Oregon State Bar CLE Seminars

Legal Ethics—Best Practices

Friday, May 4, 2018
8:30 a.m.–4:30 p.m.

6 Ethics credits and
.5 Practical Skills credit

LEGAL ETHICS—BEST PRACTICES

OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

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FACULTY

Disciplinary Counsel's Office

Angela W. Bennett

Angela Bennett is an Assistant Disciplinary Counsel with the Oregon State Bar's Office of Disciplinary Counsel. After prosecuting disciplinary cases for two years, she now investigates disciplinary complaints. Ms. Bennett is also the attorney responsible for administering the Oregon State Bar's Probation and Enforcement program. Prior to attending law school, Ms. Bennett was a certified chemical dependency counselor for a non-profit agency in Portland. After completing an externship with Judge Ancer Haggerty in the Federal District Court for Oregon, she began her law career as an associate litigator with Dunn Carney, litigating civil cases in federal and state courts.

Amber Bevacqua-Lynott

Amber Bevacqua-Lynott is the Chief Assistant Disciplinary Counsel and Deputy Director of Regulatory Services for the Oregon State Bar. She has been with the Disciplinary Counsel's Office since 2001. Ms. Bevacqua-Lynott is active in the National Organization of Bar Counsel, where she often presents and serves on multiple committees. She is also a member of the ABA Center for Professional Responsibility CLE Committee. In addition to investigating and prosecuting disciplinary matters, Ms. Bevacqua-Lynott is a regular speaker on professional responsibility and ethics issues. She is also a contributor to the Oregon Rules of Professional Responsibility Annotated and the Ethical Oregon Lawyer. Ms. Bevacqua-Lynott received her B.A. from the University of Redlands (1993) and her J.D. from Pepperdine University School of Law (1996). She is a member of the Oregon Bar (1999), and an inactive member of the Florida (1998) and California (1996) State Bars.

Nik T. Chourey

Nik T. Chourey is an Assistant Disciplinary Counsel with the Oregon State Bar and assigned to prosecution of formal disciplinary matters. Mr. Chourey's practice as a trial attorney in civil litigation began in 2008. Since that time, he has tried multiple cases to jury verdicts and defended clients in courts throughout Oregon. Before his practice, Mr. Chourey served as Multnomah County Judge Jean Kerr Maurer's trial clerk.

Susan R. Cournoyer

Susan Roedl Cournoyer, Oregon State Bar, Tigard. As an Assistant Disciplinary Counsel, Susan investigates allegations of attorney misconduct and reports on those matters to the Bar's State Professional Responsibility Board. She represents the Bar on appeals in discipline cases and in reciprocal discipline proceedings before the Oregon Supreme Court. Susan chairs the Multnomah Bar Association Equity, Diversity, and Inclusion Committee. Prior to joining the Disciplinary Counsel's Office, Susan was an associate with Portland law firm Sussman Shank. In 1998 and 1999 (during a seven-year South Pacific sailing adventure), Susan worked for the United Nations Development Programme as an advisor to the Office of Ombudsman in the Republic of Vanuatu.

Dawn M. Evans

Dawn M. Evans is Disciplinary Counsel and Director of Regulatory Services at the Oregon State Bar. Evans served as the Director of Professional Standards at the State Bar of Michigan for nine years, administering departments pertaining to ethics, the unauthorized practice of law, the client protection fund, the lawyers and judges assistance program, bar admissions, and lawyer referral. Prior to that time, Evans worked for eighteen years in attorney discipline at the State Bar of Texas, the last five years of which as Chief Disciplinary Counsel. She is a former president of the National Organization of Bar Counsel and, during her years in private practice, held positions as a director of the Texas Young Lawyers Association and president of the Walker County Bar Association. She is a graduate of University of Texas School of Law and holds a bachelor of arts cum laude in history and government from Southwestern University in Georgetown, Texas.

Stacy R. Owen

Stacy R. Owen is an Assistant Disciplinary Counsel with the Oregon State Bar's Office of Disciplinary Counsel. She investigates complaints about lawyers referred from the Bar's Client Assistance Office. Prior to working for the Bar, Ms. Owen was a litigator at Markowitz Herbold. She is involved in the community as a member of the board of directors for St. Andrew Legal Clinic and as the co-chair of First Book Portland, an organization that provides new books to needy children.

OREGON STATE BAR
LEGAL ETHICS—BEST PRACTICES

May 2018
Course Materials & Handbook

Section 1 — Introduction & Schedule

8:00-8:30 Registration

Moderators:

—Amber Bevacqua-Lynott, Oregon State Bar
—Linn D. Davis, Oregon State Bar

8:30-8:45 PRACTICE AIDS/HELPFUL HINTS

—Amber Bevacqua-Lynott, Oregon State Bar
—Linn D. Davis, Oregon State Bar

8:45- 9:00 OAAP

—Douglas S. Querin, Oregon Attorney Assistance Program

9:00-10:00 FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

— Daniel P. Atkinson, Oregon State Bar
—Sheila M. Blackford, Professional Liability Fund
—Linn D. Davis, Oregon State Bar

10:00-10:30 FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP (cont.)

— Nik T. Chourey, Oregon State Bar

Section 11 — Fee Agreements/Arrangements

10:30-10:40 Break

10:40-11:30 FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP (cont.)

— Susan R. Cournoyer, Oregon State Bar

Section 12 — Protecting Client Property

11:30-12:30 ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP

—Angela W. Bennett, Oregon State Bar
—Stacy R. Owen, Oregon State Bar

Section 13 — Duties to the Client
Section 14 — Confidences/Secrets and Other Limitations on Disclosure of Client Information

12:30-1:15 Lunch

1:15-2:50 ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP (cont.)

—Amber Bevacqua-Lynott, Oregon State Bar

Section 15 — 26-year Secret (60 Minutes video)
Section 16 — Conflicts

2:50-3:00 Break

3:00-3:20 ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP (cont.)

—Lisa Amatangel, Oregon State Bar

Section 17 — Duties to Others

3:00-3:50 ISSUES NEAR THE END OF/AFTER THE ATTORNEY-CLIENT RELATIONSHIP

—Theodore W. Reuter, Oregon State Bar

Section 18 — Termination of the Attorney-Client Relationship
Section 19 — Post-Representation Issues

3:50-4:20 OTHER ISSUES

—Dawn M. Evans, Oregon State Bar

Section 20 — Misrepresentation & Dishonesty
Section 21 — Criminal Conduct
Section 22 — Other Personal Conduct
Section 23 — Professionalism

4:20-4:30 QUESTIONS AND CLOSING REMARKS

4:30 Adjourn

PRACTICE AIDS/HELPFUL HINTS

Section 2 — Where to Go for Ethics Advice

- **Oregon State Bar General Info**
  - http://www.osbar.org
  - Front Desk: (503) 620-0222 or toll-free inside Oregon: (800) 452-8260
  - Regulatory Services/Discipline: (503) 620-0222
  - TDD/TTY: (503) 684-7416 or toll-free in Oregon: (800) 452-8260 x416

- **OSB General Counsel's Office Informal Telephone Ethics Advice**

Amber Hollister, General Counsel	(503) 431-6312	ahollister@osbar.org
Mark Johnson Roberts, Deputy General Counsel	(503) 431-6363	mjroberts@osbar.org

Notes

- **OSB General Counsel's Office Written Ethics Advice (RPC 8.6)**

Amber Hollister, General Counsel	(503) 431-6312	ahollister@osbar.org
Mark Johnson Roberts, Deputy General Counsel	(503) 431-6363	mjroberts@osbar.org

Notes

- **Volunteer Defense Counsel List**

Danielle Edwards, Director of Member Services	(503) 431-6426	dedwards@osbar.org

  - http://www.osbar.org/members/leadership.asp : Other: Volunteer Defense Counsel Panel

- **Formal Ethics Opinions:**
  - http://www.osbar.org/ethics

- **Ethics Reference Books:**
  - *Oregon Rules of Professional Conduct Annotated* (2016 & Supps.), OSB Publications
  - *The Oregon Ethical Lawyer* (OSB CLE 2015 *rev.*)
  - Jarvis, Moore, Sapiro & Tellam, *Oregon Rules of Professional Conduct Annotated,* Oregon Law Institute of Lewis & Clark Law School (6th ed., 2010).
  - Disciplinary Board Reporter (1984-present)
    - http://www.osbar.org/publications/dbreporter/dbreport.html

- Supp 2-1: Sylvia Stevens, *May We Help You? Ethics Advice Made Easy*, OSB Bulletin, June 2010.

Notes

PLF RESOURCES AND PRACTICE AIDS

Section 3 — PLF Resources

The PLF has hundreds of practice aids that you can download from our website. Some of the most frequently used practice aids are: File Retention and Destruction Guidelines, Engagement Letters, Disengagement and Nonengagement letters, Opening a Law Office Checklist, Conflicts of Interest Systems, and Docketing and Calendaring. To browse Forms in over 43 categories, go to the PLF website, www.osbplf.org, click on Practice Management, and then click on Forms.

The PLF also helps to fund BarBooks™, the free online library of OSB Legal Publications available on the Oregon State Bar website, www.osbar.org.

Professional Liability Fund
16037 SW Upper Boones Ferry Road, Suite 300, Tigard, OR 97224
PO Box 231600, Tigard, OR 97281-1600
(503) 639-6911 or (800) 452-1639 (Toll-Free within Oregon)
www.osbplf.org

In Brief

In Brief – The Professional Liability Fund *In Brief* contains information on how to avoid legal malpractice, technology updates, practice tips, and resources of interest to Oregon practitioners.

For information about *In Brief* publications available from the Professional Liability Fund, visit:

https://www.osbplf.org/publications/in-brief.html

For information about archived *In Brief* articles by issue, visit:

https://www.osbplf.org/publications/in-brief-archive.html

inPractice

inPractice – The Professional Liability Fund encourages Oregon lawyers and law office staff to follow or subscribe to *inPractice* – the PLF's blog featuring practice management information and other practical advice for lawyers in private practice.

To read posts, visit:

https://www.osbplf.org/inpractice/

Twitter@Oregon_PLF – Follow @OregonPLF on Twitter for technology and practice management tips.

PLF Publications

Books published from the Professional Liability Fund are free to lawyers whose principal offices are in Oregon. If you do not have a principal office in Oregon, you may download the PDFs. Oregon lawyers may request a print copy of the following helpful guides:

A Guide to Setting Up & Using Your Lawyer Trust Account (2016)
Oregon Statutory Time Limitations Handbook (2014)
A Guide to Setting Up & Running Your Law Office (2016)
Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death (2015)

Practice Management Advisors:

Sheila Blackford

503.684.7421

Hong Dao

503.726.1467

Rachel Edwards

503.726.1474

Jennifer Meisberger

503.726.1466

Notes

PRACTICE AIDS/HELPFUL HINTS

Section 4 — Bar Books

Why should I use BarBooks™?

- To locate the research you need right from your desk, or anywhere you have Internet access, 24/7.
- To save precious billable hours by eliminating trips to the library and time poring through print publications.
- To increase your certainty that you have researched every avenue because you can access all the legal publications at once.
- To represent your clients with complete confidence.
- To download over 1,800 time saving forms and jury instructions in MS Word or WordPerfect format.
- To download and print entire books for portable use.
- To find out what your colleagues have to say about a particular topic in comments.

Which books do I have access to with BarBooks™?

Our books are a valuable research tool and time-saver for any Oregon lawyer, and with BarBooks™ you can explore, search, or download all titles published by the OSB Legal Publications Department. BarBooks™ are a great way to begin your legal research for any case. Since each book presents a practice area from the Oregon perspective, you'll find explanations of Oregon cases, statutes, and administrative rules throughout. You'll also discover time-saving forms and practice tips from our expert authors.

Each chapter, jury instruction, and ethics opinion is posted as soon as it is finalized and before the print version of the whole book is available. Any new titles released by the OSB Legal Publications Department will also be added to the BarBooks™ library. Plus,

several Professional Liability Fund handbooks and over 140 CLE Seminar Handbooks have been added to BarBooks™.

What are the terms and conditions of my use of BarBooks™?

If you are an active or active pro bono member of the Oregon State Bar, your BarBooks™ access is governed by a License Agreement, which provides:

- You are entitled to access BarBooks™ from any computer at any time.
- You are entitled to download and use any of the forms and jury instructions included in the BarBooks™ library.
- You are entitled to download and print for your personal or professional use the PDF of any book included in the BarBooks™ library.
- Your license is in effect as long as you maintain your status as an active or active pro bono member.
- You may allow your support staff to access BarBooks™ on your behalf using your bar number and password. It is recommended that you change your password in the event any support staff who has been allowed such access leaves your employ.
- You are entitled to purchase support staff accounts at a cost of $50 per account in the event you do not want to share the password associated with your bar number with your support staff. An order form is available here.

Current Searchable Library (as of April 2017)

Administering Oregon Estates (2012 rev.)
Administering Trusts in Oregon (2007 rev.)
Administering Trusts in Oregon (2017 rev. in progress)
Advising Oregon Businesses, Vols. 1–2 (2001 rev. with 2007 supp.)
Advising Oregon Businesses, Vols. 1–2 (2017 rev.)
Advising Oregon Businesses, Vols. 3–4 (2003 rev. with 2009 supp.)
Advising Oregon Businesses, Vol. 5 (forms volume) (2010 edition)
Appeal and Review: The Basics (2010 edition)

Appeal and Review: Beyond the Basics (2014 edition)
Arbitration and Mediation (1996 rev. with 2008 cum. supp.)
Bankruptcy Law (1999 rev. with 2007 supp.)
Construction Law (2011 rev.)
Consumer Law in Oregon (2013 rev.)
Contract Law in Oregon (2003 rev. with 2008 supp.)
Creditors' Rights and Remedies (2016 rev.)
Criminal Law (2013 rev.)
Damages (2016 rev.)
Elder Law (2017 rev.)
Environmental and Natural Resources Law (2002 edition with 2006 supp.)
Environmental Law Volume 1: Regulation and Permitting (2013 edition)
Environmental Law Volume 2: Enforcement and Litigation (2015 edition in progress)
The Ethical Oregon Lawyer (2015 rev.)
Family Law (2013 rev.)
Federal Civil Litigation in Oregon (2009 rev.)
Fee Agreement Compendium (2007 rev.)
Guardianships, Conservatorships, and Transfers to Minors (2009 rev.)
Health Law in Oregon (2011-2014)
Insurance (1996 rev. with 2003 cum. supp.)
Insurance Law: The Basics (2011 edition)
Interpreting Oregon Law (2009 edition)
Juvenile Law (2007 rev.)
Juvenile Law: Dependency (2017 edition in progress)
Labor and Employment Law: Private Sector (2011 rev.)
Labor and Employment Law: Public Sector (2011 rev.)
Land Use (2010 edition)
Oregon Administrative Law (2010 edition with 2016 supp.)
Oregon Civil Litigation Manual (2004 rev. with 2009 supp.)
Oregon Civil Pleading and Practice (2012 rev.)
Oregon Constitutional Law (2013 edition)
Oregon Real Estate Deskbook (2015 edition)
Oregon Trial Objections (2009 edition)
Rights of Foreign Nationals (2010 edition)
Torts (2012 rev.)
Uniform Civil Jury Instructions (2005 rev. with 2006-2016 supps.)
Uniform Criminal Jury Instructions (2009 rev. with 2010-2016 supps.)
Workers' Compensation (2008 rev.)

PLF Handbooks

- A Guide to Setting Up and Running Your Law Office (PLF -- 2016)
- A Guide to Setting Up and Using Your Lawyer Trust Account (PLF -- 2016)
- Oregon Statutory Time Limitations (PLF -- 2014)
- Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death (PLF -- 2015)

Notes

PRACTICE AIDS/HELPFUL HINTS

Section 5 — OSB Legal Publications & Other Resources

In addition to the implementation of the BarBooks™ program, the Bar's Legal Publications Department continues to offer a wide range of resources and manuals in print format. A current catalog of these materials follows this section.

Additionally, the Bar offers its members free access to the Fastcase™ on-line research system. Like BarBooks™, this research tool can be accessed through the Bar's website.

Fastcase™ includes law libraries from all 50 states, as well as federal coverage since the inception of reporting. The Fastcase™ collection includes cases, statutes, regulations, court rules, and constitutions. Fastcase™ also provides access to a newspaper archive, legal forms, and allows searches of the PACER federal filing system.

The Fastcase™ libraries are searchable by keyword (or "Boolean" search) or natural language search. The system also allows members to search by citation.

In addition links to FAQs, Fastcase™ provides telephone, email and live chat with reference attorneys from 8am to 8pm Monday through Friday. Free training webinars are offered two to three times each month (some of which also carry free CLE credit), and the slides from these classes can be downloaded at any time.

The Oregon State Bar is among twenty-one state bar associations which have purchased Fastcase™ subscriptions for its members.

Notes

PRACTICE AIDS/HELPFUL HINTS

Section 6 — Oregon Attorney Assistance Program (OAAP) Resources

http://www.oaap.org/

(503) 226-1057 or (800) 321-6227 (OAAP)

The Oregon Attorney Assistance Program (OAAP) is a confidential service funded by the Professional Liability Fund (PLF) for all Oregon lawyers and judges. The OAAP provides assistance with and referral for:

- problem alcohol use
- problem drug use
- problem substance use
- stress management
- time management
- career transition
- compulsive disorders (including problem gambling)
- relationships
- depression
- anxiety
- any other issues that affect the ability of a lawyer, judge, or law student to function effectively

OAAP assistance includes:

- individual counseling
- workshops
- educational programs
- referrals

- Supp 4-1: Sheila Blackford, *Knockout Burnout!*, AttorneyAtWork.com, May 9, 2011

Confidentiality

All communications with the OAAP are completely confidential and will not affect standing with the Professional Liability Fund or the Oregon State Bar. No information will be disclosed to any person, agency, or organization outside the OAAP without the consent of the person accessing the program. Contacts with OAAP are kept strictly confidential pursuant to ORS 9.568, PLF Policy 6.150 – 6.300, Oregon State Bar Bylaw Article 24, Oregon Rule of Professional Conduct 8.3(c)(3), and Oregon Code of Judicial Conduct JR 2–104(C). No one will be told about requests for services.

How Can I Access OAAP Services?

If you are interested in any of the OAAP programs, call the OAAP at (503) 226-1057 or (800) 321-6227 (OAAP). The OAAP welcomes individuals who refer themselves to the programs and will also work with anyone who is concerned that an attorney or judge is not functioning effectively.

Are There Any Costs?

All services are free or at nominal cost. If additional professional help is needed, the OAAP can serve as a referral resource.

Statement of Mission

The purpose of the Oregon Attorney Assistance Program (OAAP) is:

1. To provide assistance to Oregon lawyers and judges who experience problem alcohol, drug, and/or other substance use, burnout, career transition, depression, anxiety, compulsive disorders (including Internet, sex, and gambling addictions), time management issues, relationship issues, stress, or other distress that impairs ability to function effectively;

2. To aid in the curtailment of malpractice claims and disciplinary complaints;

3. To educate the legal community about sources of distress and/or impairment, such as the disease of alcoholism, problem substance use, anxiety, depression, relationship issues, compulsive disorders, chronic illness, and career transition;

4. To educate the legal community and the families of Oregon lawyers and judges about the scope of services offered by the OAAP and resources that are available for assistance.

Philosophy and Approach

The OAAP is based on the philosophy of lawyers helping lawyers. All OAAP attorney counselors are lawyers and professionally trained counselors. As a result, we are able to establish a unique rapport with members of the legal community.

The OAAP encourages the involvement of family members, colleagues, coworkers, partners, friends, and others who are concerned about a lawyer, judge, or other member of the legal community who is experiencing distress. In some situations (alcoholism, chemical dependency, addiction, depression), the person with the disease or problem may deny that he or she is in need of assistance. Involvement of concerned others can help break the denial barrier and lead to effective assistance. At times, the person's condition may be interfering with his or her ability to seek help. Contacting the OAAP for information will begin the process of confidential assistance.

Notes

OAAP Attorney Counselors:

Shari R. Gregory
503-226-1057 or 800-321-OAAP x14
sharig@oaap.org

Karen A. Neri
503-226-1057 or 800-321-OAAP x11
karenn@oaap.org

Bryan R. Welch
503-226-1057 or 800-321-OAAP x19
bryanw@oaap.org

Douglas S. Querin
503-226-1057 or 800-321-OAAP x12
douglasq@oaap.org

Qualifications of OAAP staff

All OAAP attorney counselors:

(1) are licensed attorneys;

(2) have experience or training in alcohol and chemical dependency, intervention, mental health issues, group dynamics, and public speaking;

(3) have an understanding of or experience with 12-step programs; and

(4) if in recovery, have at least five consecutive years of recovery.

OAAP attorney counselors attain CEAP (Certified Employee Assistance Professional), CADC (Certified Alcohol and Drug Counselor), or other comparable counseling credentials within four years of employment at the OAAP and maintain the certification or credentials in addition to other appropriate continuing education.

Barbara S. Fishleder

OAAP Executive Director

503-684-7425

barbaraf@oaap.org

Notes

FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 7 — Basic Law Office Responsibilities

Notes

A. Law Office Structure

1. Attorneys who share offices and who do not wish to be regarded as members of a single firm must, *inter alia*, protect the confidences and secrets of each attorney's client and must not permit any joint employees to share client confidences or secrets. *OSB Legal Ethics Op No 2005-50*.

2. An attorney may share office space with a nonattorney professional who maintains a separate and independent business. An attorney may not, however, agree to a system of cross-referrals on a quid pro quo basis with another professional. *OSB Legal Ethics Op No 2005-2*.

3. A legal aid service is a "firm" or "law firm" within this definition. *OSB Legal Ethics Op No 2005-138*.

4. An attorney designated as "of counsel" for a law firm is considered a member of the firm for conflict of interest purposes. Therefore, when the attorney has a practice separate from the firm to which she is "of counsel," the current and former clients of both firms must be considered in evaluating whether conflicts exist. *OSB Legal Ethics Op No 2005-155*.

5. Because RPC 1.0(d) specifically defines a law firm as including a public defender's office, if one attorney in such an office is disqualified because of a former client information-specific conflict, all other attorneys in the

office are disqualified as well, unless the conflict is waived. *OSB Legal Ethics Op No 2005-174.*

6. A former partner who is without PLF coverage may consult with firm lawyers as long as she assumes no direct responsibility for client matters. *OSB Legal Ethics Op No 2005-169*.

7. Law firms that represent clients on the opposite side of a matter may employ the same nonattorney if the nonattorney does not acquire confidences or secrets from the client of either firm. If the nonattorney does acquire confidences or secrets from the client of either firm, the law firms may not both employ the nonattorney unless both clients consent after full disclosure. *OSB Legal Ethics Op No 2005-44*.

B. Communications About the Lawyer or Law Firm

1. The United States Supreme Court has ruled that attorney advertising is a form of commercial speech that is entitled to some constitutional protection. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2nd 810 (1977), the court ruled that a ban on all lawyer advertising could not withstand constitutional scrutiny as the First Amendment protects such advertising that is truthful and not misleading. Oregon's Rules of Professional Conduct codify that ruling.

2. An attorney may ethically solicit clients in writing as long as the written solicitations are truthful and not misleading and as long as the attorney otherwise complies with RPC 7.1 and 7.3. *OSB Legal Ethics Op No 2005-127*.

- Supp 7-1: Mark J. Fucile, *Avoiding Bad News: Risk Management in Law Firm Marketing*, OSB Bulletin, Jan 2009.

Notes re 2014 Changes to the Advertising Rules:

RPC 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

- *In re Lopez*, 350 Or 192, 252 P3d 312 (2011). [reciprocal 9-month suspension] Attorney's advertisement stating that persons in an auto accident had the right by law to receive at least $15,000 created a misleading impression concerning the results that attorney could obtain for prospective clients.

- *In re Hendrick*, 24 DB Rptr 138 (2010). [2-year suspension] Attorney advertised his firm as a team of lawyers, when he was a solo practitioner.

- *In re Magar*, 337 Or 548, 100 P3d 727 (2004). [1-year suspension] Attorney filed pleadings and sent letters on his letterhead to the court and opposing counsel when he was an inactive member of the bar and not eligible to practice law. [DR 2-101(A)(1)]

- *In re Shatzen*, 18 DB Rptr 213 (2004). [120-day suspension + BR 8.1 reinstatement] Attorney made misrepresentations when he continued to advertise that he was a certified public accountant years after his CPA certificate had lapsed. [DR 2-101(A)(1)]

- *In re Duncan*, 17 DB Rptr 202 (2003). [90-day suspension] Letterhead and yellow page advertising suggesting that out-of-state lawyer was licensed to practice law in Oregon violated the rule. [DR 2-101(A)(1)]

- *OSB Legal Ethics Op No 2005-49.* An attorney who has formed a professional corporation may ethically list, or refrain from listing, the

professional corporation designation in the attorney's telephone directory listings, advertisements, and letterhead.

- *OSB Legal Ethics Op No 2005-3.* As a general proposition, an attorney may write a column on legal matters for a local newspaper, engage in similar conduct for a radio or television station or speak to community groups, church groups, and the like on legal matters. The attorney must not, however, make false or misleading communications or permit others to make improper advertisements about the attorney.

- *OSB Legal Ethics Op No 2005-31*. An attorney who is a part-time judge or state legislator may not have the attorney's secretary answer the phone at the attorney's law office by stating "Judge_____'s office" or "Senator_____'s office."

- *OSB Legal Ethics Op No 2005-127.* A direct mail advertisement exists when an attorney communicates in written form with someone who is known to need legal services in a particular matter. When such mailings are made, the attorney must place the word "Advertisement" on the mailing in the form and location as required by the rule.

- *OSB Legal Ethics Op No 2005-127.* The requirement to identify a mailing as an "Advertisement" does not apply to the general circulation of newsletters.

- *OSB Legal Ethics Op No 2005-35*. An attorney may ethically send greeting cards and letters to the attorney's present and former clients thanking them for employing the attorney. An attorney may also send greeting cards and letters to individuals who have referred clients to the attorney in which the attorney thanks them for doing so. The attorney does not need to make a special notation that the cards or letters are "advertisements."

- *OSB Legal Ethics Op No 2005-112.* Under proper circumstances, an attorney may participate in marketing the attorney's services through a welcoming program or health club services program.

- *OSB Legal Ethics Op No 2007-180.* Attorney who participates in a nation-wide, internet-based lawyer referral service is responsible for ensuring that any service advertising about the attorney (*e.g.,* the

jurisdictional or geographic scope of practice) is not false or misleading.

- Supp 7-2: *Lawyer Websites,* American Bar Association, Formal Opinion 10-457 (August 8, 2010).

- Supp 7-3: Helen Hierschbiel, *Internet Marketing: Rules of the Road*, OSB Bulletin, January 2008.

RPC 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

- *OSB Legal Ethics Op No 2007-180*. Attorney who pays a fixed periodic fee to participate in a nation-wide, internet-based lawyer referral service or who pays a fee based on the number of "hits" on the attorney's advertising is not engaged in an improper fee-sharing arrangement with a non-lawyer as long as the fee is not related to any particular work derived from the service listing or based on actual referrals or retained clients.

- *OSB Legal Ethics Op No 2005-175*. Although the rules do not prohibit an attorney's participation in professional or civic groups for the purpose of networking, an attorney may not be a member of such an association if it requires making referrals as a condition of membership. By making a referral to another professional, the attorney is giving something of value in exchange for the promotion of the attorney's services, which violates RPC 7.2(a). By accepting such referrals, the attorney is receiving something of value in exchange for making referrals to others, in violation of RPC 5.4(e).

- *OSB Legal Ethics Op No 2005-112*. Under proper circumstances, an attorney may participate in marketing the attorney's services through a welcoming program or health club services program.

- *OSB Legal Ethics Op No 2005-108*. An attorney with an active family mediation practice may advertise under the "family counselor section" of the yellow pages as long as the advertisement is truthful and not misleading. If the attorney intends to advertise as an attorney (*i.e.,* for legal work and not for counseling work), the advertisement must state that the attorney is offering legal services.

- *OSB Legal Ethics Op No 2005-73.* An attorney may ethically accept unsolicited referrals from social friends, clients, and other business professionals and may thank such individuals for sending referrals to the attorney.

RPC 7.2 ADVERTISING

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and contact information of at least one lawyer or law firm responsible for its content.

- *OSB Legal Ethics Op No 2005-168*. An attorney may have an ownership interest in a for-profit lawyer referral service and may participate in the management of the service. However, the attorney may not treat the service as an adjunct to the attorney's law practice, provide legal advice to callers in the course of screening referral inquiries, or provide for the service to split fees with the attorneys to whom referrals are made.

- Supp 7-4: Amber Hollister, *What Hath the Web Wrought? Advertising in the Internet Age*, OSB Bulletin, May 2011.

C. Solicitation

RPC 7.3 SOLICITATION OF CLIENTS

A lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer.

1. To "initiate" personal contact with a prospective client to obtain professional employment, a lawyer must act intentionally to violate the rule. *In re Blaylock*, 328 Or 409, 978 P2d 381 (1999) (because attorney was also an emergency physician on duty in the emergency and was told by a nurse that the family of a critically injured man had requested to see him in his capacity as an attorney, he did not solicit the potential clients as contemplated by the former rule as the attorney was under the impression that the prospective client had sought his advice through an intermediary).

    - *OSB Legal Ethics Op No 2005-175.* Although the rules do not prohibit attorneys from participating in professional or civic groups for the purpose of networking, they must comply with the requirements of RPC 7.2(a) and 5.4(e). When following up on any client referrals that result, the attorney's response must be in writing, unless the person making the referral states that the client has authorized a personal contact.

    - *OSB Legal Ethics Op No 2005-127*. An attorney may ethically solicit additional clients in writing as long as the written solicitations are truthful and not misleading and as long as the attorney otherwise complies with RPC 7.1 and 7.3.

    - *OSB Legal Ethics Op No 2005-106*. Although an attorney may ethically purchase a tax return preparation business or a private legal practice, the attorney may not use such purchases to engage in improper client solicitations.

    - *OSB Legal Ethics Op No 2005-100.* An attorney who is contacted by a potential client may thereafter initiate personal or telephone

contact with the client in order to see whether the client wishes the attorney to pursue a matter on the client's behalf.

- *OSB Legal Ethics Op No 2005-100.* An attorney who receives a name and address of a client from the Oregon State Bar Lawyer Referral Service but is not, in fact, contacted by the client may write to the client but may not initiate telephone or in-person communications.

- *OSB Legal Ethics Op No 2005-70*. An attorney who leaves a firm may thereafter initiate personal contact with clients for whom the attorney did work while at the firm in order to solicit their business.

- *OSB Legal Ethics Op No 2005-51.* An attorney may ethically join a trade association that the attorney represents as long as improper solicitation does not occur and as long as the attorney does not permit the attorney's judgment on behalf of a client to be impaired.

- *OSB Legal Ethics Op No 2005-35*. An attorney may hold an open house and invite current clients, former clients, and nonclients to attend. That improper in-person solicitation could theoretically occur is not sufficient by itself to prohibit the invitations or event.

- *OSB Legal Ethics Op No 2005-10*. With appropriate disclosure and client consent, an attorney may advise clients concerning transactions with business enterprises that the attorney owns. An attorney may not, however, use such enterprises as a means of engaging in improper in-person solicitation of clients.

RPC 7.3 SOLICITATION OF CLIENTS

(b) the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

- *In re Idiart*, 19 DB Rptr 316 (2005). [reprimand] Attorney delegated to non-lawyer staff the task of sending direct mail solicitations to injury victims without making reasonable efforts to ensure that the staff's conduct was compatible with the disciplinary rules. Staff sent such a solicitation to the family of a traffic fatality immediately after

the accident, when attorney should have known that the family was unable to exercise reasonable judgment about employing counsel.

- *OSB Legal Ethics Op No 2005-79*. With disclosure and consent, an attorney may be employed by a church to represent nonchurch members in support of issues of interest to the church (e.g., helping to assure care for the elderly). In performing such work, the attorney may ethically initiate personal or telephone contact with potential clients.

Additional Discussion Points:

HYPOTHETICAL

- Attorney Anthony had a solo law practice, specializing in sports litigation. He operated his practice under the names "Anthony & Associates," "Law Offices of Anthony & Associates," and similar names. Anthony used these names on his firm letterhead and other documents, as well as in his advertisements and directory listings.

What was wrong with Anthony's firm name?

A. It lacked creativity.

B. It was misleading.

C. Nothing. Anthony had been looking to hire associates.

D. Nothing, because the letterhead and advertisements listed him as the only attorney with the firm.

DISCUSSION

Answer: _____

In re Reed, 21 DB Rptr 222 (2007) (public reprimand). *See also, In re Potts/Trammel/ Hannon*, 301 Or 57, 718 P2d 1363 (1986).

D. Firm Names

RPC 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

- *In re Shatzen*, 18 DB Rptr 213 (2004). [120-day suspension + BR 8.1 reinstatement] Attorney made misrepresentations when he continued to advertise that he was a certified public accountant years after his CPA certificate had lapsed. [DR 2-102(A)]

- *OSB Legal Ethics Op No 2005-153*. Attorneys employed by an insurer to defend insureds' liability claims may not hold themselves out in letterhead and pleadings as practicing in a law firm without disclosing their status as employees of the insurer.

- *OSB Legal Ethics Op No 2005-101*. A mediation service owned in part by an attorney may not use a misleading trade name.

- *OSB Legal Ethics Op No 2005-65*. Attorneys may ethically list nonattorney personnel on their firm letterhead as long as the listing is not misleading.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

- *OSB Legal Ethics Op No 2005-109*. An Oregon law firm that contracts with a Washington law firm to represent the Washington law firm's clients in Oregon whenever the clients consent and the RPCs permit may identify the Washington law firm on its letterhead as an "associated office" and may permit itself to be advertised on the Washington law firm's letterhead as an associated office.

- *OSB Legal Ethics Op No 2005-103*. A law firm that includes both attorneys who reside in Oregon and are members of the Oregon

State Bar and attorneys who reside in other states in which they are admitted to practice (but who are not members of the Oregon State Bar) may advertise the availability of non-Oregon bar members to their Oregon clients as long as the advertisement does not state or imply that those attorneys are licensed in Oregon. The firm also must not permit the non-Oregon attorneys to work on Oregon matters other than on a *pro hac vice* basis in litigation or in conjunction with Oregon bar members on nonlitigation matters.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

- *In re Cain*, 26 DB Rptr 55 (2012). [reprimand] Attorney continued to list the names of associate lawyers on her firm's website after the associates left the firm.
- *In re Kinney*, 26 DB Rptr 59 (2012). [reprimand] Attorney continued to list the names of associate lawyers on his firm's website after the associates left the firm.

- *OSB Legal Ethics Op No 2005-12.* Attorneys A, B, and C who maintain separate practices but share office space may not hold themselves out as "associates" or "of counsel" and may not practice under the name "A, B & C, attorneys at law."

(e) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer of the lawyer's firm devotes a substantial amount of professional time in the representation of the client

- *OSB Legal Ethics Op No 2005-155*. An attorney designated as "of counsel" for a law firm is considered a member of the firm for conflict of interest purposes. Therefore, when the attorney has a practice separate from the firm to which she is "of counsel," the

current and former clients of both firms must be considered in evaluating whether conflicts exist.

- *OSB Legal Ethics Op No 2005-169*. A law firm may continue to use in the firm's name the name of a former partner who has retired from the active practice of law but continues to practice as a mediator, providing the use of the lawyer's name is not misleading. A designation on the letterhead that the former partner's practice is "limited to mediation" should sufficiently inform the public.

Notes

Notes

FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 8 — Law Office Management

A. Business Plan: *See* generally PracticePRO (Canadian PLF) practice aids at: http://practicepro.ca/practice/PracticeFinances.asp and http://practicepro.ca/practice/financesbookletprecedents.asp related to "managing the finances of your practice."

Practice PRO also has additional materials that can be downloaded such as: a business plan, a sample budget, an associate agreement, along with some other aids which can be downloaded in Word for easy customization.

- Supp 8-1: Lawyer's Professional Indemnity Company: *Business Plan Outline*
- Supp 8-2: The Professional Liability Fund: *(Current List of) The PLF Practice Aids and Forms*
- Supp 8-3: Sheila Blackford, Dee Crocker & Beverly Michaelis, *Business Essentials: Tips for the Small Firm and Sole Practitioner,* OSB Bulletin, May 2011
- Supp 8-4: Randal Acker, *Riding the Wave: So You Want to Hang Out Your Own Shingle?*, OSB Bulletin, Oct 2010
- Supp 8-5: Sheila Blackford, *Law Office Start-Up—Law Office on a Shoestring,* OSB Bulletin, Oct 2008

1. Financial plan

   - *See* Supp 8-2: The PLF Practice Aids and Forms: Financial Management & Trust Accounting

   a. Trust accounts

      - Supp 8-6: The Professional Liability Fund: *Frequently Asked Trust Account Questions*

b. Accounts receivable

c. Accounts payable

d. Tracking of financial transactions

- Supp 8-7: The Professional Liability Fund: *Client Ledger Card*
- Supp 8-8: The Professional Liability Fund: *Trust Account Receipts and Disbursements Journal*

e. Regular review procedures

- Supp 8-9: The Professional Liability Fund: *Trust Account Reconciliation*

2. Human resources plan

- *See* Supp 8-2: The PLF Practice Aids and Forms: Office Manuals & Staff

a. Partners/Associates

- Supp 8-10: The Professional Liability Fund: *Delegation Memo*

b. Contract attorneys

- Supp 8-11: Heidi O. Strauch, *Choosing a Contract Attorney: Tips for Establishing a Working Relationship*, OSB Bulletin, Feb/Mar 2011
- *See also,* Supp 8-10: The Professional Liability Fund: *Delegation Memo*

c. Support staff

- Supp 8-12: The Professional Liability Fund: *Checklist for New Secretaries*
- *See also,* Supp 8-10: The Professional Liability Fund: *Delegation Memo*

d. Training and regular review of needs

- Supp 8-13: The Professional Liability Fund: *Confidentiality—A Responsibility of Legal Staff*

3. Work flow plan

- *See* Supp 8-2: The PLF Practice Aids and Forms: Calendaring & Docketing, Financial Management, Office Manuals & Staff

a. Employee job descriptions

- *See, e.g.,* Supp 8-14: The Professional Liability Fund: *Receptionist's Duties*

b. Define office procedures

c. Assign responsibility

i. Calendars

ii. Docket control/tickling

iii. Time-keeping

iv. Billing

B. Systems

- Supp 8-15: The Professional Liability Fund: *Office Systems Review Checklist*

1. Comprehensive Filing & Storage System

- *See* Supp 8-2: The PLF Practice Aids and Forms: File Management
- Supp 8-16: Beverly Michaelis, *Setting Up an Effective Filing System*

a. Active Files (open)

b. Inactive Files (closed)

- Supp 8-17: The Professional Liability Fund: *File Retention and Destruction*
- Supp 8-18: The Professional Liability Fund: *File Closing Checklist*

c. General Office Files

d. Master client information files

e. Clients' original document files and case documents files

f. Managing data

- Supp 8-19: Dee Crocker, *Backing Up: Your Most Important Office System,* OSB Bulletin, April 2011
- Supp 8-20: The Professional Liability Fund: *How to Back Up Your Computer*
- Supp 8-21: Robert J. Ambrogi, *Do-It-Yourself Security: Help Keeping Your Data Safe*, OSB Bulletin, Feb/Mar 2009

2. Calendaring & Docket Control System

- *See* Supp 8-2: The PLF Practice Aids and Forms: Docketing & Calendaring
- Supp 8-22: The Professional Liability Fund: *Calendaring and File Tickling Systems*

a. More than one system

b. More than one person

c. Understood by everyone

3. Client Information System

- *See* Supp 8-2: The PLF Practice Aids and Forms: Client Relations, Client Communication, Conflicts of Interest, Docketing & Calendaring, Financial Management, Technology

- Supp 8-23: The Professional Liability Fund: *New Client Information Sheet*
- Supp 8-24: The Professional Liability Fund: *Declined Prospect Information Sheet*

a. Client index

b. Log of actions in each client matter

c. Tickler system for events and deadlines

d. Conflicts index

- Supp 8-25: The Professional Liability Fund: *Conflict of Interest Systems*
- Supp 8-26: The Professional Liability Fund: *Request for Conflict Search and System Entry*

e. Up-to-date billing records (including accounting of any entrusted funds)

- *See* Supp 8-7: The Professional Liability Fund: *Client Ledger Card*

f. Maintain an easily-accessible permanent record of client information

i. Card or computer file with a separate card or file for each client and cross-referencing of multiple names

ii. Must have ability to check conflicts with a new client matter

- Before initial consultation with the potential new client AND
- Repeat as additional parties or participants become known

4. The internal organization of all files should be planned and consistent for each type of file.

   - *See* Supp 8-2: The PLF Practice Aids and Forms: File Management, Financial Management, Mail Handling, Office Sharing, Technology, and Checklists customized to practice areas in substantive practice area listings.

C. Timekeeping, Billing & Collection

- *See* Supp 8-2: The PLF Practice Aids and Forms: Financial Management, Technology

1. Choose a timekeeping system and train all timekeeping attorneys and staff to adhere to it

   - Supp 8-27: Dee Crocker: *Choices—Law Firm Billing and Accounting Software,* OSB Bulletin, Dec 2008

   - Supp 8-28: Dee Crocker: *SaaS in the Office: Internet-Based Case Management and Billing Software,* OSB Bulletin, Aug/Sept 2009

   - Supp 8-29: The Professional Liability Fund: *Billing and Time Slips*

   - Supp 8-30: The Professional Liability Fund: *Daily Time Sheet*

2. Billing cycle

   a. Set a regular billing cycle

   b. Notify clients of the billing cycle

   c. Set aside sufficient staff time to process billings and collections

3. Costs

   a. Inform clients of costs to be charged to them

   b. Maintain accurate cost records

   c. Bill costs to the clients

4. Bill only for work performed and costs incurred

5. Consider employing collection procedures when clients do not pay

D. Office Manual

- *See* Supp 8-2: The PLF Practice Aids and Forms: Client Communication, Client Relations, Office Manuals, Staff, Technology

1. Inform employees of various office systems (*e.g.,* mail handling, telephone messages, tickler systems), office procedures, obligations and benefits.

2. Confidentiality. *See* RPC 5.1, RPC 5.2 & RPC 5.3

   - *See* Supp 8-12: The Professional Liability Fund: *Confidentiality—A Responsibility of Legal Staff*

3. Establish terms of employment of employees, with care not to create implied contractual obligations between your firm and the employees.

4. Suggest that also include:

   a. Office conduct

   b. Compensation

   c. Continuing education

d. Staff meetings

e. Absence from the office during office hours

f. Personal telephone calls

g. Resignation or termination

h. Office hours

E. Other Considerations

1. Research tools

   - Supp 8-31: Dee Crocker, *In Search Of: Evaluating Legal Research Tools,* OSB Bulletin, April 2010

2. Contingency plan

   - Supp 8-32: Beverly Michaelis, *Plan Ahead—Are you prepared for the unthinkable?,* OSB Bulletin, July 2005

Notes

FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 9 — Supervising Others

HYPOTHETICAL

- For many years Partner owned and operated a successful law partnership with Associate. A few years ago, because of concerns over a pending divorce, Associate was made an employee of the firm, without an equity share. Nevertheless, Associate has continued to act as the office manager, including responsibility over all financial matters.

  A number of clients have begun to complain to Partner about the legal services provided by Associate, and the fees charged for those services. Complaints of incompetence and unpreparedness have mounted, in large part, because of Associate's personal problems related to alcohol abuse, potential mental-health issues, inattention to work, her pending divorce, and significant personal financial issues. Staff have complained to Partner that Associate is regularly visibly intoxicated at the office; checks have gone missing; bills have gone unpaid; services have been interrupted; and vendors are refusing to extend credit to the firm.

  Associate's unpredictable actions recently forced Partner to prohibit Associate from making court appearances (so she does not embarrass the firm) but she has instead spent more time "working" at the office. Staff tells Partner that client money has now begun going missing and firm obligations have continued to go unpaid.

What are Partner's and Associate's responsibilities for Associate's clients and their funds?

A. Both Partner and Associate are responsible for each of Associate's client matters and their money.

B. Only Associate is responsible. She is her clients' attorney and also responsible for the firm finances.

C. Partner and Associate are both responsible for the legal matters but only Associate is responsible for the money issues.

D. Only Partner is responsible. As Associate's supervisor, he must assist with her clients and is ultimately responsible for client funds.

DISCUSSION

Answer: _____

See RPC 1.1, 1.2, 1.3 & 1.4.

Notes

See RPC 1.15-1(a) & (c), RPC 8.4(a)(2) & (a)(3).

Notes

In re Connall SC S061623 (2013) [Form B resignation]

RPC 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

- *In re Connall,* SC S061623 (2013). [Form B resignation] Senior partner surrendered responsibility for firm operations and management to attorney employee and failed to supervise her access to and use of the firm's lawyer trust account. When possible mismanagement of client funds by the employee was brought to his attention, he failed to investigate or take remedial measures.

- *In re Sunderland*, 21 DB Rptr 257 (2007). [1-year suspension] Attorney learned after filing a bankruptcy petition for his clients that they would be receiving tax refunds that had not been disclosed in the petition. Through an associate, attorney advised his clients not to appear for the first meeting of creditors, which attorney surmised would lead to the dismissal of the bankruptcy and permit his clients to spend the refunds without disclosure to the court.

- *OSB Formal Ethics Op No 2007-179*. If investigators working for a prosecutor reveal information about a suspect that has a substantial impact on proceedings the suspect is involved with in an unrelated case, the prosecutor's responsibility for the investigator's statement will depend on the level of the prosecutor's authority over the investigators. Additionally, the prosecutor's supervising attorney may be vicariously responsible for the statement if the managing or supervising attorney knew of the conduct at a time when its

consequences could be avoided or mitigated and failed to take any reasonable remedial action.

- *OSB Legal Ethics Op No 2007-178*. Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients. Attorneys who work in public defense organizations should seek assistance from supervisors and managers in order to achieve manageable workloads. Supervisors and managers of such organizations may be responsible for the misconduct of their subordinates if they "induce" the misconduct by knowingly contracting for excessive indigent defense caseloads.

RULE 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

- *OSB Legal Ethics Op No 2007-178*. Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients. Attorneys who work in public defense organizations should seek assistance from supervisors and managers in order to achieve manageable workloads. If remedial measures are not then approved, attorneys should continue up the chain of command and may have to file, without firm approval, motions to withdraw.

Notes

OPTIONAL HYPOTHETICAL

- About 10 years ago, California lawyer Ashley Able formed "Able & Cain," a law partnership with California lawyer, Calvin Cain, and set up shop in Northern California.

  Five years ago, Ashley was admitted to practice in Oregon. However, despite interim efforts, Calvin was not admitted to the Oregon Bar until this past year.

  Four years ago, Ashley and Calvin opened a law office in Southern Oregon under the name "Cain & Able" and used letterhead (at Cain's suggestion) that stated:

  Cain & Able
  Attorneys at Law
  Licensed in Oregon and California
  Calvin Cain
  Ashley Able

  Each year since they opened their Oregon practice, Cain has placed the following advertisement in the local Oregon paper directory and in the on-line Yellow Pages:

  Cain & Able
  Experienced Trial Attorneys & General Practice
  Licensed in Oregon & California

  Also since they opened they opened their practice, Cain has: written and signed letters to opposing counsel and opposing parties regarding substantive matters; rendered legal advice to clients in person and in telephone conferences; engaged in substantive negotiations with opposing counsel; represented a client at a state court deposition; signed a motion and filed it with the state circuit court; and made a routine state court appearance without supervision.

Ashley Able is responsible for which of Cain's actions?

A. The letterhead and phone directory ad, because they were misleading.

B. Rendering advice to clients and appearing on behalf of clients in court, because these acts constituted the unauthorized practice of law.

C. Signing and filing a motion with the court, because this was a misrepresentation about Cain's authority to do so.

D. All of Cain's conduct.

DISCUSSION

Answer: _____

In re Duncan, 17 DB Rptr 202 (2003).

RULE 8.5 Disciplinary Authority

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Notes

HYPOTHETICAL

- For nearly 30 years, Attorney Archer practiced law in partnership with his father—who was the head of the firm and the firm manager. Near the beginning of their partnership, they hired Ima Gambler as a secretary, paralegal and bookkeeper. Gambler was responsible for duties including preparing checks, receiving the bank statements, and reconciling the bank accounts.

  Twenty years into her tenure, Gambler confessed to Archer that she had taken firm funds through "payroll draws" to support her gambling habit, and that she had not paid the money back through payroll deductions, as she was supposed to do ("First Thefts"). After Archer and his father investigated Gambler's First Thefts, they did not report Gambler to the police but had her agree to pay back the funds (which she never did). Moreover, in spite of her confession, rather than restrict Gambler's access to firm accounts and client funds, Gambler's job remained secure and her financial and banking responsibilities at the firm continued. Thereafter, notwithstanding Gambler's unfettered access to his clients' funds, Archer did nothing to supervise or monitor Gambler because he viewed her as his father's secretary and not his secretary.

  Over a subsequent two-year period, Archer's father's health declined substantially and he became unable to meaningfully continue with the law practice. During this same period, Gambler embezzled more than $300,000 from the firm's accounts, including the firm's general account, the trust account, and directly from two of Archer's clients ("Second Thefts").

Is Archer responsible for Gambler's First or Second Thefts?

A. Yes. Archer is responsible for Second Thefts but not the First Thefts.

B. No because Gambler acted intentionally on her own.

C. Yes. Archer is on the hook for both the First and Second Thefts.

D. No because Gambler was Archer's father's responsibility—not Archer's.

DISCUSSION

Answer: _____

_____

_____

_____

_____

_____

_____

_____

In re Williamson, SC S064038 (2016) [Form B resignation].

RULE 5.3 Responsibilities Regarding Non-Lawyer Assistants

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

- *In re Cottle,* 29 DB Rptr 79 (2015). [60-day suspension, all stayed/2-year probation] As managing shareholder, attorney

oversaw law firm operations, was responsible for the manner in which the law firm handled firm and client money, and had direct supervisory authority over the non-lawyer staff employed by the firm. Attorney undertook to represent a client in matters that included the sale of a home and received a settlement check from the title company for more than $35,000. Attorney directed law firm staff to deposit the client's check, along with checks from two other clients, into his lawyer trust account. The total to be deposited was a little more than $40,000. Law firm staff did not complete the deposit, and attorney did not verify that the deposit had been completed before writing a check a few weeks later for his fees in connection with the sale, which was returned for insufficient funds.

- *In re Strader*, 27 DB Rptr 219 (2013). [30-day suspension] Managing shareholder, with direct supervisory authority over all non-lawyer staff employed by the firm, failed to supervise an office manager, who misappropriated client funds over a two-year period from a segregated trust account.

- *In re Nishioka*, 23 DB Rptr 44 (2009). [reprimand] Attorney utilized the services of a non-lawyer assistant in a probate matter, allowing the assistant to use attorney letterhead and pleading forms without adequate supervision, failing to review or approve of the assistant's work before it was filed in court and failing to ensure that the assistant was not engaged in the unauthorized practice of law.

- *In re Idiart*, 19 DB Rptr 316 (2005). [reprimand] Attorney delegated to non-lawyer staff the task of sending direct mail solicitations to injury victims without making reasonable efforts to ensure that the staff's conduct was compatible with the disciplinary rules.

HYPOTHETICAL

- Attorney Anderson signed blank trial subpoenas and instructed his investigator to arrange for service on witnesses in a criminal rape case. Without Anderson's knowledge, the investigator used one of the subpoenas to obtain the victim's high school records prior to trial, which the school released in violation of statutes governing such records. Upon receipt of the records, Anderson did not return them or notify the school, but provided them to his client for use in preparing cross-examination of the victim.

  When questioned by the judge in the case about his possession and use of the records, Anderson defended the investigator and his own actions.

Anderson did not engage in any misconduct, because the school was the party who improperly turned over the records.

1. True

2. False

DISCUSSION

Answer: _____

In re Taylor, 23 DB Rptr 151 (2009). [reprimand]

Notes

FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 10 — Formation of the Attorney-Client Relationship

- Supp 10-1: Beverly Michaelis, *Make the Right Match: What If You Only Represented Clients You Liked?*, OSB Bulletin, July 2008

A. When Does the Relationship Begin?

1. The Oregon Rules of Professional Conduct do not define the point at which a lawyer-client relationship comes into existence.

2. The creation of the lawyer-client relationship requires no retainer or other express written or oral agreement. *In re Bristow*, 301 Or 194, 202, 721 P2d 437 (1986); *In re Robertson*, 290 Or 639, 648, 624 P2d 603 (1981). The absence of an explicit agreement adds nothing to the evidence on the issue of whether the lawyer-client relationship exists. *In re Weidner*, 310 Or 757, 768 n.7, 801 P2d 828 (1990).

3. Generally where an attorney-client relationship has been found to exist by the court, the factual circumstances have usually included an undisputed past relationship or the lawyer's admissions evidencing the relationship or both. *See, e.g., In re Bristow*, 301 Or 194, 201-02, 721 P2d 437 (1986); *In re Jans*, 295 Or 289, 666 P2d 830 (1983); *In re Robertson*, 290 Or 639, 624 P2d 603 (1981); *In re Galton*, 289 Or 565, 580-81, 615 P2d 317 (1980); *In re Hershberger*, 288 Or 559, 606 P2d 623 (1980).

4. In the absence of factual circumstances such as an undisputed past relationship or the lawyer's admissions evidencing the relationship or both, the court looks to whether:

   a. the services performed by the lawyer were of the kind traditionally done professionally by lawyers, i.e., legal work, and

b. whether the putative client subjectively intended (or did not intend) that the relationship be created. *In re Weidner*, 310 Or 757, 768-69, 801 P2d 828 (1990); *see also, In In re Mettler*, 305 Or 12, 20, 748 P2d 1010 (1988) (lawyer-client relationship did not exist where lawyer was employed by a state agency in a position that did not require that the employee be a lawyer, and despite outward appearances, as viewed by third parties, there was a lack of intent to form the relationship by either the lawyer or the state agency).

5. To establish that the lawyer-client relationship exists based on the client's reasonable expectation, a putative client's subjective, uncommunicated intention or expectation must be accompanied by one or more of the following:

   a. evidence of objective facts on which a reasonable person would rely as supporting existence of that intent;

   b. evidence placing the lawyer on notice that the putative client had that intent;

      i. evidence that the lawyer shared the client's subjective intention to form the relationship; OR

      ii. evidence that the lawyer acted in a way that would induce a reasonable person in the client's position to rely on the lawyer's professional advice.

   The evidence must show that the lawyer understood or should have understood that the relationship existed, or acted as though the lawyer was providing professional assistance or advice on behalf of the putative client. *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990).

HYPOTHETICAL

- Attorney Michelle Adams received an unsolicited email from Dale Drake asking if she could represent him in a contemplated divorce against his wife, Kitty Hawk. In the email, Drake disclosed that his wife was an alcoholic, had mental health issues, and had abused two of their three minor children. Hawk was another local attorney and Adams felt uncomfortable representing Drake, so she sent an email back to Drake declining to represent him.

  Earlier this month, Drake sent Adams another unsolicited email saying he understood why she had previously declined to represent him and he had obtained other counsel. However, both he and Hawk would now like Adams to serve as the mediator in their divorce. He asked whether Adams would be willing to serve in that capacity.

QUESTION 1: Did Adams form an attorney/client relationship with Drake?

A. Yes

B. No

Answer: _____

QUESTION 2: Which of the following statements is correct and why?

