15-1(d) because it read the fee agreement to contemplate termination by the client: "attorney for consideration does agree to represent the client for all issues relating to this matter prior to appeal or retrial . . . or through and including the attorney be discharged by client." The panel apparently concluded, erroneously, that an attorney may contract his way into keeping an entire flat fee even if he does not complete services for a client. This court has previously held that a non-refundable fee could be clearly excessive if the representation is terminated prior to completion of the

342 Or 279, 151 P3d 154 (2007); *In re Gastineau*, 317 Or 545, 857 P2d 136 (1993). Indeed, Jagger knew that he should refund a portion of the advance fee. He understood that Cheney had hired new counsel to handle the case and that “human fairness” required Jagger to return some of the fee. Tr. 288. However, Jagger did not promptly return any funds to Cheney but instead waited for six months (August 2010 to January 31, 2011) to unilaterally calculate an amount to which Cheney was entitled. Jagger did not actually deliver any funds until November 2011, 17 months after the representation ended.

Even given the benefit of the doubt, Jagger’s six-month delay in writing a refund check to Cheney is sufficient to violate RPC 1.15-1(d), which requires the attorney to *promptly deliver* funds or property the client is entitled to receive. The court should find a violation of RPC 1.15-1(d).

VII. SANCTION

This court refers to the *ABA Standards for Imposing Lawyer Sanctions* (1991 ed.) (amended 1992) (hereinafter, “Standards”), in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct.

A. ABA Standards.

The *Standards* set out an analytical framework for determining the appropriate sanction in discipline cases using three factors: (1) the ethical duty or duties violated; (2) the lawyer’s mental state; and (3) the actual or potential injury caused. *In re Obert*, 352 Or 231, 258, 282 P3d

services contemplated. See, *In re Gastineau*, 317 Or 545, 857 P2d 136 (1993).

825 (2012). After analyzing these factors, the court makes a preliminary determination of sanction, after which it adjusts that sanction, if appropriate, based upon the existence of aggravating or mitigating circumstances and Oregon case law. *Id.*

1. Duties Violated.

The most important ethical duties are those obligations a lawyer owes to his clients. *Standards* at 5. In this case, Jagger violated his duty to preserve and protect client property (client funds). *Standards* § 4.1. He also violated his duty to provide his client competent representation. *Standards* § 4.5. Jagger violated his duty to the legal system to obey obligations under the rules of a tribunal and thereby avoid abuse of the legal process. *Standards* § 6.2. Finally, Jagger violated his duty to the profession to cooperate with disciplinary investigations. *Standards* § 7.0.

2. Mental State.

“Knowledge” is 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.” “Intent” is “the conscious objective or purpose to accomplish a particular result.” *Standards* at 7. The trial panel correctly determined that Jagger knew the law relating to FAPA orders but chose to ignore it when he assisted his client to engage in conduct that violated the order. ER 21-22. The record also establishes that Jagger acted knowingly when he failed to promptly account for and deliver Cheney’s funds, despite numerous requests in 2010-2011. (Based upon Jagger’s then-pending discipline, he was aware at that time that it was inappropriate not to remit the unearned portion of a flat fee upon termination of the representation.) Finally, the record establishes that Jagger knowingly failed to respond to the Bar’s requests for information.

3. Actual or Potential Injury.

For the purposes of determining an appropriate disciplinary sanction, the court considers both actual and potential injury. *Standards* at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Both Ms. Yang and Mr. Fan suffered actual injury as a result of Jagger's arranging their telephone contact in his office. Ms. Yang was subjected to unwanted contact and Mr. Fan was convicted of contempt.

Jagger's failure to cooperate with the Bar's investigation caused actual injury to both the legal profession and to the public because multiple requests and a referral to the LPRC were necessitated by his failure to timely respond to DCO, thereby delaying the Bar's investigation. *In re Schaffner II*, 325 Or 421, 426-27, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 222-23, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990).