A. Adams must decline to serve as a mediator in this matter.

B. Adams may accept the request to serve as a mediator.

Answer: _____

DISCUSSION

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

- *In re Van Thiel,* 24 DB Rptr 282 (2010). [reprimand] Attorney undertook to mediate a dissolution of marriage, but did not clearly inform the parties of, and obtain their consent to, his role as mediator. Thereafter, attorney began to represent one of the parties in the dissolution matter. [2.4(a)(1) & (a)(2)]

- *OSB Legal Ethics Op No 2005-167*. An attorney acting as a mediator in a domestic relations matter may not continue on with the mediation if one party discloses to the mediator the existence of hidden assets and instructs the mediator to withhold this information from the other side. To continue with the mediation without disclosure would amount to a participation in a fraud upon the other party in violation of RPC 8.4(a)(3) and (4). On the other hand, disclosure of the attempted fraud would be contrary to statutory confidentiality for communications made in mediation. The fact that the mediator is unfamiliar with the substantive law in the area does not excuse continued participation in the mediation. A mediator should serve only in matters in which he or she is competent to recognize significant legal issues.

- *OSB Legal Ethics Op No 2005-101*. Attorneys who act as mediators pursuant to RPC 2.4 do not technically represent any of the parties to the mediation; consequently, RPC 1.7 is inapplicable. Attorney-mediators must, however, comply fully with this rule. For example, RPC 2.4 prohibits an attorney from drafting a settlement agreement on behalf of divorcing spouses and then representing one or both of the spouses in placing the agreement of record with the court.

Notes:

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

> **(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:**
>
> **(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and**
>
> > **(i) the disqualified lawyer is timely screened from any participation in the matter; and**
> >
> > **(ii) written notice is promptly given to the prospective client.**

HYPOTHETICAL

- Attorney Nunyour Beeswax ("Beeswax") was asked by an insurance friend, Slick Sales ("Slick") to represent Elder Guy ("Elder") concerning the administration of the estate of his brother, Deceased Guy ("Deceased"). Beeswax agreed, and prepared and delivered a fee agreement to Slick to give to Elder, which Slick returned signed a few days later.

  Based on information provided by Slick, Beeswax prepared and delivered to Slick a probate petition. After Slick returned the signed petition, Beeswax filed it with the court ("Probate Case"), and Elder was appointed as the personal representative of Deceased's estate.

  Based on information from Slick, Beeswax prepared and delivered to Slick an inventory of the estate property and certain waivers to be signed by the five heirs. Slick returned two signed waivers.

  A few months later, based on information from Slick, Beeswax prepared and delivered to Slick a statement in lieu of final account, which Beeswax filed with the court after Slick obtained Elder's signature. The court's order approving the verified statement awarded Beeswax a $1,200 attorney fee and the remaining assets were divided equally among the five heirs.

  Finally, based on information Slick provided to Beeswax, Beeswax prepared and filed an order to close the estate, which the court signed, closing the Probate Case.

  At no time during the representation did Beeswax meet, speak to or otherwise communicate directly with Elder. In fact, Beeswax did not know whether Elder actually existed.

Who was the client of Nunyour Beeswax?

A. Slick.

B. Elder.

C. Both Slick and Elder.

D. Neither Slick nor Elder.

DISCUSSION

Answer: _____

In re Britt, 20 DB Rptr 100 (2006) [six-month suspension]

B. Duties to Prospective Clients

1. Oregon Evidence Code defines "client," for purposes of the lawyer-client privilege, to include, among others, a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer." OEC 503(1)(a).

2. Oregon Rules of Professional Conduct also provide for specific duties to would-be clients, even in the absence of a formalized relationship.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

- Supp 10-2: Sylvia Stevens, *Prospective Clients, Effective Use of RPC 1.18*, OSB Bulletin, Feb/March 2010

3. When a person delivers "funds, securities or other properties" to a lawyer who is considering whether to represent that person, the person has entrusted those materials to the lawyer as a lawyer and, as such, is as much entitled to be considered a "client" for that limited purpose as if the person had made a confidential, verbal communication to the lawyer. *In re Spencer*, 335 Or 71, 84, 58 P3d 228 (2002).

4. There is the potential to trigger these duties through on-line questionnaires or email communications with members of the public. *See, e.g., Barton v. US District Court for the Central District of California,* 410 F3d 1104 (9th Cir 2005).

   - *See* Supp 7-1: Mark J. Fucile, *Avoiding Bad News: Risk Management in Law Firm Marketing*, OSB Bulletin, Jan 2009 (*supra* §7)

C. Scope of Representation: How to avoid confusion about services you have agreed to provide

1. Look to the Oregon Rules of Professional Conduct:

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

- *In re Johnson*, 30 DB Rptr 300 (2016). [four-year suspension, 30 months stayed/3-year probation] The court appointed attorney to represent a client a post-conviction client, in which the prosecutor intended to have the original conviction amended. The client objected to the amendment.

Although attorney communicated with both the prosecutor and the trial court regarding the amendment, he failed to timely communicate his client's objections to the amendment to either the court or the prosecutor. By the time attorney finally sent a letter to the court concerning his client's objections, the amendment had already been entered.

- *In re Hudson,* 27 DB Rptr 226 (2013). [2-year suspension, all but 6 months stayed/2-year probation] Attorney neglected to review documents provided to him by opposing counsel in child custody and support proceedings that provided for his client to pay significant support to the non-custodial parent. Accordingly, he did not object to the calculations at any stage prior to their entry as a judgment.

- *In re Billman,* 27 DB Rptr 126 (2013). [30-day suspension] Attorney agreed to settlement of a domestic relations matter and recited terms into the record without having confirmed with his client whether she was agreeable to the terms and conditions, and allowed a judgment to be entered to that effect.

- *In re Ingram,* 26 DB Rptr 65 (2012). [reprimand] After concluding that his client's lawsuit had no merit, and before consulting with his client, attorney informed opposing counsel that he would not oppose a defense motion for summary judgment. He also did not convey to his client a defense proposal to stipulate to a dismissal without costs, did not notify his client that the case had been dismissed, and waived any objection to a form of judgment which included costs.

- *In re Bailey,* 25 DB Rptr 19 (2011). [reprimand] Attorney accepted a settlement offered by an opposing party without consulting with, or obtaining authority from, attorney's client.

- *In re Spencer,* 24 DB Rptr 209 (2010) [90-day suspension] Attorney neglected to pursue a step-parent adoption for clients who had requested completion of the work by a time-sensitive date.

- *In re Sushida*, 24 DB Rptr 58 (2010) [3-year suspension] Attorney failed to file a petition for dissolution within the time requested by the client and then misrepresented the filing date to the client. Attorney also failed to file a proof of service on the adverse party and failed to take other substantive action in the dissolution thereafter. Regarding a second client, attorney was retained but failed to take any substantive action in a support modification matter.

- *In re Dames,* 23 DB Rptr 105 (2009). [reprimand] After concluding that his client's medical malpractice case lacked merit, attorney conceded a defense motion for summary judgment without notice to his client, knowing that the client desired to proceed with the claim.

- *In re Clarke,* 22 DB Rptr 320 (2008). [60-day suspension] After deciding that a client's appeal had no merit, attorney decided not to file a brief, did not withdraw, allowed the appeal to be dismissed and thereafter failed to disclose the dismissal to the client. [DR 7-101(A)(2)]

- *In re Groom,* 22 DB Rptr 124 (2008). [1-year suspension, 10 months stayed/1-year probation] In the appeal of a client's criminal conviction, attorney failed to put the client's handwritten supplemental brief in proper form and file it by a date certain, despite the court ordering him to do so. Attorney also failed to respond to the court's subsequent directives that he explain his non-compliance. [DR 7-101(A)(2)]

- *In re Banks,* 21 DB Rptr 193 (2007). [7-month suspension] Attorney unilaterally dismissed a client's medical malpractice lawsuit without her knowledge or consent and then failed to inform the client that he had done so.

- *In re Cherry,* 20 DB Rptr 59 (2006). [30-day suspension] Attorney represented her sister in becoming guardian and conservator over the sister's granddaughter, despite attorney's reservations concerning the sister's suitability. Thereafter, attorney encouraged other family members to intervene and seek the sister's removal as guardian and

conservator, contrary to the sister's wishes and objectives. [DR 7-101(A)(1)]

- *In re Derby,* 19 DB Rptr 306 (2005). [1-year suspension] Attorney repeatedly failed to file required documents in a probate proceeding despite numerous inquiries and directives from the court, resulting in the issuance of several show cause citations and a finding that attorney was in contempt. [DR 7-101(A)(2)]

- *In re O'Dell,* 19 DB Rptr 287 (2005). [2-year suspension] After his suspension from practice for disciplinary reasons, attorney failed to withdraw from a pending criminal case and did not arrange for his client to appear for sentencing, resulting in a warrant being issued for the client's arrest. [DR 7-101(A)(2)]

- *In re DenHartigh,* 19 DB Rptr 159 (2005). [90-day suspension] Attorney failed to take any constructive action to advance his client's interests in a child support matter despite his client's repeated urging that he do so. [DR 7-101(A)(2)]

- *In re Davis,* 19 DB Rptr 116 (2005). [120-day suspension] Attorney knowingly failed to take action to advance and protect the interests of her client in a probate proceeding for a period of almost one year. [DR 7-101(A)(2)]

- *In re Ames*, 19 DB Rptr 66 (2005). [2-year suspension] Attorney failed to file a petition for divorce or take any other significant action after being paid a retainer to do so. [DR 7-101(A)(2)]

- *In re Schenck*, 18 DB Rptr 309 (2004). [reprimand] Attorney who lost a civil jury trial subsequently wrote a letter to the local newspaper without his client's consent, apologizing for the client's behavior on the witness stand, and implying that the client had acted improperly. [DR 7-101(A)(3)]

- *In re Clark,* 17 DB Rptr 231 (2003). [120-day suspension + BR 8.1 reinstatement] Attorney intentionally failed to complete a small estate administration for a client or to respond to the client's inquiries concerning the matter. [DR 7-101(A)(2)]

- *In re Gorham,* 17 DB Rptr 159 (2003). [reprimand] Attorney filed a motion to change the venue of a client's post-conviction relief proceeding contrary to the client's instruction not to do so. [DR 7-101(A)(1)]

- *In re Hughes,* 17 DB Rptr 69 (2003). [6-month suspension] Attorney represented creditors in bankruptcy court litigation to determine whether a judgment they obtained could be discharged by the debtor. After settlement talks broke off, attorney failed to communicate with his clients and failed to respond to a motion to dismiss filed by the debtor. [DR 7-101(A)(1)]

- *OSB Legal Ethics Op No. 2011-187.* Attorney who receives from an opposing party electronic documents from which embedded metadata can be detected by use of a standard word processing feature is not required to notify the sender unless attorney knows or reasonably should know that the metadata was inadvertently included in the document. In that case, attorney must notify the sender but is not required to return the document. In no event should attorney return the document to the sender without first discussing the matter with the client.

- *OSB Legal Ethics Op No 2007-178.* Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients, keeping each client reasonably informed, explaining each matter to the extent necessary to permit the client to make informed decisions and abiding by the decisions the client is entitled to make.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

- *In re Schwindt*, SC S060906, 28 (2013). [2-year suspension] Without obtaining informed consent, attorney attempted to limit the scope of his representation of credit modification clients but did not explain that he would not undertake a legal review of

each file; would not be drafting letters individually tailored to each client's circumstances; and would merely sign form letters.

- *OSB Legal Ethics Op No. 2011-183*. Attorney and client may limit the scope of representation such that attorney is involved only in specific aspects of a client's legal matter, so long as the limitation is reasonable under the circumstances and the client gives informed consent. A limited-scope representation does not absolve attorney from duties of competence, diligence or other rules. Attorney should explain to the client the risks of a limited-scope representation, particularly where the legal matter may be complex, and further clarify with the client and opposing counsel whether the scope of the representation does or does not require all communications to go through attorney under RPC 4.2

  - Supp 10-3: Amber Hollister, *Unbundling Legal Services: Limiting the Scope of Representation*, OSB Bulletin, July 2011

  - Supp 10-4: Beverly Michaelis, *Unbundling in the 21st Century: How to Reduce Malpractice Exposure While Meeting Client Needs,* OSB Bulletin, Aug/Sept 2010

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- *In re Daum*, 24 DB Rptr 199 (2010) [120-day suspension] Attorney fabricated and included rental expenses on bankruptcy petition to allow client to qualify for bankruptcy relief under belief that client would have to start paying rent in the not-too-distant future.

- *In re Rasmussen,* 21 DB Rptr 304 (2007). [120-day suspension] In-house corporate attorney participated in structuring a sales transaction in which the company illegally recognized a gain on the sale. Thereafter, at the direction of a company accountant, attorney removed transaction documents from the company file

in anticipation of an independent financial audit. [DR 7-102(A)(7)]

- *OSB Legal Ethics Op No 2005-92*. An attorney may assist a client in breaching a contract or in minimizing the damages likely to flow from that breach as long as the attorney refrains from defrauding others or engaging in other, similarly wrongful conduct.

- *OSB Legal Ethics Op No 2005-7*. An attorney who is a member of the state legislature may not accept compensation from a client for seeking legislation that would benefit the client.

2. Utilize engagement letters to define both the client and the scope of the representation.

    - Supp 10-5: Mark J. Fucile, *Starting Right: Using Engagement Letters as a Risk Management Tool*, OSB Bulletin, July 2005.

3. Always use written fee agreements signed by the client

The importance of a clear written fee agreement to avoid fee and other disputes with a client cannot be emphasized enough.

4. Consider also sending letters declining representation or, the Write and Refuse Letter (WAR Letter) to ensure that the layperson understands that you do not represent them and to avoid the resulting battle of "he said/she said."

    - *See* Supp 18-4: Disengagement Letter—Declining Further Representation (*infra* § 18).

D. Factors to Consider when Deciding Whether to Accept a Client Matter

- Supp 10-6: Sheila Blackford, *Recognizing Difficult Client Types,* PLF In Brief, Issue 110, Sept 2011

1. What are the client's objectives?

   a. Avoid representing clients for whom the matter is a personal vendetta or who view attorneys as "hired guns."

   b. Determine whether the objectives of the representation are within the limits of the law. *See* RPC 1.2(c) *supra*

   c. Determine whether the matter is within the limits otherwise imposed by a lawyer's professional obligations. *See, e.g.,* RPC 3.1, RPC 8.4(a)(1).

Rule 3.1 Meritorious Claims and Contentions

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

- *In re Cyr*, SC S063187 (2015). [Form B resignation] Attorney initiated a fraud case against the contractor for his personal residence when the contractor initiated foreclosure proceedings on a valid contractor's lien.

- *In re Roe,* 28 DB Rptr 87 (2014) [2-year suspension, all but 6 months stayed/2-year probation] After representing a husband seeking to avoid foreclosure of his and his wife's home, attorney sued his client and the client's wife for attorneys' fees. An arbitrator's award on the attorney's fee claim against the client (only) was not appealed and became a final judgment. Two years later, attorney sued the client, his wife, and their adult

daughter in another county, alleging that they had fraudulently transferred the property the attorney had been hired to save from foreclosure for the purpose of avoiding his original judgment. Court determined that that attorney's actions in second county lacked any reasonable basis.

- *In re Anderson*, 27 DB Rptr 243 (2013). [90-day suspension] Attorney pursued multiple contempt and civil proceedings that lacked any good-faith factual or legal basis. These filings were motivated by and the result of animosity toward the client's former wife and sister-in-law, and were "reckless, willful, malicious and in bad faith."

- *In re Summer*, 27 DB Rptr 39 (2013). [disbarred] In defense of a motion for summary judgment in a medical malpractice matter, attorney filed a false affidavit stating that he consulted with a expert that was willing to testify that the defendants had not employed the proper standard of care. The attorney had no valid defense to the summary judgment motion.

- *In re Partington*, SC S060387, OSB Case Nos. 12-51 & 12-65 (2013). [60-day suspension] Attorney filed a disingenuous appeal of his client's criminal convictions, in which he knowingly misrepresented the record and which was "wholly unsupported."

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Despite instructions from a trial judge in a civil case that the judge would grant a motion for JNOV in favor of attorney's client if one was filed and a caution about when such a motion was due, attorney failed to timely file the motion and instead filed a notice of appeal which deprived the trial court of jurisdiction. The notice of appeal was defective, the appeal ultimately was dismissed, and attorney failed to refile his post-trial motions timely. He also filed a second, untimely notice of appeal, intending to argue that a criminal statute that permitted the late filing of a notice of appeal should apply to his client's civil case. This argument had no basis in law or fact and therefore was the assertion of a frivolous position.

- *In re Marandas*, 351 Or 521, 270 P3d 231 (2012). [dismissed] Bar alleged that attorney made misrepresentations in court

when he asserted that a settlement agreement required all settling parties to keep the terms confidential. The charge was dismissed because attorney had some basis to make those factual assertions and a plausible legal argument to support his position. An additional charge that attorney structured the settlement to obtain an improper double recovery was also dismissed because attorney's legal argument was plausible.

- *In re Smith*, 348 Or 535, 236 P3d 137 (2010). [90-day suspension] Attorney represented a client who had disputes with her employer, a nonprofit corporation that operated a medical marijuana clinic. Attorney advised his client that, because the nonprofit was administratively dissolved, the client had a right to enter the clinic premises and attempt to take control of the operations, a position that attorney knew was frivolous. Note: Any deeds performed by a lawyer, including giving a client legal advice, constitute "action on behalf of a client" as contemplated by this rule.

- *Dimeo v. Gesik*, 197 Or App 560, 106 P3d 697 (2005). In determining whether to assess attorney fees against a party under ORS 20.105(1) for asserting a claim without an objectively reasonable basis, the court imposes a continuing duty upon a party to evaluate its position throughout the course of the litigation. A claim that was objectively reasonable when asserted may become unreasonable in light of additional evidence or changes in the law.

- *In re Matthews*, 19 DB Rptr 193 (2005). [1-year suspension] Attorney represented father in a custody proceeding in which the court split custody of the minor children between the parents with visitation for each parent with their non-custodial children. Father died unexpectedly and mother took physical custody of all the children. On behalf of father's second wife, attorney then obtained an ex parte writ of assistance from a different judge ordering mother to return the children. To obtain the writ and a subsequent restraining order, attorney made false statements to the court about mother's fitness, the safety of the children and whether other litigation involving the children was pending. Attorney also failed to disclose that father had died, that attorney was acting for second wife who had no legal standing

in the matter and that the original judge had retained jurisdiction over the case. [DR 7-102(A)(2)]

- *In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004). [reprimanded] On two occasions, attorney filed a last minute motion to prevent or stay the sale of his clients' property through foreclosure. The trial court denied the motions and sanctioned both the attorney and his clients for filing the motions for an improper purpose. Disciplinary charges against the attorney were dismissed because he had an arguable legal basis for the motions and the bar did not prove that he was motivated solely to harass or injure the opposing party. [DR 7-102(A)(1); DR 7-102(A)(2)]

- *In re Andersen*, 18 DB Rptr 172 (2004). [stipulated 4-month suspension + BR 8.1] Attorney violated the rule when, without any legal right to do so, he threatened to withhold from an opposing party bank records and rental files belonging to them unless they settled the case on terms attorney proposed. [DR 7-102(A)(2)]

- *In re Magar*, 335 Or 306, 66 P3d 1014 (2003). [dismissed] In a fact specific opinion, the court concluded that the bar had failed to prove by clear and convincing evidence that attorney had knowingly advanced an unwarranted claim by filing various claims and defenses over a period of several years to forestall foreclosure of his clients' real property. [DR 7-102(A)(2)]

- *OSB Legal Ethics Op No 2005-59*. As a general proposition, an attorney who is asked to represent a plaintiff may sue only those defendants against whom a colorable claim appears to exist after reasonable investigation. With regard to what constitutes a reasonable investigation, an attorney may take into account matters such as whether pertinent information is in the hands of the potential defendants, whether a statute of limitations is about to run, whether further investigation prior to service of process might cause the defendants to flee, and whether potential defendants are willing to toll any approaching statute of limitations. If, however, the attorney learns after filing the claim that there is no colorable basis on which the claim against a

particular defendant can be pursued, the attorney must dismiss the claim.

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

- *In re Partington,* SC S060387 (2013). [60-day suspension]

- *In re Idiart,* 19 DB Rptr 316 (2005). [reprimand] Attorney delegated to non-lawyer staff the task of sending direct mail solicitations to injury victims without making reasonable efforts to ensure that the staff's conduct was compatible with the disciplinary rules. Staff sent such a solicitation to the family of a traffic fatality immediately after the accident, when attorney should have known that the family was unable to exercise reasonable judgment about employing counsel.

- *OSB Legal Ethics Op No 2007-179.* An attorney may not counsel a client to hire a public relations firm to make public statements about a pending matter that the attorney knows would violate the trial publicity rule, RPC 3.6, if made by the attorney herself.

- *OSB Legal Ethics Op No 2007-178.* Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients. Attorneys who work in public defense organizations should seek assistance from supervisors and managers in order to achieve manageable workloads. Supervisors and managers of such organizations may be responsible for the misconduct of their subordinates if they "induce" the misconduct by knowingly contracting for excessive indigent defense caseloads.

- *OSB Legal Ethics Op No 2005-115.* An attorney may not ethically represent customers of a foreign corporation engaged in the unauthorized practice of law in Oregon.

- *OSB Legal Ethics Op No 2005-106.* An attorney who purchases a tax return preparation business or a private legal practice may not use these purchases to engage indirectly in improper client solicitation.

- *OSB Legal Ethics Op No 2005-47.* Defense counsel may not offer or agree to settle litigation on condition that plaintiff's counsel agree not to sue the defendant again.

- *OSB Legal Ethics Op No 2005-10.* An attorney may not use a separate business that the attorney owns as a means of engaging in improper in-person solicitation.

- *OSB Legal Ethics Op No 2005-2.* An attorney may share office space with a nonattorney professional who maintains a separate and independent business but may not agree to a system of cross-referrals on a quid pro quo basis.

2. Does the client appear to be excessively needy or unstable or does he or she suffer from diminished capacity?

   a. If the former, consider a non-engagement letter.

   b. If the latter, there may be additional considerations for the lawyer if the individual is undertaken as a client under RPC 1.14.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- *OSB Legal Ethics Op No 2005-159*. When representing a mentally ill parent in a dependency or termination-of-parental-rights case, attorney should seek the lawful objectives of the client and not substitute the attorney's judgment for that of the client. If the client cannot adequately act in his or her own interests, the attorney may seek the appointment of a guardian or take other protective action for the client as limited by the disciplinary rule. Once a guardian ad litem is appointed, the attorney must take direction from that person, although the attorney periodically may determine whether the guardian is adequately asserting the client's interest or whether a guardian at litem is still needed.

- *OSB Legal Ethics Op No 2005-41.* An attorney who has represented a client on business matters for a number of years and has recently begun to observe extraordinary behavior by the client that appears to be out of character with the client's former behavior and contrary to the client's own best interests may take reasonable action to protect the client's interests. The action must, however, be the least restrictive form of action sufficient to address the situation

3. Has the would-be client employed/discharged multiple prior attorneys on the same matter?

    a. How many (more than one)?

    b. What happened to dissolve those attorney-client relationships?

        i. Does the client still owe those attorneys money?

        ii. Do agreements with prior attorney(s) limit your potential fee?

        iii. Consider contacting the Bar to determine whether the prospective client filed any complaints in connection with those prior representations.

4. What is the prospective client's realistic budget for the legal matter?

    a. Does the client have a source for funding legal matter?

    b. Is he or she willing to put down a retainer?

        i. More likely to pay money at the outset than at the end when enthusiasm for the case has subsided (especially if do not prevail).

        ii. Attorneys are not permitted to "fund" the representation. *See* RPC 1.8(e).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

- *In re Noble (II*), 30 DB Rptr 264 (2016). [60-day suspension] Attorney entered into a written fee agreement with a client that allowed attorney to loan money to the client to cover expenses related to the client's case. The fee agreement failed to provide whether the terms of the loan were fair and reasonable to the client, failed to advise the client to seek independent counsel, and failed to include the essential terms of the loan and Respondent's role in the transaction.

- *In re Noble (I)*, 30 DB Rptr 116 (2016). [4-year suspension/2 years stayed/2-year probation] Attorney assisted a personal-injury client in obtaining a litigation loan, and had her give him a loan from the proceeds. In another case, attorney received a client loan from settlement proceeds. In neither instance did attorney discuss the terms or duration of the loans with the clients, including whether there was interest on the loans, nor did he document them in writing. Attorney did not obtain the clients' informed written consent agreeing to the essential terms of the loans, his role in the transactions, or advise either client that they should seek advice from independent counsel regarding the loans.

- In re Spencer, 355 Or 679, 330 P3d 538 (2014). [30-day suspension] Attorney was both a licensed attorney and a licensed real estate broker. The client retained attorney to file for Chapter 13 bankruptcy. When the client sold some out-of-state property, respondent advised her to invest the proceeds in a home in Oregon to take advantage of a bankruptcy exemption and then offered to serve as her real estate broker. Although the client was made aware that attorney would be receiving a portion of any sales commission, attorney failed to recommend that the client seek independent legal counsel and failed to obtain the client's informed, written consent to the representation.

- In re Seligson, 27 DB Rptr 314 (2013). [reprimand] Soon after being retained to advise a client regarding her estranged husband's bankruptcy and its effect on the couple's real property, it was discovered that the second mortgage was potentially avoidable and created the possibility of the client having significant equity. Shortly

thereafter, the client's divorce attorney prepared a trust deed for the client's signature in favor of specified parties, including attorney, to secure his fees. Although attorney only minimally participated in creation and execution of the trust deed, he had knowledge of and consented to it without obtaining his client's informed written consent.

- *In re Ghiorso*, 27 DB Rptr 110 (2013) [reprimand] Attorney participated as co-borrower with his client on one loan and separately loaned money or advanced assistance to that same client on at least two other occasions. In none of the transactions did the attorney provide the client with adequate disclosures, including that the attorney was not acting as his lawyer in the transactions, or obtain his client's informed consent to the transactions.

- *In re Hendrick*, 19 DB Rptr 170 (2005) [30-day suspension] Attorney loaned money to his client to resolve a non-judicial foreclosure and satisfy other debts owed by the client to the creditor. [DR 5-103(B)]

- *In re Carstens*, 17 DB Rptr 46 (2003). [30-day suspension] Attorney loaned money to his divorce client to insure that the client did not lose her house, and subsequently assisted the client by paying her household expenses. [DR 5-103(B)]

- *OSB Legal Ethics Op No 2005-4*. An attorney may not advance or guarantee cost-of-living expenses to a client pending the outcome of litigation that the attorney is handling for the client. An attorney may, however, advance bail money to a client or advance funds to pay litigation-related costs as long as the client remains liable to the attorney therefor. The attorney may also pay his or her own travel and investigation expenses incurred on the client's behalf.

c. How likely is it that the prospective client will have the ability to pay during or at the conclusion of the representation?

5. Will you be able to get along with the client?

    a. Trust your instincts—will there be a personality clash?

    b. Is the client an "expert" or a "hands-on" manager?

    c. Does the prospective client insist on an incorrect version of the law?

    d. Does the individual listen to you?

6. What are the prospective client's justifiable or reasonable expectations? Are they manageable? Are they achievable?

7. Who is the client?

    a. An individual? Multiple individuals? A company?

        i. Does this create a current-client conflict of interest? *See* RPC 1.7 (discussed in § 16)

        ii. Will there be confusion about who the attorney represents?

    b. Does the prospective client have an interest adverse to a former client? *See* RPC 1.9 (a) & (b); §19A, below.

8. What are your own expectations of the proposed representation?

    a. Evaluate your skill, competency and experience.

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- *In re Johnson*, 30 DB Rptr 300 (2016). [4-year suspension, 30 months stayed/3-year probation] Attorney missed both filing and extended deadline in two unrelated post-conviction cases, one of which resulted in the client losing the opportunity to have the

court review his case. Attorney also made a number of calendaring errors and procedural mistakes in multiple cases, including petitioning for Oregon Supreme Court review of appellate commissioner decisions rather than asking for reconsideration, missing deadlines and extended deadlines for filing opening briefs and petitions for review, failing to respond to a motion, and submitting a filing that was dismissed.

- *In re Brewster*, 30 DB Rptr 181 (2016). [reprimand] Attorney obtained ex parte orders granting her domestic relations clients temporary relief, including child support and custody, and other types of relief that were prohibited by statute in domestic-relations cases.

- *In re Oliveros*, 30 DB Rptr 145 (2016). [60-day suspension, all stayed/3-year probation] An elderly couple retained attorney to help them rescue their home from foreclosure, using half of the final $1 million installment of wife's inheritance, with the remaining inheritance funds to be invested to generate retirement income. Attorney recommended that they use the investment money to make loans to two other current clients. The loan transactions were unsecured or under-secured. The debtors made a few initial loan payments then defaulted and filed bankruptcy.

- *In re Gifford*, 29 DB Rptr 299 (2015). [60-day suspension] One of six heirs to her uncle's intestate estate hired attorney to assist her in the administration of the estate. After preparing the court documents reflecting the six heirs, attorney learned that one of the heirs might be in jail, and another might be transient. Without reviewing statutes related to missing heirs and filing appropriate pleadings and documentation in accord with those statutes, attorney revised portions of the documents previously signed by his client to represent that there were only four heirs, rather than six, and filed the altered documents with the probate court.

- *In re Sheridan*, 29 DB Rptr 179 (2015). [60-day suspension, all stayed/3-year probation] In an immigration matter, attorney undertook to represent a client on an illegal re-entry charge following his conviction and removal for several assault felonies.

Before she was removed from the case, attorney failed to timely file the client's post-conviction relief petition; filed a petition for post-conviction relief and one or more motions in the illegal reentry case that were without basis in law or fact; failed to acquire the knowledge, skill, thoroughness or preparation reasonably necessary to represent the client in the post-conviction matter or in the illegal reentry case; rendered legal advice to her client in the course of the illegal reentry case that was without basis in law or fact; and filed an unfounded motion to recuse the district court judge.

- *In re Jagger*, 357 Or 295, 348 P3d 1136 (2015). [90-day suspension] Attorney arranged for a phone call between his client and the client's girlfriend—who was the victim of his client's assault and had a restraining order against attorney's client. Attorney violated rule by failing to understanding statutes related to the restraining order or his client's obligations, instead inviting victim to speak with his client and advising his client that he could speak with the victim, in violation of the restraining order.

- *In re McCarthy*, 354 Or 697, 318 P3d 747 (2014) [90-day suspension] No discussion of facts by the court; affirmed trial panel's disposition.

- *In re Hudson*, 27 DB Rptr 226 (2013) [2-year suspension, all but 6 months stayed/2-year probation] Attorney and his partner (May) undertook to represent petitioner in a divorce proceeding, but filed the petition in a jurisdiction other than where the petitioner resided, and failed to effect service on the respondent over the next year. Even if the matter had been properly filed, attorney's attempts at service would have been insufficient under the ORCP requirements. In a second matter, attorney failed to review and recognize that proposed child support calculations were based upon 50/50 parenting time when that was not the situation of the parties or his client's understanding of the arrangement.

- *In re May*, 27 DB Rptr 200 (2013) [reprimand] Attorney and her partner (Hudson) undertook to represent petitioner in a divorce proceeding, but filed the petition in a jurisdiction other than

where the petitioner resided, and failed to effect service on the respondent over the next year. Even if the matter had been properly filed, attorney's attempts at service would have been insufficient under the ORCP requirements.

- *In re Kleinsmith*, SC S061057, OSB Case No. 12-169 (2013) [90-day suspension] Attorney improperly filed a number of collections matters on behalf of a bank in various states.

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Despite instructions from a trial judge in a civil case that the judge would grant a motion for JNOV in favor of attorney's client if one was filed and a caution about when such a motion was due, attorney failed to timely file the motion and instead filed a notice of appeal which deprived the trial court of jurisdiction. The notice of appeal was defective, the appeal ultimately was dismissed, and attorney failed to refile his post-trial motions timely. He also filed a second, untimely notice of appeal, intending to argue that a criminal statute that permitted the late filing of a notice of appeal should apply to his client's civil case. Attorney was found to have engaged in a pattern of incompetence.

- *In re Fredrick*, 26 DB Rptr 129 (2012). [reprimanded] In an attempt to protect a client's financial interests in an impending divorce, attorney advised the client to sign a promissory note in favor of client's father as evidence that funds father contributed to the marriage over the years were loans. In fact, father had made gifts, not loans, to the couple. In addition, attorney prepared and filed a UCC-1 financing statement to secure the note, advising the client that this may protect the client's interest in the couple's real property. A trial panel found this advice to lack competence. [DR 6-101(A)]

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] Attorney took on legal matters, some beyond her usual practice area, did not handle them competently, neglected a number of them and failed to respond to client inquiries.

- *In re Richardson*, 350 Or 237, 253 P3d 1029 (2011). [disbarred] Attorney who did not have experience in elder or estate law

assisted his elderly client, who had been receiving Medicaid benefits, in transferring her home and only asset to another, thereby disqualifying her from receipt of further Medicaid benefits. Attorney disbarred for violation of this and other rules. Supreme Court did not discuss facts or violations substantively because, after filing a petition for review of the disciplinary board trial panel opinion, attorney failed to file an appellate brief.

- *In re Lopez*, 350 Or 192, 252 P3d 312 (2011). [9-month suspension] After settling a personal injury case for less than the sum of the clients' medical expenses, and after unsuccessfully attempting to negotiate reductions of those expenses from the providers, attorney failed for over 2½ years to resolve the various claims to the settlement proceeds.

- *In re O'Rourke*, 24 DB Rptr 227 (2010) [reprimand] Attorney failed to understand rules regarding guardian ad litem for adult protected persons which resulted in negligent misrepresentations to the court and third parties.

- *In re Daum*, 24 DB Rptr 199 (2010) [120-day suspension] In a bankruptcy proceeding, attorney failed to understand or properly investigate the characterization of a private agreement his client had entered into to help fund medical school and mistakenly believed it was in the nature of a student loan. When it was discharged, private backer refused to further fund the client's education.

- *In re Hammond*, 24 DB Rptr 97 (2010) [30-day suspension] During the course of representing the plaintiffs in a property dispute, attorney lacked the knowledge, skill and experience in land use, litigation and appellate matters that was reasonably necessary for the representation. In addition, attorney was not prepared to try the lawsuit in circuit court after the trial judge denied her motion to postpone trial. [DR 6-101(A)/RPC 1.1]

- *In re Dixon*, 22 DB Rptr 241 (2008). [12 months] Attorney was retained to file a petition for post-conviction relief on behalf of a client. Although attorney's petition was timely under state law, attorney did not know about, and missed the filing deadline under, a federal statute, resulting in the client losing the right to later file a writ of habeas corpus.

- *In re Later*, 22 DB Rptr 340 (2008). [reprimand] Attorney hired for employment litigation failed to follow up on information necessary to trigger obligation of employer to grant benefit his client had settled for, in part because he did not sufficiently understand workers' compensation and employment law. Attorney then brought a second legal action asserting claims that the client had released in the first action.

- *In re DeBlasio*, 22 DB Rptr 133 (2008). [30-day suspension + restitution] On behalf of his firm, attorney accepted a portfolio of collection claims without the experience necessary to pursue them competently. Attorney mistakenly believed his partner, who had expertise with collection practice, would tend to the claims. However, the partner died and attorney thereafter continued to handle the claims, resulting in the filing of suits not authorized by the client, suits filed in the wrong plaintiff's name, suits dismissed for lack of service or prosecution and other errors.

- *In re Hilborn*, 22 DB Rptr 102 (2008). [1-year suspension/10 months stayed/2 years probation] Attorney who was not familiar with federal practice failed to take steps to become familiar with federal rules, laws or procedures when client's employment claim was transferred to federal court and did not understand (in failing to respond to a motion to dismiss a particular claim) that, when granted, he would not be permitted to replead that cause of action.

- *In re Wetsel*, 21 DB Rptr 129 (2007). [18-month suspension] Prior to filing a child custody petition in Oregon on behalf of a client, attorney failed to ascertain that Oregon had no jurisdiction because of where the child and the parties had resided in the preceding months. After opposing counsel challenged jurisdiction, attorney failed to response or appear such that the client was assessed attorney fees. [DR 6-101(A)]

- *In re Black*, 21 DB Rptr 6 (2007). [1-year suspension] Attorney negotiated a plea agreement on behalf of a client who was not a United States citizen, advising the client that the guilty plea would not result in the client's deportation. In fact, attorney did not know and did not research the consequences the plea

would have on the client's ability to remain in the country. [DR 6-101(A)]

- *In re Bettis*, 342 Or 232, 149 P3d 1194 (2006). [30-day suspension] Attorney failed to provide competent services to a criminal defense client when he sought and obtained his client's waiver of the right to a jury trial without first reviewing any discovery or conducting any factual or legal investigation into the issues in the case. [DR 6-101(A)]

- *In re White*, 19 DB Rptr 343 (2005). [6-month suspension] Attorney delegated a substantial portion of his immigration practice to a legal assistant, then failed adequately to supervise his legal assistant's activities or acquire sufficient knowledge of and competency in immigration law, all to his clients' detriment. [DR 6-101(A)]

- *In re Hendrick*, 19 DB Rptr 170 (2005). [30-day suspension] Attorney failed to recognize that his clients' bankruptcy proceeding stayed action in a state court lawsuit initiated by his clients against a licensing agency, and he pursued that litigation

  without disclosing to the state court or the opposing party that bankruptcy had been filed. [DR 6-101(A)]

- *In re Trukositz*, 19 DB Rptr 78 (2005). [12-month suspension] Attorney failed to claim PIP benefits for a client in a personal injury case because he did not know such benefits were available. [DR 6-101(A)]

- *In re Breckon*, 18 DB Rptr 220 (2004). [reprimand] Attorney without previous experience in dissolutions involving significant real property issues failed to obtain an appraisal for trial or elicit evidence in support of client's position regarding property value. [DR 6-101(A)]

b. Determine whether undertaking the representation would impose significant financial hardships on you or your law practice.

c. Evaluate your current workload and the anticipated time and effort that the contemplated representation will require. There is no "full

plate" defense for failing to timely or competently complete a matter.

- *In re Kesner,* 21 DB Rptr 199 (2007). [60-day suspension] As the effective date of a new bankruptcy law approached, attorney undertook to represent more clients wishing to file bankruptcy petitions under the old law than he could competently handle, filing 90 such petitions in a week that were incomplete, inaccurate, internally inconsistent or did not comply with applicable law. Thereafter, attorney failed timely or competently to correct the petition deficiencies despite the order of the court [RPC 1.1].

- *OSB Legal Ethics Op No 2007-178*. Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients.

d. Assess whether there are reliable office systems in place (including staff) to adequately manage the case.

Notes

FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 11 — Fee Agreements/Arrangements

HYPOTHETICAL

- Clair Lee Hesitant and Attorney Arnold met to discuss her contemplated divorce. Afterwards, Hesitant understood that Arnold would charge her $250/hour against a $10,000 retainer to complete her divorce. Arnold believed that while they discussed his $250 hourly rate, Hesitant ultimately agreed to a non-refundable "minimum fee" of $10,000. Arnold did not, however, prepare any document reflecting his understanding of the fee agreement. Hesitant gave Arnold a $10,000 check, which he immediately deposited into his general account (not trust).

  One month later, Hesitant terminated the representation. By letter, she asked Arnold to discontinue work on her behalf and return her retainer less fees incurred. Arnold did not respond to Hesitant's letter.

  The next month, Hesitant's new attorney, Austin, reiterated her request for a refund of the unearned retainer. Arnold responded that because the $10,000 she had paid him was a "minimum fee," she was not entitled to any refund. Arnold offered to arbitrate the matter, but did not make any refund.

Was it appropriate for Arnold to retain <u>any or the entire</u> $10,000 fee?

A. No—None of it. He had not fully performed under the agreement (*i.e.,* he had not completed the dissolution). Therefore, he was not entitled to any of the fee.

B. Yes—All of it. They at least orally agreed that the $10,000 fee would be earned upon receipt.

C. Yes—Some of it. It was appropriate for Arnold to keep some of the retainer, but not all of it, because he had not fully performed under the agreement.

D. No and Yes. It was a flat fee, so it was <u>all or nothing</u>. Arnold was permitted to keep all of the fee or return all of the fee, but there was no

means in the agreement for apportioning or allocating a portion of the fee to the services actually performed.

DISCUSSION

Answer: _____

See In re Gastineau, 317 Or 545, 551, 857 P2d 136 (1993) (a lawyer collects a clearly excessive fee when he or she collects a non-refundable flat fee, does not perform or complete the professional representation for which the fee was paid, but fails to promptly remit the unearned portion of the fee).

NOTE: There has been no guidance as yet from the court as to what method should be used to calculate the portion of the fee to be returned in the event that the representation is terminated under a flat fee agreement prior to the completion of the contemplated legal services.

However, a lawyer may not simply calculate the refund required by subtracting the amount of money the lawyer would have charged for the work, had the lawyer charged an hourly rate. *In re Balocca*, 342 Or 279 (2007). Such an hourly rate computation in the fixed fee context would "deny [the client] the benefit of the flat-fee arrangement." *Id.* at 292.

NOTE: It does not matter why the representation was not completed or who terminated the representation. Regardless of the reason, if the legal services were not completed (e.g., the attorney did not represent the client through entry of judgment), the attorney may not retain the entire flat fee.

See In re Martin, 328 Or 177, 184-85, 970 P2d 638 (1998) (attorney violated rule even where he held the belief that it was legal for him to disperse client funds).

See In re Biggs, 318 Or 281, 293, 864 P2d 1310 (1994) (without a clear written agreement, funds must be considered client property, and must be deposited in the lawyer trust account and withdrawn only as they are earned); *OSB Legal Ethics Op. 2005-151*.

Moreover, RPC 1.5(c)(3) prohibits a lawyer from entering into an arrangement for, charging or collecting a fee denominated as "earned on receipt," "nonrefundable" or similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited in the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

In re Fadeley, 342 Or 403, 153 P3d 682 (2007) (30-day suspension).

A. First and Foremost—Fees Cannot Be Illegal or Excessive

1. Lawyers are prohibited by RPC 1.5(a) from charging or collecting illegal or excessive fees. By its terms, this rule prohibits charging inappropriate fees, even if they are never collected (or never intend to be).

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

2. Illegal fees are those which are prohibited by statute or require court or other regulatory approval. *See In re Altstatt,* 321 Or 324, 897 P2d 1164 (1995) (it is impermissible to collect attorney fees from an estate in probate without prior court approval. Such a fee is unlawful and therefore "illegal").

   - *In re Krueger,* 29 DB Rptr 273 (2015) [6-month suspension, 90 days stayed/2-year probation] Attorney collected an illegal fee when he prematurely removed a portion of his client's settlement funds from trust for his anticipated attorney fees prior to obtaining the statutorily required court approval.

   - *In re Vanagas*, 27 DB Rptr 255 (2013) [reprimand] Attorney accepted payment from conservatorship funds without obtaining court approval as required by statute.

   - *In re Lopez*, 350 Or 192, 252 P3d 312 (2011). [9-month suspension] Attorney represented children in personal injury actions. Contrary to applicable state law, attorney settled the matters and then deducted his fee and the clients' medical expenses without court approval.

   - *In re Hammond*, 24 DB Rptr 187 (2010). [reprimand] Attorney collected an illegal fee because he was paid his attorney fee by the client in a federal workers' compensation case without obtaining prior approval from the workers' compensation board, as required by statute.

- *In re Sunderland*, 23 DB Rptr 61 (2009). [3 years] In a probate proceeding and related conservatorship, attorney collected attorney fees without court approval. [DR 2-106(A)]

- *In re Knappenberger*, 344 Or 559, 186 P3d 272 (2008). [2-year suspension] Attorney charged a client an attorney fee in a social security disability claim without the approval, required by law, of the Social Security Administration. [DR 2-106(A)]

- *In re Runnels*, 22 DB Rptr 254 (2008). [1-year suspension] Attorney's fee from a probate estate was illegal because it was not approved by the court, as required by statute, before it was paid to attorney.

- *In re Odman*, 22 DB Rptr 34 (2008). [181-day suspension] Attorney collected an illegal fee when he was paid for services rendered in a conservatorship without court approval. [DR 2-106(A)]

- *In re Nealy*, 20 DB Rptr 34 (2006). [4-month suspension] Attorney took periodic payments for his fees from a probate estate without the court approval required by statute. [DR 2-106(A)]

- *In re Anderson,* 12 DB Rptr 136 (1998) [18-month suspension/12 months stayed/2 year probation] Attorney's fee was illegal under state and federal bankruptcy laws because the fee agreement included an irrevocable wage assignment and did not accurately reflect the fee offered, including the annual percentage interest rate on unpaid amounts. The respondent also charged a supplemental fee without obtaining required court approval.

- *OSB Legal Ethics Op No 2005-171*. An attorney does not collect an illegal fee when the attorney accepts a retainer or interim compensation from a personal representative without court approval, so long as the funds are those of the personal representative and are not from estate assets. [*Supersedes Op No 2005-63*.]

- PRACTICE TIP: Lawyers should be cautious of the amount, source and form of money received from clients. The denomination may significant in light of federal money-laundering statutes. Federal law requires financial institutions to report cash transactions of more than $10,000 to the federal government. 31 USC § 5313; 31 CFR § 103.22(b)(1). In addition, 18 USC § 1956(a)(1)(B) provides, in part: "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity knowing that the transaction is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under state of federal law, shall be sentenced to a fine or imprisonment for not more than twenty years, or both. Additionally, 18 USC § 1957 makes it a crime to: "knowingly engage…in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." *See In re Albrecht*, 333 Or 520, 526 (2002) (lawyer disbarred for engaging in money-laundering scheme with client).

3. Whether a fee is excessive is determined by a reasonableness standard, including the criteria set forth in RPC 1.5(b). However, this list is not exclusive. *See In re Potts/Trammel/Hannon*, 301 Or 57, 66, n 3, 718 P2d 1363 (1986).

RULE 1.5 FEES

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

- *In re Bosse*, 30 DB Rptr 311 (2016) [24-month suspension] Attorney was paid a flat fee to defend a collection matter without a written fee agreement. Attorney performed very little work on the case and later asked the client for additional funds, of which the client only sent a portion because attorney would not provide her with an itemized bill. Due to attorney's neglect, the plaintiff was granted summary judgment. Attorney failed to return the unearned portion of the fee knowing he had not completed the representation.

- *In re Einhorn*, 30 DB Rptr 283 (2016) [disbarred] Attorney was paid a fee to resolve post-dissolution marital property issues. Other than exchanging a few emails, attorney took no action on the case. The client terminated the representation and requested a refund. Attorney neither refunded any money nor justified earning it.

- *In re Simon*, 30 DB Rptr 214 (2016) [185-day suspension] Client was involved in a business entity that needed to be dissolved, and was its managing member. Attorney was placed in control of the logistics for transfers from an escrow account established for the payment of creditors of the business entity. Attorney arranged for payment from this escrow fund of a $75,000 fee to another attorney for bankruptcy consultation services, $25,000 of which was subsequently sent by that attorney to one of attorney's personal creditors at his direction. The fee was excessive as there was no evidence that client authorized the fees to either attorney or the bankruptcy attorney.

- *In re Fisher*, 30 DB Rptr 196 (2016) [30-day suspension] Attorney represented a client pursuant to a written contingency arrangement that discussed an alternative hourly fee but did not define terms essential to the client's understanding of that fee or identify what hourly rates would apply using such a calculation. Later communications from attorney suggested that the contingency percentage (not the alternative hourly fee) would be utilized. When the case settled, attorney knew that his client was not satisfied with his representation and unhappy with the amount of the settlement. When attorney received the settlement, he removed attorney fees and costs calculated using the alternative hourly fee and sent the remainder—much less than the 60% the client was expecting—to the client with a release that conditioned the client's acceptance of the funds (his own funds) on his concession that he was "satisfied" with the both the settlement and attorney's legal representation, which were more than the client had agreed to pay.

- *In re Dowell*, 30 DB Rptr 168 (2016) [reprimand] After his personal injury contingency client filed a Bar complaint against him, attorney withdrew, and the client retained new counsel. Attorney filed a lien for a full third of what he believed the client's case would settle for despite the fact that the actual settlement was less than he had anticipated and despite that he had not completed the representation.

- *In re Smith*, 30 DB Rptr 134 (2016) [reprimand] Husband and wife retained attorney to represent them in injury claims arising from a motor vehicle accident. Both clients signed fee agreements providing for a one-third contingency fee on all monies that attorney successfully negotiated. Attorney thereafter charged a one-third fee against the uncontested portion of husband's PIP benefits and collected a fee on wife's uncontested wage-loss benefits, neither of which attorney was required to negotiate.

- *In re Meyer*, 29 DB Rptr 64 (2015). [reprimand]. After personal injury client terminated his representation, attorney asserted that client owed him his contingent fee for amount allegedly offered by insurance company while he was still client's attorney. However, insurer never made an offer (i.e., contingent event did not occur) and client actually received far less as a settlement

than attorney had contemplated, making attorney's claim based on his erroneous belief of a larger possible settlement clearly excessive both in timing and in amount.

- *In re Cottle*, 27 DB Rptr 22 (2013). [30-day suspension] Attorney accepted flat fee and filing fee to file divorce, prepared some documents and paid himself for that time, but failed to file the petition or reasonably communicate with his client for more than four years. Attorney then failed to account for or refund any funds to the client, and thereafter failed to respond to Bar inquiries.

- *In re Mahr*, SC S041496, Case No. 13-52 (2013) [disbarred] Attorney accepted fees for numerous immigration matters, failed to complete them, and failed to refund any of the unearned fees.

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Attorney took a flat fee to represent a client arrested on a years-old out-of-state warrant. Attorney met with the client once, but before commencing any work on the matter, the client was released from jail because the other state decided not to pursue extradition. The client requested, but attorney refused to make, a refund of the fee. Attorney was found to have collected a clearly excessive fee because he had not taken any substantial step toward completing work on the matter.

- *In re Jordan*, 26 DB Rptr 191 (2012). [18-month suspension] Attorney failed to attend court appearances for his immigration client and failed to tell his client that attorney was about to be, and then was, suspended from the practice of law. Knowing that his suspension was about to start, attorney nevertheless asked the client to pay additional attorney fees and failed to refund those fees he received after the suspension took effect. In another matter, attorney refused to refund any portion of a flat fee he received in a criminal appeal even though attorney's suspension prevented him from completing the representation.

- *In re Morasch*, 26 DB Rptr 146 (2012). [2-year suspension] Attorney took a retainer in a domestic relations matter, failed to render the services agreed upon, and did not return the unearned portion of the retainer.

- *In re Cain*, 26 DB Rptr 55 (2012). [reprimand] Attorney charged an excessive fee when she filed an application for interim compensation in a bankruptcy proceeding, claiming compensation at her hourly rate for work done by a non-lawyer in her firm.

- *In re Kinney*, 26 DB Rptr 59 (2012). [reprimand] Attorney charged a client under hourly rates that the client had not agreed to pay. In other matters, attorney filed with the court statements in support of attorney fee awards that incorrectly attributed to attorney time spent on legal matters by non-lawyer staff.

- *In re Isaak*, 23 DB Rptr 91 (2009). [6-month suspension] While representing an elderly client as a heir in a Florida probate, attorney spent substantially more time in the matter than the client's likely distribution warranted, reducing by his obstreperous conduct the size of the estate available to all heirs and delaying the completion of the probate. Attorney also billed for hundreds of hours on the elderly client's behalf in regard to Medicaid and personal issues before her death, but much of that time did not involve legal work and the probate court disallowed most of attorney's claim for fees. [DR 2-106(A)]

- *In re Moore*, 21 DB Rptr 281 (2007). [60-day suspension] In addition to a substantial nonrefundable retainer, attorney also charged and collected from a domestic relations client several thousands of dollars described as "initial compensation" that was not to be applied toward attorney's hourly fees and bore no relationship to time attorney spent on the case.

- *In re Luetjen*, 18 DB Rptr 41 (2004). [1-year suspension] Attorney borrowed money from a client and, at a later date, agreed to perform legal services for the client in the future in lieu of paying interest on the loan. Attorney charged an excessive fee in that the value of the legal services performed was less that the interest waived by the client. [DR 2-106(A)]

- *In re Morin,* 319 Or 547, 878 P2d 393 (1994) [disbarred] Attorney fees in preparing wills were not earned and were clearly excessive where attorney knew the wills were invalid.

4. Fees can be both illegal and excessive.

- *In re Lopez,* 350 Or 192, 195, 252 P3d 312 (2011). [9-month suspension] Attorney represented a woman and her three minor children in a personal injury action. In the course of that representation, he settled the children's claims without obtaining court approval, as California law requires, and he deducted his fee and the children's medical expenses without first obtaining court approval, as California law also requires. Finally, the respondent charged the woman a fee that exceeded local court guidelines.

- *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to on recons*., 347 Or 529 (2010). [disbarred] Attorney commingled his billings as personal representative of an estate with those for his work as successor trustee, thereby double-charging for certain services and collecting fees without the statutorily required permission of the probate court. [DR 2-106(A)]

- *In re Nishioka*, 23 DB Rptr 44 (2009). [reprimand] Attorney billed a client at an hourly rate that exceeded the rate specified in the fee agreement, making the fee excessive, and collected fees in a probate proceeding without obtaining court approval, making the fee illegal.

- *In re Hammond*, 22 DB Rptr 168 (2008). [30-day suspension] Attorney's $6,000 fee in a federal workers compensation matter was both illegal, in that attorney did not obtain the agency's approval of the fee required by statute, and excessive, in that it exceeded the bounds of a reasonable fee for the limited services rendered.

- *In re Morrison,* 14 DB Rptr 234 (2000). [15-month suspension] Attorney charged an excessive fee in a workers' compensation case when he took a percentage of a client's recovery in excess of the fee allowed by the workers' compensation board.

5. Charging a client for activities that have no benefit to the client amounts to an excessive fee.

- *In re May*, 27 DB Rptr 200 (2013). [reprimand] Attorney hired to file and pursue divorce proceeding billed her client for obviously futile service attempts that would not have constituted proper service even if they had somehow reached the respondent. Attorney also billed for other services that were of no benefit to the client and could not have advanced her legal matter.

- *In re Kleinsmith*, SC S061057, Case No. 12-169 (2013) [90-day suspension] Attorney improperly filed more than a dozen collections matters on behalf of a bank in various states and then charged the bank legal fees for mitigating the consequences of his own negligence.

- *In re Knappenberger*, 344 Or 559, 186 P3d 272 (2008). [2-year suspension] Attorney charged a client for time spent preparing an affidavit in defense of the client's challenge to attorney's fee. [DR 2-106(A)]

- *In re Paulson,* 335 Or 436, 71 P3d 60 (2003) [reprimand] Attorney billed a client for his time responding to an ethics complaint filed by the client. The charge was excessive because it was for time spent in pursuit of the attorney's own interests, the client had no obligation to pay it and it did not benefit the client.

- *In re Benett,* 331 Or 270, 14 P3d 66 (2000). [180-day suspension]. Attorney charged an excessive fee when he billed his clients for the time he spent disputing his bill with his clients.

- *In re Potts/Trammel/Hannon,* 301 Or 57, 718 P2d 1363 (1986) [reprimand] Adding further charges to bill for firm's time in defending against objection to its fees violated rule.

- *OSB Legal Ethics Op No 2005-78*. An attorney may not retaliate for client protests by sending the client a greater bill.

6. Expenses can also be deemed excessive.

   a. General office overhead is included in a lawyer's fee and may not be billed separately.

      - *In re Moore*, 21 DB Rptr 281 (2007) [60-day suspension] In addition to other excessive billing, attorney charged and collected from a domestic relations client a monthly overhead fee assessed retroactively to the commencement of the representation.

   b. Costs may be billed separately but cannot be used to generate a profit for the lawyer. *See e.g., OSB Legal Ethics Op No 2005-125* (discussing when costs may be charged in connection with providing copies of a client's file)

      i. Contract lawyer's services billed as a cost or expense may not exceed the actual costs of those services. However, if they are billed as legal services, the billing lawyer may add a surcharge for those, so long as the adjusted charges are still reasonable under RPC 1.5. *ABA Formal Ethics Op.* 00-420 (2000).

B. Fee Structure

1. Charging and collecting an excessive fee is a serious ethical violation. Lawyers should make sure to reach an early, clear understanding of fees with their clients. *In re Potts/Trammel/Hannon*, 301 Or 57, 74, 718 P2d 1363 (1986); *In re Wyllie*, 331 Or 606, 625, 19 P3d 338 (2001)

2. A lawyer may not charge or collect more than the agreed-on fee. *OSB Formal Ethics Op Nos 2005-15, 2005-69 & 2005-96; see also In re Yacob*, 318 Or 10, 860 P2d 811 (1993).

3. Hourly Rate

a. There is no *requirement* that an hourly fee agreement be in writing. *In re Campbell,* 345 Or 670, 685, 202 P3d 871 (2009).

b. Hourly rates must be reasonable under the criteria listed in RPC 1.5(b) and should be based upon rates for attorneys in the area performing similar services. Fees should not be based upon a lawyer's "intuition" or reliance on the court to instruct if it believes that the fees are excessive in any particular case. *In re Potts/Trammel/Hannon*, 301 Or 57, 69, 718 P2d 1363 (1986).

c. Retainers are often utilized in conjunction with hourly-rate agreements. Remember: retainers are client funds until they are earned and must be properly treated as such. *See* § 12.

d. Once an hourly rate is established, client approval must be obtained to increase that rate.

□ PRACTICE TIP: If a lawyer is charging by the hour, he or she should have a minimum retainer and the terms of the replenishment should be in the written agreement. The lawyer should then adhere to the replenishment schedule so that he or she does not spent a lot of time working on a case for which the lawyer is never paid. Billings need to be sent monthly along with a cover letter that identifies something substantive that is happening in the client's legal matter. In that way, the client gets some service/information with a bill. If the lawyer decides not to charge a client for something, the bill should reflect the work done, the time spent and the fact that you are not charging the client for it.

- *In re Simon,* 30 DB Rptr 214 (2016). [185-day suspension] Attorney arranged for payment from client's escrow fund of a $75,000 fee to another attorney for bankruptcy consultation services, $25,000 of which was subsequently sent by that attorney to one of attorney's personal creditors. The fee was excessive as there was no evidence that client agreed to pay, or authorized, the fees to either attorney or the bankruptcy attorney.

- *In re Kinney*, 26 DB Rptr 59 (2012). [reprimand] Attorney charged a client under hourly rates that the client had not agreed to pay.

- *In re Nishioka*, 23 DB Rptr 44 (2009). [reprimand] Attorney billed a client at an hourly rate that exceeded the rate specified in the fee agreement, making the fee excessive.

- *In re Unfred*, 22 DB Rptr 276 (2008). [reprimand] Attorney and client signed a fee agreement under which the client was to receive a discounted hourly rate through an employee assistance contract. Thereafter, attorney billed and collected at his normal, undiscounted rate, which was excessive in light of the fee agreement.

- *In re Gudger*, 21 DB Rptr 160 (2007). [reprimand] Attorney charged an excessive fee when he sent his client an invoice that charged out attorney's time at an hourly rate greater than specified in the fee agreement without prior notice to or consent from the client.

- *In re Campbell*, 17 DB Rptr 179 (2003). [reprimand] Attorney's fee agreement with client required client to pay a rate 1½ times attorney's standard hourly rate if the client dropped the claim or did not accept attorney's settlement recommendation. Attorney's later attempt to enforce the agreement and collect the fee at 1½ times his normal rate was excessive under the rule. [DR 2-106(A)]

4. Flat or Fixed Fee

a. Fixed fee agreements are permitted in Oregon, so long as they are not excessive or unreasonable. *In re Hedges*, 313 Or 618, 623-24, 836 P2d 119 (1992); *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994).

b. The mere fact that a fixed fee may result in a fee in excess of a reasonable hourly rate does not in itself make the fee unethical. *In re Gastineau*, 317 Or 545, 552, 857 P2d 136 (1993).

c. However, "[t]he disjunctive use of the word 'collect' means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began." *In re Gastineau*, 317 Or at 550–551; *OSB Legal Ethics Op Nos 2005-15, 2005-69, 2005-97, 2005-151*; *In re Sassor*, 299 Or 720, 705 P2d 736 (1985).

d. An initially reasonable flat fee becomes excessive when an attorney fails to perform or complete the professional representation for which the fee was paid and does not remit the unearned portion of the fee. *In re Gastineau,* 317 Or 545, 857 P2d 136 (1993).

e. Regardless of the reason why an attorney fails to do the work, it is the lack of agreed effort that causes the violation. *In re Gastineau,* 317 Or 545, 857 P2d 136 (1993).

f. Once a flat-fee arrangement has been made, an attorney cannot attempt to justify retention of the fee based upon calculation of time spent on the matter at his or her hourly rate; this would deny the client the benefit of the flat-fee arrangement. *See In re Balocca,* 342 Or 279, 292, 151 P3d 154 (2007).

g. A lawyer may not charge more than the agreed-on fee, and any fee charged in excess of the agreed-on fee is excessive as a matter of law. It follows that unless either (a) the fixed fee agreement itself allows for changes over time or (b) the fixed fee agreement is permissibly modified pursuant to *OSB Legal Ethics Op No 2005-97*, the agreed-on fixed amount is all that the lawyer may collect. *OSB Legal Ethics Op No 2005-151.*

□ PRACTICE TIP: If a lawyer is charging a flat fee, the fee agreement should make it clear that no work will be done until the fee is paid in full. The lawyer should then stick to that requirement. Give the client a reasonable time in which to come up with the money, and if they cannot, refund the entire deposit (unless the fee agreement states that some of what the client deposited goes to pay for the initial meeting). With this financial relationship, the lawyer will not spend time working on a case for which he or she will never get paid.

- *In re Simon*, 30 DB Rptr 214 (2016) [185-day suspension] Client was involved in a business entity that needed to be dissolved, and was its managing member. Attorney was placed in control of the logistics for transfers from an escrow account established for the payment of creditors of the business entity. Attorney arranged for payment from this escrow fund of a $75,000 fee to another lawyer for bankruptcy consultation services, $25,000 of which was subsequently sent by that attorney to one of attorney's personal creditors. The fee was excessive as there was no evidence that

client agreed to pay, or authorized, the fees to either attorney or the bankruptcy lawyer.

- *In re Fisher*, 30 DB Rptr 196 (2016) [30-day suspension] Attorney represented under contingency arrangement that discussed an alternative hourly fee but did not define terms essential to the client's understanding of that fee or identify what hourly rates would apply using such a calculation. Later communications from attorney suggested that the contingency percentage (not the alternative hourly fee) would be utilized. When the case settled and attorney received the settlement, he removed attorney fees and costs calculated using the alternative hourly fee, and sent the remainder—much less than the 60% the client was expecting—to the client with a release that conditioned the client's acceptance of the funds (his own funds) on his concession that he was "satisfied" with the both the settlement and attorney's legal representation, which were more than the client had agreed to pay.

- *In re Dowell*, 30 DB Rptr 168 (2016) [reprimand] After his personal injury contingency client filed a Bar complaint against him, attorney withdrew, and the client retained new counsel. Attorney filed a lien for a full third of what he believed the client's case would settle for despite the fact that the actual settlement was less than he had anticipated and despite that he had not completed the representation.

- *In re Lopata*, 29 DB Rptr 170 (2015) [90-day suspension, all stayed/2-year probation] Attorney failed to complete the filing of a trademark application or respond to the client's inquiries about the status of the application. Approximately a year later, the attorney learned that he had failed to properly file the application but failed to take steps to then complete it or promptly return the client's unearned portion of the fee.

- *In re Meyer*, 29 DB Rptr 64 (2015) [reprimand]. After personal injury client terminated his representation, attorney asserted that client owed him his contingent fee for amount allegedly offered by insurance company while he was still client's attorney. However, insurer never made an offer (i.e., contingent event did not occur) and client actually received far less as a settlement than attorney had contemplated, making attorney's claim based on his erroneous

belief of a larger possible settlement clearly excessive both in timing and in amount.

- *In re Cottle*, 27 DB Rptr 22 (2013). [30-day suspension] Attorney accepted flat fee and filing fee to file divorce, prepared some documents and paid himself for that time, but failed to file the petition or reasonably communicate with his client for more than four years. Attorney then failed to account for or refund any funds to the client, and thereafter failed to respond to Bar inquiries.

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Attorney took a flat fee to represent a client arrested on a years-old out-of-state warrant. Attorney met with the client once, but before commencing any work on the matter, the client was released from jail because the other state decided not to pursue extradition. The client requested, but attorney refused to make, a refund of the fee. Attorney was found to have collected a clearly excessive fee because he had not taken any substantial step toward completing work on the matter.

- *In re Lounsbury,* 24 DB Rptr 53 (2010). [reprimand] Due to a concern over the attorney's services, his criminal defendant client terminated the attorney's services prior to the completion of the work provided for the flat fee agreement. The attorney failed to return the unearned portion of the fee he had been paid.

- *In re Balocca*, 342 Or 279, 151 P3d 154 (2007). [90-day suspension] Attorney may not agree to perform specified legal services for a flat fee, fail to complete the work, and then claim that the fee is earned based on an hourly computation of time spent on the matter. In this context, keeping the fee without completing the work is collecting an excessive fee. [DR 2-106(A), DR 2-110(A)(3)]

HYPOTHETICAL

- Attorney Atticus was hired to represent Defendant Dustin in direct appeal of his most recent criminal convictions. Pursuant to a written fee agreement drafted by Dustin, Atticus agreed to represent Dustin on direct appeal for a flat fee.

  Prior to the completion of the representation, Dustin offered to pay Atticus a bonus fee for each month that Dustin's sentence was reduced on appeal. Atticus accepted that offer.

  Atticus was permitted to accept Dustin's bonus offer because:

  A. Dustin was already a current client.

  B. The request expanded the scope of the representation and therefore it was permissible to negotiate an additional fee.

  C. It was Dustin's suggestion, rather than Atticus' request.

  D. Atticus was willing to be subject to Bar discipline.

DISCUSSION:

Answer: _____

See also, OSB Legal Ethics Op 2005-13.

In re Coran, 24 DB Rptr 269 (2010). [reprimand]

5. Contingency

a. The mere fact that a contingent fee is charged does not make a fee unreasonable or excessive in violation of RPC 1.5. *See* RPC 1.5(b); *OSB Formal Ethics Op 2005-13.*

b. Like other types of fees, contingent fees must be reasonable under the criteria listed in RPC 1.5(b).

c. The "clearly excessive" standard in RPC 1.5(a) and the "reasonable contingent fee" standard in RPC 1.8(i)(2) are the same. *OSB Formal Ethics Op Nos 2005-54, 2005-97, 2005-124*.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

d. Apart from some statutory limitations on contingent fee arrangements in certain types of matters (*e.g.,* ORS 20.340, placing certain limitations on personal injury or wrongful death contingency fee arrangements, and requiring them to be in writing), the amount and provisions of such agreements are up to the lawyer and client to determine under general principles of contract law. *OSB Formal Ethics Op 2005-97.*

e. In addition to being subject to discipline, excessive fees, especially those based upon a contingent fee arrangement, may be subject to disgorgement. *See, e.g., Harrington v. Thomas,* 73 Or App 648 (1985) (Contingency agreement entered into between attorney and conservator for incompetent man was held to be excessive by the appellate court and a majority of the fees disgorged when the court found that the conservator had not been fully informed about the

arrangement and may not have signed the document had she been so).

□ PRACTICE TIP: An attorney should keep contemporaneous time records, even where the representation is based upon a contingency arrangement. This aids the lawyer in determining whether the contingent fee structure is a fair and beneficial way of handling similar types of legal matters in the future and also allows for the recovery of fees on a *quantum meruit* basis if it should become necessary.

- *In re Angel*, 22 DB Rptr 351 (2008). [reprimand] Attorney improperly collected an hourly fee in a contingent fee case.
- *In re Kerrigan,* 271 Or 1, 530 P2d 26 (1975) [18-month suspension] Attorney took from a personal injury settlement a larger percentage for a fee than the fee agreement called for.
- *OSB Legal Ethics Op No 2005-54*. Only if the total fee obtained thereby would not be clearly excessive or unreasonable, may an attorney provide in a contingent fee agreement that client's refusal to accept a settlement offer that the attorney deems reasonable will transform the agreement into one in which the attorney is entitled to the agreed-upon percentage of the rejected settlement amount plus an hourly fee from that point forward.
- *OSB Legal Ethics Op No 2005-15.* If a settlement agreement provides that payment is to be made over time, an attorney who is to be paid on a contingent fee basis may only take the applicable percentage from each settlement payment. A greater percentage may be taken only if the fee agreement expressly so provides.

RULE 1.5 FEES

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

- *In re Coran,* 24 DB Rptr 269 (2010). [reprimand] In representing client in direct appeal of criminal convictions, attorney agreed to accept a bonus fee for each month that the client's sentence was reduced on appeal, which was an improper contingent fee in a criminal case.

f. An attorney may not accept a contingent fee in a proceeding which seeks a division of assets between an unmarried couple. *OSB Legal Ethics Op No 2005-13.*

g. An attorney may accept a contingent fee for representing a client in enforcing an order for spousal or child support that was previously obtained by other counsel. *OSB Legal Ethics Op No 2005-13.*

h. An attorney may not accept a contingent fee for representing a spouse in dissolution proceedings. *OSB Legal Ethics Op No 2005-13.*

- *In re Hill,* 261 Or 573, 495 P2d 261 (1972) [reprimand] Attorney entered into a contingent fee agreement with a divorce client.

- *In re Pederson/Spencer,* 259 Or 429, 486 P2d 1283 (1971) [reprimand] Lawyers improperly agreed to and collected a contingency fee in a divorce proceeding.

C. Refundable vs. Non-Refundable

1. <u>There is no such thing as a truly non-refundable fee.</u>

2. A fee can be required to be refunded, in whole or in part, if the legal work for which it was paid is not fully performed. *In re Gastinueau,* 317 Or 545, 857 P2d 136 (1993); *OSB Legal Ethics Op No 2005-151*.

3. RPC 1.5(c)(3) specifically provides the "magic words" that must appear in fee agreements to allow a lawyer to treat funds received from a client as his or her own in advance of work being performed.

RULE 1.5 FEES

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

- *In re Baldwin*, 30 DB Rptr 328 (2016). [reprimand] Attorney represented a client in three different criminal matters pursuant to a written fee agreement wherein the retainer was designated as a "minimum non-refundable fee." The fee agreement failed to explain that the nonrefundable fee would not be deposited in a lawyer trust account, nor did it explain that the client could discharge the lawyer at any time and if she did so she might be entitled to a full or partial refund if the services had not been completed.

- *In re Fowler*, 30 DB Rptr 190 (2016). [reprimand] Attorney believed client's payment was a nonrefundable retainer, but failed to have the client sign a written fee agreement and did not provide the client with the required disclosures.

- *In re Bowman*, 30 DB Rptr 157 (2016) [reprimand] Attorney represented a client pursuant to a written fee agreement that provided for a flat fee, earned on receipt, but that failed to include language advising the client that her funds would not be deposited into a lawyer trust account, that she could terminate the representation at any time, and that if she did so she could be entitled to a full or partial refund of the fee if services for which the fee was paid had not been completed.

- *In re Ferrua*, 30 DB Rptr 99 (2016) [181-day suspension] Attorney received a flat fee pursuant to an oral agreement, and did not

indicate that the funds would not be deposited into trust, that the client was entitled to terminate the representation at any time, and that if he discharged attorney, client would be entitled to a refund of all or part of the fee, if the services for which the fee was paid were not completed.

- *In re Dickey*, 30 DB Rptr 19 (2016) [disbarred] Attorney was paid a flat fee to represent a client on criminal charges. The fee agreement failed to fully explain that the funds would not be deposited in a lawyer trust account, that the fee was "earned on receipt," or that the client could discharge the lawyer at any time and if he did so that he might be entitled to a full or partial refund of his fee.

- *In re Bottoms*, 29 DB Rptr 210 (2015) [2-year suspension, 1-year stayed/2-year probation] Attorney agreed to represent client pursuant to a written fee agreement for aa nonrefundable retainer but failed to advise the client that his retainer would not be deposited into trust or that the client could discharge the attorney at any time and might be entitled to a refund of some or all of the monies paid.

- *In re Bertoni*, 28 DB Rptr 196 (2014) [6-month suspension] Over two years, attorney represented a number of clients in criminal matters under flat free agreements that failed to explain that the funds paid to attorney would not be deposited into his lawyer trust account, that the clients could discharge attorney at any time, and that they might be entitled to a refund of all or part of the fee if the services for which the fees were paid were not completed.

- *In re Eckrem*, 28 DB Rptr 77 (2014) [90-day suspension, all but 30 days stayed/2-year probation] Attorney required domestic relations client to pay a non-refundable flat fee but the fee agreement failed to explain that the funds paid would not be deposited into his lawyer trust account, that the client could discharge the attorney at any time, and that if the client discharged the attorney, she may be entitled to a refund of all or part of the fee if the services for which the fee was paid were not completed.

- *In re Coran,* 27 DB Rptr 170 (2013). [30-day suspension, stayed/24-month probation] Attorney's flat fee agreement failed to

explain that client could discharge the attorney at any time and in that event might be entitled to a refund of all or part of the fee if the services for which the fee was paid were not complete.

4. This Rule merely codifies what the courts have consistently held:

a. Even if an attorney and client orally agree that a fee will be earned on receipt and not refundable, an oral agreement does not provide a sufficient basis for a lawyer to treat a client's funds as if they were his or her own. *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007)

b. A lawyer may be excused from depositing into a trust account money received from a client before services are performed if the client has agreed, in writing, that all legal fees paid are deemed earned by the lawyer upon receipt. *In re Hedges*, 313 Or 618, 623-24, 836 P2d 119 (1992).

c. 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 RPC 1.15. *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994); *see also, In re of Balocca,* 342 Or 279, 287-88 (2007).

- *In re Sousa,* 323 Or 137, 914 P2d 408 (1996). [disbarred] Attorney disciplined for collecting a non-refundable retainer and then failing to take any action the matter or to return any portion of the retainer.

D. Fee Agreement

1. Written

a. Not a *per se* requirement, unless the lawyer wants to treat the client funds as earned upon receipt. *See* Flat Fee discussion, above (§11B4); *OSB Formal Ethics Op No 2005-151.*

□ PRACTICE TIP: All fee agreements should be in writing, and preferably a writing signed by the client. The agreement should set out the amount of fees, including

whether the lawyer will charge for paralegal or secretarial time, the scope of the representation, the duties of the lawyer and the client with regard to the relationship, and what triggers the end of the relationship, either because the matter is completed or for other reasons, such as the non-payment of fees.

b. Care should be taken in crafting written fee agreements. If a fee agreement is ambiguous, it must be construed against the attorney. *OSB Legal Ethics Op No. 2005-124*.

c. Both the attorney and client should sign and date any fee agreement.

d. Lawyers cannot attempt to limit liability from malpractice in fee agreement. *See* RPC 1.8(h)(1) & (3).

e. Lawyers cannot limit liability from ethical violations in a fee agreement or any other agreement with the client. RPC 1.8(h)(4)

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

*** * ***

(3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

2. Other than written fee agreements

a. As noted above, oral fee agreements are not *per se* unethical in most circumstances.

b. Where the law does not require that the agreement between the lawyer and client be in writing, the Bar bears the burden to prove that the lawyer charged the client fees that were not authorized by the terms of the agreement. *In re Campbell*, 345 Or 670, 685, 202 P3d 871 (2009)

c. However, in the absence of a written fee agreement, it is the lawyer's burden to establish the terms of the fee arrangement with the client. *See In re Balocca,* 342 Or 279, 289 151 P3d 154 (2007) (where an attorney seeks to rely on the existence of a fee agreement to justify his or her handling of client payments, it is the attorney's burden to demonstrate the existence of such an agreement).

- *In re Brown*, 23 DB Rptr 137 (2009). [90 days] Attorney who enters into an oral fee agreement for a nonrefundable retainer earned on receipt must reduce that agreement to writing at or near the time of collecting the client's retainer. Attorney may not collect the funds, remove them from trust and wait several weeks before obtaining the client's signed agreement.

3. Interest Rates

a. Absent an express agreement between attorney and client, an attorney may not charge the client more than statutory nine percent interest on past-due bills. *OSB Legal Ethics Op No 2005-97*.

b. If the client expressly agrees at the outset of the representation to a charge of 18% interest and it is otherwise lawful for the attorney to charge 18%, the attorney may do so. The attorney may not, however, simply rely on a statement at the bottom of a monthly billing to the fact that 18% interest will be charged thereafter on past-due sums. *OSB Legal Ethics Op No 2005-97*.

- *In re Campbell,* 345 Or 670, 202 P3d 871 (2009) [60-day suspension] Attorney billed client for late fees in excess of the legal rate of interest without obtaining client's written agreement to pay those charges.

- *In re Schroeder,* 15 DB Rptr 212 (2001) [reprimand] Attorney violated rule by charging client more than the legal rate of

interest on a past-due fee without the client's affirmative agreement to pay the higher rate of interest.

- *OSB Legal Ethics Op No 2005-133*. Interest charged as part of a private plan to finance legal fees is analogous to credit card plans offered by attorneys and not per se unethical. However, if the interest rate is excessive, the attorney's fee may also be excessive.

4. It is a good practice to enter into a new fee agreement whenever there is a new matter on which the lawyer has agreed to represent the client or anytime the representation expands beyond the scope of the initially contemplated representation (*e.g.,* an appeal following representation in civil litigation or a criminal matter).

5. Ability to modify, alter or renegotiate

   - Supp 11-1: American Bar Association, *Formal Opinion 11-458: Changing Fee Arrangements During Representation*

   a. Under RPC 1.8(a), changing a fee agreement after the commencement of representation may be considered a business transaction with a client that requires specific consents and disclosures.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

b. A modification of a fee agreement in the lawyer's favor requires client consent based on an explanation of the reason for the change and its effect on the client. *OSB Legal Ethics Op No 2005-97; In re Skinner*, 14 DB Rptr 38 (2000).

c. Any modification to the fee agreement must be objectively fair. *OSB Legal Ethics Op No 2005-97.*

- *In re Campbell*, 345 Or 670, 202 P3d 871 (2009). [60-day suspension] Billing a client for late fees in excess of the legal rate of interest without obtaining the client's written agreement to pay those charges constitutes charging a clearly excessive fee. [DR 2-106(A)]

- *In re Gudger,* 10 DB Rptr 135 (1996) [180-day suspension/90 days stayed/2 year probation] Attorney disciplined for conditioning further representation on clients' modification of written fee agreements and then withdrawing after clients refused modification.

E. Division of Fees

1. There is no prohibition against sharing fees with other lawyers so long as the client agrees and the fee otherwise comports with RPC 1.5(a). *See* RPC 1.5(d).

RULE 1.5 FEES

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

2. There is still valid case law indicating that fees must be divided "in proportion to the services performed and responsibility assumed." *See, e.g., In re Potts/Trammel/Hannon*, 301 Or 57, 72, 718 P2d 1363 (1986). However, that provision specifically stated in the former Code of Professional Responsibility did not get incorporated into the Oregon Rules of Professional Conduct. Accordingly, it appears that proportionality is no longer a requirement, so long as the total fee is reasonable, and the client consents.

OPTIONAL HYPOTHETICAL

- Constance Fight and her husband, Willie (the "Fights"), retained Attorney Animus to defend them in a civil lawsuit and pursue counterclaims on their behalf.

  Two years into the representation, Animus requested that the Fights pay him a substantial retainer so that he could try the case scheduled for the following month. Constance instead proposed a fixed fee arrangement, which Animus sent to the Fights, and they signed soon after.

  The agreement provided for the Fights to immediately pay Animus a $30,000 fixed fee, which would comprise all or part of his compensation through trial. Any compensation over $30,000 was to be paid on a contingent basis—depending upon the outcome of the litigation. The written agreement did not discuss whether the $30,000 fixed fee was considered to be earned upon receipt or non-refundable.

  The Fights paid Animus $30,000 in cash, which Animus deposited into his general business account. Thereafter, the trial was postponed a number of times. Animus performed significant work on the case, but he, Constance, and Willie began to disagree on a number of issues and, prior to trial or completion of the case, the court granted Animus' motion to withdraw. Animus refused to refund to the Fights any portion of the $30,000 fee.

Was it appropriate for Animus to retain any or all of $30,000 fee?

A. No—None of it. He had not fully performed under the agreement by taking the case to trial. Therefore, he was not entitled to any of the fee.

B. Yes—All of it. At his hourly rate, Animus had more than earned the entire $30,000 fee and therefore was entitled to keep it all.

C. Yes—Some of it. It was appropriate for Animus to keep some of the retainer, but not all of it, because he had not fully performed under the agreement.

D. No and Yes. It was a flat fee, so it was all or nothing. Animus was permitted to keep all of the fee or return all of the fee, but there was no means in the agreement for apportioning or allocating a portion of the fee to the services performed.

DISCUSSION

Answer: _____

See In re Fadeley Discussion above.

In re Vance, 20 DB Rptr 92 (2006) (public reprimand); *see also, In re Albrecht*, 333 Or 520, 526 (2002); 26 USC §6065 (i).

HYPOTHETICAL

- Hardluck Case hired Attorney Atta to represent him in a dissolution proceeding pursuant to a written fee agreement for $150/hour. Case gave Atta a $1,500 retainer, which Atta properly deposited into trust.

  Over the following two months, Atta spent 7.95 hours working on Case's matter, earning $1,192.50 at his hourly rate. Nevertheless, during this period, Atta negligently withdrew $1,305 from trust. Atta ultimately spent enough time on the matter to justify all of the funds he took.

  Atta later used computer software to implement an increase in his general rate. Due to an oversight, his rate was increased to $200/hour for all entries after the stated increase date, including on Case's account. Prior to any notification from Atta, an invoice was sent to Case that charged him for several hours of time at $200/hour. Case did not pay the increased rate, but instead paid Atta the balance reflected on the prior invoice.

Which of the following is NOT TRUE about Atta's conduct?

A. He violated the excessive fee rule even though his billing was in done in error and his client did not pay it.

B. He knowingly converted client funds.

C. He failed to maintain client funds in trust, notwithstanding that he ultimately earned all of the funds he withdrew.

D. He violated the rules regarding the handling of client property even though the additional amount withdrawn was *de minimus* and eventually earned.

DISCUSSION

Answer: _____

See In re Martin, 328 Or 177, 186, 970 P2d 638 (1998) (only those acts of conversion that are intentional or knowing, and not merely negligent, unknowing or innocent, constitute "conduct involving dishonesty" under the ethics rules); *In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) (lawyer inadvertent use of client funds for personal purposes when, unbeknownst to the lawyer, his employees had deposited client funds in his general account, technically amounted to conversion, but was not dishonest).

In re Gudger, 21 DB Rptr 160 (2007) (public reprimand).

□ PRACTICE TIP: Focus on making the financial relationship clear from the beginning so that it does not become a sticking point or bone of contention later. The lawyer can then spend time working with the client instead of doing work that for which the client will not pay.

HYPOTHETICAL

- Mamma Bear referred her boyfriend, Papa Smurf, to Attorney Adequate for a bankruptcy consultation. After reviewing Papa's finances with him during their meeting, Adequate agreed to prepare and file a bankruptcy petition for a flat fee of $550. Adequate believed that he told Papa that the fee was earned upon receipt, however, he was unable to locate a fee agreement signed by Papa.

  Papa paid a total of $300 over a few months, but did not pay the balance. Adequate did not deposit the $300 into his lawyer trust account. Adequate and Papa never met again. Adequate did not prepare a bankruptcy petition for Papa, but "closed" Papa's file several months later, without notice to Papa and without refunding any of the money Papa had paid.

  After the birth of her and Papa's child, Mamma asked Adequate to defend her in the paternity action filed by Papa. Adequate reviewed his files and determined that he had not received confidences from Papa regarding Mamma's affair, her pregnancy, or the child, so he filed Mamma's answer without seeking written consent from Papa or Mamma.

  Papa's counsel asserted a conflict of interest due to Adequate's former representation of Papa, and requested that Adequate refund the $300 that Papa had paid him, since Adequate had not performed any services. Adequate replied that there was "no attorney-client relationship" with Papa, but that the money Papa had paid him was "earned when received and not refundable."

Adequate's statements to Papa's counsel:

A. Were correct.

B. Were correct with respect to the conflict, but not the fees.

C. Were correct with respect to the fees, but not the conflict.

D. Were incorrect.

DISCUSSION

Answer: _____

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 therefore, must be deposited into a lawyer's trust account until earned for fees or costs, or refunded to the client. *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994).

See In re Gastineau, 317 Or 545, 551, 857 P2d 136 (1993).

In re Balocca, 342 Or 279, 151 P3d 154 (2007) (90-day suspension).

- Supp 11-2: Scott Morrill, *Disbursing Disputed Funds: Understanding RPC 1.15-1(d)(e),* OSB Bulletin, Jan 2011
- Supp 11-3: Helen Hierschbiel, *The Transformation: When fee disputes become ethical misconduct,* OSB Bulletin, Dec 2008

Notes

FRONT-END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 12 — Protecting Client Property

A. Identifying and Safeguarding Property of Others

1. Rule 1.15 imposes obligations on lawyers for safekeeping, accounting and delivery of property or money not belonging to the lawyer, but which finds its way into the lawyer's possession. *See* RPC 1.15-1. Such property may include:

    a. Client funds paid in advance or otherwise not owing to the attorney at the time of receipt

    b. Third-party funds provided to the attorney to be held in escrow

    c. Settlement funds paid to or owed by a client

    d. Original documents given to the lawyer by clients or others on behalf of clients

    e. Wills and other estate planning documents prepared by or given to the lawyer for safekeeping

    f. Client files

2. A lawyer should hold property of others with the care required of a professional fiduciary. *ABA Model Rules,* Rule 1.15, Comment [1]

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is

situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

*** * ***

□ PRACTICE TIP: RPC 1.15-1(a) requires a lawyer to keep and preserve complete records of client funds for five years after the termination of the representation —a bank statement or electronic transaction record does not suffice; nor is it enough to request records from the bank when questioned by the client or the Bar. The rule requires actual possession of complete records. Be sure that your records are up to date and kept current.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

□ PRACTICE TIP: Do not rely entirely on electronic banking to track and manage trust account funds. In addition to being insufficient to meet obligations for recordkeeping, electronic tracking often results in lazy practices and bad records. Attorneys must:

- Keep individual client ledgers
- Identify withdrawals to particular clients
- Identify deposits to particular clients
- Have simultaneous records regarding all transactions in and out of trust.

3. In addition to current and former clients, the plain language of the rule applies to property of prospective clients and third parties.

4. The language of the rule is mandatory and may not be waived by a client. An attorney therefore cannot place a client's funds in anything other than an interest-bearing account or in any type of institution not described in this section. *OSB Formal Ethics Op No 2005-117.*

- Supp 12-1: Sylvia Stevens, *Trust Accounts and the FDIC—Protecting Client Funds in Uncertain Times,* OSB Bulletin, Oct 2008

- Supp 12-2: Sylvia Stevens, *Trust account Lessons—Cautionary Notes,* OSB Bulletin, July 2008

5. Identifying what are client funds

a. In general, all funds provided to a lawyer that are not earned funds remain client funds (unless otherwise specified in a written fee agreement).

- *In re Cauble*, 27 DB Rptr 288 (2013). [45-day suspension/ restitution] Relying upon direction from one client as spokesperson for a group of clients (who were involved in litigation in which the first client was not a party), the attorney used funds advanced by the group to pay past due legal fees owed only by the first client

- *In re Ireland,* 26 DB Rptr 47 (2012). [30-day suspension] Attorney failed to deposit client funds in trust upon receipt. Even if attorney mistakenly believed, as she asserted, that the money was a gift from the client and not payment for future legal services, she did

not deposit the funds into trust once she learned that her belief was incorrect.

b. A fixed fee paid in advance remains the property of the client until earned and must be deposited into the attorney's trust account unless the fee agreement indicates that the prepaid fee is earned and becomes the property of the attorney upon receipt. Funds held in trust may subsequently be transferred only after completion of the agreed-on services, unless otherwise specifically provided for. *See In re Fadeley*, 342 Or 403, 153 P3d 682 (2007); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007); *OSB Legal Ethics Op No* 2005-151.

- *In re Cottle*, 27 DB Rptr 22 (2013) [30-day suspension] Attorney accepted flat fee and filing fee to file divorce, prepared some documents and paid himself for that time, but failed to file the petition or reasonably communicate with his client for more than four years.

c. Money paid to an attorney by opposing counsel, rather than the client, may still be considered client funds, and therefore subject to the protections of RPC 1.15.

- *In re McIlhenny*, 18 DB Rptr 82 (2004) [reprimand] Attorney violated rule when he failed to deposit and maintain in his trust account judgment proceeds received from the opposing party equal to his outstanding fees, knowing that his client disputed his bill. Even though the money was paid to the attorney by the opposing party rather than the client, it was still client funds for purposes of the rule.

6. Failure to safeguard client funds by depositing them into and/or maintaining them in trust violates the rule.

- *In re Einhorn*, 30 DB Rptr 283 (2016) [disbarred] Attorney was paid an advance retainer which he negotiated rather than depositing into his lawyer trust account until earned.

- *In re Noble (II),* 30 DB Rptr 264 (2016) [60-day suspension] Attorney placed his own funds in his lawyer trust account as a loan to his client. The loan proceeds became client funds upon their

deposit into the lawyer trust account. The fee agreement specified that if the case was successful attorney would be repaid the full loan amount. The case was not successful but attorney withdrew the remaining client loan proceeds for himself.

- *In re Kmetic*, 30 DB Rptr 250 (2016) [six-month suspension, all but 30 days stayed/2-year probation] For convenience reasons, attorney purportedly deposited two clients' advance cash payments into her personal account; there was no record of the deposit. Later that same day, attorney deposited funds into her trust account, including a check drawn on her personal account, which allegedly represented her clients' advance funds, and then drafted a check on her trust account for an expenditure unrelated to either of the clients who had provided the cash payments. Attorney's personal check was dishonored and the bank reversed that portion of the prior deposit, drawing on the remaining funds in trust and leaving a negative balance. Two more checks were presented for payment on attorney's trust account against a near-zero balance. The bank honored the checks and charged overdraft fees, exhausting all remaining client funds in trust.

- *In re Hellewell*, 30 DB Rptr 204 (2016) [30-day suspension, all stayed/18-month probation] Respondent failed to deposit client's retainer into his lawyer trust account, notwithstanding that he did not have a written fee agreement complying with RPC 1.5(c)(3).

- *In re Fowler*, 30 DB Rptr 190 (2016) [reprimand] Attorney was paid a set amount, which she believed was a nonrefundable retainer, but failed to have the client sign a written fee agreement and did not provide the client with the required disclosures. As such, attorney did not deposit the retainer into a lawyer trust account separate from her own funds and failed to keep records accounting for the client's funds.

- *In re Noble (I)*, 30 DB Rptr 116 (2016) [4-year suspension/2 years stayed/2-year probation] Attorney deposited client's personal injury settlement proceeds into his general office account and, after distributing some to the client and himself, transferred the remaining funds into his lawyer trust account. Attorney's poor bookkeeping resulted in the client's funds being exhausted. Further distributions on the client's behalf were thus withdrawn from other clients' funds. In another case, attorney failed to properly handle,

track, and manage his client's settlement funds, resulting in his commingling his personal funds with the client's funds and prematurely withdrawing the client's funds.

- *In re Ferrua*, 30 DB Rptr 99 (2016) [181-day suspension] Attorney received a flat fee for his oral agreement to represent a client incarcerated on drug-related charges. Attorney failed to put the funds into a lawyer trust account and did not create a trust ledger or track the funds in any other manner.

- *In re Landers*, 30 DB Rptr 89 (2016) [disbarred] Attorney failed to deposit client's retainer into her lawyer trust account. When attorney closed her practice she converted the remaining trust funds, including the client's retainer, to her own personal use.

- *In re Dickey*, 30 DB Rptr 19 (2016) [disbarred] Client retained attorney to represent him in felony criminal matters and to handle his personal affairs. Client signed a power of attorney but restricted attorney from using the client's property for his own benefit. Attorney obtained a debit card in his name on the client's bank account and used it for numerous personal cash withdrawals and purchases, and allowed his domestic partner to use the client's car for his personal use. Additionally, attorney successfully pursued a civil-forfeiture claim on the client's behalf under a contingency arrangement but failed to disburse any of the proceeds to the client or deposit them in the client's bank account. In another matter, Attorney was paid a flat fee to represent a client on criminal charges. The fee agreement did not contain the disclosures required by RPC 1.5(c)(3) but he failed to deposit the fee in trust.

- *In re Sumner*, 29 DB Rptr 346 (2015) [3-year suspension] Attorney disciplined for multiple violations over a four-year period, including failing to safeguard and account for client funds and property.

- *In re Kolstoe*, 29 DB Rptr 128 (2015) [reprimand] Attorney correctly deposited $500 in earned fees from a client into his business account, but mistakenly recorded the transaction as a deposit into his pooled lawyer trust account. Forgetting that he had already collected the earned fees from the client, respondent mistakenly collected $500 from the pooled trust account as fees earned for his efforts on behalf of the client. Since the client did not have funds in the pooled trust account, that $500 was paid from the funds of other

clients maintained in the pooled trust account. Because attorney was not reconciling his accounts on a monthly basis, he was not aware of the mistake until he was later notified that the funds in the pooled trust account were insufficient to pay another check he issued on that account.

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Attorney took a credit card payment from a client and deposited it directly into his business account without a written agreement allowing him to do so and before the fee was earned.

- *In re Bertoni*, 26 DB Rptr 25 (2012). [150-day suspension] Over an extended period, attorney negligently withdrew client funds from his law firm's trust account before the funds were earned. Attorney also failed to maintain complete trust account records for five years, as required by the rule. In addition, attorney periodically deposited his own funds into the firm trust account in amounts that exceeded bank service charges and minimum balance requirements.

- *In re Eckrem*, 23 DB Rptr 84 (2009). [60-day suspension] Attorney collected an advanced flat fee in payment for an adoption and a retainer in another client matter, and did not deposit either client's funds in a trust account.

- *In re Oh*, 23 DB Rptr 25 (2009). [8-month suspension] Attorney failed to deposit client funds into a trust account despite a fee agreement specifying that he would do so. Attorney also failed to deposit into trust funds paid by the client in advance for expenses.

- *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006). [1-year suspension] Attorney who never reconciled his monthly trust account statements or maintained a trust account ledger to keep track of client funds was negligent in his trust accounting practices, and such proof was sufficient to establish a violation of the rule. A second violation occurred because attorney's trust account was not properly identified as a "lawyer trust account." [DR 9-101(A)]

- *In re Koessler*, 20 DB Rptr 246 (2006). [2-year suspension] A delay of less than a month in depositing a client retainer into a trust account does not violate the rule, particularly when the rule contains no express requirement of a "prompt" deposit. [DR 9-101(A)]

- *In re Rose*, 20 DB Rptr 237 (2006). [reprimand] In the appeal of a post-conviction relief matter, attorney deposited a retainer into his trust account, but then withdrew the funds before they were earned, mistakenly believing he had a written fee agreement allowing him to do so. [DR 9-101(A)]

- *In re Scott*, 20 DB Rptr 3 (2006). [6-month suspension] Attorney incurred transcript costs on behalf of a client during the course of the representation but did not pay the costs. When the case settled, attorney disbursed to herself from the proceeds an amount equal to the costs even though she had never paid them. [DR 9-101(A)]

- *In re Carreon*, 19 DB Rptr 297 (2005). [60-day suspension] While acting as house counsel to a corporate client, attorney withdrew corporate funds from his trust account and applied them to pay a money judgment that had been entered against attorney in connection with his employment, without the corporation's consent. [DR 9-101(A)]

- *In re Joiner*, 18 DB Rptr 314 (2004). [reprimand] Attorney erroneously believed that her fee agreement provided that the retainer she received was a non-refundable flat fee earned on receipt and deposited the entire retainer directly into her business account. [DR 9-101(A)]

- *In re Koessler*, 18 DB Rptr 105 (2004). [6-month suspension] Attorney failed to deposit a retainer into trust, failed to maintain any records of the funds, and failed to render an accounting for them. [DR 9-101(A)]

- *In re Hendershott*, 17 DB Rptr 13 (2003). [reprimand] Attorney who deposited a flat fee in his lawyer trust account failed to properly maintain his client's funds when he withdrew almost the entire fee, having done far less work on the case than the amount withdrawn and without a written fee agreement permitting this to occur. [DR 9-101(A)]

- *OSB Legal Ethics Op No 2005-172*. Lawyer may accept credit card payments from clients. However, unearned retainers paid by credit card must be deposited into a trust account into which lawyer must deposit funds sufficient to cover any service fee for the credit card transaction. Lawyer must also ensure that any credit card

chargebacks to the account are not against the funds of other clients.

- *OSB Legal Ethics Op No 2005-149.* Assuming an attorney does not expect a client to dispute a bill for work that has been performed, trust account funds may be withdrawn when the bill is sent. If a dispute thereafter arises, an attorney may, but is not required to, replenish the trust account in the amount in dispute.

- *OSB Legal Ethics Op No 2005-135*. A lawyer acting as an arbitrator is working as a lawyer for purposes of trust account rules and must therefore keep retainer fees in a client trust account until they are earned.

- *OSB Legal Ethics Op No 2005-117*. An attorney can only place trust account funds in an IOLTA account or, if the client can be expected to earn a net positive return therefrom, an interest-bearing trust account in one of the institutions identified in RPC 1.15-2. The term "federally regulated investment company" should be construed to refer to an investment company under the federal Investment Company Act of 1940, 15 USC §§ 80(a)-1 to 80(b)-21. *See, e.g.,* 15 USC § 80(a)-3.

- *OSB Legal Ethics Op No 2005-68*. An attorney who represents an insurer and an insured in an action to recover damages allegedly caused by a third party's negligence must, upon the receipt of settlement funds, make the appropriate division of funds as between the insurer and the insured or, if necessary, interplead the funds. The attorney cannot simply forward all funds received to the insurer and rely upon the insurer to work matters out with the insured.

- *OSB Legal Ethics Op No 2005-52*. If the plaintiff has no colorable argument as to why the attorney should not do so, an attorney who represents a plaintiff in personal injury litigation and who receives funds in settlement of the litigation may properly pay those funds to the plaintiff's creditors if the attorney is statutorily obligated to make such payments (*e.g.,* to a PIP carrier); the attorney has, with the plaintiff's consent, agreed to make such payments; or the creditor has a valid security interest in the settlement proceeds. If the plaintiff has or may have a colorable argument but it is not clear that the plaintiff is entitled to such funds, the attorney may either

retain the funds in the attorney's trust account or interplead them in an action to which the plaintiff and any other claimants would be parties.

- *OSB Legal Ethics Op No 2005-48*. An attorney who receives client funds but who cannot locate the client must place the funds in trust while taking reasonable steps to locate the client. The attorney must also comply with the Uniform Disposition of Unclaimed Property Act. If the funds are of sufficient quantity and likely to be held for a sufficient period of time to earn a positive return for the client, the attorney must place the funds in an interest-bearing trust account for the client's benefit.

7. With the exception of money to cover bank service charges, funds that do not qualify as client (or third-party) funds cannot be deposited into trust. RPC 1.15-1(b).

RULE 1.15-1 SAFEKEEPING PROPERTY

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes.

a. This prohibits a lawyer from placing his own funds in trust regardless of the source. Some examples of funds that cannot be deposited into trust include:

i. Proceeds from the sale of a lawyer's own real or personal property.

ii. A lawyer's personal funds to be hidden from creditors. *See In re Howard,* 304 Or 193, 743 P2d 719 (1987).

iii. Funds received from a client pursuant to a flat-fee agreement that complies with RPC 1.5(c)(3).

- *In re Cottle*, 29 DB Rptr 79 (2015). [60-day suspension, all stayed/2-year probation] Respondent undertook to represent a client in matters that included the sale of a home and received a settlement check from the title company for more than $35,000. Respondent directed law firm staff to deposit the client's check,

along with checks from two other clients, into his lawyer trust account. The total to be deposited was a little more than $40,000. Law firm staff did not complete the deposit, and respondent did not verify that the deposit had been completed before writing a check a few weeks later for his fees in connection with the sale. After the bank returned the check for insufficient funds, respondent transferred approximately $41,000 of his own funds into the firm's lawyer trust account to correct the depositing error.

- *In re Bertoni*, 26 DB Rptr 25 (2012). [150-day suspension] Over an extended period, attorney negligently withdrew client funds from his law firm's trust account before the funds were earned. Attorney also failed to maintain complete trust account records for five years, as required by the rule. In addition, attorney periodically deposited his own funds into the firm trust account in amounts that exceeded bank service charges and minimum balance requirements.

- *In re Lafky,* 25 DB Rptr 134 (2011). [4-month suspension] Attorney failed to deposit all client funds in trust, withdrew funds from trust before they were earned, failed to maintain complete trust records, and left more of his own funds in trust than was necessary to pay bank charges.

- *In re Levie*, 22 DB Rptr 66 (2008). [6-month suspension] Attorney intentionally used his trust account as his own personal account, depositing his own funds and paying personal and business expenses directly from that account in order to shield those funds from creditors.

- *In re Lancefield*, 19 DB Rptr 247 (2005). [60-day suspension] Attorney used his trust account to pay personal, business and client obligations, and attorney failed to keep adequate records to know when and how much he was entitled to withdraw from the account. [DR 9-101(A) & DR 9-101(C)(3)]

- *In re Andersen*, 19 DB Rptr 227 (2005). [6-month suspension] Believing that his personal and business accounts were vulnerable to fraud or theft, attorney used his trust account for all personal and professional deposits and disbursements, including the deposit of the proceeds from the sale of his personal residence. [DR 9-101(A) & DR 9-101(C)(3)]

- *In re McMurry*, 14 DB Rptr 193 (2000). [60-day suspension] Attorney deposited his own funds in his lawyer trust account to shield them from the claims of his creditors. [DR 9-101(A)]

- *In re Bassett*, 12 DB Rptr 14 (1998). [60-day suspension] Attorney placed personal funds in a dormant lawyer trust account that contained no client funds to avoid discovery and seizure by the IRS. [DR 9-101(A)]

RULE 1.5 FEES

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

B. Accounting for Property in a Lawyer's Possession

1. When requested by a client or third person for whom the attorney is holding property, the lawyer is required to promptly render an accounting of pertinent funds currently or previously in the lawyer's possession. RPC 1.15-1(d).

RULE 1.15-1 SAFEKEEPING PROPERTY

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client

or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

- *In re Hubbard,* 30 DB Rptr 378 (2016). [reprimand] Court ordered the opposing party to pay respondent's attorney fees and awarded her client a judgment for child support. Garnished funds for attorney's fees were deposited into her lawyer trust account. Respondent received additional monies from the garnishment after her bill was paid off but did not notify the opposing party that she had received more than the attorney fee judgment or maintain the excess funds in trust. Rather, attorney paid the excess funds to her client, mistakenly reasoning that they should go toward back child support payments.

- *In re LeClaire,* 30 DB Rptr 338 (2016). [120-day suspension, all but 30 days stayed/2-year probation] Attorney represented a client in a felony matter. A few years later, the client asked attorney to send him his file but he failed to reply or to provide the client with his file.

- *In re Bosse,* 30 DB Rptr 311 (2016). [24-month suspension] Client paid attorney to defend her in a collection matter without a written fee agreement. After filing an answer, attorney took no further action in the case, and summary judgment was eventually granted with a garnishment issued against attorney's client. Attorney failed to provide an accounting or return the client's unused funds upon request.

- *In re Einhorn,* 30 DB Rptr 283 (2016) [disbarred] A client retained attorney to help her resolve post-dissolution marital property issues. Attorney converted the retainer to his own use rather than depositing it into his lawyer trust account. After Respondent took no substantive action on the case, the client terminated his representation and requested a refund; attorney neither refunded the money nor provided an accounting.

- *In re Ettinger,* 30 DB Rptr 173 (2016) [disbarred] Attorney was paid a retainer for representation but before she filed a petition for custody, the parties settled the matter through mediation. Attorney failed to refund the unused portion of the retainer and did not respond to the clients' request for the unused funds.

- *In re Burt,* 30 DB Rptr 139 (2016). [reprimand] Court-appointed criminal client made multiple requests for copies of all discovery materials. Attorney did not provide all of the discovery material before trial or even after the client complained to the Bar.

- *In re Ferrua,* 30 DB Rptr 99 (2016). [181-day suspension] Attorney received a flat fee to represent a client through trial on drug-related charges. There was no written fee agreement. Shortly before trial, attorney sought to withdraw. The client requested a refund of unearned fees but attorney refused.

- *In re Landers,* 30 DB Rptr 89 (2016). [disbarred] At the conclusion of her client's custody dispute, attorney agreed to continue representing client in exchange for the deposit of an additional retainer. When attorney closed her practice sometime later, she converted the retainer to her own personal use. The client later requested a refund, but respondent failed to refund the funds or to provide an accounting as requested. In a second matter, a client terminated attorney's representation when she stopped responding to his inquiries and neglected matters his custody case. Attorney failed to refund the unearned fees or to provide the client with an accounting, as requested.

- *In re Merrill,* 29 DB Rptr 306 (2015). [120-day suspension, all but 30 days stayed/2-year probation] Despite request from client's representative and the Bar, respondent could not account for client's retainer because he did not make and maintain records regarding those funds. He did not provide any funds to the client prior to her death and when respondent was unable to confirm to his satisfaction who the client's successor in interest was, he discontinued efforts and failed to return any portion of her retainer.

- *In re Krueger,* 29 DB Rptr 273 (2015). [6-month suspension, 90 days stayed/2-year probation] Attorney failed to notify his clients of his receipt of personal injury settlement proceeds—funds in which they had an interest—for nearly a year.

- *In re Houston,* 29 DB Rptr 238 (2015). [150-day suspension/BR 8.1] Attorney failed to account for retainer and promptly return client's documents.

- *In re Simms,* 29 DB Rptr 133 (2015). [120-day suspension] In one matter, attorney received settlement funds to which his client was entitled, yet failed to forward those funds to his client until months later and only after bar involvement. In a second matter, respondent failed to account for the funds that his client had advanced for costs.

- *In re Throne,* 29 DB Rptr 104 (2015). [2-year suspension] In representing multiple water districts, attorney failed to forward an amendment to his clients necessary for their joint prosecution agreement with other districts. He also failed to provide information needed by at least one client to file exceptions in the litigation, despite multiple requests from the client.

- *In re Beach,* 29 DB Rptr 92 (2015). [stipulated 6-month suspension] Client hired respondent to prepare a special needs trust to protect her resources which were being depleted by the cost of in-home care. Client's new counsel wrote to respondent and requested client's file and a full refund. Respondent did not promptly provide the requested documents, including the estate planning documents that respondent had recently had client execute.

- *In re Sheasby,* 29 DB Rptr 41 (2015). [4-year suspension] Attorney failed to properly maintain client funds in trust and failed to account for and deliver client property, upon request.

- *In re Bertoni,* 28 DB Rptr 196 (2014). [6-month suspension]. Client retained respondent to represent him in sentencing and appeal of a criminal matter for a flat fee that respondent did not deposit into trust. When respondent later withdrew prior to the completion of the matter, he was slow to provide an accounting of the client's funds, despite promises, and never refunded any portion of the fee he acknowledged was owing to the client.

- *In re Kaufman,* 28 DB Rptr 174 (2014). [disbarred] In three separate matters, despite requests, respondent failed to timely provide his clients with their files or return the unearned portion of their retainers.

- *In re Zackheim,* 28 DB Rptr 9 (2014). [reprimand] Attorney represented a mother and her sons in two separate personal injury actions. In the first, respondent withheld $2,000 of the mother's settlement proceeds to cover a possible judgment for costs if she did not prevail at trial against a remaining defendant. After mother lost at trial, the court ordered her to pay costs; however, respondent failed either to pay the judgment or deliver the retained funds to mother prior to her complaining to the bar. In the second action, sons terminated respondent's representation and instructed him to forward their files to new counsel. Respondent refused, improperly asserting that he was entitled to retain them.

- *In re Coran,* 27 DB Rptr 170 (2013). [30-day suspension, all stayed/24-month probation] Attorney failed to promptly deliver a copy of client's post-conviction file for several months, and only after the client complained to the bar.

- *In re Fjelstad,* 27 DB Rptr 68 (2013). [30-day suspension] Attorney failed to forward to client settlement checks he received a period of four years. Even after client learned of the checks and demanded them, attorney failed to timely provide them or the proceeds they represented.

- *In re Smith,* 27 DB Rptr 32 (2013). [90-day suspension] Attorney failed to notify parent client that minor's personal injury award judgment had been paid by the obligor, received by the attorney, disbursed by the attorney to the guardian ad litem and that guardian ad litem had issued a satisfaction.

- *In re Cottle*, 27 DB Rptr 22 (2013). [30-day suspension] Attorney failed to account for or refund any funds to his client. In a second matter, attorney agreed to assist a Utah attorney with a collections matter, but failed to deposit the recording fee in trust, failed to take action or communicate with the Utah attorney, and failed to return the recording fee when requested.

- *In re Cullen*, 26 DB Rptr 173 (2012). [disbarred] After settling personal injury matters and disbursing portions of the proceeds to the clients, attorney failed to pay medical providers with the remaining proceeds as he agreed to do, did not deliver the funds to the clients and failed to respond to requests from the clients for an accounting.

- *In re Snyder*, 348 Or 307, 232 P3d 952 (2010). [30-day suspension] Attorney failed to return a personal injury client's file materials, including medical records, despite numerous requests from the client.

- *In re Dixon*, 24 DB Rptr 1 (2010). [4-year suspension] Attorney ignored multiple requests from a client for the client's file material and then failed to respond to a court order directing attorney to turn the file over to the client.

- *In re Eckrem*, 23 DB Rptr 84 (2009). [60-day suspension] After terminating the representation of a client, attorney failed to provide timely an accounting of client funds, return file material to the client or refund money paid by the client in advance for anticipated costs.

2. The obligation to render an accounting of property to a client under the Rules of Professional Conduct is conditioned on a client's request for such an accounting. *In re Koch*, 345 Or 444, 198 P3d 910 (2008).

   a. Note: the duty under RPC 1.15-1(d) differs from the prior disciplinary rule, which did not require a client request. *See, In re Skagen*, 342 Or 183, 149 P3d 1171 (2006).

3. An oral accounting is insufficient to comply with the requirements of this rule. *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006).

4. The "promptness" requirement under the rule is a reasonableness standard. Accordingly, while an instantaneous response is not necessary, something less than several months is generally required. *See, e.g., In re Hedges*, 313 Or 618, 624, 836 P2d 119 (1992) (attorney took 14 months to account for and return unearned funds); *In re Chandler*, 303 Or 290, 295, 735 P2d 1220 (1987) (lawyer disciplined when took just over 11 months to account for client funds and make a refund).

   - *In re Coran*, 27 DB Rptr 170 (2013). [30-day suspension, stayed/24-month probation] Attorney failed to promptly deliver a copy of client's post-conviction file for several months, and only after the client complained to the bar.

- *In re Fjelstad*, 27 DB Rptr 68 (2013) [30-day suspension] Attorney failed to forward to client settlement checks he received a period of four years. Even after client learned of the checks and demanded them, attorney failed to timely provide them or the proceeds they represented.

- *In re Lopez*, 350 Or 192, 252 P3d 312 (2011). [9-month suspension] Attorney represented various clients in personal injury actions. After settling these matters, he failed to distribute proceeds to his clients and to pay medical liens for substantial periods of time.

- *In re Colvin*, 21 DB Rptr 250 (2007). [120 days] Attorney failed to keep adequate records of trust account deposits, disbursements and earned fees such that his account balance was inaccurate. He also failed to reconcile his records with bank statements such that accounting errors were not discovered over time.