Jagger's failure to promptly deliver the unearned portion of Cheney's funds denied Cheney the use of these funds when he hired a new attorney to replace Jagger.

4. Preliminary Sanction.

Absent aggravating or mitigating circumstances, the following *Standards* apply:

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty

owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

5. Aggravating Circumstances.

The trial panel found the following three aggravating factors:

1. A prior record of discipline. *Standards* § 9.22(a). Jagger has a significant prior disciplinary history, some of which is relevant to this proceeding because it involved the same or same types of misconduct as in the present case.

- (a) Admonition:¹¹ Jagger was admonished in 1983 for neglecting a probate proceeding in violation of former DR 6-101(A)(3) (current RPC 1.3). This admonition is relevant because it warned Jagger that, "The Board also has expressed concern over your failure to respond to inquiries from the Bar regarding this matter. While such a rule was not in effect when this matter was first investigated by the Bar, you should be aware that DR 1-103(C) [current RPC 8.1(a)(2)] now requires a member of the Bar to cooperate with a disciplinary investigation." Ex. 5A.
- (b) Public Reprimand: In 1985, Jagger was reprimanded by a trial panel for violating former DR 9-102(B)(4) (current RPC 1.15-1(d)) (failure to provide client property) when he destroyed materials obtained in representing his client rather than delivering them to the client. *In re Jagger*, 1 DB Rptr 63 (1985). Ex. 5B.

¹¹ A letter of admonition may be considered an aggravating factor when it involved conduct that was the same or similar to the misconduct at issue. *In re Cohen*, 330 Or 489, 500-01, 8 P3d 953 (2000).

- (c) Public Reprimand: In 1995, Jagger was reprimanded for violating former DR 7-104(A)(1) (improper communication with a represented party). *In re Jagger*, 9 DB Rptr 11 (1995). Ex. 5D.
 - (d) Admonition: In 2002, Jagger was admonished for failing to deposit and maintain client funds in trust in violation of former DR 9-101(A) (current RPC 1.15-1(c)). Ex. 5E.
 - (e) Six-month Suspension and Restitution: In 2011, Jagger was suspended for six months for violating former DR 9-101(A) (failure to maintain client funds in trust); former RPC 1.15-1(c) (failure to maintain client funds in trust); RPC 1.15-1(d) (duty to return client property promptly upon request and render an accounting); RPC 1.5(a) (clearly excessive fee); RPC 1.16(d) (duty, upon termination of representation, to refund any fee or expense that has not been earned or incurred); and RPC 8.1(a)(2) (failure to respond to inquiries from a disciplinary authority) in connection with two complaints. *In re Jagger*, 25 DB Rptr 113 (2011). Ex. 5F.
- (2) Vulnerability of the victim. *Standards* § 9.22(h). The panel noted the vulnerability of Ms. Yang, the victim of violent crime at the hands of Jagger's client. Ms. Yang sought protection in the legal system and Jagger "knowingly placed her in a vulnerable position" (ER 27) for the benefit of his client.
- (3) Substantial experience in the practice of law. *Standards* § 9.22(i). Jagger has practiced law in Oregon since 1970.

If, as the Bar urges, this court finds that Jagger violated RPC 1.15-1(d) and RPC 8.1(a)(2) in this matter, the following two additional aggravating factors are present:

- (a) A pattern of misconduct. *Standards* § 9.22(c). Jagger's prior misconduct in failing to fully or timely respond to the Bar (Exs. 5A & 5F), in conjunction with the charge in this case, demonstrates a collective pattern of failing to adequately respond to disciplinary inquiries. *Standards* § 9.22(c). See *In re Schaffner I*, 323 Or 472, 480, 918 P2d 803 (1996). His prior misconduct also shows a pattern of mishandling client funds and other property. Exs. 5B, 5E, 5F.
- (b) Multiple offenses. *Standards* § 9.22(d).

6. Mitigating Circumstances.

The trial panel correctly found no mitigating circumstances. ER 27.