- *In re Skagen*, 342 Or 183, 149 P3d 1171 (2006). [1 year] Attorney who never reconciled his monthly trust account statements or maintained a trust account ledger to keep track of client funds was negligent in his trust accounting practices, and such proof was sufficient to establish a violation of the rule. [DR 9-101(A)]

- *In re Koessler*, 20 DB Rptr 246 (2006). [2 years] Attorney accepted a client retainer but later could not produce records sufficient to account for how those funds were expended or applied. [DR 9-101(C)(3)]

- *In re Scott*, 20 DB Rptr 3 (2006). [6 months] Attorney failed to maintain adequate records of the deposit and disbursement of the client's funds. [DR 9-101(C)(3)]

- *In re Wilson*, 18 DB Rtpr 285 (2004). [1 year] Attorney whose emotional condition caused her to withdraw from practice failed to properly maintain client funds and records. [DR 9-101(A) & (C)(3)]

C. Handling Trust Accounts

1. RPC 1.15-1(a) requires lawyers to ensure that any client funds be deposited and maintained in a trust account that bears interest and that is specifically identified by use of the phrase "Lawyer Trust Account." *In re Skagen*, 342 Or 183, 209, 149 P3d 1171 (2006).

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

   a. Cannot be labeled "Client Trust Account" or some other variation.

   b. Must also be in the jurisdiction where the lawyer's office is situated. This may create additional considerations for lawyers practicing in jurisdictions that border Oregon.

2. IOLTA Designation

   a. A "pooled" trust account (IOLTA) should be used for funds received by a lawyer for a client or third person when the funds are either:

      i. relatively small in amount such that the amount of interest they would receive would be *de minimus*, OR

      ii. the lawyer does not expect to have possession of the funds for a sufficient duration for the funds to be able to generate substantial interest.

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

3. A Lawyer Trust Account should not be used as a personal checking account, nor should the lawyer's own funds be co-mingled with those in trust. *See, e.g., In re Benjamin,* 312 Or 515, 923 P2d 413 (1991); *In re Howard,* 304 Or 193, 743 P2d 719 (1987).

- *In re Levie*, 342 Or 462, 154 P3d 113 (2007). [1 year] Attorney disciplined, in part, for using his trust account as a personal checking account. [DR 9-101(A)]

- *In re Colvin*, 21 DB Rptr 250 (2007). [120 days] Attorney deposited his own funds into trust and paid personal expenses from that account at a time when he had no other bank account available to him.

- *In re Lancefield*, 19 DB Rptr 247 (2005). [60 days] Attorney used his trust account to pay personal, business and client obligations, and attorney failed to keep adequate records to know when and how much he was entitled to withdraw from the account. [DR 9-101(A) & DR 9-101(C)(3)]

- *In re Andersen*, 19 DB Rptr 227 (2005). [6 months] Believing that his personal and business accounts were vulnerable to fraud or theft, attorney used his trust account for all personal and professional deposits and disbursements. [[DR 9-101(A) & DR 9-101(C)(3)]

- *In re Goyak*, 19 DB Rptr 179 (2005). [6 months] Attorney deposited and maintained personal funds in his trust account and failed to maintain required trust account records. [DR 9-101(A) and (C)(3)]

□ PRACTICE TIP: Do not rely entirely on electronic banking to track and manage trust account funds. In addition to being insufficient to meet obligations for recordkeeping, electronic tracking often results in lazy practices and bad records.

Attorneys must:

- Keep individual client ledgers
- Identify withdrawals to particular clients
- Identify deposits to particular clients
- Have simultaneous records regarding all transactions in and out of trust.

4. Both banks and lawyers are required to notify the Bar of any overdrafts on any Lawyer Trust Account. RPC 1.15-2(i) & (l).

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(i) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:

(1) the identity of the financial institution;

(2) the identity of the lawyer or law firm;

(3) the account number; and

(4) either

(i) the amount of the overdraft and the date it was created; or

(ii) the amount of the returned instrument and the date it was returned.

(l) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (i). The lawyer shall include a full explanation of the cause of the overdraft.

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] Attorney failed to notify the bar when she issued an NSF check on her lawyer trust account.

- *In re Colvin*, 21 DB Rptr 250 (2007). [120-day suspension] Attorney failed to notify the bar of overdrafts on his lawyer trust account or provide an explanation of the cause.

5. Lawyers are also required to file annual compliance forms regarding the maintenance of any IOLTA accounts. RPC 1.15-2(m).

   NOTE: Failure to timely do so may result in an administrative suspension.

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(m) Every lawyer shall certify annually on a form and by a due date prescribed by the Oregon State Bar that the lawyer is in compliance with Rule 1.15-1 and this rule. Between annual certifications, a lawyer establishing an IOLTA account shall so advise the Oregon Law Foundation in writing within 30 days of establishing the account, on a form approved by the Oregon Law Foundation.

a. Regardless of the existence of a trust account, the amount it is used or the condition of the account (*e.g.,* zero balance), a lawyer can be suspended for failing to comply with this reporting requirement.

   - *In re Nielson*, 25 DB Rptr 196 (2011) [120-day suspension] Attorney failed to comply with his IOLTA certification requirement, despite requesting and being given additional time to submit it. Attorney thereafter failed to substantively respond to the bar and the LPRC regarding the reasons for his non-compliance, instead giving a multitude of excuses why he could not respond.

   - *In re Klosterman*, 23 DB Rptr 204 (2009). [9-month suspension] Attorney failed to file his annual IOLTA compliance certificate with the bar.

   - *In re Barteld*, 23 DB Rptr 198 (2009). [reprimand] Despite numerous requests from the bar, attorney failed to file the annual IOLTA compliance certificate.

D. Duties Regarding Return of Client Property

1. Lawyers are required to promptly return or deliver property in their possession to those entitled to it. RPC 1.15-1(d).

RULE 1.15-1 SAFEKEEPING PROPERTY

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

2. Any time an attorney withholds from a client money to which the attorney is not entitled, the integrity of the whole profession is at stake. *In re Hedrick*, 301 Or 750, 760, 725 P2d 343 (1986).

- *In re Hubbard,* 30 DB Rptr 378 (2016). [reprimand] Court ordered the opposing party to pay respondent's attorney fees and awarded her client a judgment for child support. Garnished funds for attorney's fees were deposited into her lawyer trust account. Respondent received additional monies from the garnishment after her bill was paid off but did not notify the opposing party that she had received more than the attorney fee judgment or maintain the excess funds in trust. Rather, attorney paid the excess funds to her client, mistakenly reasoning that they should go toward back child support payments.

- *In re LeClaire,* 30 DB Rptr 338 (2016). [120-day suspension, all but 30 days stayed/2-year probation] Attorney represented a client in a felony matter. A few years later, the client asked attorney to send him his file but he failed to reply or to provide the client with his file.

- *In re Bosse,* 30 DB Rptr 311 (2016). [24-month suspension] Client paid attorney to defend her in a collection matter without a written fee agreement. After filing an answer, attorney took no

further action in the case, and summary judgment was eventually granted with a garnishment issued against attorney's client. Attorney failed to provide an accounting or return the client's unused funds upon request.

- *In re Einhorn,* 30 DB Rptr 283 (2016) [disbarred] A client retained attorney to help her resolve post-dissolution marital property issues. Attorney converted the retainer to his own use rather than depositing it into his lawyer trust account. After Respondent took no substantive action on the case, the client terminated his representation and requested a refund; attorney neither refunded the money nor provided an accounting.

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- *In re Landers,* 30 DB Rptr 89 (2016). [disbarred] At the conclusion of her client's custody dispute, attorney agreed to continue representing client in exchange for the deposit of an additional retainer. When attorney closed her practice sometime later, she converted the retainer to her own personal use. The client later requested a refund, but respondent failed to refund the funds or to provide an accounting as requested. In a second matter, a client terminated attorney's representation when she stopped responding to his inquiries and neglected matters his custody case. Attorney failed to refund the unearned fees or to provide the client with an accounting, as requested.

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- *In re Simms,* 29 DB Rptr 133 (2015). [120-day suspension] In one matter, attorney received settlement funds to which his client was entitled, yet failed to forward those funds to his client until months later and only after bar involvement. In a second matter, respondent failed to account for the funds that his client had advanced for costs.

- *In re Throne,* 29 DB Rptr 104 (2015). [2-year suspension] In representing multiple water districts, attorney failed to forward an amendment to his clients necessary for their joint prosecution agreement with other districts. He also failed to provide information needed by at least one client to file exceptions in the litigation, despite multiple requests from the client.

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- *In re Bertoni,* 28 DB Rptr 196 (2014). [6-month suspension]. Client retained respondent to represent him in sentencing and appeal of a criminal matter for a flat fee that respondent did not deposit into trust. When respondent later withdrew prior to the completion of the matter, he was slow to provide an accounting of the client's funds, despite promises, and never refunded any portion of the fee he acknowledged was owing to the client.

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- *In re Zackheim,* 28 DB Rptr 9 (2014). [reprimand] Attorney represented a mother and her sons in two separate personal injury actions. In the first, respondent withheld $2,000 of the mother's settlement proceeds to cover a possible judgment for costs if she did not prevail at trial against a remaining defendant. After mother lost at trial, the court ordered her to pay costs; however, respondent failed either to pay the judgment or deliver the retained funds to mother prior to her complaining to the bar. In the second action, sons terminated respondent's representation and instructed him to forward their files to new counsel. Respondent refused, improperly asserting that he was entitled to retain them.

- *In re Coran,* 27 DB Rptr 170 (2013). [30-day suspension, all stayed/24-month probation] Attorney failed to promptly deliver a copy of client's post-conviction file for several months, and only after the client complained to the bar.

- *In re Fjelstad*, 27 DB Rptr 68 (2013) [30-day suspension] Attorney failed to forward to client settlement checks he received a period of four years. Even after client learned of the checks and demanded them, attorney failed to timely provide them or the proceeds they represented.

- *In re Cottle*, 27 DB Rptr 22 (2013) [30-day suspension] Attorney failed to account for or refund any funds to the client, and thereafter failed to respond to Bar inquiries. In a second matter, attorney agreed to assist a Utah attorney with a collections matter, but failed to deposit the recording fee in trust, failed to take action or communicate with the Utah attorney, and failed to return the recording fee when requested.

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Attorney took a credit card payment from a client and deposited it directly into his business account without a written agreement allowing him to do so and before the fee was earned. When the client requested that the retainer be returned, attorney refused.

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] Attorney neglected legal matters to a point where clients asked that she turn over the client files, which she then failed to do. Attorney also failed to refund the unearned portion of client retainers.

- *In re Cullen*, 26 DB Rptr 173 (2012). [disbarred] After settling personal injury matters and disbursing portions of the proceeds to the clients, attorney failed to pay medical providers with the remaining proceeds as he agreed to do, nor did he deliver the funds to the clients.

- *In re Lopez*, 350 Or 192, 252 P3d 312 (2011). [9-month suspension] Attorney represented various clients in personal injury actions. After settling these matters, he failed to distribute proceeds to his clients and to pay medical liens for substantial periods of time

- *In re Snyder*, 348 Or 307, 232 P3d 952 (2010). [30-day suspension] Attorney failed to return a personal injury client's file materials, including medical records, despite numerous requests from the client.

- *In re Hendrick*, 24 DB Rptr 138 (2010). [2-year suspension] Attorney failed to refund a fee requested by a client despite attorney's website advertisement that he would make full refunds if a client was not satisfied with his services.

- *In re Dixon*, 24 DB Rptr 1 (2010). [4-year suspension] Attorney ignored multiple requests from a client for the client's file material and then failed to respond to a court order directing attorney to turn the file over to the client.

- *In re Eckrem*, 23 DB Rptr 84 (2009). [60-day suspension] After terminating the representation of a client, attorney failed to provide timely an accounting of client funds, return file material to the client or refund money paid by the client in advance for anticipated costs.

- *In re Okai*, 23 DB Rptr 73 (2009). [4-year suspension] Attorney obtained a settlement check in a personal injury matter, but failed to deliver the funds to the client promptly. In another client matter, attorney failed to refund the unearned portion of a retainer after the termination of the client's representation.

- *In re Watson*, 22 DB Rptr 160 (2008). [disbarred] After an incarcerated client released his wallet and three money orders to attorney for safekeeping, attorney failed to account to the client for the funds and converted them to his own use.

- *In re DeBlasio,* 22 DB Rptr 133 (2008). [30-day suspension] On behalf of his firm, attorney accepted a portfolio of collection claims from a client. The firm collected some funds, but failed to notify the client of their receipt or remit funds timely to the client.

3. However, if the attorney is aware of a dispute over who is entitled to the property, the attorney is required to maintain and segregate the property until the dispute is resolved. RPC 1.15-1(e).

RULE 1.15-1 SAFEKEEPING PROPERTY

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

a. If the client has no colorable argument as to why the attorney should not do so, an attorney who represents a plaintiff in personal injury litigation and who receives funds in settlement of the litigation may properly pay those funds to the plaintiff's creditors if the attorney is statutorily obligated to make such payments (*e.g.,* to a PIP carrier); the attorney has, with the plaintiff's consent, agreed to make such payments; or the creditor has a valid security interest in the settlement proceeds. If the plaintiff has or may have a colorable argument but it is not clear that the plaintiff is entitled to such funds, the attorney may either retain the funds in the attorney's trust account or interplead them in an action to which the plaintiff and any other claimants would be parties. *OSB Legal Ethics Op No 2005-52*.

- *In re Pierson*, SC S061044, Case No. 13-01 (2013) [reprimand] During a two-year period, attorney repeatedly left portions of earned fees in trust after he was entitled to take them, commingling his own funds with client funds, and client settlement proceeds were occasionally incomplete or untimely, as he failed to reconcile his trust account check register to monthly bank statements and to his client ledgers.

- *In re Petersen*, 26 DB Rptr 186 (2012). [reprimand] Pursuant to a settlement of a dispute between a contractor and a customer, contractor's attorney agreed to hold the customer's funds in his trust account until the customer's counsel notified attorney that the customer was satisfied with the contractor's remedial work. Contrary to the agreement, attorney released the funds to his client, the contractor, without the consent of opposing counsel, based on the contractor's false representation that the customer did not object.

b. The rule does not require that a lawyer replenish disputed funds taken from trust, if the lawyer was unaware of any dispute regarding the funds at the time the funds were removed from trust. *OSB Legal Ethics Op No. 2005-149.*

4. Special considerations regarding the duty to provide client files or other original documents.

   a. As a general proposition, an attorney must provide a former client with the original or copies of everything in the attorney's files that may reasonably be of benefit to the former client. *OSB Legal Ethics Op No 2017-192*.

   b. With limited exceptions for documents that are intrinsically significant or are valuable original paper documents, such as securities, negotiable instruments, deeds and wills, there is no ethical prohibition against maintaining the client file solely in electronic or paperless form. *OSB Legal Ethics Op No 2016-191.*

   c. The question of who pays for any photocopy charges for client files or any charges for locating and segregating materials depends, *inter alia*, on the nature of the documents, the terms of the fee agreement between attorney and client, and the extent to which the attorney had previously provided copies of documents to the client. The charges may not, in any event, be clearly excessive or unreasonable. *OSB Legal Ethics Op No 2017-192*.

   d. However, if the attorney has a valid lien on any client papers and property at the time requested by the client, the attorney may seek to enforce that lien. *OSB Legal Ethics Op No 2005-90*.

      i. Caveat: If the client does not have the sufficient resources to pay the attorney in full and if surrender of any property is necessary in order to avoid foreseeable prejudice to the client, the attorney's lien must yield to the fiduciary duties that the attorney owes to the client upon the payment of whatever amount the client can afford to pay. *OSB Legal Ethics Op No 2005-90*.

      - *In re Gregory*, 19 DB Rptr 150 (2005). [reprimand] Attorney ignored requests from his former client and her new counsel for the client's file and the unearned portion of her retainer, until the client filed a complaint with the bar. [DR 9-101(C)(4)]

      - *In re Seto*, 18 DB Rptr 134 (2004). [reprimand] Attorney delayed delivery of his client's file to the client even after the court ordered him to do so. [DR 9-101(C)(4)]

- *In re Koessler*, 18 DB Rptr 105 (2004). [6-month suspension] Attorney failed to return her client's file despite requests from successor counsel. In another matter, she failed to deposit a retainer into trust, failed to maintain any records of the funds and failed to render an accounting. [DR 9-101(C)(3) and (C)(4)]

- *OSB Legal Ethics Op No 2005-70*. An attorney who leaves a firm and joins another firm may only take those files that the clients have authorized the attorney to take and may only take them if the firm does not have a valid and enforceable lien on them for unpaid fees.

- *OSB Legal Ethics Op No 2005-60*. When an attorney leaves a firm, the firm may refuse to transfer client documents to the attorney unless and until the client authorizes the transfer in writing. The firm may not, however, withhold client documents after receipt of written authorization and may not, for example, require that a client physically come to the firm's offices to pick up the documents.

- *OSB Legal Ethics Op No 2005-43*. An attorney who has drafted a will for a client and who can no longer find the client must either preserve the will or arrange for the will to be preserved by competent successor counsel. The subject of preservation of wills is covered under ORS 112.800, *et seq*. ORS 112.815 and 112.820 establish the sole conditions under which attorneys may destroy wills.

Notes

HYPOTHETICAL

[NOTE: Based upon hypo by Professor Michael Virzi, University of SC School of Law]

- On Monday afternoon, Client walks into your office. He visited your office the previous Friday and gave you a $5,000 cash retainer to represent him in his divorce. You deposited the cash into your IOLTA account on Friday afternoon where other client funds were already on deposit.

- Now Client says he has reconciled with his wife and wants his retainer back. Knowing that he paid you in cash, you write him a $5,000 check from your IOLTA account. Fifteen minutes later, you receive a call from your banker across the street informing you that the cash you deposited on Friday was counterfeit and that the $5,000 provisional credit to your IOLTA account has been revoked. You ask your banker to stop payment on the check you just wrote, but Client has already cashed it.

What rules have you violated? What must you do next?

A. RPC 1.15-1(a) & (c)—you drew on client funds. You need to replenish your trust account for the misappropriated funds.

B. RPC 8.4(a)(3)—you converted client funds. You must self-report to the Bar and pay back the funds.

C. You violated no rules. You don't need to take any action because this wasn't your fault—you were the victim of fraud.

D. RPC 1.2(c) & RPC 8.4(a)(2)—you participated in a criminal act with a client. You need to turn yourself into law enforcement and the Bar.

DISCUSSION

Answer: _____

□ PRACTICE TIP: Just because the bank or the bank's computer tells you that funds from a deposit are available does not mean you can write checks on those funds. According to the UCC, there is a difference between "available" funds and "collected" funds. Before you can write a check on a deposit, the funds from the deposit must have been collected by your bank, *i.e.,* the money is actually in the account, not merely available. So long as the funds are only "available"—as opposed to "collected"—a deposit can be dishonored and reversed by your bank.

□ PRACTICE TIP: Instruct your bank to dishonor any NSF check, even if this could prove embarrassing. This instruction will prevent one client's funds from being improperly withdrawn to cover another client's obligations.

See also, In re Martin, 328 Or 177, 189, 970 P2d 638 (1998) (attorney placed money in drawer, believing he would later earn it).

HYPOTHETICAL

- Young Associate, who was previously employed in a large law firm since graduating from law school, decides to open his own practice. He takes with him his very experienced legal assistant, who is familiar with the bookkeeping and billing programs Associate intends to use. Associate is not, however, completely familiar with these programs and has never managed a lawyer trust account.

  As he has done in the past, Associate entrusts the bookkeeping and management of his lawyer trust account to his legal assistant. She determines how much money can be taken out of trust as earned fees, writes the trust checks for costs (lawyer signs all checks), and enters the trust account transactions into the bookkeeping system. The legal assistant is also charged with reconciling the trust account.

  For years, the legal assistant overlooks to subtract the checks for costs from the clients' funds in trust. She does not keep individual client ledger cards or know how to obtain a client's trust balance from the bookkeeping program, and when the bookkeeping program shows a different month-end balance in the account from that in the bank statement, she merely adjusts the figure in the bookkeeping program, so it appears to equal the balance in the bank statement.

Which of the following is/are correct?

A. practice of Associate's assistant of not recording costs paid out of trust will, eventually, result in payment from trust for clients who did not actually have that amount in the account, resulting in funds belonging to other clients being withdrawn by Associate before he had earned the money belonging to those clients.

B. Same as answer A and Associate should be disbarred for conversion of client funds.

C. Associate acted properly in setting up his lawyer trust account, but he made no effort over a period of years to see if his assistant was properly managing the account and will be subject to discipline.

D. Associate acted properly in delegating responsibility for the bookkeeping and billing duties as his assistant was experienced in these matters and could ask him if she had any questions about carrying out these responsibilities.

DISCUSSION

Answer: _____

See In re Peterson, 348 Or 325, 232 P3d 940 (2010) (evidence was not sufficient to show that attorney did not have a legitimate reason to remove funds from trust); *In re Holman,* 297 Or 36, 682 P2d 243 (1984) (attorney who misappropriated trust funds but who produced evidence that his addiction to prescription drugs resulted in a mental impairment such that he was unable to appreciate the wrongfulness of his acts was found not to have engaged in dishonest conduct).

Cf., In re Martin, 328 Or 177, 970 P2d 638 (1998) (attorney who genuinely believed that spending client money for the services of another lawyer and law clerk were "cost," was not guilty of conversion when he made those expenditures. However, in a second matter, the attorney spent client money on personal expenses knowing the money was not yet earned. In disbarring the attorney, the court rejected defenses that the attorney was unaware of the applicable disciplinary rule, that the attorney's mental condition negated any intent to convert the funds, or that the money was ultimately earned); *In re Pierson*, 280 Or 513, 571 P2d 907 (1977) (A single act of knowing conversion by an attorney of his client's trust funds resulted in disbarment. The fact that restitution was made had no bearing as discipline is not dependent upon attorney's financial ability to rectify the results of his conduct.)

Cf. In re Mannis, 295 Or 594, 668 P2d 1224 (1983); *In re Holman*, 297 Or 36, 682 P2d 243 (1984). *OSB Legal Ethics Op No 2005-145.*

- *OSB Legal Ethics Op No 2005-149* [superseding *OSB Legal Ethics Op No* 2005-88]. Assuming an attorney does not expect a client to dispute a bill for work that has been performed, trust account funds may be withdrawn when the bill is sent. If a dispute thereafter arises, an attorney may, but is not required to, replenish the trust account in the amount in dispute.

- *In re Colvin*, 21 DB Rptr 250 (2007). [120-day suspension] Attorney failed to keep adequate records of trust account deposits, disbursements and earned fees such that his account balance was inaccurate. He also failed to reconcile his records with bank statements such that accounting errors were not discovered over time. Attorney also deposited his own funds into trust and paid personal expenses from that account at a time when he had no other bank account available to him.

Notes

ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP

Section 13 — Duties to the Client

HYPOTHETICAL

- Attorney Albert was asked by his rec-league basketball buddie (Nephew) to assist getting his aunt ("Auntie") discharged from a care facility so she could return home. Albert practiced primarily criminal law but agreed to see what he could do.

  Albert met with Auntie both alone and with Nephew at the care facility, which was paid in full by her Medicaid benefits. After speaking with her on two consecutive days, Albert determined that Auntie was sufficiently competent to make decisions about her welfare and sincere in her desire to return to her home.

  Albert drafted a power of attorney for Nephew to allow him to arrange for her removal from the care facility and to make arrangements for her ongoing care. Albert also provided Auntie with a quit-claim deed granting her home (and only asset) to Nephew, in exchange for his promise to care for her there until her death.

  Within a day of her return home, Nephew decided that Auntie was too much work and took her back to the facility. The care facility accepted Auntie but could no longer care for her free of charge, as the transfer of her home had disqualified her from further Medicaid benefits. Nephew refused to reconvey the home to her.

  What duties to Auntie did Albert violate?

  A. His duty of competent representation.

  B. His duty of loyalty.

  C. His duty of candor.

  D. All of the above.

DISCUSSION

Answer: _____

In re Richardson, 350 Or 237, 253 P3d 1029 (2011). [disbarred].

See also, In re Zanotelli, 23 DB Rptr 124 (2009). [reprimand] When an elderly couple sought attorney's assistance with legal matters pertaining to wife's finances and a modification of her estate plan, attorney failed to make sufficient inquiry to determine whether wife was competent (she was not), failed to adequately consult with each client separately regarding their objectives, failed to recognize that wife was unable to provide basic information about her assets and failed to sufficiently investigate to determine that the couple had only been married for three weeks and that husband was a recently convicted felon.

See also, In re Nawalany, 20 DB Rptr 315 (2006). [reprimand] Attorney was contacted by someone he did not previously know and was asked to draft a will and a power of attorney on an urgent basis for an elderly woman. The will was to provide that the testator's house would be left to the person who made the initial contact with attorney. Attorney drafted the will and power of attorney on an expedited basis, and witnessed their execution, but failed to make sufficient inquiry into the testator's mental state or her relationship with the beneficiary. In fact, the testator was in a state of deteriorating physical and mental health, and recently had been placed in an adult foster home operated by the beneficiary who was exercising undue influence over the testator. [DR 6-101(A)]

A. Competence

1. It is one of the most fundamental principles of the profession that a lawyer is required to competently represent a client. *See* RPC 1.1.

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. Whether an attorney has provided competent representation is determined by viewing the representation as a whole, rather than by focusing on discrete tasks or specific aspects of the representation. *In re Magar*, 335 Or 306, 66 P3d 1014 (2003); *see also, In re Gygi,* 273 Or 443, 541 P2d 1392 (1975) (isolated instances of ordinary negligence are not sufficient, in and of themselves, to warrant discipline).

3. Legal knowledge and skill

   a. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include:

      i. The relative complexity and specialized nature of the matter,

      ii. The lawyer's general experience,

      iii. The lawyer's training and experience in the field in question,

      iv. The preparation and study the lawyer is able to give the matter, and

      v. Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. *ABA Model Rules,* RPC 1.1, Comment [1]; *See also, In re Odman*, 297 Or 744, 687 P2d 153 (1984) (where the lawyer acknowledged that he did not do estate work, did not undertake to become qualified in the area, and did not associate an attorney who had probate experience).

   b. In many instances, the required proficiency is that of a general practitioner. *ABA Model Rules,* RPC 1.1, Comment [1].

   c. Perhaps the most fundamental legal skill is the ability to determine what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. *ABA Model Rules,* RPC 1.1, Comment [2].

      - *In re Brewster*, 30 DB Rptr 181 (2016) [reprimand] Respondent obtained ex parte orders granting her domestic relations clients temporary relief, including child support and custody, and other types of relief that were prohibited by statute in domestic-relations cases.

      - *In re Oliveros*, 30 DB Rptr 145 (2016) [60-day suspension, all stayed/3-year probation] An elderly couple retained Respondent to help them rescue their home from foreclosure, using half of the final $1 million installment of wife's inheritance, with the remaining inheritance funds to be invested to generate retirement income. Respondent recommended that they use the investment money to make loans to two other current clients.

The loan transactions were unsecured or under-secured. The debtors made a few initial loan payments then defaulted and filed bankruptcy.

- *In re Sheridan*, 29 DB Rptr 179 (2015) [60-day suspension, all stayed/3-year probation] In an immigration matter, attorney undertook to represent a client on an illegal re-entry charge following his conviction and removal for several assault felonies. Before she was removed from the case, attorney failed to timely file the client's post-conviction relief petition; filed a petition for post-conviction relief and one or more motions in the illegal reentry case that were without basis in law or fact; failed to acquire the knowledge, skill, thoroughness or preparation reasonably necessary to represent the client in the post-conviction matter or in the illegal reentry case; rendered legal advice to her client in the course of the illegal reentry case that was without basis in law or fact; and filed an unfounded motion to recuse the district court judge.

- *In re Jagger*, 357 Or 295, 348 P3d 1136 (2015) [90-day suspension] Attorney arranged for a phone call between his client and the client's girlfriend—who was the victim of his client's assault and had a restraining order against attorney's client. Attorney violated rule by failing to understanding statutes related to the restraining order or his client's obligations, instead inviting victim to speak with his client and advising his client that he could speak with the victim, in violation of the restraining order.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] Attorney and his partner undertook to represent petitioner in a divorce proceeding, but filed the petition in a jurisdiction other than where the petitioner resided, and failed to effect service on the respondent over the next year. Even if the matter had been properly filed, attorney's attempts at service would have been insufficient under the ORCP requirements. In a second matter, attorney failed to review and recognize that proposed child support calculations were based upon 50/50 parenting time when that was not the situation of the parties or his client's understanding of the arrangement.

- *In re Kleinsmith*, S061057, OSB Case No. 12-169 (2013) [90-day suspension] Attorney improperly filed more than a dozen collections matters on behalf of a bank in various states.

- *In re Obert*, 352 Or 231, 282 P3d 825 (2012). [6-month suspension] Despite instructions from a trial judge in a civil case that the judge would grant a motion for JNOV in favor of attorney's client if one was filed and a caution about when such a motion was due, attorney failed to timely file the motion and instead filed a notice of appeal which deprived the trial court of jurisdiction. The notice of appeal was defective, the appeal ultimately was dismissed, and attorney failed to refile his post-trial motions timely. He also filed a second, untimely notice of appeal, intending to argue that a criminal statute that permitted the late filing of a notice of appeal should apply to his client's civil case. Attorney was found to have engaged in a pattern of incompetence.

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] Attorney took on legal matters, some beyond her usual practice area, did not handle them competently, neglected a number of them and failed to respond to client inquiries.

- *In re Fredrick*, 26 DB Rptr 129 (2012). [reprimand] In an attempt to protect a client's financial interests in an impending divorce, attorney advised the client to sign a promissory note in favor of client's father as evidence that funds father contributed to the marriage over the years were loans. In fact, father had made gifts, not loans, to the couple. In addition, attorney prepared and filed a UCC-1 financing statement to secure the note, advising the client that this may protect the client's interest in the couple's real property. A trial panel found this advice to lack competence.

- *In re Richardson*, 350 Or 237, 253 P3d 1029 (2011). [disbarred] Attorney who did not have experience in elder or estate law assisted his elderly client, who had been receiving Medicaid benefits, in transferring her home and only asset to another, thereby disqualifying her from receipt of further Medicaid benefits. Attorney disbarred for violation of this and other rules. Supreme Court did not discuss facts or violations substantively

because, after filing a petition for review of the disciplinary board trial panel opinion, attorney failed to file an appellate brief.

- *In re Lopez*, 350 Or 192, 252 P3d 312 (2011). [9-month suspension] After settling a personal injury case for less than the sum of the clients' medical expenses, and after unsuccessfully attempting to negotiate reductions of those expenses from the providers, attorney failed for over 2½ years to resolve the various claims to the settlement proceeds.

- *In re O'Rourke*, 24 DB Rptr 227 (2010) [reprimand] Attorney failed to understand rules regarding guardian *ad litem* for adult protected persons which resulted in negligent misrepresentations to the court and third parties.

- *In re Daum*, 24 DB Rptr 199 (2010) [120-day suspension] In a bankruptcy proceeding, attorney failed to understand or properly investigate the characterization of a private agreement his client had entered into to help fund medical school and mistakenly believed it was in the nature of a student loan. When it was discharged, private backer refused to further fund the client's education.

- *In re Hammond*, 24 DB Rptr 97 (2010) [30-day suspension] During the course of representing the plaintiffs in a property dispute, attorney lacked the knowledge, skill and experience in land use, litigation and appellate matters that was reasonably necessary for the representation. In addition, attorney was not prepared to try the lawsuit in circuit court after the trial judge denied her motion to postpone trial.

- *In re Dixon*, 22 DB Rptr 241 (2008). [12-month suspension] Attorney was retained to file a petition for post-conviction relief on behalf of a client. Although attorney's petition was timely under state law, attorney did not know about, and missed the filing deadline under, a federal statute, resulting in the client losing the right to later file a writ of habeas corpus. *See also, In re Lyons*, 19 DB Rptr 271 (2005).

- *In re Hilborn*, 22 DB Rptr 102 (2008). [1-year suspension/10-months stayed/2 years probation] Attorney who was not familiar with federal practice failed to take steps to become familiar with

federal rules, laws or procedures when client's employment claim was transferred to federal court and did not understand (in failing to respond to a motion to dismiss a particular claim) that, when granted, he would not be permitted to replead that cause of action.

- *In re Black*, 21 DB Rptr 6 (2007). [1-year suspension] Attorney negotiated a plea agreement on behalf of a client who was not a United States citizen, advising the client that the guilty plea would not result in the client's deportation. In fact, attorney did not know and did not research the consequences the plea would have on the client's ability to remain in the country. [DR 6-101(A)]

- *In re Trukositz*, 19 DB Rptr 78 (2005). [12-month suspension] Attorney failed to claim PIP benefits for a client in a personal injury case because he did not know such benefits were available. [DR 6-101(A)]

- *OSB Legal Ethics Op No. 2011-187.* The duties to provide competent counsel to a client and to protect information related to the representation require that attorney take reasonable care to prevent the inadvertent disclosure of metadata embedded in electronic documents disclosed to others, including maintaining a basic understanding of the technology or utilizing adequate technology support.

- Supp 13-5: Helen Hierschbiel, *Revealing Bits & Bytes: Guarding (and Exploiting) Metadata,* OSB Bulletin, June 2012

- *OSB Legal Ethics Op No 2005-167*. A mediator should serve only in matters in which he or she is competent to recognize significant legal issues.

- *OSB Legal Ethics Op No 2005-129*. An attorney who is a sole practitioner with no employees must take some steps to ensure that the needs of the attorney's clients will be met in the event of the attorney's death or disability.

4. Thoroughness and preparation

   a. The required attention and preparedness are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. *ABA Model Rules,* RPC 1.1, Comment [5].

   b. However, even routine matters require some basic level of review and attention. *See, e.g., In re Bettis*, 342 Or 232, 149 P3d 1194 (2006) (criminal defense attorney failed to provide competent services to a criminal defense client when he sought and obtained his client's waiver of the right to a jury trial without first reviewing any discovery or conducting any factual or legal investigation into the issues in the case); *see also, In re Magar*, 296 Or 799, 681 P2d 93 (1984) (attorney found guilty of mishandling matter where failed to obtain sufficient information from client prior to filing bankruptcy); *In re Rudie,* 294 Or 740, 662 P2d 321 (1983) (attorney guilty of inadequate preparation when, despite being retained two and a half years prior to the trial of his clients' case, did not adequately discuss the matter with his clients or examine their records until the night before the trial was to begin).

      - *In re Johnson*, 30 DB Rptr 300 (2016) [4-year suspension, 30 months stayed/3-year probation] Attorney missed both filing and extended deadline in two unrelated post-conviction cases, one of which resulted in the client losing the opportunity to have the court review his case. Respondent also made a number of calendaring errors and procedural mistakes in multiple cases, including petitioning for Oregon Supreme Court review of appellate commissioner decisions rather than asking for reconsideration, missing deadlines and extended deadlines for filing opening briefs and petitions for review, failing to respond to a motion, and submitting a filing that was dismissed.

      - *In re Gifford*, 29 DB Rptr 299 (2015) [60-day suspension] One of six heirs to her uncle's intestate estate hired attorney to assist her in the administration of the estate. After preparing the court documents reflecting the six heirs, attorney learned that one of the heirs might be in jail, and another might be transient. Without reviewing statutes related to missing heirs and filing appropriate pleadings and documentation in accord with those statutes, attorney revised portions of the documents previously

signed by his client to represent that there were only four heirs, rather than six, and filed the altered documents with the probate court.

- *In re Misfeldt*, 24 DB Rptr 25 (2010) [reprimand] Attorney undertook to represent an elderly woman in a protected person proceeding, without ever meeting or speaking with her and without making sufficient inquiry into her condition and objectives.

- *In re Lance*, 21 DB Rptr 87 (2007). [6-month suspension] Attorney appointed to represent defendant charged with multiple sex crimes failed to communicate with the client or respond to the client's inquiries, failed to apply timely for funds to hire an investigator, failed to interview witnesses or consult with computer or medical experts, failed to subpoena witnesses for trial and failed to communicate with defense counsel appointed to represent the client on related federal charges. [DR 6-101(A)]

- *In re Wetsel*, 21 DB Rptr 129 (2007). [18 months] Prior to filing a child custody petition in Oregon on behalf of a client, attorney failed to ascertain that Oregon had no jurisdiction because of where the child and the parties had resided in the preceding months. After opposing counsel challenged jurisdiction, attorney failed to respond or appear such that the client was assessed attorney fees. [DR 6-101(A)]

c. Implicit in the thoroughness obligation is the notion that the lawyer must allow sufficient time and attention to attend to each and every client matter. *See, e.g., In re Worth,* 337 Or 167, 92 P3d 721 (2004).

- *In re Kesner*, 21 DB Rptr 199 (2007). [60-day suspension] As the effective date of a new bankruptcy law approached, attorney undertook to represent more clients wishing to file bankruptcy petitions under the old law than he could competently handle, filing 90 such petitions in a week that were incomplete, inaccurate, internally inconsistent or did not comply with applicable law. Thereafter, attorney failed timely or competently to correct the petition deficiencies despite the order of the court.

- *OSB Legal Ethics Op No 2007-178*. Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients. Attorneys who work in public defense organizations should seek assistance from supervisors and managers in order to achieve manageable workloads. If remedial measures are not then approved, attorneys should continue up the chain of command and may have to file, without firm approval, motions to withdraw.

- *OSB Legal Ethics Op No 2005-98*. An attorney may ethically agree with an insurer to handle a number of cases for the insurer at a flat rate per case regardless of the amount of work required as long as the overall fee is not clearly excessive and as long as the attorney does not permit the existence of such a fee agreement to limit improperly the amount of work that the attorney is willing to do for a particular client.

d. The scope of what constitutes reasonable preparation may be limited by agreement with the client. *See* RPC 1.2(b).

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

5. As a general proposition, an attorney who is asked to represent a plaintiff may sue only those defendants against whom a colorable claim appears to exist after reasonable investigation. *OSB Legal Ethics Op No 2005-59*.

a. With regard to what constitutes a reasonable investigation, an attorney may take into account matters such as

i. whether pertinent information is in the hands of the potential defendants,

ii. whether a statute of limitations is about to run,

iii. whether further investigation prior to service of process might cause the defendants to flee, and

iv. whether potential defendants are willing to toll any approaching statute of limitations. *OSB Legal Ethics Op No 2005-59*.

- *In re Petersen*, 22 DB Rptr 1 (2008). [reprimand] Attorney settled a claim for a client, which included a payment from the adverse party and mutual releases, and then filed a lawsuit for the client against the adverse party alleging the same and related claims. In light of the earlier settlement, attorney's failure to investigate or understand whether there was a factual or legal basis for the lawsuit demonstrated a lack of competence.

- *In re Hendrick*, 19 DB Rptr 170 (2005). [30-day suspension] Attorney failed to recognize that his clients' bankruptcy proceeding stayed action in a state court lawsuit initiated by his clients against a licensing agency, and he pursued that litigation without disclosing to the state court or the opposing party that bankruptcy had been filed. [DR 6-101(A)]

6. If an attorney learns after filing a claim that there is no colorable basis on which the claim against a particular defendant can be pursued, the attorney must dismiss the claim. *OSB Legal Ethics Op No 2005-59*.

    - *In re Later*, 22 DB Rptr 340 (2008). [reprimand]. Attorney hired for employment litigation failed to follow up on information necessary to trigger obligation of employer to grant benefit his client had settled for, in part because he did not sufficiently understand workers' compensation and employment law. Attorney then brought a second legal action asserting claims that the client had released in the first action.

7. Because a lawyer is required to supervise subordinate lawyers (*see* RPC 5.1), the duty of competence cannot be met simply by assigning or referring the matter to a subordinate. *Cf., In re Eadie,* 333 Or 42, 36 P3d 468 (2001) (attorney violated rule *inter alia* by failing to supervise associate's preparation of response to motion for summary judgment).

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

> **(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**
>
> **(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

8. Similarly, a lawyer's failure to adhere to his or her obligations regarding professional independence under RPC 5.4(c) may also result in a failure to provide competent representation.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

- *In re Britt*, 20 DB Rptr 100 (2006). [6 months] Attorney failed to render competent representation to an elderly client when attorney permitted a financial planner to direct or regulate all aspects of the representation, never meeting or communicating with the client, to the financial detriment of the client. [DR 6-101(A)]

- *OSB Legal Ethics Op No 2005-166 (rev 2016).* Insurance defense lawyer may not agree to comply with insurer's billing guidelines if to do so requires the lawyer to materially compromise his or her ability to exercise independent judgment on behalf of a client.

- *OSB Legal Ethics Op No 2005-115 (rev 2014).* An attorney may not ethically permit the representation of a client to be controlled by others.

- *OSB Legal Ethics Op No 2005-98.* An attorney may ethically agree with an insurer to handle a number of cases for the insurer at a flat rate per case regardless of the amount of work required as long as the overall fee is not clearly excessive and as long as the attorney does not permit the existence of such a fee agreement to limit the work that the attorney would otherwise do for a particular client.

- *OSB Legal Ethics Op No 2005-79 (rev 2014).* With disclosure and consent, an attorney may be employed by a church to represent non-church members in support of issues of interest to the church (e.g., helping to assure care for the elderly).

- *OSB Formal Ethics Op No 2005-77 (rev 2016).* When an insurer retains an attorney to review an insurance policy covering one of the insurer's insured customers, the attorney may possibly then represent both the insurer and the insured in defense of the underlying litigation subject to a reservation of rights if no conflict of interest would result and the insurer would not be directing or regulating the attorney's professional judgment.

- *OSB Legal Ethics Op No 2005-66.* An attorney who is a member of a legal aid society board of directors may represent a client in a proceeding in which the opposing party will be represented by an attorney who is a legal aid society employee as long as the conditions set forth in DR 5-108 are met.

- *OSB Formal Ethics Op No 2005-51 (rev 2014).* When an attorney represents a trade association and the association asks the attorney to become an associate member, the attorney should consider whether joining the trade association could potentially allow the association to direct or regulate the attorney's professional judgment.

- *OSB Legal Ethics Op No 2005-30 (rev 2016).* An attorney may ethically represent both an insurer and an insured in action against a third-party tortfeasor to recover both damages paid to the insured by the insurer and damages to the insured that were

not reimbursed by insurer unless it appears that the interests of the insurer and the insured are in conflict. If the attorney is paid by the insurer to bring such an action, the insured must consent thereto.

- *OSB Legal Ethics Op No 2005-22.* An attorney who is asked by an insurance adjustor to handle a conservatorship proceeding in order to effect the settlement of a personal injury claim by an injured minor that the insurance adjustor has just reached may ethically do so with disclosure and consent.

Notes:

HYPOTHETICAL

- Paul Cybil Hazard is a Spanish interpreter and translator. He is not a lawyer.

  Attorney Anderson allowed Hazard to share office space in exchange for Hazard's assistance in Anderson's immigration law practice. Anderson regularly relied on Hazard to provide translation services and interview his clients. Anderson also allowed Hazard to meet alone with clients, and to select and prepare immigration forms and send correspondence using Anderson's digital signature.

  Anderson agreed to represent Sara Client (who had illegally entered the US from Mexico), in her effort to obtain legal permanent residency in the US. With Anderson's knowledge and consent, Hazard met with and assisted Client. Client paid Anderson $400 for legal services, which Anderson shared with Hazard.

  During his representation of Client, Anderson did not supervise Hazard's activities and failed to take a number of actions (or even determine the necessity of any action) on behalf of Client, including failing to adequately prepare himself or Client for a removal hearing before the US Immigration Court, and failing to submit necessary documents. Anderson essentially delegated responsibility for handling Client's legal matter to Hazard.

What rules are implicated by Anderson's conduct?

A. RPC 1.1 [competence].

B. RPC 5.4(a) [improper fee sharing with a nonlawyer].

C. RPC 5.5(a) [assisting another in the unlawful practice of law].

D. All of the above.

DISCUSSION

Answer: _____

In re White, 19 DB Rptr 343 (2005).

HYPOTHETICAL

- Ben Unlucky was struck by a golf cart driven by Mary Mulligan. Soon thereafter, Unlucky hired Average Attorney to make a personal injury claim. Over the next year, Average regularly met with Unlucky and communicated with Mulligan's insurer re: medical payments, lost wages, and Unlucky's ongoing need for care.

  After the first year, Average ceased communicating with Unlucky. Unlucky eventually wrote to the Bar asking for help in determining whether Average still represented him. Average did not respond to multiple inquiries from the Bar.

  Nevertheless, on the last day before the statute of limitations ran on Unlucky's claim, Average filed a complaint in circuit court. However, the process server Average hired was not able to effect service on Mulligan within the time allowed by statute. As a result, Mulligan's attorney moved for motion for summary judgment on the basis that Unlucky failed to bring his claim within the statute of limitations. The motion was granted.

  Due to Average's lack of communication with the Bar, a Bar investigator met with Average at his law office but Average declined to produce his file or to discuss Unlucky's complaint, stating he wished to consult with an attorney. However, Average did not respond to the investigator's follow-up inquiries until he was served with a subpoena. Average thereafter complied.

Average neglected:

A. Nothing. The case was filed within the statute of limitations and he eventually responded to the Bar.

B. Unlucky, Unlucky's case and his obligation to the Bar.

C. To respond to the Bar but sufficiently handled Unlucky's case.

D. To communicate with Unlucky and the Bar but adequately handled Unlucky's case.

DISCUSSION

Answer: _____

NOTE: Attorneys who fail to respond to DCO are subject to immediate and indefinite suspension under BR 7.1, until such time as they elect to respond.

> **BR 7.1 Suspension for Failure to Respond to a Subpoena.**
>
> **(a) Petition for Suspension. When an attorney fails without good cause to timely respond to a request from Disciplinary Counsel or the LPRC for information or records, or fails to respond to a subpoena issued pursuant to BR 2.3(a)(3), BR 2.3(b)(3)(C), or BR 2.3(b)(3)(E), Disciplinary Counsel may petition the Disciplinary Board for an order immediately suspending the attorney until such time as the attorney responds to the request or complies with the subpoena. A petition under this rule shall allege that the attorney has not responded to requests for information or records or has not complied with a subpoena, and has not asserted a good-faith objection to responding or complying. The petition shall be supported by a declaration setting forth the efforts undertaken by Disciplinary Counsel or the LPRC to obtain the attorney's response or compliance.**
>
> **(b) Procedure. Disciplinary Counsel shall file a petition under this rule with the Disciplinary Board Clerk, with proof of service on the state chairperson, who shall have the authority to act on the matter**

for the Disciplinary Board. A copy of the petition and declaration shall be served on the attorney as set forth in BR 1.8(a).

(c) Response. Within 7 business days after service of the petition, the attorney may file a response setting forth facts showing that the attorney has responded to the requests or complied with the subpoena or the reasons why the attorney has not responded or complied. The attorney shall serve a copy of the answer upon Disciplinary Counsel pursuant to BR 1.8(b). Disciplinary Counsel may file a reply to any response within 2 business days after being served with a copy of the attorney's response. The response and reply shall be filed with the Disciplinary Board Clerk, with proof of service on the state chairperson.

(d) Review by the Disciplinary Board. Upon review, the Disciplinary Board state chairperson shall issue an order: immediately suspending the attorney from the practice of law for an indefinite period; or denying the petition. The state chairperson shall file the order with the Disciplinary Board Clerk, who shall promptly send a copy to Disciplinary Counsel and the attorney.

(e) Duties upon Suspension. An attorney suspended from practice under this rule shall comply with the requirements of BR 6.3(a) and (b).

(f) Independent Charges. Suspension of an attorney under this rule is not discipline. Suspension or reinstatement under this rule shall not bar the SPRB from causing disciplinary charges to be filed against an attorney for violation of RPC 8.1(a)(2) arising from the failure to respond or comply as alleged in the petition for suspension filed under this rule.

(g) Reinstatement. Subject to the provisions of BR 8.1(a)(viii) and BR 8.2(a)(v), any person who has been a member of the Bar but suspended under Rule 7.1 solely for failure to respond to requests for information or records or to respond to a subpoena shall be reinstated by the Executive Director to the membership status from which the person was suspended upon the filing of a Compliance Affidavit with Disciplinary Counsel as set forth in BR 12.10.

In re Klosterman, 21 DB Rptr 170 (2007) (120-day suspension).

B. Diligence

1. A lawyer is required by RPC 1.3 to pursue clients' legal matters using "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." *ABA Model Rules,* RPC 1.3, Comment [1].

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

2. Neglect in the context of this rule is the failure to act or the failure to act diligently. The lawyer's conduct must be viewed along a temporal continuum, rather than as discrete, isolated events. *In re Magar,* 335 Or 306, 66 P2d 1014 (2003); *In re Eadie,* 333 Or 42, 36 P3d 468 (2001).

   - *In re Allen,* 30 DB Rptr 362 (2016) [60-day suspension/formal reinstatement/restitution] Respondent took no substantial action in her client's matter and failed to protect or further the client's interests. Additionally, while the client's matter was still pending, Respondent abandoned her practice without giving notice to her client.

   - *In re Bosse,* 30 DB Rptr 311 (2016) [24-month suspension] In an attempt to resolve a client's foreclosure matter, Respondent offered to provide a proposal for a deed in lieu of foreclosure, but failed to do so, and thereafter failed to reply to either the opposing counsel's or the court's attempts to communicate with him and failed to appear at court hearings. In another case, after Respondent filed an answer in a collections matter, the plaintiff filed for summary judgment, but agreed to defer the ruling and rescheduled arbitration a number of times on Respondent's assurances to return a proposed judgment, which he failed to do. In reliance on Respondent's subsequent promises that he would meet with his client and return the signed proposed judgment, the plaintiff set over the reset hearing and did not reinstate the case for two years. Plaintiff was eventually granted summary judgment and Respondent's client was garnished. When the client contacted Respondent about the garnishment, Respondent promised to pursue the matter but took no further action.

- *In re Johnson*, 30 DB Rptr 300 (2016) [4-year suspension, 30 months stayed/3-year probation] Respondent missed both the filing and the extended deadlines in two unrelated post-conviction matters. Respondent also engaged in neglect in multiple other matters, including missing deadlines and extended deadlines for filing opening briefs and petitions for review, and failing to respond to a dispositive motion.

- *In re Hellewell,* 30 DB Rptr 204 (2016) [30-day suspension, all stayed/18-month probation] Client requested that Respondent file a petition seeking relief from his sex offender reporting requirement. After drafting the petition, Respondent failed to do any further work on the case. The client's wife made numerous requests for a status update but Respondent provided no information other than his erroneous assertions that the petition had been filed. When Respondent finally checked the file, he discovered he had not filed the petition, and refunded the client's money minus the filing fee. Several months later, Respondent filed the petition but then failed to respond to the wife's requests for a status update. When the court denied the petition, Respondent waited several weeks before informing his client.

- *In re Ferrua,* 30 DB Rptr 99 (2016) [181-day suspension/restitution] Respondent represented a client incarcerated on drug-related charges. After Respondent requested and received a 90-day extension of the trial date, the parties were ordered to notify the court by a given date whether they expected the case to proceed to trial. Respondent did not notify the court or file for a continuance. From the arraignment to the day before the rescheduled trial date, Respondent only met once with his client, had only a few brief telephone calls with him, and had no written communication. Respondent had not taken any steps to prepare for trial, filed pleadings, interviewed witnesses, prepared exhibits, or attempted to negotiate a plea. Respondent also ignored numerous telephone calls, emails, and voicemails from the court regarding his readiness for trial. Four days before the rescheduled trial date, Respondent telephoned the court and indicated he needed to seek another continuance but failed to file the necessary motion.

- *In re Landers,* 30 DB Rptr 89 (2016) [disbarred] Respondent was retained to represent a client in a custody case but failed to reply to a motion or to inform the client about an upcoming hearing. After

several months of failing to respond, the client terminated Respondent's representation. Thereafter, Respondent did not inform the court that she no longer represented the client.

- *In re Smale,* 30 DB Rptr 51 (2016) [60-day suspension, all stayed/2-year probation] Bankruptcy trustee sought to avoid a lien exempting client's car from the bankruptcy estate and offered to settle the matter for $5,000. Client directed attorney to counter-offer for $2,000. Attorney failed to convey the counter-offer, and after the court ordered the client to relinquish the car as part of the estate, attorney failed to notify her client of the order, assuming the client would be notified directly. Thereafter, Respondent failed to resume or pursue settlement negotiations with the trustee.

- *In re Erm,* 30 DB Rptr 1 (2016) [30-day suspension] Attorney represented a wife who lived in Utah with her three children in a dissolution and custody determination filed by husband in Oregon. Respondent made an initial court appearance and moved to sever the custody matter from the dissolution proceeding but did not file a response to the husband's petition for dissolution and took no further action in the case. Respondent did not contest Oregon's jurisdiction in the dissolution and an Oregon court held that Oregon had jurisdiction on all issues except custody. Thereafter Respondent took no further action and husband was granted a default judgment against the wife, the proposed of which Respondent neither responded nor objected to.

- *In re Sumner,* 29 DB Rptr 346 (2015) [3-year suspension] Respondent neglected numerous cases over a four-year period, failed to respond to client inquiries about the matters, and failed to respond to the Bar.

- *In re Aman,* 29 DB Rptr 334 (2015) [1-year suspension, all but 6 months stayed/2-year probation] Respondent failed to actively pursue client's patent infringement action; failed to respond to the client's attempts to communicate with him; failed to explain to the client the ramifications of his discovery of "prior art" on the client's infringement claim; and failed to convey that he intended to take no further action on the client's behalf.

- *In re Merrill,* 29 DB Rptr 306 (2015) [120-day suspension, all but 30 days stayed/2-year probation] After agreeing to write a demand

letter to a client's neighbor, respondent decided that the client did not have any claim that could successfully be pursued but did not convey this information to the client or take action on her matter for more than a year. In a second matter, respondent failed to timely pursue his client's claim for damages to her mobile home resulting from a sewage flood, and failed to protect her personal property and possessions. In a third matter, respondent failed to timely attend to his client's rent dispute, and when he eventually obtained a copy of the client's lease—following Bar involvement—he determined she did not have any claim but failed to notify her of his position or take further action on her behalf.

- *In re Noren,* 29 DB Rptr 294 (2015) [30-day suspension] Six months after he agreed to act as the hearing officer for an enforcement proceeding, respondent became concerned about his jurisdiction to hear the matter but did not advise the parties of his concerns, take further action to resolve his concerns, or withdraw from the proceeding, resulting in the dismissal of the matter a year later on the defendant's motion.

- *In re Peterson,* 29 DB Rptr 221 (2015) [60-day suspension, all stayed/2-year probation] Respondent failed to complete grandparent adoption for a year, despite earlier assurances that it was a simple process that would only take a few months. Respondent failed to notify grandmother client that matter had been placed on the backburner or return her numerous calls requesting an update.

- *In re Lopata,* 29 DB Rptr 170 (2015) [90-day suspension, all stayed/2-year probation] Respondent failed to complete the filing of a trademark application or respond to the client's inquiries about the status of the application. Approximately a year later, the respondent learned that he had failed to properly file the application but failed to take steps to then complete it or promptly return the client's fee.

- *In re McVea,* 29 DB Rptr 163 (2015) [6-month suspension] In a personal injury claim for a slip and fall accident that occurred on a marina walkway, respondent failed to: act in response to requested discovery; respond to a motion and order compelling discovery; respond to a motion to dismiss for failure to comply with the court's order compelling discovery; appear at the hearing on the motion to

dismiss; inform his client that her case had been dismissed as a sanction for his failure to comply with a discovery order; obtain the dismissal order and provide it to his client; respond to defendant's attorney fee request or advise his client that defendant was requesting an award of attorney fees; file an objection to defendant's statement of attorney fees; inform his client when a supplemental judgment for fees was entered against her; and respond to requests for a copy of the dismissal order.

- *In re Throne,* 29 DB Rptr 104 (2015) [2-year suspension] As both a member of an arbitration panel and as an attorney in several matters, respondent failed to take substantive action on a number of matters for a year and a half, and also failed to communicate with clients or respond to their attempts to communicate with him. Respondent also failed to notify clients that he had not taken action on their matters or advise them at such time as his license to practice law was suspended.

- *In re Ireland,* 29 DB Rptr 53 (2015) [8-month suspension]. Respondent engaged in a course of negligent conduct in a divorce modification proceeding when she failed to secure entry of an order setting aside the order of default and supplemental judgment and failed to attend scheduling conferences prompted by her failure to submit these orders. In a second matter, respondent failed to file a paternity petition over a prolonged period, and failed to notify her client that she had not done so.

- *In re Sheasby,* 29 DB Rptr 41 (2015) [4-year suspension] Apart from reviewing information on similar patents and one email to the client, attorney took no action on patent matter, despite multiple status requests by the client. Attorney similarly took no action on a second patent matter for the client and failed to respond to the client's requests.

- *In re Vernon,* 29 DB Rptr 12 (2015) [60-day suspension, all stayed/2-year probation] Attorney was appointed to represent client in a PCR matter. After the state filed an answer, the client was released from prison and began serving a term of post-prison supervision. Thereafter, despite repeated requests from attorney's office, the client did not sign the releases necessary to obtain documents from trial counsel. Following notice to the respondent, the court dismissed the PCR for want of prosecution. In a later

review of her caseload, respondent discovered that she had not filed an amended PCR petition and that the matter had been dismissed. After she informed the client of the dismissal, she promised to seek its reinstatement, but failed to do so despite calls from the client and a complaint to the Bar.

- *In re Snell,* 29 DB Rptr 5 (2015) [60-day suspension, all but 30 days stayed/2-year probation] Attorney who filed liens against a hotel on behalf of Clients 1 and 2, filed a lawsuit seeking to foreclose Client 1's lien, and also filed an answer on behalf of Client 2 which cross claimed against the other lien-holder defendants, including Client 1. For nearly two years, respondent did nothing to advance Client 2's cross-claim.

- *In re Koenig,* 28 DB Rptr 301 (2014) [reprimand] Respondent failed to take action on client's criminal appeal for several months and to communicate important events to the client, including that the public defender's office could not assume the case and that the court had denied any further extensions to file the appeal. When matter was then dismissed, respondent took no steps to ensure his client knew or attempt to reinstate the appeal.

- *In re Allen,* 28 DB Rptr 275 (2014) [6-month suspension, all stayed/3-year probation] Respondent struggling with depression issues failed to take prompt action on several domestic relations matters and guardianship proceedings, despite inquiries from clients and opposing counsel.

- *In re Kaufman,* 28 DB Rptr 174 (2014) [disbarred] Attorney failed to complete three legal matters for which he had been retained. Specifically, he informed his clients that he would prepared documents and/or communicate with opposing counsel on his clients' positions. In all matters he failed to complete the actions he assured his clients he would take, injuring his clients in their underlying proceedings.

- *In re Segarra,* 28 DB Rptr 69 (2014) [90-day suspension, all but 30 days stayed/2-year probation] Attorney who suffered debilitating migraines accepted domestic relations cases but failed to timely attend to matters, file motions, comply with discovery requests, and was unable to appear for scheduled proceedings, resulting in attorney fees being awarded against at least one of his clients.

- *In re Andersen,* 28 DB Rptr 52 (2014) [6-month + 1-day suspension] Attorney delayed filing request for arbitration of an employment claim for nearly a year, and thereafter failed to participate, missing scheduled conferences with the arbitrator and failing to respond to his clients' attempts to contact him.

- *In re Burns,* 27 DB Rptr 279 (2013) [210-day suspension] Attorney was hired to file an affidavit of claiming successor of a small estate but failed to do so for 14 months, at which point the client requested the attorney to hold the affidavit. When the client again directed the attorney to file the affidavit, she failed to do so before being suspended from the practice of law eight months later.

- *In re Ifversen (II),* 27 DB Rptr 269 (2013) [1-year suspension, consecutive to prior 1-year suspension]. Attorney did not act on client's criminal expungement matter for six months, despite numerous requests from the client and despite promises by the attorney that he was taking action.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] Attorney neglected to review documents provided to him by opposing counsel in child custody and support proceedings that provided for his client to pay significant support to the non-custodial parent. Accordingly, he did not object to the calculations at any stage prior to their entry as a judgment. In another matter attorney failed to take any substantive action in client's divorce proceeding for nearly a year.

- *In re Kleen*, 27 DB Rptr 213 (2013). [reprimand] After obtaining fee from client to obtain an expert opinion in her medical malpractice case, attorney determined through his own informal investigation that client's case would be difficult to prove. Attorney did not inform the client of his concerns or take any further action on client's behalf, including notifying the client of or responding to claims from medical creditors, until, in response to contact from the bar, he communicated with the client shortly before the statute of limitations ran.

- *In re Vernon,* 27 DB Rptr 184 (2013) [90-day suspension] Attorney neglected two court-appointed post-conviction relief matters, at least one of which she did intentionally because she believed the client's case lacked merit. However, attorney failed to notify the

client of this belief or respond to numerous attempts by the clients to communicate with her.

- *In re Hall*, 27 DB Rptr 93 (2013) [150-day suspension] After determining that neither the insurer nor the defendant's attorney would accept service of a personal injury complaint, attorney failed to take any steps to serve defendant personally, despite court notices of the need to do so, and the case was dismissed. In a second matter, attorney failed to file accountings or respond to a citation for removal, causing his personal representative client to be removed from her husband's estate.

- *In re Steves*, 26 DB Rptr 283 (2012). [1-year suspension] In three separate domestic relations matters, attorney was instructed by the court to prepare and submit a proposed order or judgment, but she failed to do so or take other action to advance her clients' interests.

- *In re Petranovich*, 26 DB Rptr 1 (2012). [60-day suspension] After concluding that his client's civil lawsuit had no merit, attorney decided not to respond to defense motions for summary judgment, did not communicate that decision to the client, did not respond to status inquiries from the client, did not inform the client that summary judgment had been granted and the lawsuit dismissed, and did not tell the client that the opposing party had filed a motion for sanctions against the client.

- *In re Obert*, 336 Or 640, 89 P3d 1173 (2004). [30-day suspension] Attorney failed to pursue a client's adoption matter when he could not locate the birth father and did not know how to proceed. In another matter, attorney failed to file a timely notice of appeal and then failed to inform the client for five months that the appeal had been dismissed. In a third matter, attorney failed to respond to a client's repeated requests for the return of file documents. [DR 6-101(B)]

- *In re Worth*, 336 Or 256, 82 P3d 605 (2003). [90-day suspension] Attorney was part of a consortium of lawyers who received court appointments to represent indigent clients in post-conviction relief and habeas corpus proceedings. Attorney failed to read the provisions of the consortium contract, failed to notify the court that he was the lawyer assigned by the consortium to individual cases such that he did not receive various court notices, did not attend to

or monitor client matters resulting in their repeated dismissals and subsequent reinstatements, and failed to communicate with his clients. [DR 6-101(B)]

- *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003). [60-day suspension] Attorney filed a lawsuit for a client on the last day before the statute of limitations ran, but failed to effect timely service on the defendants, resulting in the suit's dismissal. This failure plus the attorney's failure to inform his client of the dismissal for over a year constituted neglect of a legal matter. [DR 6-101(B)]

3. A finding of neglect is not based solely on the passage of time. Rather, it is dependent upon the events occurring in a particular matter and the need for action by the lawyer. *See, e.g., In re Meyer,* 328 Or 220, 970 P2d 647 (1999) (attorney's neglect in domestic relations matter, while only over a two-month period, caused substantial harm to the client); *but cf., In re Snyder,* 348 Or 307, 232 P3d 952 (2010) (attorney's strategic decision not to take any action in a personal injury case over a substantial period of time, but short of the statute of limitations, was not neglect of a legal matter).

   - *In re Pizzo,* 30 DB Rptr 371 (2016) [reprimand] Respondent represented a client in responding to show cause order to modify parenting time. Respondent agreed to timely draft and file a response by the following week, with an interim draft to the client. Respondent did not send the client a draft as promised, or timely file the response, despite numerous messages from the client, and a call in which Respondent assured the client that he would follow through. The client was forced to contact another attorney for assistance and draft and file a pro se response to the show-cause order.

   - *In re Beach,* 29 DB Rptr 92 (2015) [6-month suspension] Client hired respondent to prepare a special needs trust to protect her resources, which were being depleted by the cost of in-home care. Respondent failed to complete the necessary documents for six months, despite persistent inquiries and pleas from the client about her mounting financial concerns in the absence of the trust.

   - *In re Landers,* 28 DB Rptr 15 (2014) [30-day suspension, all stayed/2-year probation] In representing a husband in a divorce,

attorney failed to take action to represent his interests, including preparing and filing income-related documents necessary for support calculations, resulting in temporary support being ordered in an amount based solely on wife's characterization of husband's income.

- *In re Burns*, 27 DB Rptr 279 (2013) [210-day suspension] Attorney was hired to file an affidavit of claiming successor of a small estate but failed to do so for 14 months, at which point the client requested the attorney to hold the affidavit. When the client again directed the attorney to file the affidavit, she failed to do so before being suspended from the practice of law eight months later.

- *In re Ifversen II*, 27 DB Rptr 269 (2013) [1-year suspension]. Attorney did not act on client's criminal expungement matter for six months, despite numerous requests from the client and despite promises by the attorney that he was taking action.

- *In re Ifversen I*, 27 DB Rptr 150 (2013) [1-year suspension] In spite of promises and representations that he was diligently proceeding on a mother's and her children's personal injury claims, attorney failed take any action prior to the statute of limitations running on mother's claim or thereafter pursue the children's claims.

- *In re Robins*, 26 DB Rptr 260 (2012). [6-month suspension/ stayed/2-year probation] Attorney failed to file a conservatorship accounting, respond to successor counsel's requests for estate financial records, or comply with two orders to show cause issued to compel attorney's surrender of the records.

- *In re Jordan*, 26 DB Rptr 191 (2012). [18-month suspension] In an immigration matter, attorney failed to attend court appearances for his client and failed to tell his client that attorney was about to be, and then was, suspended from the practice of law.

- *In re Cullen*, 26 DB Rptr 173 (2012). [disbarred] After settling personal injury matters and disbursing portions of the proceeds to the clients, attorney failed to pay medical providers with the remaining proceeds as he had agreed to do.

- *In re Franklin*, 26 DB Rptr 122 (2012). [30-day suspension] On behalf of a client, attorney agreed with defense counsel to abate

the client's lawsuit for two years in order to pursue mediation and/or arbitration. Thereafter, attorney failed to contact the designated mediator or follow through on mediation, despite inquiries from opposing counsel and the client. Ultimately, the client's case was dismissed by the court and, because attorney failed to secure as part of the abatement agreement a tolling of the statute of limitations, refiling the case was time-barred.

- *In re Redden*, 342 Or 393, 153 P3d 113 (2007). [60 days] Attorney failed to complete a child support arrearage matter for a client for nearly two years. [DR 6-101(B)]

- *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006). [3-month suspension + BR 8.1 reinstatement] Attorney committed neglect when he was appointed to handle a client's appeal, but took no action on the matter for nearly a year and allowed the appeal to be dismissed. In another matter, attorney failed to respond to a motion to dismiss from opposing counsel and did not inform the client when the motion was granted. [DR 6-101(B)]

- *In re Worth*, 337 Or 167, 92 P3d 721 (2004). [120-day suspension] Attorney failed to move a client's case forward, despite several warnings from the court and a court directive to schedule arbitration by a date certain, resulting in the court granting the opposing party's motion to dismiss. [DR 6-101(B)]

- *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004). [90-day suspension] Attorney who appealed a spousal support determination neglected the matter when he failed to keep the client informed of the status of the appeal, did not respond to the client's inquiries, and essentially abandoned the client after oral argument. A similar charge involving a second client was dismissed because attorney did keep the client informed about a pending appeal. [DR 6-101(B)]

4. Evidence of harm or injury to the client is not necessary to establish a violation. *In re Knappenberger*, 340 Or 573, 135 P3d 297 (2006)

(attorney's eight-year neglect in obtaining and filing a qualified domestics relations order for a client violated the rule, regardless of actual injury).

- *In re Dugan,* 30 DB Rptr 277 (2016) [reprimand] After attorney conducted research, drafted a demand letter, and sent tort claims notices to the appropriate agencies in pursuit of a wrongful death claim for her client's daughter, she waited nearly two years before taking any further action on the client's case. Attorney eventually filed a civil complaint just before the statute of limitations expired.

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] Attorney took on legal matters, some beyond her usual practice area, did not handle them competently, neglected a number of them and failed to respond to client inquiries.

- *In re Jackson*, 347 Or 426, 223 P3d 387 (2009). [120-day suspension] While representing a client in a dissolution of marriage proceeding, attorney was not prepared for a settlement conference he had requested, failed to send his calendar of available dates to an arbitrator, failed to respond to messages from the arbitrator's office and failed to take steps to pursue the arbitration after a second referral to arbitration by the court.

- *In re Koch*, 345 Or 444, 198 P3d 910 (2008). [120-day suspension] Attorney failed to advise her client that another lawyer would prepare a qualified domestic relations order for the client and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter.

- *OSB Legal Ethics Op No 2007-178.* Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients. Attorneys who work in public defense organizations should seek assistance from supervisors and managers in order to achieve manageable workloads. If remedial measures are not then approved, attorneys should continue up the chain of command and may have to file, without firm approval, motions to withdraw.

- *OSB Legal Ethics Op No 2005-162*. A public employee attorney does not violate RPC 1.3 by engaging in a lawful labor strike

against the public employer, provided steps are taken by the attorney in advance of the strike to insure that pending legal matters handled by the attorney are properly tended to in the attorney's absence. Where there is a substantial risk of irreparable harm to the public employer because of the attorney's absence, it may be necessary for the attorney to aid the employer during the strike to avoid neglect as to a particular legal matter.

- *OSB Legal Ethics Op No 2005-33.* An attorney who is owed fees for handling a pending appeal and who cannot locate the client must either continue with the appeal or seek leave to withdraw. The attorney cannot simply cease work.

Notes

HYPOTHETICAL

- Early in the year, Attorney Alistair agreed to act as the hearing office for an enforcement proceeding brought by the La La County Health Department against Cool Restaurant & Catering and its owner, Missy Cool. Shortly thereafter, a discovery dispute arose between the parties, who briefed their positions for Alistair.

  After the first month, Alistair became concerned about his jurisdiction to hear the matter, so he did nothing substantive on the case except write a mid-year letter requesting that the parties provide dates for a hearing.

  Alistair's attempt to determine his jurisdiction were unsuccessful, but he did not advise the parties of his concern, take further action to resolve his concerns, or withdraw from the proceeding. The following summer (a year later), the defendants moved to dismiss the matter; La La County did not oppose the motion.

Which of the Oregon Rules of Professional Conduct are implicated by Alistair's failure to act?

A. None, because there is no evidence of any harm to the parties.

B. RPC 1.3 [neglect of a legal matter].

C. RPC 1.3 [neglect of a legal matter] and RPC 8.4(a)(4) [conduct prejudicial to the administration of justice].

D. RPC 1.3 [neglect of a legal matter] and RPC 1.1 [competence].

DISCUSSION

Answer: _____

In re Noren, 29 DB Rptr 294 (2015) (30-day suspension)

HYPOTHETICAL

- After trial in a domestic relations matter, you are ordered by the court to prepare the judgment but fail to do so, resulting in the dismissal of the dissolution for lack of prosecution and in a second case, you failed to accept timely a personal injury settlement for a second client.

In either instance, did your conduct constitute neglect of a legal matter?

A. Yes.

B. No.

C. Yes as to the domestic relations matter but no as to the personal injury matter.

DISCUSSION

Answer: _____

- *In re Steves*, 26 DB Rptr 283 (2012). [1-year suspension] In three separate domestic relations matters, attorney was instructed by the court to prepare and submit a proposed order or judgment, but she failed to do so or take other action to advance her clients' interests.

- *In re Robins*, 26 DB Rptr 260 (2012). [6-month suspension/ stayed/2-year probation] Attorney failed to file a conservatorship accounting, respond to successor counsel's requests for estate financial records, or comply with two orders to show cause issued to compel attorney's surrender of the records.

- *In re Hayes,* 24 DB Rptr 157 (2010). [disbarred] Attorney repeatedly failed to file complete and accurate schedules and other required documents in bankruptcy proceedings and repeatedly failed to deliver or timely deliver documents requested by bankruptcy trustees.

- *In re Dolton,* 22 DB Rptr 7 (2008). [reprimand] Contrary to court rule and the repeated requests of the probate court, attorney failed to file a necessary document in a conservatorship and also failed to appear at a show cause hearing.

- *In re Derby,* 19 DB Rptr 316 (2005). [1-year suspension] Attorney repeatedly failed to file required documents in a probate proceeding despite numerous inquiries and directives from the court, resulting in the issuance of several show cause citations and a finding that attorney was in contempt. [DR 6-101(B)]

- *In re Young,* 295 Or 461, 666 P2d 1339 (1983). [reprimand] Attorney's inexperience and anxiety let to his inability to prepare and file a pretrial order in federal court resulting in dismissal of his client's case.

- *In re Collier,* 295 Or 320, 667 P2d 481 (1983). [reprimand] A course of negligent conduct, including failing to file pleadings within deadlines set by the court, constituted neglect under the disciplinary rule.

- *In re Franklin*, 26 DB Rptr 122 (2012). [30-day suspension] On behalf of a client, attorney agreed with defense counsel to abate the client's lawsuit for two years in order to pursue mediation and/or arbitration. Thereafter, attorney failed to contact the designated mediator or follow through on mediation, despite inquiries from opposing counsel and the client. Ultimately, the client's case was dismissed by the court and, because attorney failed to secure as part of the abatement

agreement a tolling of the statute of limitations, refiling the case was time-barred.

- *In re Koch*, 345 Or 444, 198 P3d 910 (2008). [120-day suspension] Attorney failed to communicate with the client and client's second lawyer when they needed information and assistance from attorney to complete the client's legal matter.

- *In re Meyer*, 328 Or 220, 970 P2d 647 (1999) [1-year suspension] Lawyer neglected a client's divorce matter—even though representation only last a couple of months. The client emphasized that his immediate concern was opposing his wife's request for temporary support. The lawyer failed to file the appropriate paperwork or respond to the wife's motions. The lawyer arrived unprepared to a settlement meeting and failed to provide opposing counsel necessary financial documentation, despite promising to do so.

In re Snyder, 16 DB Rptr 287 (2002) [1-year suspension]

Notes:

HYPOTHETICAL

- A Bar complaint has been filed against you alleging that you entrusted opposition of a summary judgment motion to a new associate in your office, and then failed to properly supervise the associate's response, resulting in the dismissal of your client's case. You were aware that this associate had minimal legal experience and had never before opposed a motion for summary judgment, but you assigned the matter to her nonetheless.

Would this constitute neglect of a legal matter?

A. Yes.

B. No.

DISCUSSION

Answer: _____

Note that you are responsible for your associate's failings under these facts because you both ordered the conduct and had managerial authority over the associate. *See* RPC 5.1; §9, *supra*.

In re Eadie, 333 Or 42, 36 P3d 468 (2001).

HYPOTHETICAL

- You are handling a federal worker's compensation matter for Andy Body. Body is somewhat difficult in that he's very "hands on." He calls you daily; emails your legal assistant multiple times a day; edits work on which you've literally spent hours, nitpicking your grammar, etc.

  You have previously advised Body that you would keep him informed of significant developments in the case but because of the busy nature of your practice you could not respond to every communication when there was nothing new to report. Based upon your explanation to Body, you and your paralegal have not responded to every call or email.

  Because of Body's perception that you have failed to communicate with him, he has now filed a Bar complaint against you. You disagree with the complaint and submit your response to the Bar. You also decide you must withdraw from representing Body because he filed the complaint.

Part A: Have you failed to communicate with Body as required by Oregon Rules of Professional Conduct?

A. Yes.

B. No.

DISCUSSION:

Answer: _____

- PRACTICE TIP: Once a lawyer is aware that a client's communication demands exceed the "reasonableness" requirement under the ethics rules, he or she should consider whether it is worth continuing with the representation or, at minimum, establish a regular communication schedule (in the absence of significant news in the client's matter).
  - Supp 13-1: Nancy Byerly Jones, *How You Can Eliminate Constant Telephone Interruptions,* Lawyers Weekly USA, Dec 15, 1997.

Part B: Must you withdraw because you now have a conflict of interest with Body?

A. Yes.

B. No.

DISCUSSION:

Answer: _____

In re Knappenberger, 337 Or 15, 90 P3d 614 (2004); *Oregon Formal Ethics Op. 2009-182*.

- Supp 13-2: Helen Hierschbiel, *When is Withdrawal Warranted? Representing Clients Who File Claims Against You,* OSB Bulletin, Jan 2010

HYPOTHETICAL

- Attorney Apple was appointed to represent Peter Rose on 100 state court charges related to Rose's illegal sports betting enterprise. A federal grand jury had already indicted Rose on multiple counts related to the same enterprise.

  Federal sentencing guidelines required that any sentence imposed by the federal court would run consecutively to any sentence previously imposed by the state court. Rose thus faced a possible sentence of 20 to 30 years if he was not sentenced in his federal case prior to (or at the same time as) his state case.

  For several months, Apple did not communicate with Rose, respond to his messages, or take steps to develop a defense. Rose lost confidence in Apple.

  The evidence against Rose was overwhelming, but he asserted his innocence and demanded a jury trial in state court. Once Apple restarted communications, he did not discuss Rose's options or their consequences so Rose did not have sufficient information to recognize that it was in his best interest to attempt to reduce the length of his likely incarceration through a plea agreement. The matter proceeded to trial in state court but Apple did not prepare Rose to testify or subpoena any witnesses.

Which of the Oregon Rules of Professional Conduct are implicated by Apple's representation of Rose?

A. None. Rose was guilty of all the crimes charged.

B. RPC 1.3 [neglect].

C. RPC 1.3 [neglect] and RPC 1.4 [duty to adequately communicate].

D. RPC 1.1 [competence], RPC 1.3 [neglect] and RPC 1.4 [duty to adequately communicate].

E. RPC 1.1 [competence] and RPC 1.3 [neglect].

DISCUSSION

Answer: _____

Neglect is the failure to act or the failure to act diligently. The lawyer's conduct must be viewed along a temporal continuum, rather than as discrete, isolated events. *In re Magar*, 335 Or 306, 66 P2d 1014 (2003); *In re Eadie*, 333 Or 42, 36 P3d 468 (2001). However, a substantial period of time is not required to establish neglect. *See In re Meyer*, 328 Or 220, 970 P2d 647 (1999) (attorney found to have neglected domestic relations matter, despite delay of only two months). Rather, there only must be some action required that the lawyer failed to take.

In re Lance, 21 DB Rptr 87 (2007) (6-month suspension).

HYPOTHETICAL

- Attorney Aluminum was appointed to represent Clark Kent in challenging Kent's decade-old criminal conviction. Kent contacted the court after several months to determine the status of his request for appointment of counsel. In response, the court advised Kent of Aluminum's appointment by mail and copied Aluminum.

  In each of the following two months, Kent wrote Aluminum a letter, seeking confirmation of Kent's appointment and requesting information about the status of the legal matter. Receiving no response to his letters and telephone messages, Kent filed a writ of mandamus against the judge who had appointed Aluminum. After the court advised Aluminum of the mandamus proceeding, Aluminum notified Kent of his appointment and commenced work on his legal matter.

What rule is NOT implicated by Aluminum's conduct?

A. RPC 1.3 [neglect].

B. RPC 1.4(a) [failure to comply with client requests for information].

C. RPC 1.4(b) [failure to explain a matter to the extent necessary to allow the client to make informed decisions regarding the representation].

D. RPC 8.4(a)(4) [conduct prejudicial to the administration of justice].

E. None. All of the above rules are applicable to Aluminums conduct.

DISCUSSION

Answer: _____

Notes

In re Willes, 17 DB Rptr 271 (2003) (public reprimand).

HYPOTHETICAL

- Attorney Alex was appointed to represent Convict Ted in his appeal. Ted obtained a stay of his sentence—meaning that all outstanding arrest warrants were recalled pending his appeal.

  Alex's file listed Ted's current residential and business addresses as well as his cell and home phone numbers; numbers Alex used multiple times to speak to Ted prior to the deadline for filing the brief.

  The day before the brief was due, Alex attempted to call to Ted at his residence but did not reach him. Alex did not try any of the numbers in his file.

  The following day, Alex moved to withdraw from Ted's case reporting that he had not been able to maintain contact with Ted, had no current address at which to communicate with him, and that he understood from Ted's former counsel, OJIN, and a probation officer, that Ted was on "abscond status." Alex did not serve Ted with his motion.

  (Ted had not absconded and continued to live and work at the addresses he had provided to Alex.)

  When the court granted Alex's motion, Ted's appeal was dismissed, the stay of sentence was revoked and an arrest warrant was reissued. Following his arrest, and arraignment on a probation violation, Ted called Alex and was advised that his appeal had been dismissed. The court granted Alex's request for reinstatement of the appeal but denied reinstatement of the stay.

Which of these rules is NOT implicated by Alex's conduct?

A. RPC 1.3 [neglect of a legal matter].

B. RPC 1.4(a) & (b) [failure to communicate].

C. RPC 1.8(b) [prohibition against use of information to disadvantage of a client].

D. RPC 1.16(d) [failing to take reasonable steps to protect a client's interests upon withdrawal].

E. RPC 8.4(a)(4) [conduct prejudicial to the administration of justice].

DISCUSSION

Answer: _____

In re Johnson, 17 DB Rptr 185 (2003).

C. Communication

1. The duty to adequately communicate with clients has always been a part of the duty of diligence (previously under DR 6-101(B), currently under RPC 1.4). *See, e.g., In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997) ("A lawyer owes to a client the duty of diligence, which requires that the lawyer communicate with and keep the client informed of the status, progress, and disposition of a legal matter.")

    - Supp 13-3: Sylvia Stevens, *Let's Talk: The Value of Good Client Communication,* OSB Bulletin, Aug/Sept 2007

RULE 1.4 COMMUNICATION

(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.

2. An attorney must communicate bad news as well as good news to the client, and a failure to do so timely violates the rule. *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006).

    - Supp 13-4: Mark J. Fucile, *Difficult Conversations: Telling Clients About Mistakes,* OSB Bulletin, June 2007

3. What is "reasonably informed?"

    - *In re Bosse*, 30 DB Rptr 311 (2016) [24-month suspension] Plaintiff in collections matter filed for summary judgment against Respondent's client, but agreed to defer the ruling and then rescheduled arbitration a number of times based on Respondent's assurances to return a proposed judgment. Respondent informed his client that the plaintiff had made a fair settlement offer but, for two years, Respondent failed to notify his client that he had received the proposed judgment, provide her with a copy, or explain its terms, despite the client's repeated requests for details regarding the settlement. Plaintiff was granted

summary judgment and a garnishment was issued against Respondent's client, which is how she learned that summary judgment had been granted.

- *In re Johnson*, 30 DB Rptr 300 (2016) [4-year suspension, 30 months stayed/3-year probation] Respondent was asked by his post-conviction client to object to proposed amendment to the original criminal conviction. Respondent failed to communicate his client's objections to either the court or the prosecutor until after the amendment had already been entered. Respondent failed to communicate the timing of the proposed amended judgment to his client or keep his client informed about the status of the matter. In other matters, Respondent made calendaring errors and procedural mistakes and failed to promptly or adequately inform his clients that he had missed deadlines in their cases.

- *In re Hellewell*, 30 DB Rptr 204 (2016) [30-day suspension, all stayed/18-month probation] Client requested that attorney file a petition seeking relief from his sex offender reporting requirement. After drafting the petition, Respondent failed to file it. The client's wife made numerous requests for a status update but Respondent provided no information other than his erroneous assertions that the petition had been filed. When Respondent checked the file, he discovered he had not filed the petition.

- *In re Burt*, 30 DB Rptr 139 (2016) [reprimand] Although Respondent met several times with the client at the jail, Respondent failed during these meetings to adequately explain the issues or status of the case, including a potential plea offer from the prosecution.

- *In re Ferrua*, 30 DB Rptr 99 (2016) [181-day suspension/restitution] Respondent who represented a client incarcerated on drug-related charges, requested and received a 90-day extension of the trial date. From the arraignment to the day before the rescheduled trial, Respondent only met once with his client, had only a few brief telephone calls with him, and had no written communication. Two months before trial, Respondent took a vacation out of the country but did not inform his client of his plans to be away nor inform his client when he was hospitalized shortly after returning to the states. Four days before the rescheduled trial date, Respondent told the court he would be seeking a continuance but failed to file the motion and did not

consult with his client about a speedy trial waiver or any changes in the trial date.

- *In re Landers*, 30 DB Rptr 89 (2016) [disbarred] Client learned after termination of representation that Respondent failed to reply to a motion or to inform the client about an upcoming hearing.

- *In re Smale*, 30 DB Rptr 51 (2016) [60-day suspension, all stayed/2-year probation] Respondent represented client in a Chapter 7 bankruptcy but failed to notify her client of a scheduled adversary proceeding or upcoming hearing; did not consult with her client to determine how the client wished to proceed with the case; did not explain the significance of the proceedings and how they would affect her case; and did not discuss resolving the matter with the trustee.

- *In re Erm*, 30 DB Rptr 1 (2016) [30-day suspension] Respondent represented a wife who lived in Utah with her three children in a dissolution and custody determination filed by husband in Oregon. Respondent made an initial appearance and moved to sever the custody matter from the dissolution proceeding but did not file a response to husband's petition for dissolution. Respondent did not contest Oregon's jurisdiction in the dissolution and the court held that Oregon had jurisdiction on all issues except custody. Shortly after the court's ruling, it is disputed as to whether Respondent notified the wife that his representation was concluded but he did not notify the court of any withdrawal. When husband moved for a default in the dissolution, Respondent did not respond or object to the motion, or forward the motion or subsequent order of default and proposed general judgment to wife or to her Utah attorney. When wife learned about the default, she asked Respondent to protest the judgment, which he agreed to do, but then failed to follow through or respond to the wife's request regarding the status.

- *In re Aman*, 29 DB Rptr 334 (2015) [1-year suspension, all but 6 months stayed, 2-year probation] Respondent failed to actively pursue client's patent infringement action; failed to respond to the client's attempts to communicate with him; failed to explain to the client the ramifications of his discovery of "prior art" on the client's infringement claim; and failed to convey that he intended to take no further action on the client's behalf.

- *In re Merrill*, 29 DB Rptr 306 (2015) [120-day suspension, all but 30 days stayed/2-year probation] Respondent failed to timely pursue his client's claim for damages to her mobile home resulting from a sewage flood, and failed to convey to his client communications from the mobile home park regarding her property or his efforts on her behalf.

- *In re Houston*, 29 DB Rptr 238 (2015) [150-day suspension + BR 8.1] Respondent failed to communicate with his client after sending initial demand letter to her former employer on her behalf, including failing to notify her of subsequent communications respondent had with the employer.

- *In re Cross*, 29 DB Rptr 229 (2015) [reprimand] Respondent was hired to modify divorce judgment because client planned to move out of the country in less than five months. When he and his children became ill beginning the month after he was retained, respondent failed to take any action on the matter, notify the client that he was unable to do so, or respond to the client's email communications regarding the matter.

- *In re Peterson*, 29 DB Rptr 221 (2015) [60-day suspension, all stayed/2-year probation] Respondent failed to complete grandparent adoption for a year, despite earlier assurances that it was a simple process that would only take a few months. Respondent failed to notify grandmother client that matter had been placed on the backburner or return her numerous calls requesting an update.

- *In re Lopata*, 29 DB Rptr 170 (2015) [90-day suspension, all stayed/2-year probation] Respondent failed to complete the filing of a trademark application or respond to the client's multiple inquiries about the status of the application. Approximately a year later, the respondent learned that he had failed to properly file the application but failed to take steps to then complete it or promptly return the client's fee.

- *In McVea*, 29 DB Rptr 163 (2015) [6-month suspension] In a personal injury claim for a slip and fall accident that occurred on a marina walkway, respondent failed to notify his client: about requested discovery; that a motion and order compelling discovery had been filed; that a motion to dismiss for failure to comply with the court's order compelling discovery had been filed; a hearing on the motion to dismiss was scheduled; that her case had been dismissed as a sanction for the attorney's failure to comply with a discovery order; that defendant was requesting an award of attorney fees; that he did not file

an objection to defendant's statement of attorney fees; and that a supplemental judgment for fees was entered against her.

- *In re Throne*, 29 DB Rptr 104 (2015) [2-year suspension] As both a member of an arbitration panel and as an attorney in several matters, respondent failed to take substantive action on a number of matters for a year and a half, and also failed to communicate with clients or respond to their attempts to communicate with him. Respondent also failed to notify clients that he had not taken action on their matters or advise them his license to practice law was suspended.

- *In re Beach*, 29 DB Rptr 92 (2015) [6-month suspension] Client hired respondent to prepare a special needs trust to protect her resources, which were being depleted by the cost of in-home care. Respondent failed to respond or timely respond to multiple inquiries from her client over the course of more than six months, requesting an update on when the trust documents would be ready.

- *In re Ireland*, 29 DB Rptr 53 (2015) [8-month suspension]. Respondent failed to adequately communicate with at least four clients in their separate domestic relations matters.

- *In re Vernon*, 29 DB Rptr 12 (2015) [60-day suspension, all stayed/2-year probation] Respondent was appointed to represent client in a PCR matter. After the state filed an answer, the client was released from prison and began serving a term of post-prison supervision. Thereafter, despite repeated requests from respondent's office, the client did not sign the releases necessary to obtain documents from trial counsel. Following notice to the respondent, the court dismissed the PCR for want of prosecution. In a later review of her caseload, respondent discovered that she had not filed an amended PCR petition and that the matter had been dismissed. After she informed the client of the dismissal, she promised to seek its reinstatement, but failed to do so despite calls from the client and a complaint to the Bar.

- *In re Koenig*, 28 DB Rptr 301 (2014) [reprimand] Respondent represented a client in his appeal of a conviction for felony murder. The court of appeals affirmed the conviction and respondent had 35 days in which to file a motion for review by the Oregon Supreme Court. Because the client could not afford a further appeal he requested respondent withdraw and arrange for the Oregon Public Defense Services Appellate Division to substitute as counsel. During the next

several months respondent failed to respond to the client's repeated requests for information as to the deadline for filing for review and as to whether arrangements had been made for substitute counsel. Respondent was unsuccessful in obtaining substitute counsel and failed to inform the client. Respondent waited three months before informing the client of the court's denial of his request for review and that he had not yet withdrawn from the case.

- *In re Bertoni*, 28 DB Rptr 196 (2014) [6-month suspension] Respondent did not ensure that all his clients were aware of his upcoming suspension and the intended substitution of another attorney on respondent's behalf during that suspension. In another matter, respondent failed to notify his criminal client over several years that the state was seeking, and later obtained, an amended judgment, which amendment may have breached the plea agreement. [DR 6-101(B) & RPC 1.4(a)]

- *In re Kaufman*, 28 DB Rptr 174 (2014) [disbarred] Respondent repeatedly and consistently failed to adequately communicate with clients in three separate matters, failed to respond to their efforts to communicate with him and refused to provide information when requested.

- *In re Segarra*, 28 DB Rptr 69 (2014) [90-day suspension, all but 30 days stayed/2-year probation] Respondent missed two discovery deadlines in divorce proceeding. On the eve of trial someone called the client on respondent's behalf and informed her that respondent was sick and could not attend the trial but that both the opposing counsel and the court had been notified. When client went to the courthouse the next day she learned that neither the opposing counsel nor the court had been informed that respondent was not able to attend the trial.

- *In re Malco*, 27 DB Rptr 88 (2013) [reprimand] After recognizing that he had miscalculated at the time he was retained by his client the scope of necessary work to research and competently represent the client in her civil matter, attorney failed to communicate that fact to the client or undertake the work without having obtained her approval. Attorney thereafter failed to respond to the requests for a status update and took no further action until he learned that the client had contacted the Bar.

- *In re Fjelstad*, 27 DB Rptr 68 (2013) [30-day suspension] Attorney failed to inform client of receipt of six settlement checks over a period of four years.

- *In re Smith*, 27 DB Rptr 32 (2013) [90-day suspension] Attorney failed to notify parent client that minor's personal injury award judgment had been paid by the obligor, received by the attorney, disbursed by the attorney to the guardian ad litem and that guardian ad litem had issued a satisfaction.

- *In re Klahn*, 26 DB Rptr 246 (2012). [90-day suspension] Attorney was removed from court-appointed criminal case because he did not maintain contact with his incarcerated client and the court was concerned that the defense was not ready for trial.

- *In re Ingram*, 26 DB Rptr 65 (2012). [reprimand] After concluding that his client's lawsuit had no merit, and before consulting with his client, attorney informed opposing counsel that he would not oppose a defense motion for summary judgment. He also did not convey to his client a defense proposal to stipulate to a dismissal without costs, did not notify his client that the case had been dismissed, and waived any objection to a form of judgment which included costs.

- *In re Petranovich*, 26 DB Rptr 1 (2012). [60-day suspension] After concluding that his client's civil lawsuit had no merit, attorney decided not to respond to defense motions for summary judgment, did not communicate that decision to the client, did not respond to status inquiries from the client, did not inform the client that summary judgment had been granted and the lawsuit dismissed, and did not tell the client that the opposing party had filed a motion for sanctions against the client.

- *In re Deal*, 25 DB Rptr 251 (2011). [reprimand] In a criminal defense matter, attorney obtained a hearing continuance at the client's request, but thereafter failed to notify the client of the rescheduled hearing date or respond to status inquiries from, and on behalf of, the client.

- *In re Hunt*, 25 DB Rptr 233 (2011). [reprimand] After an adverse ruling in a child custody and support matter, attorney did not provide the client with the proposed judgment prepared by opposing counsel, did not inform the client that the opposing party was seeking an award of

attorney fees, and did not advise the client that the judgment for attorney fees had been entered.

- *In re McCaffrey*, 25 DB Rptr 190 (2011). [60-day suspension] Attorney neglected a dissolution of marriage matter she filed on behalf of a client, resulting in the proceeding twice being dismissed by the court for lack of prosecution and the court denying the second motion to reinstate the case. Attorney did not inform the client of the dismissals, the first reinstatement or the court's refusal to reinstate the case a second time. She also failed to respond to the client's status inquiries.

- *In re Edelson*, 25 DB Rptr 172 (2011). [90-day suspension] In a workers' compensation appeal, attorney decided he could not file a brief that advanced a nonfrivolous position, but did not inform his client of this or respond to multiple inquiries from the client, opposing counsel or the court.

- *In re Dole*, 25 DB Rptr 56 (2011). [reprimand] Attorney represented father and mother in estate planning and family business matters, and continued to represent father after mother died. Attorney also began to represent the adult children regarding their concerns over the valuation, liquidation and distribution of assets from mother's estate to father, fathers' spending habits and control over the family business entities. Attorney failed to keep father reasonably informed about the children's concerns and what attorney was doing to address those concerns.

- *In re Bailey*, 25 DB Rptr 19 (2011). [reprimand] Attorney accepted a settlement offered by an opposing party without consulting with, or obtaining authority from, the attorney's client.

- *In re Misfeldt*, 24 DB Rptr 25 (2010) [reprimand] Attorney failed to communicate with her elderly client during representation, believing third-party reports and court documents that client was incompetent.

- *In re Groom*, 20 DB Rptr 199 (2006). [30-day suspension] Attorney represented several clients in appeals of post-conviction relief cases. While attorney filed opening briefs for the clients, he did not notify the clients when state motions for summary affirmance were granted, did not timely file petitions for review and did not keep the clients reasonably informed about the status of their appeals.

- *OSB Legal Ethics Op No 2007-178*. Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients, keeping each client reasonably informed, explaining each matter to the extent necessary to permit the client to make informed decisions and abiding by the decisions the client is entitled to make.

- *OSB Legal Ethics Op No 2005-162*. A public employee attorney who is on strike must keep attorney's client reasonably informed to permit the client to make informed decisions.

4. Responding to reasonable requests from the client

- *In re Pizzo*, 30 DB Rptr 371 (2016) [reprimand] Attorney represented a client in responding to show cause order to modify parenting time. As the deadline for response approached, the client left numerous messages regarding the status of the promised draft response but attorney failed to reply to them.

- *In re Allen*, 30 DB Rptr 362 (2016) [60-day suspension/formal reinstatement/restitution] Respondent repeatedly failed to communicate with her client, failed to respond to her client's efforts to communicate with her, and refused to provide information to the client when requested to do so.

- *In re LeClaire*, 30 DB Rptr 338 (2016) [120-day suspension, all but 30 days stayed/two-year probation] On the same day a client signed a written flat-fee agreement and paid attorney to represent him on a probation violation, attorney negotiated a resolution with the client's probation officer. During the next few weeks the client made numerous attempts to contact attorney, but he failed to respond.

- *In re Inokuchi*, 30 DB Rptr 321 (2016) [60-day suspension] Court-appointed client repeatedly requested information regarding his case, including information on issues related to funding for a private investigator and to trial-witness subpoenas. Respondent failed to respond to any of the client's requests for information.

- *In re Dugan*, 30 DB Rptr 277 (2016) [reprimand] Respondent was retained to develop a claim for the wrongful death of his client's

daughter. Although she initially drafted a demand letter, and sent tort claims notices to the appropriate agencies, Respondent waited nearly two years before taking any further action on the case. During that two-year period, the client made multiple inquiries regarding the status of her case and urging Respondent to take action. Respondent failed to reply to the client's inquiries, apart from a few promises to act within the next few days.

- *In re Burt*, 30 DB Rptr 139 (2016) [reprimand] During the course of court-appointed representation, client sent Respondent multiple letters and left multiple voice-mails requesting updates and information about the case. Respondent failed to reply to the client's requests for information, or respond to the client's mental health worker's messages.

- *In re Landers*, 30 DB Rptr 89 (2016) [disbarred] A client retained Respondent to represent the client in a custody case. Several months later the client terminated the representation because Respondent stopped replying to the client's inquiries.

- *In re Merrill*, 29 DB Rptr 306 (2015) [120-day suspension, all but 30 days stayed/2-year probation] After agreeing to write a demand letter to a client's neighbor, respondent did not take action on her matter for more than a year, and failed to respond to her attempted communications with him for approximately half of the time.

- *In re Cross*, 29 DB Rptr 229 (2015) [reprimand] Respondent was hired to modify divorce judgment because client planned to move out of the country in less than five months. When he and his children became ill beginning the month after he was retained, respondent failed to take any action on the matter, notify the client that he was unable to do so, or respond to the client's email communications regarding the matter.

- *In re Peterson*, 29 DB Rptr 221 (2015) [60-day suspension, all stayed/2-year probation] Respondent failed to complete grandparent adoption for a year, despite earlier assurances that it was a simple process that would only take a few months. Respondent failed to notify grandmother client that matter had been placed on the backburner or return her numerous calls requesting an update.

- *In re Sheasby*, 29 DB Rptr 41 (2015) [4-year suspension] Apart from reviewing information on similar patents and one email to the client,

respondent took no action on patent matter, despite multiple status requests by the client. Respondent similarly took no action on a second patent matter for the client and failed to respond to the client's requests.

- *In re Allen*, 28 DB Rptr 275 (2014) [6-month suspension, all stayed, 3-year probation] Respondent struggling with depression issues failed to respond to numerous client inquiries about the status of their legal matters.

- *In re Segarra*, 28 DB Rptr 69 (2014) [90-day suspension, all but 30 days stayed/2-year probation] Respondent was retained to modify a client's parenting time and to respond to an order to show cause to enforce parenting time. Respondent drafted the motion but failed to file it with the court. The client made numerous requests to review documents that she had provided to respondent, but respondent did not reply and did not respond to the client's repeated request for information about her case.

- *In re Andersen*, 28 DB Rptr 52 (2014) [6-month + 1-day suspension] Respondent delayed filing request for arbitration of an employment claim for nearly a year, and thereafter failed to participate, missing scheduled conferences with the arbitrator and failing to respond to his clients' attempts to contact him.

- *In re Landers*, 28 DB Rptr 15 (2014) [30-day suspension, all stayed/2-year probation] In representing a husband in a divorce, attorney failed to respond to husband's attempts to contact her or otherwise communicate with him for several months in advance of a support hearing, including to notify him of the hearing.

- *In re May*, 27 DB Rptr 200 (2013). [reprimand] Attorney failed to respond to client's attempts to reach her for a number of months, resulting in the client coming to her office to find that the office had been moved out of town. Client did not obtain a response from attorney until after she contacted the bar.

- *In re Vernon*, 27 DB Rptr 184 (2013) [90-day suspension] Attorney neglected two court-appointed post-conviction relief matters, at least one of which she did intentionally because she believed the client's case lacked merit. However, attorney failed to notify the client of this

belief or respond to numerous attempts by the clients to communicate with her.

- *In re Ifversen*, 27 DB Rptr 150 (2013) [1-year suspension] Attorney repeatedly did not respond to telephone calls and canceled appointments he had made with his client to discuss the status of her and her children's personal injury case. When attorney did respond, he did not provide truthful information, falsely stating that the matter had been filed and was proceeding.

- *In re Grimes*, 27 DB Rptr 105 (2013) [reprimand] Unclear how to handle an increasingly complicated guardianship/conservatorship where an insurer was seeking a probate proceeding and attorney questioned proper venue, she failed to respond to her client's attempts to communicate with her regarding the status over several months.

- *In re Hall*, 27 DB Rptr 93 (2013) [150-day suspension] Attorney admitted to having limited contact with his client over three-year period and attorney failed to respond to client's numerous calls.

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] Attorney took on legal matters, some beyond her usual practice area, did not handle them competently, neglected a number of them and failed to respond to client inquiries.

- *In re Throne*, 25 DB Rptr 255 (2011). [30-day suspension] In a real property matter, attorney failed to respond to status inquiries from an out-of-state client and then failed to return to the client the unearned portion of the client's retainer.

- *In re Bryant*, 25 DB Rptr 167 (2011). [reprimand] In a child support modification matter, attorney failed to file timely a request for a hearing disputing a proposed administrative order, failed to communicate a settlement proposal to his client or respond to the proposal, failed to appeal the order, and failed to respond to the client's requests for information.

- *In re Erickson*, 25 DB Rptr 64 (2011). [90-day suspension] Attorney failed to file a motion to set aside a client's criminal conviction, causing the client to lose his employment. Client made numerous status inquiries, but attorney failed to respond.

- *In re Slininger*, 25 DB Rptr 8 (2011). [reprimand] Attorney failed to respond to his incarcerated client's requests for assistance in correcting the criminal judgment that erroneously stated the client was not eligible for good time credit. A corrected judgment ultimately was entered, but not until the client had nearly completed the full term of his sentence.

- *In re Daum*, 24 DB Rptr 199 (2010) [120-day suspension] Client attempted to contact attorney when she learned that her bankruptcy had not been discharged, but attorney did not return her calls for several weeks.

- *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) [30-day suspension] In personal injury claim attorney ignored the client's repeated requests for updates and information about the case and for confirmation of the client's understanding of how the case would proceed.

- *In re Koch*, 345 Or 444, 198 P3d 910 (2008). [120-day suspension] Attorney failed to communicate with her client and client's second lawyer when they needed information and assistance from attorney to complete the legal matter.

5. Types of events requiring an explanation under RPC 1.4(b).

   a. <u>Initiation of and/or inclusion in litigation</u>

      - *In re Hilborn*, 24 DB Rptr 233 (2010) [30-day suspension] Attorney failed to notify his clients that he had included them as plaintiffs in a lawsuit and failed to update them on the status of the case at any time through the entry of an adverse judgment against them.

      - *In re Spencer*, 24 DB Rptr 209 (2010) [90-day suspension] Attorney failed to respond to client's inquiries over a nine-month period regarding her efforts to halt improper garnishments against the client. Months after the garnishments were halted, without consulting with or notice to the client, attorney filed a proceeding to have the judgment declared satisfied. In another matter, attorney failed to respond to more than six months of inquires from adoption client.

b. Determination that a client's case lacks merit

- *In re Aman,* 29 DB Rptr 334 (2015) [1-year suspension, all but 6 months stayed, 2-year probation] Respondent failed to actively pursue client's patent infringement action; failed to respond to the client's attempts to communicate with him; failed to explain to the client the ramifications of his discovery of "prior art" on the client's infringement claim; and failed to convey that he intended to take no further action on the client's behalf.

- *In re Merrill,* 29 DB Rptr 306 (2015) [120-day suspension, all but 30 days stayed/2-year probation] After agreeing to write a demand letter to a client's neighbor, respondent decided that the client did not have any claim that could successfully be pursued but did not convey this information to the client or take action on her matter for more than a year. When client subsequently reached respondent after a year, the client was led to believe that respondent would soon be sending the neighbor a demand letter; respondent did not inform the client that he would not be doing so.

- *In re Kleen*, 27 DB Rptr 213 (2013). [reprimand] After attorney determined that client's case would be difficult to prove, he did not inform the client of his concerns, respond to the client's inquiries, or take any further action her behalf, including notifying the client of claims by medical creditors, until after the client contacted the bar.

- *In re Ingram*, 26 DB Rptr 65 (2012). [reprimand] After concluding that his client's lawsuit had no merit, and before consulting with his client, attorney informed opposing counsel that he would not oppose a defense motion for summary judgment. He also did not convey to his client a defense proposal to stipulate to a dismissal without costs, did not notify his client that the case had been dismissed, and waived any objection to a form of judgment which included costs.

- *In re Petranovich*, 26 DB Rptr 1 (2012). [60-day suspension] After concluding that his client's civil lawsuit had no merit, attorney decided not to respond to defense motions for summary judgment, did not communicate that decision to the client, did not respond to status inquiries from the client, did not

inform the client that summary judgment had been granted and the lawsuit dismissed, and did not tell the client that the opposing party had filed a motion for sanctions against the client.

- *In re Snyder*, 348 Or 307, 232 P3d 952 (2010) [30-day suspension] In personal injury claim attorney failed to keep his client reasonably informed about the status of the case when he did not apprise the client about communications with the hotel, the client's health insurer's assertion of recovery rights, or his own judgment that settlement negotiations should not be commenced.

- *In re Dames*, 23 DB Rptr 105 (2009). [reprimand] After concluding that his client's medical malpractice case lacked merit, attorney failed to respond to repeated inquiries from opposing counsel and ultimately conceded a defense motion for summary judgment and dismissal of the case without notice to his client.

c. <u>Inability or unavailability for hearings or continued practice</u>

- *In re Hudson*, 30 DB Rptr 40 (2016) [120-day suspension/60 days stayed/one-year probation] A week before the date his suspension was to start in another disciplinary matter, respondent appeared in court to argue his client's appeal in a child support mater. At no time did respondent inform his client of his suspension, nor did he recommend that she consult with another lawyer, assist her in finding another lawyer, or provide her with her client file. Respondent also failed to withdraw from the client's case or inform the court that he could not represent her due to his suspension. When the court issued a judgment mostly favorable to the opposing party, the opposing party sought reconsideration and attorney fees. The client was unable to make an informed decision as to whether to challenge the court's decision or the petition for attorney fees because respondent was unable to counsel her due to his suspension. He also failed to inform her of his inability to represent her, and failed to help her find another lawyer.

- *In re Throne,* 29 DB Rptr 104 (2015) [2-year suspension] As both a member of an arbitration panel and as an attorney in

several matters, respondent failed to take substantive action on a number of matters for a year and a half, and also failed to communicate with clients or respond to their attempts to communicate with him. Respondent also failed to notify clients that he had not taken action on their matters or advise them at such time as his license to practice law was suspended.

- *In re Jordan*, 26 DB Rptr 191 (2012). [18-month suspension] In an immigration matter, attorney failed to attend court appearances for his client and failed to tell his client that attorney was about to be, and then was, suspended from the practice of law.

- *In re Bottoms*, 23 DB Rptr 13 (2009). [reprimand] Attorney failed to appear for court hearings related to his client's criminal case, did not notify the court or his client in advance about his intent or inability to appear, did not fully explain the district attorney's settlement offer to his client and failed to otherwise keep the client reasonably informed about the status of the case.

d. <u>Involvement of other professionals, coverage by another attorney and/or delegation to another attorney</u>

- *In re Bertoni*, 28 DB Rptr 196 (2014) [6-month suspension] Respondent did not ensure that all his clients were aware of his upcoming suspension and the intended substitution of another attorney on respondent's behalf during that suspension. In another matter, respondent failed to notify his criminal client over several years that the state was seeking, and later obtained, an amended judgment, which amendment may have breached the plea agreement. [DR 6-101(B) & RPC 1.4(b)]

- *In re Koch*, 345 Or 444, 198 P3d 910 (2008). [120-day suspension] Attorney failed to advise her client that another lawyer would prepare a qualified domestic relations order for the client and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter.

e. Hearings or motions (or other events) that are potentially dispositive of case or claims

- *In re Smale*, 30 DB Rptr 51 (2016) [60-day suspension, all stayed/2-year probation] Respondent represented client in a Chapter 7 bankruptcy but failed to notify her client of a scheduled adversary proceeding or upcoming hearing; did not consult with her client to determine how the client wished to proceed with the case; did not explain the significance of the proceedings and how they would affect her case; and did not discuss resolving the matter with the trustee.

- *In re McVea,* 29 DB Rptr 163 (2015) [6-month suspension] In a personal injury claim for a slip and fall accident that occurred on a marina walkway, respondent failed to explain to his client that: the defendant had requested discovery; he had failed to provide discovery; a motion and order compelling discovery had been filed; a motion to dismiss for failure to comply with the court's order compelling discovery had been filed; a hearing on the motion to dismiss was scheduled; her case had been dismissed as a sanction for the attorney's failure to comply with a discovery order; defendant was requesting an award of attorney fees; he did not file an objection to defendant's statement of attorney fees; and a supplemental judgment for fees was entered against her.

- *In re Allen,* 28 DB Rptr 275 (2014) [6-months suspension, all stayed, 3-year probation] In representing a client in a custody matter, respondent failed to forward a dispositive judgment to her client or explain its import.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In a custody and support proceeding, attorney failed to provide client with forms of orders that effected his custodial rights and support obligations. He also failed to notify him of dispositive hearings or the results. In another matter, attorney failed to notify client that he had moved his office more than an hour away.

- *In re Klahn*, 26 DB Rptr 246 (2012). [90-day suspension] Attorney was removed from court-appointed criminal case because he did not maintain contact with his incarcerated client

and the court was concerned that the defense was not ready for trial.

- *In re Franklin*, 26 DB Rptr 122 (2012). [30-day suspension] On behalf of a client, attorney agreed with defense counsel to abate the client's lawsuit for two years in order to pursue mediation and/or arbitration. Thereafter, attorney failed to contact the designated mediator or follow through on mediation, despite inquiries from opposing counsel and the client. Ultimately, the client's case was dismissed by the court and, because attorney failed to secure as part of the abatement agreement a tolling of the statute of limitations, refiling the case was time-barred.

- *In re Dames*, 23 DB Rptr 105 (2009). [reprimand] After concluding that his client's medical malpractice case lacked merit, attorney failed to respond to repeated inquiries from opposing counsel and ultimately conceded a defense motion for summary judgment and dismissal of the case without notice to his client.

- *In re Karlin*, 24 DB Rptr 31 (2010) [60-day suspension] Client elected to appeal adverse arbitration decision in a civil matter. Prior to trial, attorney agreed to dismiss one of the claims without advising the client or explaining the significance of the dismissal.

f. <u>Dismissal of case</u>

- *In re Hellewell,* 30 DB Rptr 204 (2016) [30-day suspension, all stayed/18-month probation] Client requested that respondent file a petition seeking relief from his sex offender reporting requirement. When respondent finally filed the petition he then failed to respond to the wife's requests for a status update on the case, or timely inform his client of the court's denial of the petition.