The numerous aggravating factors justify an increase in the degree of presumptive discipline to be imposed. *Standards* § 9.21. A substantial suspension is therefore appropriate.

B. Case Law.

Oregon cases support a considerable suspension of at least six months.

Lack of competence

The court often imposes short or relatively short suspensions for lack of skill, competence or preparation. See, e.g., *In re McCarthy*, 354 Or 697, 318 P3d 747 (2013) (90-day suspension for failure to provide competent representation, failure to maintain reasonable communication with the client and failure to deposit nonrefundable advance fee into trust); *In re Bettis*, 342 Or 232, 149 P3d 1194 (2006) (30-day suspension

for attorney's failure to review discovery or conduct any factual or legal investigation prior to obtaining his client's jury waiver); *In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (60-day suspension for failing to comply with applicable procedural and substantive probate rules, lack of competence and neglect); and *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (91-day suspension where lawyer lacked knowledge and skill necessary to undertake a probate case but proceeded to attempt the representation).

Counseling or assisting a client in illegal or fraudulent conduct

Jagger's assistance and facilitation of his client's prohibited contact with a domestic violence victim warrants suspension. See, e.g., *In re Benson*, 317 Or 164, 854 P2d 466 (1993). In *Benson*, the lawyer was suspended for six months when, in anticipation that client's unencumbered property may be subject to criminal forfeiture, attorney prepared and recorded trust deeds. The court found that the attorney's acts constituted fraud despite the fact he intended only to provide the client with notice of an impending forfeiture, rather than to avoid the forfeiture itself. See also, *In re Richardson*, 350 Or 237, 253 P3d 1029 (2011) (disbarment for assisting client to convey property from elderly incompetent woman); *In re Dinerman*, 314 Or 398, 840 P2d 50 (1992) (63-day suspension for participating in a scheme to avoid bank's lending limits for his client).

Failure to respond to a disciplinary authority

The court has repeatedly held that the failure to cooperate with a disciplinary investigation, standing alone, is a serious ethical violation. *In re Parker*, 330 Or 541, 551, 9 P3d 107 (2000); *In re Bourcier*, 325 Or 429, 939 P2d 604 (1997). The court has also emphasized that it has no patience for violations of this rule. *In re Miles*, 324 Or 218, 222-23, 923 P2d 1219 (1996) (although no substantive charges were brought,

attorney was suspended for 120 days for non-cooperation with the Bar). See also, *In re Schaffner I*, 323 Or 472, 918 P2d 803 (1996) (attorney suspended for 120 days: 60 each for neglect and failure to cooperate); *In re Arbuckle*, 308 Or 135, 775 P2d 832 (1989) (two-year suspension where attorney with no prior discipline failed to return client property and failed to respond to the Bar).

When attorneys have repeatedly been disciplined for failing to cooperate with the Bar, the court has imposed severe sanctions. See, *In re Bourcier*, 325 Or 429, 939 P2d 604 (1997) (attorney disbarred for one charge each of neglect and failure to respond; court cited a prior three-year suspension for neglect and failure to cooperate and a prior 60-day suspension for neglect); *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997) (two-year suspension for neglect, failure to return original documents to client and failure to cooperate with Bar staff; court noted a prior 120-day suspension for failure to cooperate and neglect); *In re Chandler*, 306 Or 422, 432, 760 P2d 243 (1988) (attorney suspended for two years for neglect, failure to turn over a client file, failure to cooperate with the State Lawyers Assistance Committee, and failure to respond to Bar inquiries; court attached significance to two prior instances of discipline, both of which also involved neglect of client matters and failure to respond to the Bar).

Failure to account for or deliver client property

The court has suspended attorneys for failing to remit client funds or other property. See, e.g., *In re Obert*, 352 Or 231, 282 P3d 825 (2012). (six-month suspension for attorney who took a credit card payment from a client and refused to return it when requested by the client); *In re Lopez*, 350 Or 192, 252 P3d 312 (2011) (nine-month

suspension when attorney settled clients' personal injury actions but thereafter failed to timely distribute proceeds to his clients and to pay medical liens); *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) (attorney with no prior discipline was suspended for 30 days when he failed to return a personal injury client's file materials, including medical records, despite numerous requests from the client).