- *In re McCaffrey*, 25 DB Rptr 190 (2011). [60-day suspension] Attorney neglected a dissolution of marriage matter she filed on behalf of a client, resulting in the proceeding twice being dismissed by the court for lack of prosecution and the court denying the second motion to reinstate the case. Attorney did not inform the client of the dismissals, the first reinstatement or

the court's refusal to reinstate the case a second time. She also failed to respond to the client's status inquiries.

- *In re Jordan*, 24 DB Rptr 218 (2010) [60-day suspension] Attorney prepared a draft stipulated final judgment on behalf of wife for separation and dissolution, but failed to ensure that it was signed before husband left the country without complying with the parties' agreement. Wife's case was dismissed for lack of prosecution and attorney failed to notify her of that fact for nearly two years.

- *In re Colby*, 24 DB Rptr 47 (2010) [30-day suspension] Attorney failed to take action on behalf of two separate clients, resulting in the clients' claims being dismissed by the court for lack of prosecution. Attorney also failed to communicate adequately with the clients or inform them timely of the dismissals.

- *In re Karlin*, 24 DB Rptr 31 (2010) [60-day suspension] Prior to trial in a litigated matter, attorney agreed with opposing counsel to dismiss one of his client's claims without notifying the client that he had done so or explaining the potential significance of the dismissal.

- *In re Dames*, 23 DB Rptr 105 (2009). [reprimand] After concluding that his client's medical malpractice case lacked merit, attorney failed to respond to repeated inquiries from opposing counsel and ultimately conceded a defense motion for summary judgment and dismissal of the case without notice to his client.

- *In re Banks*, 21 DB Rptr 193 (2007). [7-month suspension] Attorney unilaterally dismissed a client's medical malpractice lawsuit without her knowledge or consent, and then failed to inform the client that he had done so.

- *In re Perry*, 21 DB Rptr 24 (2007). [97-day suspension] Attorney failed to complete an uncontested adoption over a five year period, twice allowing the matter to be dismissed by the court. He also failed to respond to client inquiries, failed to inform the clients of the dismissals, and did not tell them that he had moved.

- *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006). [3 months + BR 8.1 reinstatement] Attorney committed neglect when he was appointed to handle a client's appeal but took no action on the matter for nearly a year and allowed the appeal to be dismissed. Attorney failed to disclose the dismissal to the client. The fact that the appeal may not have had any arguable merit does not excuse the violation.

- *In re Koessler*, 20 DB Rptr 246 (2006). [2-year suspension] In a step-parent adoption, attorney did not respond to numerous inquiries from her clients, did not inform them that she was moving out-of-state and did not disclose that the court had dismissed the proceeding for lack of prosecution.

g. Change of office

- *In re Allen,* 30 DB Rptr 362 (2016) [60-day suspension/formal reinstatement/restitution] Respondent failed to keep her client informed of status conferences, agreements between her and opposing counsel, and hearing dates. Additionally, Respondent abandoned her law office without informing her client of her new location or of how to contact her.

- *In re LeClaire*, 30 DB Rptr 338 (2016) [120-day suspension, all but 30 days stayed/two-year probation] Respondent moved his office to a new location but failed to notify a former client that he had moved, so that when the former client requested his file, Respondent did not respond.

h. Conflicts of interest

- *In re Romano*, 30 DB Rptr 61 (2016) [60-day suspension] Respondent represented a client on DUII charges and related matters. During the representation, respondent and the client developed a personal relationship. Respondent attempted to create a conflict waiver, but it failed to provide sufficient information to allow the client to determine whether respondent should continue to represent her in the matters.

- *In re Snell*, 29 DB Rptr 5 (2015) [60-day suspension, all but 30 days stayed/2-year probation] Respondent who filed liens against a hotel on behalf of Clients 1 and 2, filed a lawsuit seeking to foreclose Client 1's lien, and also filed an answer on behalf of Client 2 which cross claimed against the other lien-holder defendants, including Client 1. Respondent failed to disclose to Client 1 or 2 that she could not ethically represent Client 2 until after she had completed her representation of Client 1; and she failed to disclose to Client 2 that, on Client 1's behalf, she would immediately foreclose Client 2's lien. Respondent did not tell Client 2 that she had entered negotiations with hotel on behalf of Client 1. Instead, she asserted various reasons why efforts to recover on Client 2's claim were delayed.

- *In re Gatti,* 356 Or 32, 333 P3d 994 (2014) [90-day suspension] Respondent failed to apprise his multiple clients how a lump sum settlement offer would be allocated among them, and failed provide them with the disclosures required by RPC 1.7(a)(2) and RPC 1.8(j) for such an allocation.

Notes

ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP

Section 14 — Confidences/Secrets and Other Limitations on Disclosure of Client Information

HYPOTHETICAL

- Attorney Austin sent a message to members of the National Workers' Compensation listserv (with 3000+ attorney members). Austin's email concerned his former client, Donna Workman, and discussed personal and medical information Austin had learned during the course of her representation.

  Austin said he was sending the info to the listserv to "provide some background on [Workman's] case, in the event you are contacted by her." The message characterized Workman as "difficult" and suggested that she was now "attorney shopping" because she was unwilling to accept a "very fair" offer from a workers' compensation insurer.

  Finally, Austin referenced his right to an attorney's lien on any eventual recovery obtained on his former client's behalf.

Austin would have been permitted to send the email if:

A. The listserv had only a statewide distribution and not a national one.

B. The listserv had been to claimants' attorneys only.

C. The e-mail had included information in addition to his warnings about a particular client that was otherwise relevant to the listserv participants.

D. None of the above.

DISCUSSION

Answer: _____

In re Quillinan, 20 DB Rptr 288 (2006) (90-day suspension).

- Supp 14-1: Helen Hierschbiel, *Odds & Ends—Safeguarding Client Information in a Digital World,* OSB Bulletin, July 2010

- Supp 13-5: Helen Hierschbiel, *Revealing Bits & Bytes: Guarding (and Exploiting) Metadata,* OSB Bulletin, June 2012

A. Confidentiality of client information and privilege

1. An attorney must maintain confidentiality of all information relating to the representation of a client to foster and promote full and candid communication by the client.

2. Statutory authority.

ORS 9.460 Duties of attorneys.

An attorney shall:

(3) Maintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct [.]

ORS 40.225 (Oregon Evidence Code Rule 503). Lawyer-client privilege.

(1) As used in this section, unless the context requires otherwise:

> **(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.**

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

> **(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;**
>
> **(b) Between the client's lawyer and the lawyer's representative;**
>
> **(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;**

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

3. Regulatory authority.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

4. Understanding the difference between a lawyer's statutory and regulatory obligations.

   a. Both encompass communications between the lawyer and client (or their agents), but that is the limit of the statutory obligation:

      i. The court has held that OEC 503 prohibits the admission of a "communication not intended to be disclosed to third persons" that was "made for the purpose of facilitating the rendition of professional legal services." The application of the privilege hinges on both:

         - the intent of the parties to shield the communication from disclosure, and

         - the purpose for which the communication is made.

         Both factors must be met in order for the clients to assert the privilege successfully. *State v. Ogle*, 297 Ore. 84, 87, 682 P2d 267 (1984) (notification of defendant by his former counsel of the date set for his appearance for arraignment was admissible over the objection of defendant that it was protected by the attorney-client privilege because the former lawyer's nonlegal testimony on the issue fell outside the scope of the privilege as the attorney was simply performing a notice function. The date of a proceeding was a matter of public record and could not be conceived as confidential.)

- *State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989) (in an action for contempt, questions regarding the dates of contact by an attorney with her client were not subject to the attorney-client privilege because there was no call for the disclosure of the content of any attorney-client communication.)

b. The Rules of Professional Conduct likewise prohibit the disclosure of communications with the client, but also proscribe revelation of information relating to the representation of the client.

RULE 1.0 TERMINOLOGY

(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

i. This expands on the statutory duty but is akin to the prohibitions under the former Code of Professional Responsibility against disclosing "secrets" in addition to information protected by the attorney-client privilege. "Secret" referred to other information gained in a current or former professional relationship that the client requested be held inviolate or to information that, if disclosed, would be embarrassing or likely detrimental to the client. DR 4-101(A). *See, In re Huffman,* 328 Or 567, 983 P2d 534 (1999) (ethical obligations to maintain client confidences and secrets are not identical, but improper disclosure of either violated former rule).

- *In re C. Burt,* 30 DB Rptr 139 (2016) [reprimand] In response to his client's request for a copy of a mental-health-examination report, which contained sensitive and confidential information about the client, respondent delivered the report to jail personnel but failed to identify it as "legal mail" or take other steps to ensure that it would not be disclosed to anyone other than the client.

- *In re Krueger,* 29 DB Rptr 273 (2015) [6-month suspension, 90 days stayed/2-year probation] Attorney's substantive

communications and disclosures to his client's medical providers exceeded that which he was ethically required or allowed to give providers with an interest in his client's settlement funds, particularly where the client had asked him to hold that information inviolate and where attorney knew the information could be detrimental to his client's interests.

- *In re Valverde,* 29 DB Rptr 192 (2015) [reprimand] While employed full-time as a civil rights investigator with BOLI, attorney also operated a private immigration law practice. Over nearly a decade, attorney stored over 1,250 documents containing client information on the state-owned computer at his BOLI office, without adequate protections or client consent. Under Oregon law, data stored on state-owned computers is state property. The state had no duty to preserve the confidentiality of the client information stored on BOLI's computer. After attorney left BOLI's employment, the client information on attorney's BOLI computer was accessed and compiled by BOLI staff.

- *In re Albright,* 29 DB Rptr 147 (2015) [reprimand] Several days before the trial date in a divorce proceeding, attorney received a settlement offer from opposing counsel. Client reported to attorney that she was unable to meet to review offer due to a doctor's appointment arising from certain physical symptoms that made her concerned that a previous health problem had returned, and that she wanted to keep this information private. The next day, attorney wrote a letter to opposing counsel explaining why the settlement could not be finalized, revealed that client had a doctor's appointment that day; that she expected to undergo further testing; that she was uncertain about the condition of her health; that she had not talked with anyone about her symptoms; and that she did not want anyone to know about them.

- *In re Paulson,* 341 Or 542, 145 P3d 171 (2006) [4-month suspension] Attorney represented a client in connection with a charge that the client's boyfriend had sexually abused the client's daughter. The boyfriend was a former client of attorney. At a hearing where attorney represented the client, attorney knowingly revealed information about the boyfriend

that he learned from the prior representation and used that information to the boyfriend's disadvantage. [DR 4-101(B)(1) and (B)(2)]

- *In re Quillinan,* 20 DB Rptr 288 (2006) [90-day suspension] Attorney sent an email message to a listserv of workers compensation attorneys disclosing personal and medical information about a former client and making disparaging remarks about the former client that were likely to be disadvantageous to the client's efforts to locate new counsel.

- *In re Dunn*, 20 DB Rptr 255 (2006). [1-year suspension] Attorney used his clients' confidences and secrets about their financial affairs to his own advantage when he sold the clients unregistered securities and took a commission on the sales. [DR 4-101(B)(3)]

- *In re Phillips*, 338 Or 125, 107 P3d 615 (2005). [36-month suspension] Attorney disclosed information regarding clients' living trusts to insurance agents so the agents could review the trusts and then offer insurance products to these clients. This revelation of client secrets was likely to be detrimental to these clients because (1) the agents were not acting in a fiduciary capacity; (2) the clients nonetheless revealed confidential information to these agents thinking they were law firm employees; (3) most of the clients were susceptible to salespeople, and; (4) in some cases, unnecessary insurance products were sold. [DR 4-101(A), (B)(1) & (3)]

- *In re Langford*, 19 DB Rptr 211 (2005). [reprimand] After termination by a client, attorney filed a motion to withdraw with the court in which she disclosed confidential client communications and the attorney's personal judgments about the client's honesty and the merits of the legal matter. [DR 4-101(B)(1) & (2)]

- *In re Jennings*, 18 DB Rptr 49 (2004). [30-day suspension] Attorney's firm prepared estate planning documents for a client. Thereafter, the client went to a successor lawyer who asked the first attorney for copies of the client's documents pursuant to signed authorizations from the client. One

authorization directed the first attorney not to disclose the authorization or the client's change in counsel to the client's son. The first attorney violated the rule when he contacted the son and made the disclosure. [DR 4-101(B)]

- *OSB Legal Ethics Op No 2005-166*. Insurance defense attorney may not agree to comply with insurer's billing guidelines if doing so requires the attorney to provide status reports to the insurer that reveal confidences or secrets of the insured.

- *OSB Legal Ethics Op No 2005-157*. An attorney representing an insured may not submit the insured's bills to a third-party audit service at the request of the insurer if the bills contain confidences or secrets of the insured.

ii. Although matters of public record may not be confidential, such information can nonetheless be a "secret" or otherwise embarrassing or detrimental to the client. The RPCs make no exception permitting disclosure of information previously disclosed or publicly available. *See In re A,* 276 Or 225, 554 P2d 479 (1976) (attorney knew from client that client's testimony that her mother was alive was false or misleading and client refused to allow disclosure to the court by the attorney; despite the fact that probate of mother's estate was public record, the attorney could not reveal confidential information and was obligated to withdraw); *see also, OSB Legal Ethics Op Nos 2005-53 & 2005-34.*

c. Prior to the implementation of the Rules of Professional Conduct, the court relied in part on OEC 503 to extend the lawyer-client privilege to persons who consult a lawyer "with a view to obtaining professional legal services from the lawyer." *In re Spencer*, 335 Or 71, 83, 58 P3d 228 (2002); *In re Knappenberger,* 338 Or 341, 108 P3d 1161 (2005). The RPCs now address this obligation. *See* RPC 1.18 (§10B, above).

5. Permissive disclosures under RPC 1.6(b) often pose the most problems for lawyers. These exceptions permit (but do not require) the lawyer to reveal information relating to the representation of a client *to the extent reasonably necessary* to accomplish the purpose for which the disclosure

is made without causing unnecessary injury to the client. *See, e.g., OSB Legal Ethics Op No 2005-34* (where attorney knows has committed perjury and client refuses to correct it, lawyer should withdraw but may not inform the court that withdrawal is sought because of client perjury).

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

- *In re Hasche*, 20 DB Rptr 96 (2006). Attorney represented husband and wife in an immigration matter. Wife met alone with attorney and informed attorney that husband had recently assaulted her, had in the past made threats against himself and others, and may have abused their daughters in the past. Attorney thereafter contacted immigration officials, urged them to take husband into custody, and informed them of husband's location. The charge of revealing client confidences or secrets was dismissed under the exception permitting disclosure of a client's intent to commit a crime and information necessary to prevent it. [DR 4-101(B)(1)]

- *OSB Legal Ethics Op No 2005-34.* An attorney who is appointed by a court to represent a supposedly indigent defendant in a criminal case and who learns that the defendant is not indigent but simply wants the benefits of free counsel may ethically reveal client confidences to the extent necessary to prevent the continuing crime of theft of services and may also endeavor to withdraw from the representation while saying nothing about the client's wrongdoing.

- *OSB Legal Ethics Op No 2005-119*. If a widow-personal representative informs her attorney that she has breached fiduciary duties owed to the estate in the past, the attorney must ask her to reveal the breaches. If she fails to do so, the attorney may seek leave to withdraw. If the failure to withdraw would cause the attorney to become directly involved in wrongdoing, the attorney *must* seek leave to withdraw. If the widow communicates an intent to commit a future crime, the attorney

may disclose that intention and the information necessary to prevent it. The attorney could also seek leave to withdraw and endeavor to say nothing.

- Supp 14-3: Helen Hierschbiel, *Disclosing Client Confidences: When Doing the "Right" Thing May be the Wrong Thing to Do,* OSB Bulletin, Aug/Sept 2011

□ PRACTICE TIP: Lawyers should take care in analyzing whether a client is confessing to a prior crime or disclosing an *ongoing* crime or an intent to commit a *future* crime; only the latter two are exceptions to the non-disclosure requirements of this rule. *See* §15, below.

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

- *OSB Legal Ethics Op No 2005-104*. An attorney may reveal client confidences and secrets to the extent necessary to rebut a malpractice claim asserted by a client in an action by the attorney to collect past due fees. An attorney may also reveal client confidences and secrets to the extent reasonably necessary to rebut a complaint against the attorney filed with the Oregon State Bar.

□ PRACTICE TIP: Lawyers should be cautious when responding to Bar complaints. Although lawyers are permitted to disclose information related to the representation of a client in defending themselves against Bar claims, not all information in a lawyer's possession may be relevant to the complaint. Moreover, all materials submitted to the Bar in the course of a disciplinary investigation become a part of the public record of the case. Accordingly, the potential to cause unnecessary damage to a client by submitting extraneous information is significant and may subject a lawyer to

discipline if that disclosure is determined to be beyond the extent reasonably necessary to address the complaint.

> **(5) to comply with other law, court order, or as permitted by these Rules; or**
>
> **(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17[.]**

6. Other considerations regarding confidentiality of information:

   - *OSB Legal Ethics Op No 2005-141*. It is ethical for a law firm to contract with a recycling service for the disposal of documents where reasonable care will be taken to ensure that the documents will not be reviewed by employees of the recycling company or others.

   - *OSB Legal Ethics Op No 2005-136*. An in-house attorney may disclose confidences or secrets of a business client in a civil action for wrongful termination, but only information that is reasonably necessary to establish the claim asserted may be disclosed, and any disclosure must be made in the least public manner. *See also, In re Lackey,* 33 Or 215, 37 P3d 172 (2002).

   - *OSB Legal Ethics Op No 2005-13*3. If using a private financing plan to finance legal fees involves disclosure of client confidences or secrets, the attorney must first obtain the client's consent after full disclosure.

   - *OSB Legal Ethics Op No 2005-120*. An attorney who, while employed by a law firm did not work on a matter or acquire confidences or secrets pertaining to that matter, may ethically work on the opposite side of that matter when subsequently employed by another law firm.

   - *OSB Legal Ethics Op No 2005-119*. An attorney who acts as counsel to an employer-fiduciary of an employee benefit plan pursuant to ERISA represents the employer and not the employees-beneficiaries. The attorney may therefore not reveal the employer-fiduciary's confidences or secrets to the

employees-beneficiaries. However, the attorney must refrain from assisting the employer in breaching any fiduciary duties owed by the employer to the employees.

- *OSB Legal Ethics Op No 2005-116*. An attorney who represents a charity may not disclose the charity's confidences or secrets to a potential donor without the charity's consent.

- *OSB Legal Ethics Op No 2005-110*. An attorney may represent a current client in a case in which the attorney will have to cross-examine a nonparty former client if the former client relationship did not involve the same matter and did not provide the attorney with confidences or secrets of the former client that could be used adversely to the former client. If the same matter was involved or if the attorney did acquire such confidences and secrets, the attorney could represent the current client only with the current and former clients' consent based upon full disclosure.

- *OSB Legal Ethics Op No 2005-106*. An attorney may ethically purchase a tax return preparation business or a private legal practice. However, the attorney must abide by the applicable rules of confidentiality and secrecy.

- *OSB Legal Ethics Op No 2005-96*. An attorney who keeps a notarial journal pursuant to ORS 194.152 or who permits the attorney's employees to do so must take steps to prevent any client confidences or secrets contained in the journal from being disclosed to others.

- *OSB Legal Ethics Op No 2005-95*. An attorney need not report RPC violations by another attorney if the source of the attorney's information about the violation is information relating to the representation of a client and if the client has not authorized disclosure. In any event, only serious RPC violations that are known to exist (i.e., not those that are merely suspected) trigger the mandatory reporting rule.

- *OSB Legal Ethics Op No 2005-80.* (1) An attorney who is permitted pursuant to RPC 4.2 to speak to a current or former officer or employee of a corporate opponent must not

inquire into or permit the current employee to disclose any communications that are subject to the corporation's attorney-client privilege. (2) Communications between the attorney for a corporation and a former corporate officer or employee are potentially subject to protection pursuant to the corporation's attorney-client privilege.

- *OSB Legal Ethics Op No 2005-50.* Attorneys who share offices must protect the confidences and secrets of each attorney's client.

- *OSB Legal Ethics Op No 2005-44*. Law firms who represent clients on the opposite side of a matter may employ the same nonattorney if the nonattorney does not acquire confidences or secrets from the client of either firm. If the nonattorney does acquire confidences or secrets from the client of either firm, the law firms may not both employ the nonattorney unless both clients consent after full disclosure.

- *OSB Legal Ethics Op No 2005-34*. (1) An attorney whose client commits what the attorney knows to be perjury must ask the client to correct the perjury and, if the client will not do so, seek leave of court to withdraw. The attorney may not, however, inform the court that withdrawal is sought because of client perjury. (2) If the court does not permit the attorney to withdraw, the attorney may ethically continue with the case. If the attorney is denied leave to withdraw, the attorney may not use or rely upon perjured testimony or false evidence in arguing the client's case.

- *OSB Legal Ethics Op No 2005-23*. Absent client consent, a former attorney for a client may not convey confidences or secrets about that client to a subsequent attorney for the same client or give client files to an educational institution for historical purposes.

- Supp 14-2: Helen Hierschbiel, *Top 10 Myths: The Duty of Confidentiality,* OSB Bulletin, June 2009.

- Supp 14-3: Helen Hierschbiel, *Disclosing Client Confidences: When Doing the "Right" Thing May be the Wrong Thing to Do,* OSB Bulletin, Aug/Sept 2011.

Notes

HYPOTHETICAL

- Anthony Able was appointed to defend Dusty Doowrong against aggravated murder charges for the death of Vick Tim. Tim had been shot in the head by Six Shooter while both men were passengers in Doowrong's car. After the shooting, Doowrong helped Shooter stuff Tim into a sleeping bag and throw him over a cliff.

  When Able met Doowrong in the county jail, Doowrong told him that Tim was still breathing when he and Shooter put him into the sleeping bag and that he heard Tim sigh as they threw him over the cliff.

  Days later, Able and appointed co-counsel, Connie Council, appeared before Judge Impartial on an evidentiary matter. Council smelled alcohol on Able's breath when they were seated at counsel's table. This was not the first time Council believed Able had appeared in court while intoxicated, and she told Judge Impartial as much. Council also reported that Doowrong was concerned about Able's drinking and wanted him off the case. Judge Impartial removed Able as counsel.

  Doowrong was subsequently acquitted after testifying that Vick Tim was already dead when he helped toss the body over the cliff.

  Later, when Judge Impartial raised some concerns about Able's fee petition, (and about his drinking,) Able wrote the court a letter disclosing that on his last visit with Doowrong, Doowrong revealed that he had, in fact, helped stuff a living man into a sleeping bag and throw him off a cliff.

  Able also sent the court an audio recording and transcript of his interview with Doowrong corroborating his account of his last conversation with Doowrong, in which Doowrong described the victim as still breathing and resisting as he was placed in the sleeping bag and thrown over the cliff.

Choose the most appropriate answer or answers:

A. Able was justified in revealing his former client's perjury as he was defending his request for attorney fees.

B. Disclosing the information was appropriate because Able knew that his former client had offered perjured testimony and he was taking remedial steps to rectify the perjury.

C. It was appropriate to disclose the perjury as Able believed it was necessary to prevent a continuing crime but not appropriate to appear before the court after drinking.

D. It was inappropriate to disclose the information.

E. It was appropriate to surrender the tape as that was his former client's own admission about his conduct, but it was improper to write the letter because that was a disclosure by Able of information he had learned during his representation of his former client.

DISCUSSION

Answer: _____

Notes

In re Selken, SC S38443 (1989) [Form B resignation]

ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP

Section 15 — 26-year Secret/Discussion

- Supp 15-1: Written Excerpt from "*26-Year Secret Kept Innocent Man in Prison*", CBS News, March 9, 2008, *updated* March 23, 2008

- Supp 15-2: Helen Hierschbiel, *Disclosing Client Confidences: When Doing the "Right" Thing May be the Wrong Thing to Do,* OSB Bar Bulletin, Aug/Sept 2011.

  "The purpose of the duty is not just to encourage full and frank discussion — such that clients share not only the good, but the bad and the ugly — but also to facilitate a relationship of trust between the lawyer and client, such that the client, confident of the lawyer's loyalty, can hear and accept both good and bad news and heed the lawyer's advice."

Notes

Notes

ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP

Section 16 — Conflicts

- Supp 16-1: Sylvia Stevens, *Conflicts of Interest, Part I: A Periodic Series,* OSB Bulletin, Oct 2009

HYPOTHETICAL

- Attorney Argyle Sox meets with prospective new clients, a recently married couple. Husband is 65. Wife is 85. Prior to the marriage, Husband was Wife's in-home caregiver. Husband tells Argyle that Wife's money has been handled by her nephew pursuant to a power of attorney. Husband says the nephew is mishandling Wife's finances. Husband wants lawyer to assist them in revoking the power of attorney so that Husband can manage Wife's money. Wife appears to follow the conversation and nods in the affirmative from time to time.

  Argyle agrees to represent Husband and Wife in legal matters concerning wife's finances and modification of her estate planning, including getting the power of attorney revoked so Husband can manage Wife's money.

Which of the following is/are accurate?

A. During the initial interview, Argyle had ample opportunity to determine if he could competently represent the interests of both Husband and Wife.

B. Argyle was negligent in evaluating Wife's competence and is subject to discipline for lack of competence.

C. Because the interests of both Husband and Wife were aligned, there was no actual conflict of interest and it was proper for Argyle to represent both.

D. Under these facts, a substantial risk existed that Argyle's representation of each client would be materially limited by his responsibilities to the other. He should not have proceeded without informed consent, confirmed in writing, from both Husband and Wife.

DISCUSSION

Answer: _____

In re Zanotelli, 23 DB Rptr 124 (2009) (reprimand)

A. Conflict Screening

1. Prior to undertaking a legal matter, a lawyer must evaluate the potential for a conflict of interest between the prospective client(s) and the lawyer's current or former clients. This includes:

    a. Running a comprehensive conflicts check with all parties involved in the contemplated representation against the lawyer's current and former client lists. *See* §8B3, above.

i. If there are current clients who are potentially affected by the prospective representation, evaluate under RPC 1.7. *See* §16B, below.

ii. If there are former clients who are potentially affected by the prospective representation, evaluate under RPC 1.9. *See* §16D, below.

iii. If the lawyer stands to benefit in some way (apart from his or her fee) from the proposed representation, evaluate under RPC 1.8. *See* §16C, below.

b. In the event of multiple prospective clients (as in the previous hypothetical), the lawyer is also required to determine at the outset whether a conflict of interest exists between the prospective clients. Use RPC 1.7 for this evaluation.

□ PRACTICE TIP: Whether a current conflict exists should be determined by examining each client's interests and goals in the legal matter from the perspective of an objectively reasonable lawyer representing only that client (*i.e.,* 100% loyalty to each client). If the lawyer can envision a way that the clients' interests may not be aligned (or might not be aligned in the future), the lawyer should undertake further evaluation of whether the clients' may be able to waive the possible conflict. If the answer is not apparent on its face, the lawyer should consult with outside counsel or contact OSB General Counsel. *See* §2, above.

Notes:

HYPOTHETICAL

- Connie Criminal hires Andrea Anderchuk to defend her against several criminal charges. Several months into the representation, Criminal is charged with an additional count of unlawfully obtaining public assistance. Criminal tells Anderchuk that she and her husband, David Deadbeat, used the public assistance to finance trips to Vegas.

  When Deadbeat is also charged with unlawfully obtaining public assistance, Anderchck undertakes to represent him as well.

Anderchuk's conduct in representing both Criminal and Deadbeat:

A. Resulted in a conflict of interest that would have been permissible if she had fully disclosed the conflict to Criminal and Deadbeat and obtained their consent to the representation, following full disclosure.

B. Constituted a non-curable current client conflict of interest.

C. Was permissible given the scope of the representation and the fact that the Criminal and Deadbeat are husband and wife.

D. Would have been allowed unless and until one was offered a deal in exchange for testimony adverse to the other. In that event, Anderchuk would have to withdraw from representing Deadbeat.

DISCUSSION

Answer: _____

See In re Jeffery, 321 Or 360, 898 P2d 752 (1995) (actual conflict of interest existed in attorney's representation of two criminal defendants accused of being co-conspirators in a drug transaction when the district attorney offered to reduce charges as to one of attorney's client in an unrelated case in exchange for testimony against the attorney's other client); *In re Cohen*, 316 Or 657, 853 P2d 286 (1983) (violation of conflict rules where lawyer simultaneously represented married clients where likely conflict became actual conflict of interest in criminal matter despite stated desire to maintain the family together in the home).

In re Johnson, 20 DB Rptr 206 (2006) (90-day suspension)

Notes

B. Current-client Conflicts

1. Rule 1.7(a) prohibits representation if the representation involves a current conflict of interest.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

2. This rule incorporates instances in which the competing interests of clients may affect a lawyer's ability to provide effective representation, as well as when a lawyer's own interests may conflict with those of the client (*i.e.,* self-interest conflicts). Lawyers often find it more difficult to spot the latter conflict.

3. <u>Personal-interest or self-interest conflicts</u>

- *In re Fisher,* 30 DB Rptr 196 (2016). [30-day suspension] At the time that his client's contingency case settled, Respondent knew that his client was not satisfied with his representation and unhappy with the amount of the settlement. Respondent removed attorney fees and costs from the settlement and sent the remainder—much less than the 60% the client was expecting—to the client with a release that conditioned the client's acceptance of the funds (his own funds) on his concession that he was "satisfied" with the both

the settlement and Respondent's legal representation. This use of funds that undisputedly belonged to the client as consideration to settle any prospective malpractice claim, created a personal-interest conflict. Respondent failed to advise his unrepresented client in writing of the desirability of seeking the advice of independent counsel and other essential terms, nor did he obtain signed written consent.

- *In re Day,* 30 DB Rptr 162 (2016). [36-month suspension] On multiple occasions, Respondent had inappropriate contact with two incarcerated clients by engaging in sexual relations or conduct with them. Respondent believed the conduct with both clients to be consensual, however sexual relations between a lawyer and an incarcerated client cannot be consensual.

- *In re Romano,* 30 DB Rptr 61 (2016). [60-day suspension] Respondent and his client developed a personal relationship that affected Respondent's professional judgment. Respondent attempted to create a conflict waiver, but did not immediately withdraw from the representation and failed to provide the client with sufficient information to allow her to determine whether Respondent should continue to represent her in the matters.

- *In re Bottoms,* 29 DB Rptr 210 (2015). [2-year suspension, 1-year stayed/2-year probation] Attorney and his wife were longtime friends of victim of criminal defendant represented by attorney. A no contact order prohibited contact with the victim by the defendant. Attorney moved to vacate the no contact order and called the victim as a witness at hearing. The court denied the motion, and the defendant was later revoked for violating the no contact order. The next day, attorney visited the victim at her home, expressed a romantic interest in her, and made inappropriate advances toward her, at a time when he still represented defendant.

- *In re McVea,* 29 DB Rptr 163 (2015). [6-month suspension] In a personal injury claim for a slip and fall accident that occurred on a marina walkway, attorney failed to comply with a discovery order and the case was dismissed. Rather than seek informed consent, attorney misrepresented to the client the reasons for the dismissal.

- *In re Obert,* 29 DB Rptr 151 (2015). [9-month suspension, all but 90 days stayed/3-year probation] Attorney pursued a motion for a new

trial for his criminal defense client that was denied. Client had viable issues that could have been raised on appeal, however, attorney advised that post-conviction relief would achieve a quicker resolution so the appeal was abandoned. The client had post-conviction issues concerning the effectiveness of counsel at the trial and appellate levels, including potential claims that the attorney's assistance as trial and appellate counsel was ineffective. Attorney did not seek or obtain informed consent. The post-conviction court denied the petition and noted that, in the post-conviction proceeding, the client had raised a viable issue that had been required to be raised on direct appeal. [RPC 1.7(a)(2)]

- *In re Salisbury,* 28 DB Rptr 128 (2014). [reprimand, following 2-year probation] Attorney made unsolicited and unwanted sexual advances toward two vulnerable female clients, inviting both to engage in intimate conduct that would expose them to potential criminal sanctions and which would jeopardize at least one's parental status with her children both in a pending custody dispute and in an unresolved investigation/agreement with DHS.

- *In re Seligson*, 27 DB Rptr 314 (2013). [reprimand] Soon after being retained to advise a client regarding her estranged husband's bankruptcy and its effect on the couple's real property, it was discovered that the second mortgage was potentially avoidable and created the possibility of the client having significant equity. The client's divorce attorney then prepared a trust deed for the client's signature in favor specified parties, including attorney, as security for his fees. Shortly thereafter, the bankruptcy trustee filed an adversary proceeding to avoid the second mortgage and the attorney's interest in the ranch property, among others, and naming the client as an adverse party. Attorney thereafter represented both his interest and his client's interest in the adversary proceeding, without obtaining informed consent from his client.

- *In re Cauble*, 27 DB Rptr 288 (2013). [45-day suspension + restitution] At the same time he was defending an unlicensed mortgage broker in litigation by investors for losses, attorney undertook to represent several additional investors (who lost funds that the mortgage broker client had invested) in litigation against the title company. Relying upon direction from the broker client as spokesperson for the additional investors, the attorney used funds advanced by the additional investors to pay past due legal fees

owed only by the mortgage broker client. Attorney's personal interest in obtaining fees from the multiparty litigation and getting the mortgage broker client's past due fees paid created a significant risk that the representation of the additional investors would be materially limited.

- *In re Krider*, 27 DB Rptr 260 (2013). [reprimand] Despite statutes dictating the payment of probate estate expenses and claims where estate funds are insufficient to pay all obligations, attorney advised the personal representative to pay debts including her own attorney fees from her prior representation of decedent before other claims.

- *In re Gough*, 27 DB Rptr 179 (2013). [reprimand] Attorney began a sexual relationship with his court-appointed client, a mother in a juvenile proceeding. He thereafter continued to represent her for a number of month when there was a significant risk that the representation would be materially limited by his personal interest.

- *In re Schwindt*, SC S060906, Case No. 12-128 (2013). [2-year suspension] Attorney entered into a continuing business relationship with credit repair company where he would receive a set legal fee for each client without first obtaining informed consent from the clients to the fact that he had a personal financial interest in, and represented, the credit repair company.

- *In re Ambrose*, 26 DB Rptr 16 (2012). [reprimand] Through various business entities, attorney entered into business transactions with a current client without sufficient disclosures concerning attorney's self-interest. In another matter, attorney represented a lender in a transaction in which a loan was made to another client, the proceeds of which were to be used by the borrower/client to pay down fees owed to attorney. Attorney did not make sufficient disclosures to the lender client about his self-interest.

- *In re Lafky*, 25 DB Rptr 134 (2011). [4-month suspension] Attorney engaged in business transactions with a client friend without obtaining the client's informed consent.

- *In re Burns*, 24 DB Rptr 266 (2010). [1-year suspension] Attorney's firm undertook to represent conservator in protected proceeding, including advising the conservator concerning whether claims against the protected person or his estate should be paid, at a time

when the firm claimed that the protected person owed the firm in excess of $8,000 in attorney fees for services rendered prior to the establishment of the conservatorship.

- *In re Isaak*, 23 DB Rptr 91 (2009). [6-month suspension] Attorney had a self-interest conflict when he represented an elderly client in defense of a conservatorship petition filed by the Department of Human Services in which it was alleged that the client was a victim of attorney's financial abuse.

- *In re Okai*, 23 DB Rptr 73 (2009). [4-year suspension] Attorney's interest in having a client obtain a prescription for a narcotic and deliver the drugs to attorney for his own use posed a significant risk that attorney's representation of the client would be materially limited by attorney's self-interest.

- *In re Schenck*, 345 Or 350, 194 P3d 804, *mod on recon* 345 Or 652 (2008). [1-year suspension] Attorney committed a self-interest conflict when he undertook to assist a client in collecting a debt from a third party while contemporaneously renegotiating his own debt with the client. The fact that attorney advised the client to take security on the loan to the third party but not on the loan to him was evidence that the attorney's professional judgment was affected by a personal interest. It was no defense to the charge that attorney engaged in the renegotiation shortly after concluding one legal matter for the client and before undertaking another. [DR 5-101(A)(1)]

- *In re Clarke*, 22 DB Rptr 320 (2008). [60-day suspension] After deciding that a client's appeal had no merit, attorney decided not to file a brief, did not withdraw, allowed the appeal to be dismissed, and thereafter failed to disclose the dismissal to the client. When the client discovered the dismissal, attorney agreed to reevaluate the merits of the appeal when her own potential liability to the client was affecting her judgment on the client's behalf.

- *In re Chancellor*, 22 DB Rptr 27 (2008). [1-year suspension] Prosecutor met socially with the victim of a rape case assigned to the prosecutor and engaged in sexual contact with her. He continued to represent the State in the rape case despite a significant risk that the representation would be limited by his personal interests.

- *In re Dunn*, 20 DB Rptr 255 (2006). [1-year suspension] Attorney committed a self-interest conflict when, without full disclosure and consent, he continued to represent clients to whom he sold unregistered securities, taking a commission on the sales. [DR 5-101(A)]

- *In re Cherry*, 20 DB Rptr 59 (2006). [30-day suspension] Attorney represented her sister in becoming the guardian and conservator over the sister's granddaughter despite her reservations concerning the sister's suitability. Thereafter, attorney encouraged other family members to intervene and seek the sister's removal as guardian and conservator, contrary to the sister's wishes and objectives. [DR 5-101(A)]

- *In re Phillips*, 338 Or 125, 107 P3d 615 (2005). [36-month suspension] Attorney had a self-interest conflict, which he failed to disclose to his clients and obtain consent for, when he employed insurance agents to review his clients' living trusts while knowing that the agents would also attempt to sell insurance products to these clients and that he would share in the resulting commissions. [DR 5-101(A)]

- *In re Nester*, 19 DB Rptr 134 (2005). [30-day suspension] Attorney engaged in a self-interest conflict when she represented a nursing-home owner in licensure proceedings while at the same time owning the consulting business that would conduct compliance audits on the nursing home and report results to the licensing agency. [DR 5-101(A)]

- *In re Kluge*, 335 Or 326, 66 P3d 492 (2003). [2-year suspension] Attorney who was both general manager and legal counsel for a corporation represented his employer in defending a discrimination claim that the alleged attorney had acted improperly as the employee's direct supervisor. Without full disclosure to and consent from the employer, attorney's self-interest conflict precluded his representation of the employer. [DR 5-101(A)]

- *In re Wright*, 17 DB Rptr 132 (2003). [reprimand] Estate attorney permitted investment of estate funds in a corporation in which he held a 50% interest without first obtaining client consent after full disclosure. [DR 5-101(A)]

- *In re Allen*, 17 DB Rptr 84 (2003). [60 days] After his client refused to use part of the funds awarded to her in a divorce to pay his fee, attorney prepared a new form of judgment directing this payment and subsequently prepared an amended judgment to permit distribution of these funds to himself from the client's investment company without informing either his client or the court that he was not authorized to do so. [DR 5-101(A)]

- *OSB Legal Ethics Op No 2006-176*. A lawyer who represents a party to a real property transaction and also acts as a real estate agent or broker, mortgage broker, or loan officer in the transaction runs a significant risk that those other roles will interfere with the lawyer's representation of the client. Therefore, the lawyer must reasonably believe that she will be able to provide competent and diligent representation to the client and must obtain informed consent in a writing signed by the client before proceeding.

- *OSB Legal Ethics Op No 2005-133*. Attorney should not offer a private financing plan for legal fees to a client without the client's consent if the attorney's professional judgment will, or reasonably may be, affected by the attorney's own financial interest in having the client choose this payment option. *See also,* RPC 1.8(e).

- *OSB Legal Ethics Op No 2005-116*. With full disclosure to and consent from the donor, an attorney may represent the donor in a trust transaction with a charity or draft a will for the donor in which property is left to the charity, even though the attorney is also a member of the charity's board.

- *OSB Legal Ethics Op No 2005-114*. When an attorney is elected city councilor or mayor of a city in which the attorney practices law, members of the attorney's law firm may represent criminal defendants even though a city police officer may be a witness as long as the firm's clients consent after full disclosure. The attorney-city councilor/mayor may not, however, participate as a councilor or mayor in any decision affecting or relating to the city's employment of the attorney's firm unless city law specifically authorizes such conduct.

- *OSB Legal Ethics Op No 2005-111*. An attorney who is owed substantial fees arising from a prior representation may condition an agreement to handle new matters upon the client's payment of

all outstanding obligations. If bankruptcy law permits, an attorney may represent a client who owes the attorney money in bankruptcy proceedings if the client consents after full disclosure.

- *OSB Legal Ethics Op No 2005-102*. (1) An attorney who is a part-time municipal judge may represent a client before the town council as long as the attorney does not act as judge in any appeals from actions taken by the town council that pertain to that client. (2) An attorney who is a part-time municipal judge may represent the defendant in a circuit court murder prosecution notwithstanding the fact that the attorney will have to cross-examine police officers who appear before the attorney as witnesses when the attorney acts as a municipal court judge. RPC 1.7 does not apply because sitting part-time as a municipal court judge constitutes "serving in a pro tem capacity."

- *OSB Legal Ethics Op No 2005-94*. An attorney who is married to a real estate broker but who does no legal work for the broker may represent a seller in drafting a listing agreement with the broker only with client consent based upon full disclosure. An attorney may represent a seller or buyer in a transaction from which the broker will earn a commission only with client consent based upon full disclosure.

- *OSB Legal Ethics Op No 2005-93*. (1) An attorney may ethically draft a will for the attorney's parents in which the attorney is left a bequest. Depending on the circumstances, however, client consent based on full disclosure may be necessary. (2) An attorney may act as counsel for the personal representative in probating the estate of one of the attorney's parents. Consent based on full disclosure may again be necessary. If the attorney is also the personal representative, consent would have to come from the probate court because the attorney could not rely on self-generated consent.

- *OSB Legal Ethics Op No 2005-91*. Subject to the constraints imposed by RPC 1.7(a) and RPC 1.8(a), an attorney may become an officer, director, or shareholder of a corporation represented by that attorney or another attorney in the same firm.

- *OSB Legal Ethics Op No 2005-39*. An attorney who is occasionally asked to serve as a pro tem judge or hearings officer may continue

to represent clients with matters pending before other judges or hearings officers of the same court or body without meeting special disclosure and consent requirements.

a. A client filing a Bar complaint against his attorney shortly before trial does not give rise to a *per se* conflict of interest under this rule. Only if a significant risk exists that the attorney's representation will be materially limited by the attorney's personal interest as a result of the complaint will the attorney need to seek the client's informed consent before continuing with the representation or, if consent is not given, withdrawing. *OSB Legal Ethics Op No 2009-182*.

   i. This is especially true in the criminal court-appointed context. *See State v. Taylor*, 207 Or App 649, 142 P3d 1093 (2006) (the bare fact that a criminal defendant filed a bar complaint against his court-appointed attorney did not require the court to appoint new counsel for the defendant; a defendant must demonstrate a reasonable probability that a conflict of interest exists that would affect an attorney's performance, as distinguished from a theoretical conflict); *see also, State v. Estacio*, 208 Or App 107, 144 P3d 1016 (2006).

b. Similarly, the fact that a lawyer may have engaged in potential malpractice in and of itself is not necessarily sufficient to create a conflict of interest. *See In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004) (an alleged conflict was dismissed because of the small likelihood that attorney's error in serving the opposing party with a notice of appeal would have affected his professional judgment for the client); *but, c.f., In re Wilkerson,* 17 DB Rptr 79 (2003) (attorney failed to serve defendants within applicable statute of limitations, resulting in the dismissal of the clients' claim and an award of fees and costs against the clients; attorney then prepared an agreement for the clients' signature to settle any malpractice claim against attorney, without disclosing his self-interest conflict).

- *In re Krueger*, 27 DB Rptr 54 (2013). [dismissed] Trial panel found no self-interest conflict where attorney advised client whose case had been dismissed to pursue his former firm for malpractice and provided her with an adequate disclosure letter. Trial panel also found no violation in a second matter where opposing party filed

Rule 21 motion due to attorney's failure to communicate with opposing counsel.

- *In re Wetsel*, 21 DB Rptr 129 (2007). [18-month suspension] Attorney's failure to appear for a client in an arbitration and argue against a motion for attorney fees, and his failure to inform the client of the resulting attorney fee award or that the client was entitled to appeal the arbitrator's decision and have a trial de novo, gave rise to a significant risk that his representation of the client would be materially limited by the attorney's own self-interest in avoiding a claim for malpractice and termination.

- *In re Trukositz,* 19 DB Rptr 78 (2005). [12-month suspension] Attorney neglected client's personal injury matter and allowed it to be dismissed. When he discovered the error, he orally notified the client, and said he would notify his malpractice carrier, but continued to represent her without obtaining proper consent and failed to contact his insurance carrier. Attorney thereafter neglected the client's matter and failed to adequately communicate with her. [DR 5-101(A)]

- *In re Obert*, 336 Or 640, 89 P3d 1173 (2004). Attorney failed to file a timely notice of appeal, resulting in dismissal. Although his shame and embarrassment prevented attorney from informing the client of the dismissal for five months, the court found no evidence that attorney's research to rectify the dismissal was impaired by his self-interest. Nor did attorney perform any further work for the client after determining his mistake could not be rectified. Accordingly, charges under this rule were dismissed. [DR 5-101(A)]

- *In re West*, 17 DB Rptr 137 (2003). [reprimand] Attorney who committed possible malpractice by failing to file a timely tort claims notice against the State for a personal injury claim continued to represent his client without first obtaining her consent after full disclosure. [DR 5-101(A)]

- *OSB Legal Ethics Op No 2005-61*. An attorney who has not timely filed claim A on behalf of a client may continue to represent the client on unrelated claim B, which was timely filed, with client consent based on full disclosure.

4. Multiple-client conflicts

- *In re Coran*, 30 DB Rptr 350 (2016) [120-day suspension, all but 30 days stayed/3-year probation] While in jail, two of respondent's clients ("Borrower" and "Lender") met each other, without Respondent's involvement. Borrower proposed that Lender loan him money for his bail in exchange for a note, a truck, and a trailer. Respondent met separately with each client to discuss the proposed loan, and made assurances to Lender regarding Borrower's ability to repay the loan. Relying in part on respondent's assurances, Lender agreed to the proposal. Respondent drafted the contract which set forth the terms of Lender's agreement with Borrower—both of whom respondent represented, and whose interests in the contract were directly adverse—without obtaining informed consent from either client.

- *In re Grenley*, 30 DB Rptr 333 (2016) [reprimand] Respondent represented the purchaser of a home in a rescission claim against the sellers arising from the sale. At the time that respondent was hired, his law firm represented the purchaser's real estate company on unrelated matters. Respondent and his purchaser client initially filed a claim only against the sellers. When information revealed during discovery suggested new claims against the purchaser's real estate company, respondent sought to resolve matters through a letter to the real estate company client. Respondent's letter did not advise either his purchaser client or the real estate company client of the current client conflict, nor did he seek informed consent from either client.

- *In re Oliveros*, 30 DB Rptr 145 (2016) [60-day suspension, all stayed/3-year probation] An elderly couple sought Respondent's assistance in investing their retirement funds. Respondent recommended that they make loans to two current clients. In the loan transactions, the interests of the clients as lenders were directly adverse to the interests of the clients who were the borrowers. Respondent failed to make the necessary disclosures and obtain consents from any of the clients involved in the transactions.

- *In re Ambrose*, 29 DB Rptr 98 (2015) [public reprimand] Attorney managed and represented an investment group (Group 1) on a development project where one source of collateral for the project

loan was a second lien trust deed on an unrelated parcel. When the first lienholder took steps to schedule a non-judicial foreclosure of the parcel, four of the seven investors on the project joined with a fifth investor (Group 2), to acquire the loan on the parcel and protect Group 1's collateral. Attorney performed the legal work necessary for Group 2, was its non-member manager, and represented it on an ongoing basis. Group 2 purchased the first lienholder's loan on the parcel, but failed to pay amounts due. Attorney continued to forbear the non-judicial foreclosure. When bankruptcy seemed inevitable, attorney represented Group 2 in completing the non-judicial foreclosure of the parcel. As a result, Group 2 obtained the parcel by bidding the amount of the first lien debt, thereby extinguishing Group 1's second lienholder position. Attorney continued to promote Group 1's interests by using the parcel as collateral through Group 2's ownership of it. However, no consents from the affected clients were obtained.

- *In re Snell*, 29 DB Rptr 5 (2015) [60-day suspension, all but 30 days stayed/2-year probation] Attorney filed a lien against a hotel on behalf of Client 1. A few months later, attorney filed another lien on behalf of Client 2. Attorney sent a demand letter to hotel for Client 2's lien and billed Client 2 for her services. A few months later, on Client 1's behalf, attorney filed a lawsuit against hotel seeking to foreclose Client 1's lien. Later, attorney prepared for Client 2 an answer to the complaint for foreclosure she had filed for Client 1. The answer denied the allegations of the complaint; cross claimed against the other lien-holder defendants, including Client 1. By representing both Client 1 and 2 in the foreclosure proceeding, attorney had a current client conflict of interest. Attorney then entered negotiations with Hotel on behalf of Client 1, without notice or approval from Client 2.

- *In re Gatti*, 356 Or 32, 333 P3d 994 (2014) [90-day suspension] Attorney representing multiple plaintiffs against the Archdiocese initially obtained consent to proceed with joint representation, and when he began negotiations, endeavored to negotiate each client's claims individually, conferred with clients individually, and helped each decide on an acceptable individual settlement offer. However, when the Archdiocese later offered to settle for a figure that was nearly twice the cumulative total of all claims, a conflict arose. Each plaintiff had an interest in obtaining as great a portion of the surplus settlement as he could. Attorney was ethically prohibited from

deciding how to allocate the sum offered. Court stated that "when multiple plaintiffs make any agreement to divide an offer that exceeds the total of their minimum offers, the plaintiffs have competing interests in that surplus." [RPC 1.7(a)(1)]

- *In re Cauble,* 27 DB Rptr 288 (2013). [45-day suspension/ restitution] At the same time he was defending an unlicensed mortgage broker in litigation by investors for losses, attorney undertook to represent several additional investors (who lost funds that the mortgage broker client had invested on their behalf) against the title company without securing the informed consent of all his clients regarding the significant risk that his representation of the additional investors would be materially limited by his responsibilities to the mortgage broker client and vice versa, particularly in light of legitimate claims the additional investors might have had against the mortgage broker client.

- *In re Hostetter,* 27 DB Rptr 13 (2013). [18-month suspension, part stayed/2-year probation] Attorney assisted company and its principals in securing bank loans. Thereafter, attorney represented company and its principals in modifying the bank loans at the same time he was representing the bank in other matters, without obtaining informed consent of the company and its principals. [DR 5-105(E) and RPC 1.7(a)]

- *In re Schwindt,* SC S060906, Case No. 12-128 (2013). [2-year suspension] Attorney entered into a continuing business relationship with credit repair company where he would receive a set legal fee for each client without first obtaining informed consent from the clients to the fact that he had a personal financial interest in, and represented, the credit repair company.

- *In re Moule,* 26 DB Rptr 271 (2012). [reprimand] Attorney facilitated a loan from one client to another, representing both clients in the transaction despite the conflict. Later, the borrowing client was charged with a crime that placed the lending client's security interest in jeopardy. Attorney's defense of the borrowing client in the criminal proceeding gave rise to another conflict. Finally, attorney had a self-interest conflict to the extent that he had an interest in avoiding potential liability to the lending client for his role in the original loan.

- *In re Browning,* 26 DB Rptr 176 (2012). [120-day suspension] Without sufficient disclosures and consent, attorney represented a creditor in the collection of a debt while simultaneously representing the debtor in an unrelated matter.

- *In re Fredrick,* 26 DB Rptr 129 (2012). Although attorney met with both father and daughter regarding daughter's legal problems, and prepared a promissory note and security instrument that daughter signed for the benefit of father, there was insufficient evidence from which to conclude that father was also attorney's client, and therefore conflict of interest charges against attorney for representing both father and daughter with respect to the note were dismissed.

- *In re Gerttula,* 26 DB Rptr 31 (2012). [reprimand] Two individual clients owned real property as joint tenants with right of survivorship. On behalf of both, attorney prepared deeds by which the clients conveyed the property to themselves as tenants in common. With regard to the manner in which they owned the property, the interests of the two clients in the transaction were adverse to one another, creating a conflict for attorney. [DR 5-105(E)]

- *In re Ambrose,* 26 DB Rptr 16 (2012). [reprimand] Through various business entities, attorney entered into business transactions with a current client without sufficient disclosures concerning the conflicts between the entities controlled and represented by attorney and those controlled by the client. In another matter, attorney represented a lender in a transaction in which a loan was made to another client, without sufficient disclosures to the lender client.

- *In re Richardson,* 350 Or 237, 253 P3d 1029 (2011). [disbarred] Attorney had represented elderly (and terminally ill) aunt grantor and nephew grantee in the transfer of the elderly woman's home for the promise that nephew would care for elderly woman at the home until her death.

- *In re Clark,* 25 DB Rptr 207 (2011). [reprimand] Attorney represented co-defendants in a criminal case when there was both the potential for disagreement between them and an actual dispute between them whether plea negotiations should include the

forfeiture of certain property. Informed consent would not have cured the conflict.

- *In re Stewart,* 25 DB Rptr 106 (2011). [reprimand] In an environmental cleanup case, attorney represented both the insureds and an insurer under a reservation of rights where a determination made by an expert potentially could have affected the existence of coverage for remediation. Attorney failed to obtain the insureds' informed consent to the conflict confirmed in writing.

- *In re Dole,* 25 DB Rptr 56 (2011). [reprimand] Attorney represented father and mother in estate planning and family business matters, and continued to represent father after mother died. Attorney also began to represent the adult children regarding their concerns over the valuation, liquidation and distribution of assets from mother's estate to father, fathers' spending habits and control over the family business entities. Attorney failed to obtain informed consent confirmed in writing from his multiple clients.

- *In re Misfeldt,* 24 DB Rptr 25 (2010). [reprimand] Attorney represented protected person at the same time as she represented the proposed conservator and guardian for the protected person.

- *In re Campbell*, 345 Or 670, 202 P3d 871(2009). [60-day suspension] Attorney who represented a Chapter 7 bankruptcy trustee in contesting a claim made against the estate by a secured creditor may not, after the claim is settled by the trustee, represent other secured creditors to object to the settlement and oppose it on appeal. [DR 5-105(C)]

- *In re Petshow*, 23 DB Rptr 55 (2009). [reprimand] Attorney represented another attorney in defense of an ethics complaint made by a client while also representing the client in the underlying legal matter out of which the ethics complaint arose, without obtaining either client's informed consent confirmed in writing.

- *In re Schenck*, 345 Or 350, 194 P3d 804, *mod on recon* 345 Or 652 (2008). [1-year suspension] Attorney prepared wills for two elderly sisters knowing that they had an actual conflict as to how they would dispose of their estates one to the other. [DR 5-105(E)]

- *In re Leo*, 22 DB Rptr 261 (2008). [reprimand] Attorney simultaneously represented two business clients that had a creditor/debtor relationship. Attorney assisted the debtor client in restructuring its business in a way that was potentially adverse to the creditor client. Thereafter, when he no longer represented the creditor client, attorney defended the debtor client against the creditor client's suit even though his prior representation of the creditor provided him with information about the creditor that gave rise to a conflict of interest. [DR 5-105(C) and DR 5-105(E)]

- *In re Kloos*, 22 DB Rptr 42 (2008). [reprimand] Attorney represented a landowner in a mandamus proceeding involving subdivision zoning. Attorney also represented an adjacent landowner whose interests in the subdivision zoning conflicted with the interests of the first client. Although attorney's representation of the second client was in matters unrelated to the mandamus proceeding, the two clients' objective interests were adverse, and attorney should have sought and obtained client consent.

- *In re Obert*, 336 Or 640, 89 P3d 1173 (2004). [30-day suspension] Attorney failed to realize that he was simultaneously representing a couple in a step-parent adoption and the birth father in defense of unrelated criminal charges. [DR 5-105(E)]

- *In re Drake*, 18 DB Rptr 225 (2004). [reprimand] Attorney had a conflict of interest when she represented a business concerning an employee's continued relationship with the company at the same time that the employee also was a client of the law firm. Although she had a good faith belief that the employee was no longer a firm client, she negligently failed to conduct further due diligence to determine whether a conflict existed. [DR 5-105(E)]

- *In re Hill*, 18 DB Rptr 1 (2004). [30-day suspension] Attorney represented husband and daughter as petitioners in a guardianship for incapacitated wife, and then represented husband in obtaining a divorce from wife. Attorney failed to advise husband and daughter of likely conflicts of interest between them as guardians, and failed to recognize actual conflicts between the interests of husband and daughter as individuals and their interests as wife's joint guardians. [DR 5-105(E)]

- *In re Lafky*, 17 DB Rptr 208 (2003). [30-day suspension] Attorney who defended one client in various proceedings against charges of financial abuse of the elderly had a conflict of interest when that client introduced him to an elderly man for the purpose of drafting a living trust for the elderly man in which the first client was named as successor trustee. [DR 5-105(E)]

- *In re Wax*, 17 DB Rptr 63 (2003). [reprimand] Attorney had a current client conflict of interest when he formed a corporation and then subsequently represented one of its principals who left the corporation to form a different business that utilized an assumed business name that the first corporation claimed to own. [DR 5-105(E)]

- *In re Hendershott*, 17 DB Rptr 13 (2003). [reprimand] Attorney who represented a client regarding an arson charge told his client he could not challenge inaccuracies in the fire investigation report because he also represented the Rural Fire Protection Department. Representation of both the fire district and the client in a criminal matter at the same time constituted a current client conflict of interest that could not be waived. [DR 5-105(E)]

- *OSB Legal Ethics Op No 2005-157*. An attorney representing an insured may not submit the insured's bills to a third-party audit service at the request of the insurer if the bills contain confidences or secrets of the insured. A request of the insured to consent to the disclosure of the billing statements to the audit service may create an actual conflict of interest between the insured and insurer, in which case the request may not be made by the attorney.

- *OSB Legal Ethics Op No 2005-130*. Attorney's representation of a client's psychotherapist at a deposition regarding the plaintiff's mental state would not normally create a conflict of interest for the attorney. If a likely conflict develops after joint representation begins, disclosure and consent would be necessary. Attorney would have to withdraw if consent could not be obtained or if an actual conflict developed.

- *OSB Legal Ethics Op No 2005-123*. Whether an attorney may ethically represent three individuals who wish to form a corporation or partnership, and whether client consent based upon full disclosure is a necessary precondition thereto, depends on the

respective interests of the individuals. There could be an actual conflict, a likely conflict, or neither.

- *OSB Legal Ethics Op No 2005-122*. (1) An attorney who appears as a special prosecutor in certain misdemeanor cases on behalf of the State of Oregon may represent parties adverse to the State, subject to client consent based upon full disclosure. (2) Representing a party in negotiating a contract with or litigating against the State constitutes representation adverse to the State. Merely assisting a client in interpreting a rule of law or regulation does not. (3) An attorney may obtain a blanket waiver governing future conflicts. Such a blanket waiver is not effective, however, if the conflict that ultimately emerges proves to be an actual conflict or if the disclosure of material facts proves to constitute less than full disclosure.

- *OSB Legal Ethics Op No 2005-121*. An attorney who is hired by an insurer to represent both the insured and the insurer in the defense of a claim that is subject to a reservation of rights or that exceeds policy limits generally will not confront a likely conflict and must conduct the litigation in a manner that is most beneficial to the attorney's primary client, the insured.

- *OSB Legal Ethics Op No 2005-85*. Representation of a corporation or partnership that is owned entirely by two individuals who are not members of the same family does not, as a matter of law, constitute representation of the owners so as to give rise, without more, to multiple client conflict-of-interest questions. Similarly, representation of one or both owners in such circumstances does not, as a matter of law, constitute representation of the corporation or partnership.

- *OSB Legal Ethics Op No 2005-77*. With consent after full disclosure, an attorney who previously represented an insurer in reviewing an insurance policy with respect to a coverage issue pertaining to a particular insured may thereafter represent the insurer and the insured in defense of the underlying litigation subject to a reservation of rights.

- *OSB Legal Ethics Op No 2005-72*. Whether an attorney may simultaneously represent both the defendant-purchaser of goods and a secured party-lender to the plaintiff-seller depends upon the

reasonably apparent effect upon the secured party-lender if the defendant-purchaser is successful. If, for example, it reasonably appears that the plaintiff-seller has sufficient resources to pay the secured party-lender regardless of whether the litigation is successful, neither an actual nor a likely conflict would be present. On the other hand, if the extent of the plaintiff-seller's resources is in doubt and a reasonable likelihood exists that the secured party-lender will be paid only if the plaintiff-seller succeeds, an actual or likely conflict would be present, depending on the role or roles of the attorney. If the only work that the attorney is doing on behalf of the secured party-lender is unrelated to the matter involving the defendant-purchaser, only a likely conflict would exist.

- *OSB Legal Ethics Op No 2005-67.* An attorney who is employed as county counsel and who, at times, advises county employees with respect to various matters of county business but not as to their personal matters has only one client, the county. Consequently, no multiple client conflict exists if the county counsel is assigned, on behalf of the county, to negotiate the county's collective bargaining agreement with county employees.

- *OSB Legal Ethics Op No 2005-62.* (1) An attorney for a personal representative is the personal representative's attorney and not the attorney for the estate or the beneficiaries. (2) An attorney who represents a personal representative who later resigns may thereafter represent that personal representative in pursuing a claim for fees and expenses against the estate. (3) Absent a conflict of interest, an attorney who represents an initial personal representative may represent a successor personal representative without disclosure and consent.

- *OSB Legal Ethics Op No 2005-46*. A law firm that provides legal services to the employees of a corporation pursuant to a prepaid legal services plan may represent one employee of the corporation against another employee of the corporation without the other employee's consent unless the other employee is a client of the firm. The mere fact that the other employee is a potential recipient of legal services under the plan does not make that employee a client of the firm.

- *OSB Legal Ethics Op No 2005-40.* Whether an attorney may represent both a secured creditor and an unsecured creditor in a

bankruptcy proceeding, and whether client consent based upon full disclosure is a necessary precondition therefor, depend on the relationship between the respective claims of the secured and unsecured creditors. With client consent based upon full disclosure, an attorney may simultaneously represent the debtor in a bankruptcy while also representing a creditor on unrelated matters.

- OSB Legal Ethics Op No 2005-37. An attorney who acts as counsel for a bond issuer may not simultaneously represent the underwriter with respect to the validity of the bonds issued. An attorney may represent an underwriter with respect to the validity of a bond issue while representing the issuer on unrelated matters, and vice versa, if both consent.

- *OSB Legal Ethics Op No 2005-27*. An attorney who represents a trade association may, without special disclosure and consent, represent one trade association member against another trade association member on matters unrelated to the attorney's work for the trade association.

5. RPC 1.7(b) defines those circumstances under which current-client conflicts may and may not be waived.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

6. The primary difference between waivable and non-waivable conflicts hinges on whether the lawyer could effectively represent the interests of all clients under the circumstances. *See, e.g., OSB Legal Ethics Op No 2006-177.* (Attorney may, on behalf of one client, take a legal position on an issue in a matter and take a conflicting or opposite legal position on the same issue for another client in a factually unrelated matter, unless the attorney actually knows or reasonably should know of the assertion of the conflicting positions and also actually knows or reasonably should know that an outcome favorable to one client will, or is highly likely to, affect the second client adversely; under the latter circumstances, the issue or positional conflict may not be waived by client consent).

    a. Examples of situations in which current client conflicts are usually easily waivable are:

        i. Both husband and wife (co-debtors) in joint bankruptcy proceedings. *OSB Legal Ethics Op No 2005-86.*

        ii. Both husband and wife in preparing joint wills. *OSB Legal Ethics Op No 2005-86.*

        iii. Both an insurer and an insured in action against a third-party tortfeasor to recover both damages paid to the insured by the insurer and damages to the insured that were not reimbursed by insurer, unless it appears that the interests of the insurer and the insured are in conflict. *OSB Legal Ethics Op No 2005-30*.

    - *In re Stewart*, 25 DB Rptr 106 (2011). [reprimand] In an environmental cleanup case, attorney represented both the insureds and an insurer under a reservation of rights where a determination made by an expert potentially could have affected the existence of coverage for remediation. Attorney failed to obtain the insureds' informed consent to the conflict confirmed in writing.

        iv. An attorney may represent a widow in her individual capacity and in her capacity as personal representative of her husband's estate. *OSB Legal Ethics Op No 2005-119.*

v. A driver and passengers in the same vehicle for personal injury/property damage claims against the adverse driver provided there is no claim for contributory negligence against the driver/client and there are aggregate resources available to adequately cover the claims of all clients. *OSB Legal Ethics Op No 2005-158*; *but c.f., In re Barber,* 322 Or 194, 904 P2d 620 (1995) (attorney violated rule by continuing to represent multiple plaintiffs in personal injury case after an actual conflict of interest developed)

b. Sometimes waiver is never possible because a lawyer always has a duty to contend for something on behalf of one client (or on behalf of the lawyer's own interests) while at the same time having a duty to oppose it on behalf of the other. Some examples are:

i. Both the buyer and seller in a real estate or similar sales transaction. *In re Richardson,* 350 Or 237, 253 P3d 1029 (2011); *In re Griffith,* 304 Or 575, 748 P2d 86 (1987); *In re Baer,* 298 Or 29, 688 P2d 1324 (1984).

- *In re Gerttula*, 26 DB Rptr 31 (2012). [reprimand] Two individual clients owned real property as joint tenants with right of survivorship. On behalf of both, attorney prepared deeds by which the clients conveyed the property to themselves as tenants in common. With regard to the manner in which they owned the property, the interests of the two clients in the transaction were adverse to one another, creating a conflict for attorney. [DR 5-105(E)]

- *In re Brown*, 18 DB Rptr 257 (2004). [30-day suspension] Attorney represented all parties in negotiating, drafting, and finalizing a stock option agreement.

ii. Both the lender and borrower in a loan transaction. *In re Wittemyer,* 328 Or 448, 980 P2d 148 (1999); *In re Carey,* 307 Or 315, 767 P2d 438 (1989); *In re Harrington,* 301 Or 18, 718 P2d 725 (1986); *In re Boyer,* 295 Or 624, 669 P2d 326 (1983).

- *In re Coran*, 30 DB Rptr 350 (2016) [120-day suspension, all but 30 days stayed/3-year probation] While in jail, two of Respondent's clients ("Borrower" and "Lender") met each other, without Respondent's involvement. Borrower proposed that Lender loan him money for his bail in exchange for a note, a truck, and a trailer. Respondent met separately with each client to discuss the proposed loan, and made assurances to Lender regarding Borrower's ability to repay the loan. Relying in part on Respondent's assurances, Lender agreed to the proposal. Respondent drafted the contract which set forth the terms of Lender's agreement with Borrower—both of whom Respondent represented, and whose interests in the contract were directly adverse.

- *In re Moule*, 26 DB Rptr 271 (2012). [reprimand] Attorney facilitated a loan from one client to another, representing both clients in the transaction. Later, the borrowing client was charged with a crime that placed the lending client's security interest in jeopardy. Attorney's defense of the borrowing client in the criminal proceeding gave rise to another conflict.

- *In re Ambrose*, 26 DB Rptr 16 (2012). [reprimand] Attorney represented a lender in a transaction in which a loan was made to another client, without sufficient disclosures to the lender client.

- *In re Patrick*, 20 DB Rptr 47 (2006). [30-day suspension] Attorney had an actual conflict of interest when he arranged loans from one client to other clients while representing both the lender and borrowers in the transactions. [DR 5-105(E)]

- *In re Bowker*, 20 DB Rptr 16 (2006). [30-day suspension] Attorney improperly represented both lender and borrower in a loan transaction. [DR 5-105(E)]

- *In re Kahn*, 19 DB Rptr 351 (2005). [reprimand] Attorney represented both lender and borrower in a loan transaction. In another matter, attorney had a likely conflict of interest when he represented one business entity as lender in a transaction while an associate in attorney's firm simultaneously represented the borrower on an unrelated matter.

iii. Both spouses in marital dissolution proceedings. *In re McKee,* 316 Or 114, 849 P2d 509 (1993); *In re Thies,* 305 Or 104, 750 P2d 490 (1988); *In re Hockett,* 303 Or 150, 734 P2d 877 (1987); *OSB Legal Ethics Op No 2005-86.*

- *In re Greif*, 21 DB Rptr 233 (2007). [reprimand] Attorney met with husband and wife about a divorce and then assisted in the negotiation of a property settlement agreement, which he later reduced to writing. While attorney believed he was acting as a mediator or scrivener, he did not make this clear to either party, each of whom had a reasonable expectation that attorney was representing them.

- *In re Freudenberg*, 20 DB Rptr 190 (2006). [30-day suspension] Attorney represented both wife (who was residing in a long-term care facility) and husband in estate and Medicaid planning, which included filing a petition on behalf of husband for support payments and a transfer of assets from wife.

iv. The birth mother and the adopting couple in an adoption proceeding. *OSB Legal Ethics Op No 2005-28*.

v. The debtor and a creditor in a bankruptcy proceeding. *In re Renn,* 299 Or 559, 704 P2d 191 (1985); *In re Hershberger,* 288 Or 559, 606 P2d 623 (1980); *OSB Legal Ethics Op No 2005-40*.

- *In re Leo*, 22 DB Rptr 261 (2008). [reprimand] Attorney simultaneously represented two business clients that had a creditor/debtor relationship. Attorney assisted the debtor client in restructuring its business in a way that was potentially adverse to the creditor client. Thereafter, when he no longer represented the creditor client, attorney defended the debtor client against the creditor client's suit even though his prior representation of the creditor provided him information about the creditor that gave rise to a conflict of interest. [DR 5-105(C) and DR 5-105(E)]

- *In re Claussen,* 322 Or 455, 909 P2d 862 (1996). [1-year suspension] An actual conflict of interest existed in attorney's representation of bankruptcy debtor and debtor's principal secured

creditor where positions taken in bankruptcy and in the case on behalf of creditor were directly in conflict. An actual conflict of interest does not require that the conflict be in the same transaction.

vi. Both a donor and a donee charity in a charitable remainder unitrust transaction. *OSB Legal Ethics Op No 2005-116*.

c. There are also situations that, except in extraordinary cases, an attorney may not ethically represent multiple clients.

i. Multiple defendants in a criminal matter. *OSB Legal Ethics Op No 2005-82.*

- *In re Clark*, 25 DB Rptr 207 (2011). [reprimanded] Attorney represented co-defendants in a criminal case when there was both the potential for disagreement between them and an actual dispute between them whether plea negotiations should include the forfeiture of certain property. Informed consent would not have cured the conflict.

- *In re Johnson*, 20 DB Rptr 206 (2006). [90-day suspension] Attorney represented husband and wife who were criminally charged with unlawfully obtaining public assistance when their interests were in actual or likely conflict.

- *In re Goldstein*, 18 DB Rptr 207 (2004). [reprimand] Attorney had a conflict of interest when he briefly represented two clients in a criminal matter without confirming his oral conflict disclosures in writing and when he represented one client whose interests were adverse to another client of his law firm without obtaining consent after full disclosure.

- *In re Jeffery,* 321 Or 360, 898 P2d 752 (1995). [9-month suspension] An actual conflict of interest existed in attorney's representation of two criminal defendants accused of being co-conspirators in a drug transaction when the district attorney offered to reduce charges as to one of attorney's clients in an unrelated case in exchange for testimony against the attorney's other client.

- *In re O'Neal,* 297 Or 258, 683 P2d 1352 (1984). Attorney could not represent co-defendants in a criminal case without violating conflicts rules, even where attorney limited his representation to negotiating pleas for the clients. The fact that representation may not include trial does not solve the conflict because of the inevitable comparisons between the co-defendants and the potential differences in their situations even at the plea stage.

  ii. A protected person and the petitioner in a probate proceeding.

- *In re Misfeldt*, 24 DB Rptr 25 (2010). [reprimand] Attorney represented protected person at the same time as she represented the proposed conservator and guardian for the protected person.

- *In re Sunderland*, 23 DB Rptr 61 (2009). [3-year suspension] Attorney represented both a conservator and the protected person when their interests were in actual or likely conflict because of the conservator's improper use of estate funds.

- *In re Carstens*, 23 DB Rptr 118 (2009). [90-day suspension] Attorney simultaneously represented an elderly client, a relative petitioning to be the elderly client's conservator, and another person petitioning to be the elderly client's guardian when the objective interests of these clients were adverse.

- *In re Koblegarde*, 19 DB Rptr 22 (2005). [reprimand] Attorney prepared an estate plan and related documents for a client and continued to represent the client regarding the estate plan. Attorney then represented the client's daughter as petitioner in a proceeding to have a guardian and conservator appointed for the original client.

- *In re Kay*, 18 DB Rptr 138 (2004). [30 days] Attorney had a conflict when he represented the petitioner in a conservatorship proceeding while also representing the protected person who opposed the appointment of a conservator.

7. Where waiver is possible, the lawyer must still fully disclose the possible conflict(s) to the affected clients and obtain their informed consent, confirmed in writing, to the continued representation. These terms are defined by RPC 1.0.

RULE 1.0 TERMINOLOGY

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. *See* paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

- *In re Grenley*, 30 DB Rptr 333 (2016) [reprimand] Respondent represented the purchaser of a home in a rescission claim against the sellers arising from the sale. At the time that Respondent was hired, his law firm represented the purchaser's real estate company on unrelated matters. Respondent and his purchaser client initially filed a claim only against the sellers. When information revealed during discovery suggested new claims against the purchaser's real estate company, Respondent sought to resolve matters through a letter to the real estate company client. Respondent's letter did not advise either his purchaser client or the real estate company client of the current client conflict, nor did he seek informed consent from either client.

- *In re Fisher,* 30 DB Rptr 196 (2016) [30-day suspension] At the time that his client's contingency case settled, Respondent knew that his client was not satisfied with his representation and unhappy with

the amount of the settlement. Respondent removed attorney fees and costs from the settlement and sent the remainder—much less than the 60% the client was expecting—to the client with a release that conditioned the client's acceptance of the funds (his own funds) on his concession that he was "satisfied" with the both the settlement and Respondent's legal representation. This use of funds that undisputedly belonged to the client as consideration to settle any prospective malpractice claim, created a personal-interest conflict. Respondent failed to advise his unrepresented client in writing of the desirability of seeking the advice of independent counsel and other essential terms, nor did he obtain signed written consent.

- *In re Oliveros*, 30 DB Rptr 145 (2016) [60-day suspension, all stayed/3-year probation] An elderly couple sought Respondent's assistance in investing their retirement funds. Respondent recommended that they make loans to two current clients. In the loan transactions, the interests of the clients as lenders were directly adverse to the interests of the clients who were the borrowers. Respondent failed to make the necessary disclosures and obtain consents from any of the clients involved in the transactions.

- *In re Romano,* 30 DB Rptr 61 (2016) [60-day suspension] Respondent and his client developed a personal relationship that affected Respondent's professional judgment. Respondent attempted to create a conflict waiver, but did not immediately withdraw from the representation and failed to provide the client with sufficient information to allow her to determine whether Respondent should continue to represent her in the matters.

- *In re Ambrose*, 29 DB Rptr 98 (2015) [public reprimand] Attorney managed and represented an investment group (Group 1) on a development project where one source of collateral for the project loan was a second lien trust deed on an unrelated parcel. When the first lienholder took steps to schedule a non-judicial foreclosure of the parcel, four of the seven investors on the project joined with a fifth investor (Group 2), to acquire the loan on the parcel and protect Group 1's collateral. Attorney performed the legal work necessary for Group 2, was its non-member manager, and represented it on an ongoing basis. Group 2 purchased the first lienholder's loan on the parcel, but failed to pay amounts due.

Attorney continued to forbear the non-judicial foreclosure. When bankruptcy seemed inevitable, attorney represented Group 2 in completing the non-judicial foreclosure of the parcel. As a result, Group 2 obtained the parcel by bidding the amount of the first lien debt, thereby extinguishing Group 1's second lienholder position. Attorney continued to promote Group 1's interests by using the parcel as collateral through Group 2's ownership of it. However, no consents from the affected clients were obtained.

- *In re Snell*, 29 DB Rptr 5 (2015) [60-day suspension, all but 30 days stayed/2-year probation] Attorney filed a lien against a hotel on behalf of Client 1. A few months later, attorney filed another lien on behalf of Client 2. Attorney sent a demand letter to hotel for Client 2's lien and billed Client 2 for her services. A few months later, on Client 1's behalf, attorney filed a lawsuit against hotel seeking to foreclose Client 1's lien. Later, attorney prepared for Client 2 an answer to the complaint for foreclosure she had filed for Client 1. The answer denied the allegations of the complaint; cross claimed against the other lien-holder defendants, including Client 1. By representing both Client 1 and 2 in the foreclosure proceeding, attorney had a current client conflict of interest. Attorney then entered negotiations with Hotel on behalf of Client 1, without notice or approval from Client 2.

- *In re Seligson*, 27 DB Rptr 314 (2013) [reprimand] Soon after being retained to advise a client regarding her estranged husband's bankruptcy and its effect on the couple's real property, it was discovered that the second mortgage was potentially avoidable and created the possibility of the client having significant equity. The client's divorce attorney then prepared a trust deed for the client's signature in favor specified parties, including attorney, as security for his fees. Shortly thereafter, the bankruptcy trustee filed an adversary proceeding to avoid the second mortgage and the attorney's interest in the ranch property, among others, and naming the client as an adverse party. Attorney thereafter represented both his interest and his client's interest in the adversary proceeding, without obtaining informed consent from his client.

- *In re Cauble*, 27 DB Rptr 288 (2013). [45-day suspension/ restitution] At the same time he was defending an unlicensed mortgage broker in litigation by investors for losses, attorney undertook to represent several additional investors (who lost funds

that the mortgage broker client had invested on their behalf) against the title company without securing the informed consent of all his clients regarding the significant risk that his representation of the additional investors would be materially limited by his responsibilities to the mortgage broker client and vice versa, particularly in light of legitimate claims the additional investors might have had against the mortgage broker client.

- *In re Hostetter*, 27 DB Rptr 13 (2013). [18-month suspension, all but 6 months stayed/2-year probation] Attorney assisted company and its principals in securing bank loans. Thereafter, attorney represented company and its principals in modifying the bank loans at the same time he was representing the bank in other matters, without obtaining informed consent of the company and its principals. [DR 5-105(E) and RPC 1.7(a)]

- *In re Schwindt*, SC S060906, Case No. 12-128 (2013). [2-year suspension] Attorney entered into a continuing business relationship with credit repair company where he would receive a set legal fee for each client without first obtaining informed consent from the clients to the fact that he had a personal financial interest in, and represented, the credit repair company.

- *In re Stewart*, 25 DB Rptr 106 (2011). [reprimand] In an environmental cleanup case, attorney represented both the insureds and an insurer under a reservation of rights where a determination made by an expert potentially could have affected the existence of coverage for remediation. Attorney failed to obtain the insureds' informed consent to the conflict confirmed in writing.

- *In re Dole*, 25 DB Rptr 56 (2011). [reprimand] Attorney represented father and mother in estate planning and family business matters, and continued to represent father after mother died. Attorney also began to represent the adult children regarding their concerns over the valuation, liquidation and distribution of assets from mother's estate to father, fathers' spending habits and control over the family business entities. Attorney failed to obtain informed consent confirmed in writing from his multiple clients.

- *In re Petshow*, 23 DB Rptr 55 (2009). [reprimand] Attorney represented another attorney in defense of an ethics complaint made by a client while also representing the client in the underlying

legal matter out of which the ethics complaint arose, without obtaining either client's informed consent confirmed in writing.

- *OSB Legal Ethics Op No 2005-160*. Attorney, formerly employed in the state public defender's office and now in private practice, may represent clients in post-conviction relief appeals in which the client contends the public defender's office rendered ineffective assistance of counsel at trial, provided the attorney's interest in maintaining the goodwill of her former office does not rise to the level of a self-interest conflict and the attorney did not participate personally and substantially in the former office's representation of the client or any co-defendant. Disclosure and consent may cure any conflicts presented.

Notes

OPTIONAL HYPOTHETICAL

- Bud Friend phoned his friend and attorney, Evan Altruist, to report he was divorcing his wife, Wanda. Altruist had and was representing Friend in a number of matters. Friend said that he and Wanda had agreed on a division of property and asked Altruist to meet with them and prepare a property settlement agreement.

  At the start of the meeting, Altruist met with Wanda alone and discussed the rights, duties, and obligations of both parties in a divorce proceeding. Altruist conveyed and discussed offers and counter-proposals from both Wanda and Friend. By the end of the meeting, the agreement reached gave Wanda more property than the division she and Friend had purportedly arrived at on their own.

  Altruist believed he was acting as a mediator or scrivener and did not believe that either Friend or Wanda was his client.

  Altruist prepared a property settlement agreement and forwarded it to Friend and Wanda for review. In addition to its terms, the agreement contained a statement that Altruist had acted at the request of both parties who had independently reached agreement on all issues without Altruist's consultation or legal advice. Both parties acknowledged that they had ample opportunity to consult with their own legal counsel before signing the agreement and had been encouraged to do so. Friend and Wanda signed the agreement.

Altruist:

A. Acted appropriately because both parties waived the potential conflict in writing following full disclosure.

B. Acted appropriately because he was acting on behalf of friends and did not charge for his mediation services.

C. Acted appropriately because he was acting as a mediator and was objectively fair in dispensing legal advice.

D. Is proof that no good deed goes unpunished.

DISCUSSION

Answer: _____

In re Greif, 21 DB Rptr 233 (2007) (public reprimand).

C. Current Client Specific Rules

1. RPC 1.8 sets out prohibitions that, more or less, are specific examples of situations that would otherwise be conflicts under RPC 1.7.

2. Business with a client. RPC 1.8(a).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

a. If the client expects the attorney to exercise professional judgment on the client's behalf the attorney may enter into a business partnership with the client only if the client consents after full disclosure. *OSB Legal Ethics Op No 2005-32*.

- *In re Spencer*, 355 Or 679, 330 P3d 538 (2014) [30-day suspension] Respondent was both a licensed attorney and a licensed real estate broker. The client retained respondent to file for Chapter 13 bankruptcy. When the client sold some out-of-state property, respondent advised her to invest the proceeds in a home in Oregon to take advantage of a bankruptcy exemption and then offered to serve as her real estate broker. Although the client was made aware that respondent would be receiving a portion of any

sales commission, respondent failed to recommend that the client seek independent legal counsel and failed to obtain the client's informed, written consent to the representation.

- *In re Hostetter*, 27 DB Rptr 13 (2013) [18-month suspension/part stayed, 2-year probation] Attorney and his wife purchased a number of parcels of real property on contract from a couple who attorney then represented in claims made concerning the parcels (i.e., property in which both the attorney and the couple had an interest) without obtaining the couple's informed consent.

- *In re Ambrose*, 26 DB Rptr 16 (2012). [reprimand] Through various business entities, attorney entered into business transactions with a current client without sufficient disclosures concerning possible conflicts between attorney and the client.

- *In re Daniels*, 22 DB Rptr 72 (2008). [reprimand] Attorney prepared legal documents for a client and jointly purchased multiple pieces of real property with that client. The client paid cash for his portion of the property while attorney had contracts with the sellers guaranteed by the client. Attorney failed to explain to the client the nature and extent of his adverse interests in those transactions.

- *In re Dickerson*, 19 DB Rptr 363 (2005). [reprimand] Attorney and his business partners were in negotiations to purchase a restaurant when attorney also undertook to represent the restaurant owner in assisting with the termination of a sublease to a third party. The objective interests of the attorney and his partners were adverse to those of the restaurant owner, but no consent following disclosure was obtained.

- *In re Eichelberger*, 19 DB Rptr 329 (2005). [60-day suspension] Attorney represented a contractor and engaged in construction projects with the contractor without sufficient disclosure or consent. Later, attorney negotiated a settlement of a claim for the contractor solely as a means of obtaining funds to apply toward the contractor's outstanding legal fees.

- *In re McLaughlin*, 17 DB Rptr 247 (2003). [reprimand] Attorney became an officer in a corporation he formed for a client without full disclosure to the client, including the disclosure that state law required attorney to act solely to further the interests of the

corporation, to the possible detriment of the client's interests. [DR 5-104(A)]

- *In re McNeff*, 17 DB Rptr 143 (2003). [60-day suspension] Attorney entered into a business venture with her client during the representation without obtaining his informed consent to her continued representation. [DR 5-101(A)]

- *OSB Legal Ethics Op No 2006-176*. A lawyer wishing to both represent a client in a real property transaction and act as a real estate agent or broker, mortgage broker, or loan officer in the transaction must obtain informed consent in a writing signed by the client.

- *OSB Legal Ethics Op No 2005-32*. An attorney who wishes to represent a partnership in which both the attorney and a client are partners may do so. If, however, the exercise of the attorney's independent professional judgment will or reasonably may be affected by the attorney's own financial interest, the attorney may do so only if the individual client and the partnership consent after full disclosure.

b. The informed consent requirements for transacting business with a client are more stringent than with other types of conflicts. *OSB Legal Ethics Op No 2006-176*.

- *OSB Legal Ethics Op No 2005-32*. If a client expects the attorney to exercise independent professional judgment on the client's behalf, an attorney may not borrow money or lease property from the client absent client consent based upon full disclosure.

- *OSB Legal Ethics Op No 2005-10*. With appropriate disclosure and client consent, an attorney may advise clients concerning transactions with business enterprises that the attorney owns.

c. When an attorney borrows money from a nonlawyer client who is not in the business of lending money, the attorney must assume, in the absence of a contrary expression by the client, that the client is relying on the attorney for professional judgment concerning the loan. *In re Schenck*, 345 Or 350, 194 P3d 804, *mod on recon* 345 Or 652 (2008).

i. Full disclosure of the conflict requires the type of advice a prudent attorney would give if the client were lending to a third party. *In re Montgomery,* 292 Or 796, 643 P2d 338 (1982).

- *In re Noble (II),* 30 DB Rptr 264 (2016) [60-day suspension] Respondent entered into a written fee agreement with a client that allowed Respondent to loan money to the client to cover expenses related to the client's case. The fee agreement failed to provide whether the terms of the loan were fair and reasonable to the client, failed to advise the client to seek independent counsel, and failed to include the essential terms of the loan and Respondent's role in the transaction.

- *In re Noble (I),* 30 DB Rptr 116 (2016) [4-year suspension/2 years stayed/2-year probation] Respondent assisted a personal-injury client in obtaining a litigation loan, and had her give him a loan from the proceeds. In another case, Respondent received a client loan from settlement proceeds. In neither instance did Respondent discuss the terms or duration of the loans with the clients, including whether there was interest on the loans, nor did he docu¬ment them in writing. Respondent did not obtain the clients' informed written consent agreeing to the essential terms of the loans, Respondent's role in the transactions, or advise either client that they should seek advice from independent counsel regarding the loans.

- *In re Ghiorso,* 27 DB Rptr 110 (2013) [reprimand] Attorney participated as co-borrower with his client on one loan and separately loaned money or advanced assistance to that same client on at least two other occasions. In none of the transactions did the attorney provide the client with adequate disclosures, including that the attorney was not acting as his lawyer in the transactions, or obtain his client's informed consent to the transactions.

- *In re Hostetter*, 27 DB Rptr 13 (2013) [18-month suspension/part stayed, 2-year probation] After participating in real estate transactions with client couple, attorney and his wife entered into two additional transactions where the couple either loaned the attorney money or transferred rights related to the parcels, without

the attorney disclosing all of the terms and obtaining the couple's informed consent to the transactions.

- *In re Luetjen*, 18 DB Rptr 41 (2004). [1-year suspension] Attorney who borrowed a substantial amount of money from a client on an unsecured basis, and with promissory notes that did not specify a due date for repayment, failed to disclose to the client his conflict of interest in obtaining the loan. [DR 5-104(A)]

- *In re Wright*, 17 DB Rptr 132 (2003). [reprimand] Estate attorney permitted investment of estate funds in a corporation in which he held a 50% interest without first obtaining client consent after full disclosure. [DR 5-104(A)]

- *In re White*, 17 DB Rptr 18 (2003). [reprimand] Attorney borrowed $20,000 from a client without security or even a written note. Attorney failed to obtain informed consent to the transaction. [DR 5-104(A)]

d. Friendship between an attorney and client is an insufficient reason to dispense with disclosures required under the rule. *In re Germundson,* 301 Or 656, 724 P2d 793 (1986).

- *In re Lafky,* 25 DB Rptr 134 (2011). [4-month suspension] Attorney engaged in business transactions with a client friend without obtaining the client's informed consent.

e. Obtaining a security interest in a client's real property after representation begins implicates this rule and necessitates compliance with its consent and disclosure requirements.

- *In re Seligson,* 27 DB Rptr 314 (2013). [reprimand] Soon after being retained to advise a client regarding her estranged husband's bankruptcy and its effect on the couple's real property, it was discovered that the second mortgage was potentially avoidable and created the possibility of the client having significant equity. Shortly thereafter, the client's divorce attorney prepared a trust deed for the client's signature in favor of specified parties, including attorney, to secure his fees. Although attorney only minimally participated in creation and execution of the trust deed, he had knowledge of and consented to it without obtaining his client's informed written consent.

3. Gifts from a client. RPC 1.8(c).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

a. An attorney may ethically draft a will for the attorney's parents in which the attorney is left a bequest. Depending on the circumstances, however, client consent based on full disclosure may be necessary. *OSB Legal Ethics Op No 2005-93.*

- *In re Schenck*, 345 Or 350, 194 P3d 804, mod on recon 345 Or 652 (2008). [1-year suspension] Attorney prepared a will for an elderly client that included a gift to attorney's wife and provided that the wife also would be a residual beneficiary. On the facts of the case, attorney could not avail himself of the defense that the gifts were not substantial. [DR 5-101(B)]

4. Advancing or Guaranteeing Financial Assistance to Client. RPC 1.8(e).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

a. An attorney may not advance or guarantee cost-of-living expenses to a client pending the outcome of litigation that the attorney is handling for the client. *OSB Legal Ethics Op No 2005-4.*

b. An attorney may, however, advance bail money to a client or advance funds to pay litigation-related costs as long as the client remains responsible for reimbursing the attorney. *OSB Legal Ethics Op No 2005-4.*

c. The attorney may also pay his or her own travel and investigation expenses incurred on the client's behalf. *OSB Legal Ethics Op No 2005-4.*

- *In re Coran*, 30 DB Rptr 350 (2016) [120-day suspension, all but 30 days stayed/3-year probation] While respondent's client was incarcerated, respondent deposited money into the client's jail account on multiple occasions without requiring or ensuring that the funds be used only for court costs or litigation expenses. The client did not use the funds for either purpose.

- *In re Ghiorso*, 27 DB Rptr 110 (2013). [reprimand] Attorney loaned money to his personal injury client beyond the expenses of the personal injury litigation.

- *In re Hendrick*, 19 DB Rptr 170 (2005). [30-day suspension] Attorney loaned money to his client to resolve a non-judicial foreclosure and satisfy other debts owed by the client to the creditor. [DR 5-103(B)]

- *In re Carstens*, 17 DB Rptr 46 (2003). [30-day suspension] Attorney loaned money to his divorce client to ensure that the client did not lose her house and subsequently assisted the client by paying her household expenses. [DR 5-103(B)]

5. Third Party Compensation. RPC 1.8(f).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.

a. An attorney may not ethically permit the representation of a client to be controlled by others. *OSB Legal Ethics Op No 2005-115*.

- *OSB Legal Ethics Op No 2005-166*. Insurance defense lawyer may not agree to comply with insurer's billing guidelines if to do so requires the lawyer to materially compromise his or her ability to exercise independent judgment on behalf of a client.

- *OSB Legal Ethics Op No 2005-98*. An attorney may ethically agree with an insurer to handle a number of cases for the insurer at a flat rate per case regardless of the amount of work required as long as the overall fee is not clearly excessive and as long as the attorney does not permit the existence of such a fee agreement to limit the work that the attorney would otherwise do for a particular client.

- *OSB Legal Ethics Op No 2005-79*. Attorney employed by church to represent others in support of issues of interest to the church (e.g., helping to assure care for the elderly) must comply with RPC 1.8(f).

- *OSB Legal Ethics Op No 2005-66*. An attorney who is a member of a legal aid society's board of directors may represent a client in a proceeding in which the opposing party will be represented by an attorney who is a legal aid society employee as long as the conditions set forth in RPC 1.8(f) are met.

- *OSB Legal Ethics Op No 2005-30*. An attorney may ethically represent both an insurer and an insured in action against a third-party tortfeasor to recover both damages paid to the

insured by the insurer and damages to the insured that were not reimbursed by insurer unless it appears that the interests of the insurer and the insured are in conflict. If the attorney is paid by the insurer to bring such an action, the insured must consent thereto.

- *OSB Legal Ethics Op No 2005-22*. An attorney who is asked by an insurance adjustor to handle a conservatorship proceeding to effect the settlement of a personal injury claim by an injured minor that the insurance adjustor has just reached may ethically do so with disclosure and consent.

6. Aggregate settlements. RPC 1.8(g)

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

- *In re Gatti*, 356 Or 323, 33 P3d 994 (2014) [90-day suspension] Lump-sum settlement offers made by archdiocese and state on multiple-client claims for sexual abuse allegedly committed by chaplain at juvenile offender facility were “aggregate settlements,” such that attorney who jointly represented clients in obtaining those settlements was required under rule to obtain each client's written informed consent, where lump-sum offers exceeded the clients’ total individual minimum settlement offers. An aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent because the defendant’s acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or because the value of each claim is not based solely on individual case-by-case facts and negotiations.

- *OSB Legal Ethics Op No 2005-158.* Attorney may represent simultaneously a driver and passengers in the same vehicle for personal injury/property damage claims against the adverse driver provided there is no claim for contributory negligence against the driver/client and there are aggregate resources available to adequately cover the claims of all clients. Disclosure and consent from the clients may be required under some circumstances, and particularly if an aggregate settlement is offered. No conflict exists in representing the passengers in a claim against the driver's insurance carrier for PIP benefits because such benefits are not based on an aggregate limit or on the fault of the driver.

7. Settlement of Malpractice Liability, Arbitration. RPC 1.8(h).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;

(3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

a. An attorney may not ethically negotiate the settlement of a malpractice claim with a client unless the attorney first advises the

client in writing that independent representation for the client is appropriate. *OSB Legal Ethics Op No 2005-61*.

- *In re Fisher*, 30 DB Rptr 196 (2016) [30-day suspension]. At the time his client's contingency case settled, respondent knew that his client was not satisfied with his representation and unhappy with the amount of the settlement. When he received the settlement, respondent removed attorney fees and costs and sent the remainder—much less than the 60% the client was expecting—to the client with a release that conditioned the client's acceptance of the funds (his own funds) on his concession that he was "satisfied" with the both the settlement and respondent's legal representation. This use of funds that undisputedly belonged to the client as consideration to settle a prospective malpractice claim violated the rule.

- *In re Schwindt*, SC S060906, OSB Case No. 12-128 (2013). [2-year suspension] Attorney required credit repair clients to sign an agreement releasing the credit repair company (also his client) and its attorneys from all claims as a condition of continuing to represent them. [RPC 1.8(h)(1) & (2)]

- *In re Bowman*, 24 DB Rptr 144 (2010). [1-year suspension, 8 months stayed/probation] Attorney entered into an agreement that required client to prospectively and unconditionally waive any right of action or claim against the attorney arising out of the legal services rendered under the agreement. The agreement further required the client to agree that any future controversy between the client and the attorney arising from or related to the legal services was subject to binding and final arbitration under rules of the American Arbitration Association. The attorney did not obtain the client's informed consent to this arbitration provision in a writing signed by the client, and the client was not otherwise independently represented with respect to the agreement. [RPC 1.8(h)(1) & (3)]

- *OSB Legal Ethics Op No 2001-165*. Attorney who investigates employee malfeasance for an employer client may require the employer to provide indemnification for resulting third party civil claims against the lawyer by the employee, but not for alleged malpractice by the attorney in handling the investigation itself.

8. Sexual relationship with a client. RPC 1.8(j).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

(1) "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and

(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

a. Attorney violates this rule by beginning a sexual relationship with a client during the representation of the client. *OSB Legal Ethics Op No 2005-140*.

- *In re Day*, 30 DB Rptr 162 (2016) [36-month suspension] On multiple occasions respondent had inappropriate contact with two incarcerated clients by engaging in sexual relations or conduct with them. Respondent believed the conduct with both clients to be consensual, however, sexual relations between a lawyer and an incarcerated client cannot be consensual.

- *In re Gough*, 27 DB Rptr 179 (2013) [reprimand] Attorney began a sexual relationship with his court-appointed client, a mother in a juvenile proceeding, when no consensual sexual relationship had existed between them before the start of the attorney-client relationship. Attorney continued to represent her for a number of months.

- *In re Goode*, 26 DB Rptr 213 (2012). [120-day suspension] Attorney engaged in sexual relations with a client shortly after he undertook

to represent her in litigation. The date that a client signs a written retainer agreement is not dispositive regarding when the attorney-client relationship commenced. Here, attorney's representation of the client was established before the sexual relations began between them.

- *In re Matthews*, 19 DB Rptr 193 (2005). [1-year suspension] Attorney commenced a sexual relationship with a domestic relations client. [DR 5-110(A)]

- *In re Peters*, 18 DB Rptr 238 (2004). [180-day suspension + BR 8.1 reinstatement] Attorney who had sexual relations with a client denied this relationship when questioned by a police detective regarding the client's whereabouts, knowing that this information was material to the investigation. [DR 5-110]

- *In re McHugh,* 14 DB Rptr 23 (2000). [60-day suspension] Attorney violated the rule when he engaged in sexual relations with a current client.

- *In re Hubbard,* 12 DB Rptr 53 (1998). [90-day suspension] Attorney began a sexual relationship with an existing client and continued to represent him after she became pregnant.

- *In re Hassenstab,* 325 Or 166, 934 P2d 1110 (1997). [disbarred] Attorney engaged in inappropriate sexual contact with at least 10 female clients.

- *In re Wolf,* 312 Or 655, 826 P2d 628 (1992). [18-month suspension]. Attorney had sex with his female client, a minor, after supplying her with alcohol. Although criminal charges were dismissed following diversion program, the court found that the lawyer acted intentionally and knew that he was violating the law. [DR 5-101(A)]

b. An attorney may not continue a pre-existing sexual relationship with a client if doing so would prejudice or damage the client. Even if no prejudice exists, client consent after full disclosure is required. An attorney in such a situation cannot rely on client consent if the attorney knows or reasonably should know that the client is not capable under the circumstances of giving meaningful consent. *OSB Legal Ethics Op No 2005-140*.

- *In re Baldwin*, 17 DB Rptr 280 (2003). [reprimand] Without full disclosure and consent, attorney represented a client in a dissolution proceeding at a time when he was engaged in a personal and sexual relationship with the client. [DR 5-101(A)]

- *OSB Legal Ethics Op No 2005-99*. An attorney may not have sexual relations with a client while representing the client in marital dissolution proceedings if doing so would prejudice or damage the client. Even if no prejudice exists, an attorney in such a situation cannot have sexual relations with a client absent client consent based on full disclosure. An attorney in such a situation also cannot rely on client consent if the attorney knows or should know that the client is not capable under the circumstances of giving meaningful consent.

9. Vicarious disqualification. RPC 1.8(k)

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

- *OSB Legal Ethics Op No 2005-155*. An attorney designated as "of counsel" for a law firm is considered a member of the firm for conflict of interest purposes. Therefore, when the attorney has a practice separate from the firm to which she is "of counsel," the current and former clients of both firms must be considered in evaluating whether conflicts exist.

- *OSB Legal Ethics Op No 2005-138*. A legal aid service is a "firm" or "law firm" for purposes of vicarious disqualification. If one legal aid lawyer is required to withdraw or decline employment, no other legal aid attorney may accept or continue such employment.

- *OSB Legal Ethics Op No 2005-114*. When an attorney is elected city councilor or mayor of a city in which the attorney practices law, members of the attorney's law firm may represent criminal defendants even though a city police officer may be a witness as long as the firm's clients consent after full disclosure. The attorney-city councilor/mayor may not, however, participate as a councilor or mayor in any decision affecting or relating to the city's employment of the attorney's firm unless city law specifically authorizes such conduct.

- *OSB Legal Ethics Op No 2005-91*. Subject to the constraints imposed by RPC 1.7, an attorney may become an officer, director, or shareholder of a corporation that another attorney in the same firm represents.

- *OSB Legal Ethics Op No 2005-75*. Attorneys who are in firms that appear before a judge may not ethically contract with the judge permitting him to use a private airplane that they own and may not purchase a vacation home with the judge.

OPTIONAL HYPOTHETICAL

- Attorney Adams represented Happy Loaner ("Loaner") on a personal injury claim. Early in the representation, Adams assisted Loaner to apply for and obtain a litigation loan from Rip-Off Financing ("Rip-Off") in the amount of $2,020 at an annual interest rate of 46.75%. Loaner received $1,500—as $520 of the advance was immediately paid back to Rip-Off for processing and origination fees. After Loaner secured the loan, Adams approached Loaner for a personal loan, and borrowed $400 from the Rip-Off loan proceeds ("Loaner Loan"). There was no discussion about the terms or duration of the Loaner Loan, including interest to be paid to Loaner or Rip-Off, if any. There was no documentation of the Loaner Loan.

  In a second matter, on behalf of his client, Will N. Cashier ("Cashier"), Adams received approximately $72,500 in settlement funds ("Cashier funds"). Adams properly deposited the Cashier funds into his lawyer trust account, then borrowed at least $2,000 of the Cashier funds ("Cashier Loan"). Although Cashier agreed to lend Adams money, there was no discussion about the terms or duration of the Cashier Loan, including interest to be paid to Cashier, if any. There was no documentation of the Cashier loan.

Which conflict rule(s) did Adams violate in the transactions with Loaner and Cashier?

A. Personal interest conflict and business with a client.

B. Multiple current-client conflict and business with a client.

C. Personal interest and former client conflict of interest.

D. All of the above.

DISCUSSION

Answer: _____

See In re Lawrence, 332 Or 502, 512, 31 P3d 1078 (2001); *In re Harrington*, 301 Or 18, 25, 718 P2d 725 (1986).

"Full disclosure" means an explanation sufficient to apprise the recipient (here, PGA) of the potential adverse impact on it regarding the matter to which it was asked to consent. RPC 1.0(b) & (g).

To comply with the full disclosure requirements, a lawyer must give the type of advice that a prudent lawyer would be expected to give the client if the client consulted the lawyer regarding the underlying issue or transaction. *In re Montgomery*, 292 Or 796, 803, 643 P2d 338 (1982); *In re Germundson*, 301 Or 656, 661, 724 P2d 793 (1986) (lawyers must take care to make the same kind of "full disclosure" to a client or potential client as they would seek on behalf of that client in a similar transaction with a third party).

In re Noble (I), 30 DB Rptr 116 (2016) (4-year suspension/2 years stayed/2-year probation)

D. Former Clients

1. Even after the representation concludes, RPC 1.9 and the lawyer's continued duty of loyalty require that the lawyer not undertake representation that would be adverse to a former client with respect to the former representation. *See* §19A below for a detailed discussion.

- Supp 16-2: Sylvia Stevens, *Conflicts, Part II: Former Client Conflicts*, OSB Bulletin, Dec 2009

OPTIONAL HYPOTHETICAL

- Attorney Allocate represented Daughter and Husband Buyer (the "Buyers") in estate planning matters. Shortly after completing their estate plans, Allocate met with Buyers about a loan they were hoping to obtain from Daughter's mother, Doris Diamond ("Diamond"), to purchase real property.

  The following month, Allocate met with Buyers and Diamond about the loan. Allocate understood that he was representing Diamond in the loan matter—not the Buyers—but did not inform them of this belief. Buyers believed that Allocate was representing them in the loan matter. Allocate prepared a promissory note and trust deed for Buyers' signatures and billed Buyers for his services.

  A year later, Daughter consulted with Allocate regarding problems with the loan from Diamond, and Allocate and Daughter met with Diamond regarding these problems. Allocate then represented Diamond in collecting the loan from Buyers.

  Allocate did not discuss with either the Buyers or Diamond the impact of his prior representation on the collection matter, nor did he obtain their consent to his representation of Diamond.

Allocate:

A. Engaged in a non-waivable current-client conflict of interest.

B. Engaged in a non-waivable former-client conflict of interest.

C. Engaged in a waivable current-client conflict and a waivable former-client conflict of interest.

D. Should have gone to the track instead of undertaking to represent Diamond.

DISCUSSION

Answer: _____

In re Bowker, 20 DB Rptr 16 (2006) (30-day suspension).

OPTIONAL HYPOTHETICAL

- Money Bags and Attorney Allgood were close friends for several years. Years ago, Bags established the Bags/Wealth Trust ("Trust") with a partner. One of the Trust's income-producing ventures was to make loans to individuals.

  Allgood suggested to Bags that the Trust loan Mr. & Mrs. Entrepreneur money to operate and expand their business. The Entrepreneurs were also long-time friends of Allgood. Bags agreed on behalf of the Trust.

  Allgood viewed the loan as a benefit to both the Entrepreneurs and the Trust, so he actively facilitated the loan transaction for both sides. In addition to negotiating and securing the loan for the Entrepreneurs, Allgood signed the promissory note as a guarantor. Allgood also obtained a special power of attorney from Bags that allowed him to conduct business with the title company on behalf of the Trust, including closing the loan with the Entrepreneurs in Bags' absence.

  Allgood referred another client, Risky Venture, to Bags for a loan. Allgood represented Risky in negotiating, securing, and facilitating the loan from the Trust. Bags also sent draft documents to Allgood for review, and Allgood was aware that Bags was looking to him to ensure that the Trust's interests were protected in the transaction.

Which of Anderson' conduct did NOT violate the Oregon Rules of Professional Conduct?

A. Anderson' referral of the Entrepreneurs and Risky (clients) to Bags for loans.

B. Anderson' participation in the loan transaction with the Entrepreneurs.

C. Anderson' participation in the loan transaction with Risky.

D. Anderson' signing as a guarantor for the Entrepreneurs in their loan transaction.

DISCUSSION

Answer: _____

In re Patrick, 20 DB Rptr 47 (2006) (30-day suspension).

HYPOTHETICAL (1 of 6)

- Because of his personal friendship with businessman Bernie Bigshot, Attorney Archer is retained to represent Bigshot's new company—in which Bigshot is a 33 1/3% shareholder and Company president.

  Over the years, Archer does all of Company's legal work, including work related to the hiring and firing of employees. Working closely together on Company business, Archer and Bigshot also socialize together on the golf course.

  Bigshot retains Archer to handle a personal dispute he's having with his neighbor over the neighbor's trees encroaching on Bigshot's property and dropping leaves into his pool.

Does Archer have a current client conflict when he agrees to represent Bigshot in his personal matter while representing Company in general corporate matters?

A. No. An attorney who represents a company automatically represents everyone who works at the company.

B. Yes. Because it is foreseeable that a dispute will develop between Bigshot and Company.

C. No. Bigshot's and Company's interests are not adverse and there is no reason that Archer's representation of one client would negatively affect his representation of the other.

D. Yes. Because the time that Archer takes to assist Bigshot with his personal matter will take away from his time spent representing Company.

DISCUSSION

Answer: _____

HYPOTHETICAL (2 of 6)

- One year, Company loses lots of money and the other shareholders vote to fire Bigshot. Bigshot sues for breach of contract and wrongful termination.

  Assume that Bigshot had not retained Archer in the encroachment dispute.

Does Archer have a conflict of interest in defending Company against Bigshot's complaint?

A. Yes. Because of Archer's and Bigshot's personal friendship, Archer has a self-interest conflict.

B. Yes. Because Bigshot was Archer's contact at Company, Archer also represented Bigshot. When Bigshot left Company, he became a former client and Archer can't defend Company against his lawsuit.

C. No. Bigshot was never Archer's client and there was no personal-interest conflict.

D. No. It was Bigshot's decision to sue. He was aware that Archer represented Company, so he waived any conflict in bringing the action against Company.

DISCUSSION

Answer: _____

HYPOTHETICAL (3 of 6)

- After Bigshot is fired from Company, Archer continues to represent him in the tree encroachment dispute. When Bigshot files his complaint against Company, Archer answers on Company's behalf.

Does Archer have a current client conflict in simultaneously representing Bigshot in the encroachment dispute and defending Company in the wrongful termination matter?

A. No. Because the matters are completely unrelated.

B. Yes. Because a lawyer can never, ever, under any circumstances, represent a client in any matter directly adverse to another client.

C. No. Because the representations do not require Archer to contend for one client that which he was required to oppose for the other.

D. Yes. Because his representation of Company is directly adverse to Bigshot.

DISCUSSION

Answer: _____

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

HYPOTHETICAL (4 of 6)

- Assume Archer successfully resolved Bigshot's encroachment dispute before Bigshot was fired.

When Bigshot sues Company, does Archer have a former client conflict when he answers on Company's behalf?

A. No. Even those Bigshot is a former client, the earlier and later matters are not the same or substantially related.

B. Yes. Archer can only represent Bigshot if both former and current clients waive the conflict.

C. Yes. And the conflict is not capable of being waived.

D. Yes. But only Bigshot is required to consent to Archer's continuing representation of Company.

DISCUSSION

Answer: _____

HYPOTHETICAL (5 of 6)

- When Bigshot is fired, Archer is so outraged at Company's shabby treatment of his friend that Archer fires the Company as a client.

  Bigshot hires a litigation attorney to represent him in the wrongful termination suit. However, after settlement negotiations, Bigshot agrees to drop his lawsuit and return to work for Company in a different capacity. Bigshot asks Archer to help him negotiate a new employment agreement with Company.

Would Archer have a former client conflict if he helps Bigshot negotiate a new employment agreement?

A. No. Archer would have a former client conflict only if he represents Bigshot in the litigation against Company.

B. No. Because the new employment agreement between Bigshot and Company is not the same matter as anything Archer worked on for Company.

C. Yes, probably.

D. Yes. This is a non-waivable former client conflict.

DISCUSSION

Answer: _____

HYPOTHETICAL (6 of 6)

- Archer is still working on Bigshot's tree encroachment matter when Bigshot is fired from Company. In this hypothetical, instead of suing Company, Bigshot decides to form another company with Archer. They contribute equal amounts of start-up capital for equal shares in the venture. Archer draws up the corporate documents. They agree that Bigshot will run the company and Archer will be its corporate counsel.

Does this arrangement create any conflicts problems?

A. No. Because the terms are fair and Bigshot's a sophisticated businessman capable of looking after his own interests.

B. No. Because Archer's personal interest in the new company is unlikely to materially limit his ability to represent Bigshot in the tree encroachment matter.

C. Yes. Tree encroachment issues are extremely delicate. Archer cannot afford to allow his attention to be distracted by the formation of a new company with Bigshot.

D. Yes. Because of the tree encroachment issue, Bigshot is a client.

DISCUSSION

Answer: _____

See RPC 1.8(a).

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Notes

Notes

ISSUES IN LAW PRACTICE/DURING THE ATTORNEY-CLIENT RELATIONSHIP

Section 17 — Duties to Others

HYPOTHETICAL

- On behalf of the estate of Steven Cousin, Attorney Andrews filed a wrongful death action against Cousin's medical providers at the time of his death. Andrews retained Dr. Knowitall, an expert who agreed with Andrews' legal position about the cause of Cousin's death. All but one defendant settled.

  Shortly before trial, Andrews heard from another lawyer that he had recently lost a case because his medical expert testified that it was "possible," rather than "probable," that the defendant doctor's actions had caused the death at issue.