Cumulative effect of prior similar discipline

When an attorney's prior discipline is taken into account, case law justifies an enhanced suspension. See, *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (two-year suspension for neglect and failure to fully cooperate with Bar where prior discipline for similar violations); *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997) (two-year suspension for neglect and failure to initially cooperate with the Bar, when attorney had prior similar discipline).

The court scrutinized an attorney's prior discipline in *In re Knappenberger*, 344 Or 559, 186 P3d 272, 283 (2008). Knappenberger had already been disciplined four times¹² for a variety of misconduct by the time he was found guilty of charging an illegal fee to an SSA client and an excessive fee to second client. The court noted that such violations would normally warrant only a short suspension in light of the one mitigating factor (full cooperation in the disciplinary process) and the aggravating factors other than his prior discipline (multiple offenses and substantial experience in the practice of law). While the prior offenses in the aggregate were serious, the court gave them only moderate weight because they involved different disciplinary rules and some had

¹² Reprimand for a single violation of contacting a represented party; 90-day suspension for a self-interest conflict and neglect; 120-day suspension for violation of contacting a represented party and a former client conflict of interest; and a one-year suspension for neglect. *Knappenberger*, 344 Or at 574.

occurred after the conduct at issue in the case before the court. *Knappenberger*, 344 Or at 576-77. The court suspended Knappenberger for two years, a period twice as long as his then most-recent one-year suspension. *Knappenberger*, 344 Or at 580.

While Jagger's disciplinary history does not feature multiple suspensions like that in *Knappenberger*, two factors the court recognized as justifying enhanced suspension stand out: Jagger's past violations of failing to cooperate and of rules similar to those present here. See, *Knappenberger*, 344 Or 576. If the moderate weight this court attributed to Knappenberger's prior discipline increased what would have otherwise been a short suspension to a two-year suspension, Jagger's most recent six-month suspension for failing in two matters to properly handle or remit client funds and failing in two matters to respond to the Bar justifies in this case a suspension of significantly more than six months.¹³

¹³ The court should consider Standard § 8.0:

8.0 PRIOR DISCIPLINE ORDERS

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

8.1 Disbarment is generally appropriate when a lawyer:

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

VIII. CONCLUSION

The record demonstrates that Jagger caused harm to his clients and others by facilitating his client's direct communication with a domestic violence victim in violation of a court order and failing to promptly account for or deliver client funds. While his failure to cooperate with a Bar investigation was not aggravated, it nevertheless required the expenditure of time by a volunteer member of the LPRC and revealed a continuing attitude that is not consistent with the profession's mandate to regulate itself.

Jagger's disciplinary history demonstrates that he had ample warning of his ethical responsibilities and the disciplinary process when he engaged in the misconduct in this case. As the trial panel noted, "the persistent nature of this attorney's violations shows either a shockingly weak grasp of the Rules of Professional Conduct or a callous disregard for those rules." ER 28. The court should impose a sanction of at least six months in order to impress upon Jagger the importance of attending to his duties to his clients, the Bar and others.

DATED this 23rd day of May, 2014.

OREGON STATE BAR

By: Susan Roedl Cournoyer
Susan Roedl Cournoyer
Bar No. 863381
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S ANSWERING BRIEF on the 23rd day of May, 2014, 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 OREGON STATE BAR'S ANSWERING BRIEF on the 23rd day of May, 2014, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

John Fisher
767 Willamette Street, Suite 302
Eugene, OR 97401

DATED this 23rd day of May, 2014.

OREGON STATE BAR

By: Susan Roedl Cournoyer
Susan Roedl Cournoyer
Bar No. 863381

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 10,636 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).

Susan Roedl Cournoyer
Susan Roedl Cournoyer