  In response to this information, Andrews wrote to Dr. Knowitall ("testimony letter") to confirm Dr. Knowitall's testimony and to ensure that he would be using the correct language when he testified. Andrews sent this testimony letter five days before trial but did not otherwise communicate with the doctor in this time.

  After Dr. Knowitall had testified, defense counsel was given time to review the doctor's file. She found the testimony letter but was unable to cross-examine Dr. Knowitall that day, and returned the testimony letter to his file.

  When the trial resumed a week later, the testimony letter was not in Knowitall's file. Defense counsel asked Dr. Knowitall about it but he did not recall having received it. Andrews, too, said he did not recall the letter, but acknowledged discussions with Dr. Knowitall about care and diligence.

Which of Andrews' actions violated the Oregon Rules of Professional Conduct?

A. Drafting and sending the testimony letter to Dr. Knowitall because it was an unethical attempt to suborn perjury.

B. Failing to acknowledge his knowledge of the testimony letter to the court and make it available for use by the defense in cross-examination.

C. Using a doctor named Knowitall.

D. None. There was nothing inappropriate about the testimony letter and Andrews had no affirmative duty to make it available to defense counsel.

DISCUSSION

Answer: _____

In re Duffy, 20 DB Rptr 125 (2006) (public reprimand).

A. Candor to the Court

1. False statements to the court

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

a. When considering whether a lawyer has made an affirmative misstatement, the court's focus is on the truth or falsity of the facts asserted. *In re Kumley*, 335 Or 639, 644-45, 75 P3d 432 (2003).

b. The fact that an attorney believed that his representations stated the legally correct position is immaterial. The point is whether the respondent knew that he was misrepresenting the facts as they existed at the time. *In re Boardman*, 312 Or 452, 456-57, 822 P2d 709 (1991).

c. Improper motive is not necessary to establish a violation. *See In re McKee*, 316 Or 114, 125, 849 P2d 509 (1993) ("A misrepresentation made with the best of intentions is nonetheless a misrepresentation.")

d. Whether a court is misled by the false statement is also irrelevant. *In re Huffman*, 331 Or 209, 13 P3d 994 (2000); *In re Bourcier,* 322 Or 561, 909 P2d 1234 (1996); *see also, In re Benson*, 317 Or 164, 169, 854 P2d 466 (1993) (in the disciplinary context, reliance by the recipient of the misrepresentation is not a required element).

- *In re Abrell*, 30 DB Rptr 289 (2016). [one-year suspension] Respondent, who is not licensed in Oregon, properly appeared in a federal case via pro hac vice admission. Shortly thereafter, Respondent filed a lawsuit in state court, claiming in filings to be applying for pro hac vice admission and to have associated local counsel on the matter. In truth, Respondent had neither applied for

pro hac vice admission in relation to the state court matter nor associated local counsel.

- *In re Gifford*, 29 DB Rptr 299 (2015). [60-day suspension] One of six heirs to her uncle's intestate estate hired attorney to assist her in the administration of the estate. After preparing the court documents reflecting the six heirs, attorney learned that one of the heirs might be in jail, and another might be transient. Attorney then revised portions of the documents previously signed by his client to represent that there were only four heirs, rather than six, and filed the altered (now false and inaccurate) documents with the probate court.

- *In re Krueger*, 29 DB Rptr 273 (2015). [6-month suspension, 90 days stayed/2-year probation] After prematurely removing settlement funds from trust that required court approval for attorney to take, attorney and his paralegal filed declarations that represented or allowed the court to believe that the funds had remained in trust. Attorney also failed to correct his client's representations to the court that the settlement funds were in trust—when attorney knew better but the client did not.

- *In re Roe*, 28 DB Rptr 87 (2014). [2-year suspension, all but 6 months stayed/2-year probation] After obtaining a judgment solely against his former client for his attorney fees, attorney misrepresented in filings with the court that his client's wife and their adult daughter had an obligation to him and that he was entitled to recover from all of them his attorney fees incurred in collecting on the judgment in pursuant to the terms of an unsigned written fee agreement (which had already been adjudicated as inapplicable to the attorney's relationship with his client). Attorney filed for and received enhanced prevailing party fees, by falsely stating that the defendants had been unreasonable in making frivolous claims and defenses in response to his collection efforts, when they had actually been defaulted, having failed to make any appearance at all.

- *In re Tank*, 28 DB Rptr 35 (2014). [90-day suspension] Attorney represented a corporation on matters related to its corporate records. Because the corporation did not have complete records, some were drafted by an associate in attorney's firm and purported to memorialize corporate records, events and actions dating back

20 years. In litigation a few months later, where an issue was ownership and control of the corporation, attorney stated or implied in open court that the corporate records were prepared well before the litigation began, and failed to explain or clarify that representation.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In connection with a bar investigation, fee arbitration, and civil proceedings brought by his former client, attorney separately submitted documents and made statements that materially misrepresented the true facts regarding the client's claims and their timing with respect to the attorney-client relationship, intending that these false statements and documentation be relied upon by the bar, the arbitrator, and the court in their respective evaluations of his former client's claims.

- *In re Partington*, S060387, Case Nos. 12-51 & 12-65 (2013) [60-day suspension] In appellate brief, attorney misrepresented the record, and specifically, the lower court's treatment of criminal charges concerning his client.

- *In re Mahr*, S041496, Case No. 13-52 (2013) [disbarred] Attorney made misrepresentations to the court regarding the fee he received in an immigration matter.

- *In re Billman*, 27 DB Rptr 126 (2013). [30-day suspension] Attorney agreed to settlement of a domestic relations matter and recited terms into the record without having confirmed with his client whether she was agreeable to the terms and conditions, and allowed a judgment to be entered to that effect.

- *In re Summer*, 27 DB Rptr 39 (2013). [disbarred] In defense of a motion for summary judgment in a medical malpractice matter, attorney filed a false affidavit stating that he consulted with a expert that was willing to testify that the defendants had not employed the proper standard of care. When the lack of an expert came to light, the court dismissed the malpractice matter and ordered the attorney to respond regarding the affidavit. The attorney failed to appear for a deposition and two subsequent sanctions hearings and gave false reasons for at least one of his absences.

- *In re Kocurek*, 26 DB Rptr 225 (2012). [6-month suspension] Attorney made a misrepresentation in an affidavit she filed in her own divorce proceeding, falsely asserting that her husband's girlfriend had a criminal record that justified restrictions on the husband's access to marital property.

- *In re Stout*, 26 DB Rptr 115 (2012). [dismissed] While representing a business owner, attorney presented an ex parte motion to a judge seeking the right to take immediate possession of certain business inventory then in the hands of an employee. Attorney asserted in the motion that his client did not know whether the employee had waived the right to be heard, when in fact attorney knew that the employee contested the claim. Disciplinary charge nevertheless was dismissed after trial panel found that attorney did not intend to mislead the court.

- *In re Klingbeil*, 25 DB Rptr 142 (2011). [dismissed] The Bar alleged that certain statements made by attorney in a declaration filed in litigation between attorney and his former firm were knowingly false. All charges were dismissed after the trial panel found some of the statements not to be false and another, while inaccurate, to be the result of carelessness rather than intentional conduct.

- *In re Hayes*, 24 DB Rptr 157 (2010). [disbarred] In an effort to stall a suspension imposed by the bankruptcy court, attorney falsely stated to the court that he had clients who would be irreparably harmed if he was immediately suspended and could not assist them; investigation showed that no clients were in such immediate jeopardy that substitute counsel could not have assisted them effectively.

- *In re Jackson*, 347 Or 426, 223 P3d 387 (2009). [120-day suspension] While representing a client in a dissolution of marriage proceeding, attorney falsely represented to the court that burglaries at his office were the reason he was unable to proceed with the case in a timely manner.

- *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to on recons.*, 347 Or 529 (2010). [disbarred] The day his disciplinary suspension became effective, attorney filed motions to abate and postpone several client matters then pending in court, supported by

his declaration that falsely represented that his disciplinary case was on appeal.

- *In re Sunderland*, 22 DB Rptr 140 (2008). [9-month suspension] Attorney lied to the court about giving timely notices to opposing counsel. [DR 7-102(A)(3)]

- *In re Cathcart*, 21 DB Rptr 299 (2007). [reprimand] Attorney filed a lawsuit on behalf of a minor child in which he falsely alleged that the child's mother was the child's duly appointed conservator for the purposes of the suit. Although attorney had intended to petition for the mother's appointment as conservator, he knew he had not yet done so when the suit was filed.

- *In re Pacheco*, 20 DB Rptr 293 (2006). [4-year suspension] Attorney falsely represented in a motion to the court that opposing counsel had no objection to setting aside a judgment of dismissal that had been entered against attorney's client.

- *In re Kent*, 20 DB Rptr 136 (2006). [2-year suspension] In support of a motion to postpone a trial in one matter, attorney falsely stated that he had another case set for trial the same day and that the other case had already been rescheduled several times. In another matter, attorney filed a motion to withdraw, falsely stating that a multiple client conflict of interest precluded his continued representation. [DR 1-102(A)(3)]

- *In re Matthews*, 19 DB Rptr 193 (2005). [1-year suspension] Attorney represented father in a custody proceeding. Father died unexpectedly and mother took physical custody of all the children. On behalf of father's second wife, attorney obtained an *ex parte* writ of assistance from a different judge ordering mother to return the children. To obtain the writ and a subsequent restraining order, attorney made false statements to the court about mother's fitness, the safety of the children, and whether other litigation involving the children was pending. Attorney also failed to disclose that father had died, that attorney was acting for second wife who had no legal standing in the matter, and that the original judge had retained jurisdiction over the case. [DR 7-102(A)(5)]

- *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004). [90-day suspension] Attorney's firm represented a client charged with

domestic violence. The attorney misrepresented to the judge whether she had given legal advice to the victim and concealed material information about the extent of her contact with the victim. [DR 1-102(A)(3)]

- *In re Worth*, 337 Or 167, 92 P3d 721 (2004). [120-day suspension] Attorney made misrepresentations to the court regarding why he had not moved his client's civil case forward or complied with the court's order that an arbitration of the matter be set by a date certain. [DR 1-102(A)(3)]

- *In re Van Loon*, 18 DB Rptr 152 (2004). [6-month suspension] In support of an *ex parte* motion to modify a parenting plan in a domestic relations case, attorney presented his client's affidavit and testimony that were misleading because they did not accurately represent the opposing party's hours of availability to spend with the minor child. [DR 1-102(A)(3)]

- *In re Koessler*, 18 DB Rptr 105 (2004). [6-month suspension] Attorney made material misrepresentations to the court when she falsely stated that she had a medical expert who would testify in support of her client's malpractice claim. [DR 1-102(A)(3), DR 7-102(A)(5)]

- *In re Myles*, 18 DB Rptr 77 (2004). [60-day suspension] Attorney signed and submitted an affidavit to an administrative law judge supporting his client's claim for unemployment benefits in which he falsely stated that a potential witness had a reputation for untruthfulness in the community. [DR 1-102(A)(3)]

2. Offer false evidence

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may

refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

a. An attorney who is told by a potential client that he intends to defraud the court should inform him not to do so. If the potential client persists in expressing this intent, the attorney may not represent him. *OSB Legal Ethics Op No 2005-53*.

b. An attorney whose client commits what the attorney knows to be perjury must ask the client to correct the perjury and, if the client will not do so, seek leave of court to withdraw. The attorney may not, however, inform the court that withdrawal is sought because of client perjury. *OSB Legal Ethics Op No 2005-34*.

   i. If the court does not permit the attorney to withdraw, the attorney may ethically continue with the case. If the attorney is denied leave to withdraw, the attorney may not use or rely upon perjured testimony or false evidence in arguing the client's case. *OSB Legal Ethics Op No 2005-34*.

- *In re Hayes*, 24 DB Rptr 157 (2010). [disbarred] Attorney knowingly and repeatedly filed false bankruptcy compensation disclosure documents.

- *In re Davenport*, 334 Or 298, 49 P3d 91, *recon*., 335 Or 67 (2002). [2-year suspension] In a deposition, attorney gave false answers in order to conceal the true identity of his client. Subsequent correction of his deposition answers did not cure the initial misrepresentations.

- *In re Gustafson*, 333 Or 468, 41 P3d 1063 (2002). [disbarred] Former deputy district attorney testified falsely regarding her possession of records that should have been destroyed pursuant to an expungement order in a juvenile proceeding. Material false statements under oath.

- *In re Morris,* 326 Or 493, 953 P2d 387 (1998). [120-day suspension] Attorney altered a signed final account for an estate by inserting an award for the prior personal representative's claim for fees, without providing notice to the court, opposing counsel, or the current personal representative, her client.

- *In re Barber,* 322 Or 194, 904 P2d 620 (1995). [disbarred] Attorney attached knowingly altered copies of contingent fee agreement to complaint in action against former clients. Attorney also misrepresented time and expenses on statement produced to support claim against former clients.

- *OSB Legal Ethics Op No* 2005-34. An attorney who is appointed by a court to represent a supposedly indigent defendant in a criminal case and who learns that the defendant is not indigent but simply wants the benefits of free counsel may ethically reveal client confidences to the extent necessary to prevent the continuation of the continuing crime of theft of services and may also endeavor to withdraw from the representation while saying nothing about the client's wrongdoing.

- *OSB Legal Ethics Op No 2005-19*. An attorney who represents a client who was injured in two separate automobile accidents may claim the same item of damages against the defendants in each case if it is not clear which accident caused which injuries. If, however, one case settles and the client obtains recovery for some of the specific damage items that are also claimed in the other case, the attorney may not endeavor to collect those same items of damages again in the other case.

3. Conceal or fail to disclose information to a tribunal

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

- *In re Gifford*, 29 DB Rptr 299 (2015). [60-day suspension] One of six heirs to her uncle's intestate estate hired attorney to assist her in the administration of the estate. After preparing the court documents reflecting the six heirs, attorney learned that one of the heirs might be in jail, and another might be transient. Attorney then revised portions of the documents previously signed by his client to represent that there were only four heirs, rather than six, and filed

the altered (now false and inaccurate) documents with the probate court.

- *In re Krueger*, 29 DB Rptr 273 (2015). [6-month suspension, 90 days stayed/2-year probation] After prematurely removing settlement funds from trust that required court approval for attorney to take, attorney and his paralegal filed declarations that represented or allowed the court to believe that the funds had remained in trust. Attorney also failed to correct his client's representations to the court that the settlement funds were in trust—when attorney knew better but the client did not.

- *In re Hayes*, 24 DB Rptr 157 (2010). [disbarred] Attorney knowingly and repeatedly filed bankruptcy compensation disclosure documents and other filings that contained false and misleading information.

- *In re Sunderland*, 22 DB Rptr 140 (2008). [9-month suspension] After one judge directed that no default judgment be entered until the defaulting party's motion to set aside the order of default was heard, attorney presented a default judgment to another judge without disclosing that a set-aside motion had been filed, that a hearing on the motion had been scheduled, and that the first judge had directed no judgment be entered until the motion was heard. [DR 7-102(A)(3)]

- *In re Willes*, 22 DB Rptr 82 (2008). [30-day suspension] Defense attorney appeared in a criminal case with a person at counsel table posing as the defendant, and did not disclose the imposter until after cross-examining the state's witness.

- *In re Blakely,* 11 DB Rptr 59 (1997). [6-month suspension] Attorney failed to list known devisees of will in petition to the court.

- *In re Claussen,* 322 Or 466, 909 P2d 862 (1996). [1-year suspension] Attorney intentionally failed to disclose to bankruptcy court his prior and ongoing relationship with debtor and debtor's principal creditor.

- *In re Hedrick,* 312 Or 442, 822 P2d 1187 (1991). [2-year suspension] Attorney misrepresented to probate court that will was

testator's final will and failed to disclose existence of later will. [DR 7-102(A)(3)]

4. Other illegal conduct

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(5) engage in other illegal conduct or conduct contrary to these Rules.

- *In re Moore*, 20 DB Rptr 150 (2006). [reprimand] Attorney notarized his client's signature on an affidavit without witnessing the signing, relying on a telephone confirmation of the signature by the client. Attorney knew this violated the statutes applicable to notaries; *see also, OSB Legal Ethics Op No 2005-5* (an attorney may not take notarial acknowledgments over the phone or direct the attorney's secretary to do so).

- *In re Gustafson,* 333 Or 468, 41 P3d 1063 (2002). [disbarred] Former deputy district attorney testified falsely regarding her possession of records that should have been destroyed pursuant to an expungement order in a juvenile proceeding. Her material false statements under oath constituted false statements of fact that were both illegal (perjury) and contrary to the disciplinary rules. [DR 7-102(A)(5) & (8)]

- *OSB Legal Ethics Op No 2005-156*. Whether an attorney may ethically tape record an in-person or telephone conversation with another individual without informing that individual in advance or employing some sort of beep or tone that would indicate the presence of a recording device depends on whether such conduct is lawful. Even if lawful, however, a recording could not be made if the individual had been led to believe that no recording would be made. [*Supersedes Op No 2005-74*.]

HYPOTHETICAL

- Attorney Ackwood represented Dutiful Wife in a dissolution of marriage proceeding against Frank Husband, which resulted in a Stipulated Judgment awarding the parties joint custody of their only child.

  On Monday, Ackwood notified Husband that Ackwood would be appearing in circuit court at the time set for *ex parte* matters on Wednesday morning, to present a motion and proposed order to the court requesting that custody of the parties' child be awarded to Wife pursuant to a statute allowing for such an order upon an allegation and finding (at hearing) that the child is in "immediate danger" ("emergency motion").

  When Ackwood and Wife appeared on Wednesday morning, they found Husband already waiting in the hallway outside the chambers and courtroom of Judge Justice, who was scheduled to hear *ex parte* matters that day. Ackwood recognized Husband but had no contact with him.

  Judge Justice's clerk appeared and inquired whether anyone was present for *ex parte* matters. Ackwood gave the emergency motion to the clerk but said nothing to her. Husband did not make his presence known to the clerk.

  The clerk then went into chambers and returned a few minutes later with a signed order awarding custody to Wife. Ackwood did not inform the clerk that the judge had signed the order based on the emergency motion without hearing from Husband, as contemplated by the applicable statute. Ackwood filed the order and left the courthouse.

  Thereafter, Husband informed the court that he had been present to be heard on the emergency motion, and Judge Justice rescinded his order.

Ackwood's conduct:

A. Was not in violation of any ethical rules because he did not make any misrepresentations to the court.

B. Was not in violation of any ethical rules because he had no obligation to tell the court of Husband's presence.

C. Violated the ethical rules because Ackwood's silence was a misrepresentation by omission.

D. Violated the ethical rules because Ackwood had an affirmative obligation to notify the court of Husband's appearance.

DISCUSSION

Answer: _____

In re Bean, 20 DB Rptr 157 (2006) (public reprimand).

5. Disclosing material facts in *ex parte* matter

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

- *In re Jaspers,* 28 DB Rptr 211 (2014). [reprimand] In filing an ex parte emergency custody order, attorney failed to disclose material information about the current custody judgment or the circumstances of the parties, necessary for the court's assessment of the motion.

- *In re Roe,* 28 DB Rptr 87 (2014). [2-year suspension, all but 6 months stayed/2-year probation] In collection and foreclosure action against former client, attorney filed for and received enhanced prevailing party fees ex parte, falsely stating that the defendants had been unreasonable in making frivolous claims and defenses in response to his collection efforts, when they had actually been defaulted, having failed to make any appearance at all.

- *In re Driscoll*, 21 DB Rptr 81 (2007). [60-day suspension] Attorney obtained an *ex parte* default judgment, advising the court that there "supposedly" was a defense lawyer involved but that he hadn't appeared. In fact, attorney and the defense lawyer had engaged in settlement negotiations, exchanged discovery requests, deposed the named parties, and conferred about defense counsel's Rule 21 motions to which attorney filed a response. Defense counsel's active participation in the litigation was material information that attorney failed to disclose to the court.

- *In re Johnson*, 20 DB Rptr 223 (2006). [30-day suspension] Attorney obtained an *ex parte* default judgment without disclosing to the court that she had received an answer from opposing counsel and a settlement offer, with an assurance that the answer would be filed in court if the settlement offer was not acceptable. The charge nevertheless was dismissed because attorney had complied with ORCP 69A and the record did not establish that the judge who granted the default would have acted differently had he known the non-disclosed facts.

- *In re Page*, 326 Or 572, 955 P2d 239 (1998). [30-day suspension] In reciprocal discipline case, court found that attorney's failure to inform the tribunal that she had made changes to the pleadings after the opposing counsel signed them violated Washington's equivalent of RPC 3.3(d).

B. Fairness to Opposing Party & Counsel

1. Access to and accuracy of evidence.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

a. The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in

discovery procedure, and the like. *ABA Model Rule* 3.4, Comment [1].

b. Although violations of these rules can subject lawyers to discipline, it is typically the judge presiding over the matter who takes corrective action for abusive litigation tactics through the exclusion of evidence, the imposition of sanctions, disqualifications, and/or the award of costs and fees. *See, e.g., State v. Kull*, 298 Or 38, 688 P2d 1327(1984) (broad discretion is conferred upon the trial court in the choice of sanctions to be imposed in the event of a failure to disclose information or evidence in a criminal case); *see also, Budden v. Dykstra*, 181 Or App 523, 47 P3d 49 (2002) (court permitted to strike defense for failure to provide discovery); *SAIF v. Harris*, 161 Or App 1, 983 P2d 1066, *rev den* 329 Or 527, 994 P2d 128 (1999) (court permitted to strike answer and enter order of default for failure to comply with order to compel production); ORCP 46B(2).

- *In re Noble*, 30 DB Rptr 116 (2016). [4-year suspension, 2 years stayed/2-year probation] Respondent represented a client in an employment claim against a retail store that was scheduled for arbitration. A coworker of the client witnessed the event giving rise to the litigation and Respondent offered the coworker $250 to appear as a witness and testify at the arbitration. The coworker was reluctant to testify, so Respondent promised the coworker an additional $750 if she testified and the client's claim was successful.

- *In re Moore*, 29 DB Rptr 73 (2015). [reprimand] While attorney was representing husband in a divorce proceeding, a domestic incident injuring wife resulted in criminal charges against husband. Attorney communicated to wife, who was unrepresented, that she could have the marital residence contingent upon her facilitation of the dismissal of the criminal charges. Wife then communicated to the district attorney her desire to have the assault case dismissed, and began resisting the district attorney's efforts to have her testify or participate in the criminal proceeding. Wife did not appear for trial, and the case was dismissed

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In connection with a bar

investigation, fee arbitration, and civil proceedings brought by his former client, attorney separately submitted documents and made statements that materially misrepresented the true facts regarding the client's claims and their timing with respect to the attorney-client relationship, intending that these false statements and documentation be relied upon by the bar, the arbitrator, and the court in their respective evaluations of his former client's claims.

- *In re Wolf*, 27 DB Rptr 208 (2013). [reprimand] Attorney's agreement to settle a claim brought by his former client conditioned the payment of money to the client on her signing an affidavit, drafted by the attorney, that negated an allegation of her complaint. The attorney thereafter used the affidavit in a different but related lawsuit.

- *OSB Legal Ethics Opinion No 2005-163*. Criminal defense lawyer does not violate RPC 3.3(b) by suggesting a civil compromise to the complaining witness.

HYPOTHETICAL

- In November, attorney Armstrong pled no contest to Assault in the Fourth Degree in connection with a dispute with his then wife, Lovely Lady. Lady also obtained a "Restraining Order" against Armstrong.

  Later in November, Armstrong entered into a Conditional Release and Deferred "Sentencing Agreement" in which he agreed to the court's instruction to have no contact with Lady.

  The following March, Armstrong contacted Lady and was arrested for violating the Restraining Order. The state did not pursue criminal charges but Armstrong stipulated that the contact with Lady that led to his arrest violated his Sentencing Agreement. Thereafter, the court notified Armstrong specifically about the need to strictly comply with the terms of his Sentencing Agreement.

  In July, Armstrong again had contact with Lady and was again arrested for violating the Restraining Order. The District Attorney filed a complaint seeking punitive sanctions against Armstrong for violating the Restraining Order.

  The court subsequently found Armstrong in willful contempt of the Restraining Order and in violation of the terms of the Sentencing Agreement. The court revoked Armstrong's Sentencing Agreement, entered a judgment finding him guilty of Assault in the Fourth Degree, and placed him on formal probation.

Armstrong's conduct:

A. Did not violate any ethical rules. The charges resulted from purely personal conduct.

B. Violated the ethics rules because he engaged in criminal conduct reflecting adversely on his fitness to practice law.

C. Violated the ethics rules because he knowingly disobeyed an obligation under the rules of a tribunal.

D. Violated the ethics rules because he both engaged in criminal conduct reflecting adversely on his fitness to practice law and knowingly disobeyed an obligation under the rules of a tribunal.

DISCUSSION

Answer: _____

In re Arsanjani, 20 DB Rptr 23 (2006) (30-day suspension).

2. Knowingly disobey a rule of a tribunal

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

a. A suspension is appropriate where attorney knowingly acts in violation of a court's order. *See In re Chase*, 339 Or 452, 121 P3d 1160 (2005) (attorney suspended for 30 days for his failure to comply with his own child support order, which resulted in the court entering a judgment of contempt).

b. An attorney may not collaterally attack contempt findings in disciplinary proceedings when he or she did not appeal those convictions in the underlying case. *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006); *see also, In re Rhodes,* 331 Or 231, 13 P3d 512 (2000) (contempt orders conclusively established that the attorney disregarded the ruling of the court in violation of the disciplinary rules).

- *In re Abrell,* 30 DB Rptr 289 (2016). [1-year suspension] Respondent, who is not licensed in Oregon, properly appeared in a federal case via pro hac vice admission. Shortly thereafter, Respondent filed a lawsuit in state court, claiming to be applying for pro hac vice admission and to have associated local counsel on the matter. In truth, Respondent had neither applied for pro hac vice admission in relation to the state court matter nor associated local counsel. Respondent appeared before the court without being properly admitted.

- *In re Sanders,* 28 DB Rptr 183 (2014). [120-day suspension/BR 8.1] In acting as the fiduciary and/or attorney for the fiduciary in at least six separate probate and protective proceedings, respondent failed to timely file accountings and required reports, and failed to obtain and/or maintain required bonds, necessitating numerous show cause orders throughout the course of the proceedings, and

resulting in a finding of contempt against respondent in at least one matter.

- *In re McDonald,* 28 DB Rptr 30 (2014). [reprimand] After the circuit court entered an order which memorialized attorney's agreement to the entry of a permanent stalking order prohibiting him from contacting the petitioner in a civil case, attorney nonetheless knowingly contacted the petitioner, in violation of order, and was found in willful contempt of court for so doing.

- *In re Summer,* 27 DB Rptr 39 (2013). [disbarred] After attorney filed a false affidavit in a medical malpractice matter he was order to make himself available for deposition but failed to do so. A show cause order was issued but the attorney failed to appear for that hearing or a subsequent hearing regarding sanctions, despite having been ordered to personally appear.

- *In re Hill*, 25 DB Rptr 260 (2011). [8-month suspension] Attorney, an inactive bar member, was acquainted with an elderly, unmarried couple. When the elderly woman's son filed a petition to establish a guardianship and conservatorship for the woman, attorney filed objections, attempted to advocate for the couple at the hearing on the petition, obstructed the hearing to the point that he was found in contempt and otherwise disrupted the proceedings.

- *In re Rubin*, 25 DB Rptr 13 (2011). [reprimand] Attorney violated a protective order issued in one proceeding when he filed a motion in another proceeding describing information that the protective order deemed confidential.

- *In re Gonzalez,* 25 DB Rptr 1 (2011). [60-day suspension] Attorney failed to comply with three court orders issued in his own domestic relations proceeding for which he was found in contempt. The disciplinary prohibition against knowingly disobeying an obligation under the "rules of a tribunal" was considered broad enough to encompass attorney's violation of a court order.

- *In re Hayes*, 24 DB Rptr 157 (2010). [disbarred] Attorney willfully did not comply with orders from the bankruptcy court requiring him to: file amended compensation disclosure forms, file applications for supplemental compensation with a copy of the fee agreements, file a report identifying all cases where he failed to disclose clients' legal insurance, and disgorge and refund fees to clients and the bankruptcy trustees.

- *In re Klosterman*, 23 DB Rptr 204 (2009). [9-month suspension] Attorney failed to file his annual IOLTA compliance certificate with the bar. Thereafter, he failed to respond to written bar inquiries and to a subpoena compelling his attendance before a local investigative committee. He also did not respond to a court's show cause order regarding the noncompliance with the committee subpoena and, as a result, was found in contempt.

- *In re Karlin*, 22 DB Rptr 346 (2008). [reprimand] Attorney was found in willful contempt of court for failing to pay obligations and comply with other requirements arising out of a general judgment of dissolution of marriage.

- *In re Groom,* 22 DB Rptr 124 (2008). [1-year suspension/10 months stayed/1-year probation] In the appeal of a client's criminal conviction, attorney failed to put the client's handwritten supplemental brief in proper form and file it by a date certain, despite the court ordering him to do so. Attorney also failed to respond to the court's subsequent directives that he explain his non-compliance.

- *In re Dunn*, 22 DB Rptr 47 (2008). [disbarred] Attorney violated his probation from a DUII conviction by continuing to consume alcohol.

- *In re Chancellor*, 22 DB Rptr 27 (2008). [1-year suspension] Following various alcohol-related arrests, attorney failed to comply with diversion and probation orders in three counties.

- *In re Levie*, 342 Or 462, 154 P3d 113 (2007). [1-year suspension] Attorney failed to comply with an arbitrator's order that all his client's sculptures had to be turned over to

a gallery for sale when attorney retained three sculptures for display in his law firm.

- *In re Sunderland,* 21 DB Rptr 257 (2007). [1-year suspension] Attorney obtained an *ex parte* judgment in the dissolution case and pursued the collection of assets awarded to his client under the judgment when an automatic stay from the parties' bankruptcy proceeding was in effect.

- *In re Eames*, 20 DB Rptr 171 (2006). [disbarred] Attorney knowingly violated the terms of a restraining order issued against him in a FAPA matter, was found in willful contempt for the violation and placed on probation, and thereafter knowingly violated the terms of his probation.

HYPOTHETICAL

- Attorney Agnew represented Husband in a dissolution of marriage from Wife. Husband and Wife had four minor children. Pursuant to a Marital Settlement Agreement, certain assets would be placed into a trust created for the benefit of Wife and the children in lieu of child and spousal support.

  Shortly after a Judgment of Dissolution was entered in circuit court, Husband and Wife created the "Gold Trust," and named Wife as trustee.

  Within a month, a dispute arose between Husband and Wife regarding assets to be placed into the Gold Trust, the use of Gold Trust assets, and the Judgment of Dissolution itself. Agnew knew that Wife was represented by counsel in these post-judgment matters.

  Agnew then filed the following "motions and orders" on behalf of Husband:

  - a Motion and Order to Appoint Husband Guardian *ad Litem* for the children (in order to file an action against Wife as trustee);
  - a Motion for Appointment of Receiver (seeking to temporarily suspend Wife as trustee and appoint a receiver to administer the Gold Trust);
  - Agnew's Affidavit of Counsel in support of the Motion for Appointment of Receiver; and
  - an Order Appointing Receiver.

  Without notice to Wife or her counsel, Agnew appeared in person and presented the motions and orders to the court. He did not disclose the existence of opposing counsel. Agnew also did not provide copies of the motions and orders to Wife or her counsel until after the court had granted both orders.

Which of the following types of misconduct was NOT implicated by Agnew's conduct?

A. Candor to the tribunal: lawyers have a duty to disclose all material facts in an *ex parte* proceeding.

B. Maintaining the integrity of the profession: lawyers are prohibited from engaging in conduct prejudicial to the administration of justice.

C. Fairness to opposing party and counsel: lawyers have a duty to comply with obligations under the rules of a tribunal.

D. Impartiality and decorum of the tribunal: lawyers have a duty not to engage in improper *ex parte* communication.

DISCUSSION

Answer: _____

In re Carusone, 20 DB Rptr 231 (2006) (public reprimand)

3. *Ex parte* contact

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(b) A lawyer shall not communicate *ex parte* on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order.

a. Even though a motion to disqualify a judge was not related to the underlying substantive claim in a lawsuit, the motion nevertheless was "on the merits" such that notice to opposing counsel and the judge to be disqualified was required. *In re Kluge*, 335 Or 326, 66 P3d 492 (2003); *In re Eadie,* 333 Or 42, 36 P3d 468 (2001).

b. A communication may be a matter of procedure and still relate to the "merits" of a case. *See In re Schenck,* 320 Or 94, 879 P2d 863 (1994) (attorney who represented clients on appeal of contempt finding but was not attorney of record in underlying litigation was disciplined for sending letter to trial judge, without copy to party's counsel, criticizing the court's decision to delay trial of the underlying matter) *but, c.f., In re Merkel*, 341 Or 142, 138 P3d 847 (2006) (charge of improper *ex parte* communication dismissed where attorney contacted arbitrator to inquire whether arbitrator had office technology that would allow for telephone testimony by witnesses at an upcoming hearing and to ask about arbitrator's policy concerning witness testimony by telephone; attorney did not ask arbitrator to rule on whether attorney's witnesses could testify by telephone and arbitrator issued no such ruling).

c. Whether the *ex parte* communication influenced the judge is irrelevant; the question of impermissibility is determined at the time the communication is made. *In re Thompson,* 325 Or 467, 940 P2d 512 (1997).

- *In re Sandoval,* 30 DB Rptr 272 (2016). [reprimand] During a protective proceeding, Respondent received an email from the petitioner, alleging that improper conduct between his attorney and Respondent had prompted petitioner to terminate his attorney. Respondent sent a letter to the court implying the petitioner was unstable and unfit to serve as a conservator or guardian, without copying petitioner. Respondent mistakenly believed that the petitioner was not represented, that the petitioner could not appear

in the matter without representation, and that he was not required to copy the petitioner on his correspondence with the court.

- *In re Jaspers,* 28 DB Rptr 211 (2014). [reprimand] Attorney filed for an ex parte emergency custodial order that did not meet the statutory requirements and thus was not "authorized by law" for purposes of allowing ex parte presentation to the court.

- *In re Fjelstad,* 27 DB Rptr 68 (2013). [30-day suspension] Attorney filed two ex parte motions in civil proceeding without providing prior notice or copies to opposing counsel.

- *In re Mercer,* 24 DB Rptr 240 (2010). [reprimand] Attorney personally presented a form of judgment to the court for signature without informing opposing counsel, who had objected, of the date when the matter would be heard.

- *In re McGavic*, 22 DB Rptr 248 (2008). [reprimand] Attorney's office negligently submitted a form of judgment to the court without serving opposing counsel with a copy.

- *In re Aylworth*, 22 DB Rptr 77 (2008). [reprimand] Attorney represented the plaintiff in a lawsuit that the plaintiff chose to dismiss. After acknowledging to opposing counsel that the defendant was entitled to recover attorney fees and costs, attorney submitted to the court a judgment of dismissal without costs to either party. Attorney negligently failed to serve opposing counsel with the form of judgment, which was later set aside when opposing counsel learned of it.

- *In re Sunderland*, 21 DB Rptr 257 (2007). [1-year suspension] Attorney obtained an *ex parte* judgment in the dissolution case without notice to the opposing party, who had assumed the dissolution was stayed by a bankruptcy petition filed by the parties.

- *In re Furrer*, 20 DB Rptr 281 (2006). [30-day suspension] Attorney engaged in improper *ex parte* contact with the court when, in connection with a contested dissolution, he obtained an order granting his client temporary exclusive use of the family residence without advance notice to opposing counsel.

- *In re Camacho*, 19 DB Rptr 337 (2005). [reprimand] Without notice to the opposing party, attorney appeared *ex parte* and obtained an order setting aside a default judgment previously entered against his client.

- *In re Genna*, 19 DB Rptr 109 (2005). [60-day suspension] Attorney improperly communicated with the court *ex parte* both orally and in writing when he calendared for trial a matter that had already been adjudicated, and then appeared for the trial to present a prima facie case of child custody and support without notice to opposing counsel.

- *In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004). [reprimand] Attorney who faxed copies to opposing counsel immediately before presenting written *ex parte* motions to the court did not violate the rule because it requires prompt delivery of copies to opposing party, not delivery in time to give adequate notice to the opposing party.

- *OSB Legal Ethics Op No 2005-134*. *Ex parte* communication between county counsel and hearings officer does not violate this rule if authorized by local ordinance or order or resolution of local governing body.

- *OSB Legal Ethics Op No 2005-84*. An attorney who represents a client who is interested in the outcome of an OLCC proceeding but who is not a party thereto cannot communicate *ex parte* with the hearings officer. An attorney in such a situation also cannot submit a letter to the hearings officer and counsel if the attorney has no reasonable basis to believe that the letter is relevant to the matters before the hearings officer.

- *OSB Legal Ethics Op No 2005-83*. Counsel for a private party may not communicate *ex parte* with a hearings officer. Agency counsel from the Oregon Attorney General's office may do so if such communications are permitted by the applicable statutes governing the operation of the agency and the Attorney General's office.

HYPOTHETICAL

- On behalf of Haddie Accident, Able Attorney filed a personal injury lawsuit for damages against Bad Driver.

  Driver retained Good Lawyer to defend him. Lawyer immediately notified Attorney of his representation, and Attorney served Lawyer with a notice of his intent to move for an order of default.

  Over the next two months, Attorney and Lawyer actively litigated the lawsuit, including engaging in settlement negotiations, exchanging discovery requests, deposing the parties, and conferring upon Lawyer's proposed ORCP Rule 21 motions, which Attorney understood had been filed with the court.

  However, Lawyer's motions were never actually received by the court and the court eventually dismissed the lawsuit for want of prosecution. When he learned of the dismissal, Attorney quickly filed a motion (with notice to Lawyer) and appeared in court to reinstate the lawsuit. Lawyer did not appear or oppose Attorney's motion and the court reinstated the lawsuit. Attorney did not notify Lawyer of the court's action.

  Five days later, Attorney appeared in court and presented a motion for order of default and entry of a default judgment. In support of this motion, Attorney told the court: "There's supposedly a defense lawyer on this case, but he hasn't appeared." The affidavit Attorney filed with his motion did not disclose Lawyer's participation in the litigation.

Assist's conduct:

A. Was not in violation of any ethical rules because he did not make any affirmative misrepresentations to the court.

B. Did not violate any ethical rules because he had no obligation to tell the court of Lawyer's participation where Lawyer had not formally appeared. Rather, it was Lawyer's responsibility to inform the court of his involvement.

C. Was justified under the circumstances and served Lawyer right.

D. Violated the ethical rules because, among other violations, Attorney had an affirmative obligation to notify the court of Lawyer's participation.

DISCUSSION:

Answer: _____

In re Driscoll, 21 DB Rptr 81 (2007) (60-day suspension).

C. Transactions with Persons Other than Clients

1. Truthfulness in statements to others

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- *In re Smith*, 348 Or 535, 236 P3d 137 (2010). [90-day suspension] Attorney made knowing false statements to several individuals that he had an order or some other written authorization from the Attorney General or a court permitting the takeover of a non-profit clinic by his client. The statements were intended to convince the employees or the police that his client was authorized to take over the clinic and that they should permit her to do so. The statements were therefore material.

- *In re Olson*, 23 DB Rptr 130 (2009). [180-day suspension] Attorney, a deputy district attorney, prosecuted a father for alleged sexual contact with his minor child. Grandmother testified on father's behalf at trial, and father was acquitted. When the attorney learned that the Department of Human Services was considering placing the minor child with the grandmother, the attorney, believing that should not happen, falsely stated to DHS that grandmother had lied during father's trial and that the judge had warned her several times about her behavior on the stand.

- *In re Levie*, 342 Or 462, 154 P3d 113 (2007). [1-year suspension] In a dispute concerning his client's compliance with the terms of a settlement agreement, attorney falsely represented to opposing counsel that all the client's sculptures had been turned over to a gallery for sale, when in fact three sculptures were on display in attorney's law firm. Attorney also falsely represented that there were no security interests encumbering the sculptures. Finally,

attorney falsely represented to an arbitrator that opposing counsel knew of and consented to the three sculptures being displayed in attorney's law firm. [DR 7-102(A)(5)]

- *In re Merkel*, 21 DB Rptr 211 (2007). [reprimand] While representing a client in a personal injury claim, attorney falsely asserted to the defending insurance carrier that a statute upon which the carrier relied had been found to be unconstitutional by the court of appeals in a particular case. Attorney knew the court had not made such a finding because he was counsel for one of the parties in that appeal.

- *In re Britt*, 20 DB Rptr 100 (2006). [6-month suspension] At the request of a financial planner who was handling the affairs of an elderly client and was the donee of a substantial gift from the client, attorney authored a letter in which he asserted that the client was of sound mind and intended the gift for the planner. The attorney also vouched for the character of the planner. In fact, the attorney had never met the client, had not communicated with the client about the gift, and did not know the planner to the extent asserted in the letter.

- *In re Mikkelsen*, 17 DB Rptr 237 (2003). [1-year suspension/all but 90 days stayed/3 year probation] Attorney made misleading statements to opposing counsel and the court concerning his clients' intentions to pursue their lawsuit and the extent to which attorney had been able to communicate with his clients.

- *In re Gilbert*, 17 DB Rptr 215 (2003). [30-day suspension] Attorney misrepresented to the adverse insurance carrier that he had authority to settle his client's claim and then settled the claim without the knowledge or authority of the client.

- *OSB Legal Ethics Op No 2005-19*. An attorney who represents a client who was injured in two separate automobile accidents may claim the same item of damages against the defendants in each case if it is not clear which accident caused which injuries. If, however, one case settles and the client obtains recovery for some of the specific damages items that are also claimed in the other case, the attorney may not endeavor to collect those same items of damages again in the other case.

HYPOTHETICAL

- Four of Attorney Augustus' employees, including Sara Legal and Sect Terry, hired a lawyer and sued Augustus on employment-related claims. Augustus received service of the summons and complaint at his office between 4:30 and 5:00 p.m. on a Friday afternoon.

  Less than an hour later, Augustus, upset about the matter, confronted Legal in her office, showing her the summons and complaint, and asking, in an angry tone, what it was and whose idea it had been. Legal told him that they should not be discussing the action. Augustus left, insisting that they would discuss the matter the following week. The entire conversation lasted less than a minute.

  Terry was in her office the next day, a Saturday, when Augustus entered and tossed a piece of paper at her. He asked her what it was, and she answered that it was the cover sheet of a civil action. Augustus asked Terry why she was bringing the action, who had decided to sue him, and whether "this is really what you want to do." Terry told Augustus to direct his questions to her lawyer but Augustus insisted that he had a right to speak with her directly. Finally, when Terry threatened to leave the room if they did not limit their discussion to work-related matters, Augustus gave her some papers to file and left. The conversation lasted between 10 and 15 minutes.

What rules are implicated by Augustus' conduct?

A. None. Augustus was permitted to speak with his law firm employees.

B. RPC 4.2 [communication with a represented person].

C. None. Augustus' brief impulsive communications with his employees regarding their lawsuit were *de minimus*.

D. RPC 4.2 [communication with a represented person], RPC 4.4(a) [action taken solely to harass, or knowingly use methods of obtaining evidence that violate the legal rights of a person], and 8.4(a)(4) [conduct prejudicial to the administration of justice].

DISCUSSION:

Answer: _____

See In re Lewelling, 296 Or 702, 706, 678 P2d 1229 (1984) (rejecting claimed justification that lawyer had communicated with represented party "on sudden impulse" when he "was emotionally upset").

The Oregon Supreme Court held in *In re Knappenberger*, 338 Or 341 (2005) that:

> The text of [*former*] DR 7-104(A)(1) [*current* RPC 4.2] provides no exception for otherwise prohibited communications, and the purposes underlying the rule suggest no basis for such an exception. DR 7-104 is a prophylactic rule designed to insulate represented persons "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation (citations omitted). All violations of the rule present that risk. Accordingly, this court previously has found violations of DR 7-104(A)(1) even when the prohibited communication was brief, transitory, or not likely to cause serious harm. 338 Or 345-46.

2. Communication with a person represented by counsel

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

- Supp 17-1: Helen Hierschbiel, *Frequently Asked Questions: Avoiding Contact with Represented Parties,* Oregon State Bar Bulletin, APRIL 2011

a. Communications between parties represented by counsel is not prohibited per se. *OSB Legal Ethics Op No 2005-147*.

b. Attorneys who are engaged in litigation or negotiations against parties known to be represented by other counsel may not directly communicate with the opposing parties or cause their clients or others (such as investigators or claims adjustors) to do so, either in person or in writing. *OSB Legal Ethics Op No 2005-6*.

c. It is no defense to an improper communication that a fee agreement has not yet been executed between the person and his attorney. *In re Schenck,* 320 Or 94, 879 P2d 863 (1994).

d. The term “subject” as used in this rule is broader than the specific matter for which a lawyer is retained. *In re Newell*, 348 Or 396, 234 P3d 967 (2010) (attorney for purchaser of business subpoenaed accountant for deposition in a civil proceeding related to accountant’s alleged embezzlement from business, without notice

to accountant's criminal attorney. At the deposition, the attorney repeatedly asked the accountant questions about the amount of money he had taken. The accountant took the Fifth Amendment and expressed concern that his criminal attorney was not present. The court found a violation of this rule even though the accountant had not retained an attorney for the civil matter. Questions to the accountant about the embezzlement were communications on a subject in which the accountant was represented by a criminal attorney).

e. Sending the original of a letter to a person represented by counsel, with a copy to the attorney, does not avoid the requirement that a lawyer must not communicate directly with persons represented by counsel on the subject matter at issue. *In re Hedrick,* 312 Or 442, 822 P2d 1187 (1991).

f. An attorney's emotional state during these communications is not a defense to a violation of the rule. *See In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005) (after being served in his office with employment related claims, attorney confronted two employees regarding those claims, knowing that they were represented by counsel); *see also, In re Lewelling,* 295 Or 702, 678 P2d 1229 (1984) (acting on sudden impulse without proper reflection is no excuse to an improper contact).

g. An attorney who is approached by a potential client and is asked to provide a second opinion to that potential client about work being done by another attorney may do so without seeking the other attorney's consent. *OSB Legal Ethics Op No 2005-81*.

- *In re Buroker*, 29 DB Rptr 321 (2015). [reprimand] Attorney continued to contact former client about a small claims action arise from the attorney's fee claim, notwithstanding notice from a lawyer that she was representing the former client on the fee claim.

- *In re Humphrey*, 29 DB Rptr 87 (2015). [reprimand] In his own divorce proceeding, attorney met alone with wife on multiple occasions to discuss financial issues, without verifying that her attorney approved of such communications. As a result of their discussions, attorney prepared a settlement agreement, along with a general judgment on paper he had created to look like his counsel's pleading paper. Attorney delivered the judgment and

signed agreement to his counsel's office, where they were filed by an assistant without being reviewed and without notice to wife's attorney.

- *In re Scherzer*, 27 DB Rptr 83 (2013). [reprimand] Attorney spoke briefly with minor about a parenting time modification proceeding when he knew that the minor was represented by counsel in that proceeding.

- *In re Kramer*, 27 DB Rptr 8 (2013). [reprimand] Attorney mistakenly emailed a represented party advising that he would be in contempt if he did not allow the attorney's client visitation with her grandchild as set forth in a stipulated judgment.

- *In re Goode*, 26 DB Rptr 213 (2012). [120-day suspension] In his own divorce proceeding, attorney sent a post-judgment demand letter to his wife at a time when she was represented by counsel. Although wife's counsel had not responded to attorney's prior communication, other facts present made it clear that wife still was represented in the matter.

- *In re Stangell*, 26 DB Rptr 203 (2012). [reprimand] While representing a client in a boundary line dispute, attorney visited the real property, encountered the opposing party, and engaged in a discussion with him without opposing counsel's permission.

- *In re Hill*, 25 DB Rptr 260 (2011). [8-month suspension] Attorney, an inactive bar member, was acquainted with an elderly, unmarried couple. When the elderly woman's son filed a petition to establish a guardianship and conservatorship for the woman, attorney filed objections and attempted to advocate for the couple in the proceeding. When doing so, attorney communicated with the elderly woman about the proceeding without consent from the lawyer who represented her in the matter.

- *In re Gonzalez (II),* 25 DB Rptr 88 (2011). [60-day suspension/BR 8.1] While representing an injured client in two workers' compensation claims, attorney left phone messages for three key employees at the client's employer when he knew the employer was represented by counsel on the claims.

- *In re Newell*, 348 Or 396, 234 P3d 967 (2010). [reprimand] Attorney for purchaser of business subpoenaed accountant for deposition in a civil proceeding related to accountant's alleged embezzlement from business, without notice to accountant's criminal attorney. At the deposition, the attorney repeatedly asked the accountant questions about the amount of money he had taken. The accountant took the Fifth Amendment and expressed concern that his criminal attorney was not present. The court found a violation of this rule even though the accountant had not retained an attorney for the civil matter. The court held that the term "subject" as used in this rule is broader than the specific matter for which a lawyer is retained. Therefore, questions to the accountant about the embezzlement were communications on a subject in which the accountant was represented by a criminal attorney.

- *In re McGavic*, 22 DB Rptr 248 (2008). [reprimand] Attorney and his office staff communicated directly with a represented party in two separate client matters.

- *In re Paulson*, 341 Or 542, 145 P3d 171 (2006). [4-month suspension] Attorney represented a client in connection with a charge that the client's boyfriend had sexually abused the client's daughter. Attorney met with both the client and the boyfriend to discuss the claims of abuse, even though attorney knew the boyfriend was represented by other counsel on the abuse charges.

- *In re Peterson*, 19 DB Rptr 368 (2005). [30-day suspension] Client terminated attorney's services in a personal injury matter and retained new counsel, resulting in a dispute over the amount of the fee to which attorney was entitled. Thereafter, attorney communicated directly with the client about the personal injury matter and the fee dispute even though he knew successor counsel represented the client in both matters.

- *In re Koessler*, 18 DB Rptr 105 (2004). [6-month suspension] Attorney, who had poor relationship with opposing counsel and could not reach him, contacted the opposing party directly to inform him that a check in attorney's office awaited the opposing party's signature.

- *In re Jennings*, 18 DB Rptr 49 (2004). [30-day suspension] Attorney's firm prepared estate planning documents for a client.

Thereafter, the client went to a successor lawyer who asked the first attorney for copies of the client's documents pursuant to a signed authorization from the client. Client's son, also a client of the first attorney, opposed the release of the documents. First attorney prepared a revocation of the authorization and gave it to the son, knowing that the son would communicate with the client about signing the revocation, which in fact occurred. This communication with a represented party, through the son, violated the rule.

- *In re McNeff*, 17 DB Rptr 143 (2003). [60-day suspension] Attorney had the opposing party in a dissolution personally served with a notice of deposition when she knew the opposing party had counsel.

- *OSB Legal Ethics Op No 2005-164*. Attorney does not violate the rule by accessing opposing party's website as long as there is no interactive communication through the website on subjects that would otherwise be prohibited in a non-electronic form.

- *OSB Legal Ethics Op No 2005-161.* Assistant Attorney General may advise state agency regarding investigations that contemplate agency contact with a represented party as long as the agency investigator is not an employee or subject to the supervision, direction, or control of the Attorney General's office and as long as the attorney does not cause or induce the communication. Attorney is not required to advise the agency not to contact the represented party.

- *OSB Legal Ethics Op No 2005-152*. Plaintiff's attorney in suit against former employer state agency may not communicate directly with a current agency employee without the consent of the Attorney General's office if the conduct of the current employee is at issue in the suit or the current employee is part of agency management. Plaintiff's attorney does not need consent from the Attorney General's office to speak with a former agency employee or a current employee of a separate agency, but consent is necessary if that employee has his own lawyer in the matter. Even if direct communication is permitted, plaintiff's attorney may not stray into subject areas protected by the attorney-client privilege.

- *OSB Legal Ethics Op No 2005-144*. Attorney may contact a county employee to obtain copies of public records without first obtaining

the County Attorney's consent. When, however, the content of the communication moves from asking a county employee for a specific document to asking the employee about the meaning of the document, the risk of violating this rule increases.

- *OSB Legal Ethics Op No 2005-126*. A prosecuting attorney who knows that a criminal defendant is represented on crime A but is unrepresented on crime B may not speak to the defendant about either crime A or crime B unless the attorney for the defendant on crime A consents. *See also, In re Burrows,* 291 Or 135, 629 P2d 820 (1981); *In re Hostetler,* 291 Or 147, 629 P2d 827 (1981) (prosecutors reprimanded for talking with defendant about one criminal charge without the consent of attorney representing defendant on another criminal matter because topics of discussion were certain to have an impact on disposition of the charges for which the defendant had counsel).

- *OSB Legal Ethics Op No 2005-126*. Before formal criminal proceedings are instituted, prosecutors may make use of undercover agents or informants who have direct access to potential defendants even though the potential defendants may be represented by counsel.

- *OSB Legal Ethics Op No 2005-80*. An attorney who represents a plaintiff in litigation against a corporate defendant that is represented by counsel may not talk to a current employee of the corporate defendant without the consent of corporate counsel: (a) if the employee is individually represented by corporate counsel, (b) if the employee is a part of corporate management or a corporate officer or director, or (c) if the employee's conduct is at issue in the litigation. If none of these categories applies, the attorney may talk to the current employee but must not inquire into or permit the current employee to disclose any communications that are subject to the corporation's attorney-client privilege.

- *OSB Legal Ethics Op No 2005-80*. An attorney who represents a plaintiff in litigation against a corporate defendant that is represented by counsel may talk to a former employee of the corporate defendant without the consent of the corporate defendant's counsel unless the former employee is a current officer or director or unless the corporate counsel individually represents the former employee. In such conversations, the attorney must not

inquire about or permit the former employee to disclose conversations subject to the corporation's attorney-client privilege. Privileged conversations can include both conversations that occurred while the former employee was still an employee and conversations that occurred between the former employee and corporate counsel after the former employee left employment.

- *OSB Legal Ethics Op No 2005-42*. An attorney who has been asked to represent a prospective plaintiff in litigation against a prospective defendant may speak to the prospective defendant about the matter or have an investigator do so if, at the time, the attorney does not know that the prospective defendant is represented by counsel in connection with the matter. The attorney may not, however, give legal advice to the prospective defendant or otherwise misrepresent the identity of the attorney's client or the nature or purpose of any questions.

3. Dealing with unrepresented persons.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

- *In re Throne*, 29 DB Rptr 104 (2015). [2-year suspension] On behalf of his client in property litigation, attorney approached unrepresented co-defendant and requested that he purchase the subject property from his client. Attorney provided legal advice to the unrepresented co-defendant that the transaction would be a valid legal transfer, and offered to defend the transfer on behalf of the unrepresented co-defendant if it should be challenged.

- *In re Krider*, 27 DB Rptr 260 (2013). [reprimand] Unrepresented beneficiaries of estate reasonably believed based on attorney's communications with them that she was representing their interests as well as those of the personal representative. Relying on this belief, at attorney's request, beneficiaries loan money to the estate, used in part to pay attorney's fees from prior representation of decedent that was never repaid.

- *In re Fredrick*, 26 DB Rptr 129 (2012). [reprimanded] Allegation that attorney gave improper legal advice to an unrepresented person was dismissed based on insufficient evidence that legal advice actually was given or that the interests of the unrepresented person were adverse to those of attorney's client.

- *In re Van Thiel*, 24 DB Rptr 282 (2010). [reprimand] Attorney undertook to mediate a dissolution of marriage, but did not clearly inform the parties of, and obtain their consent to, his role as mediator. Thereafter, attorney began to represent one of the parties in the dissolution matter. While doing so, he gave legal advice to the other party.

- *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004). [90-day suspension] Attorney's firm represented person charged with domestic violence. Attorney violated the rule when she gave legal advice to the victim and assisted in preparing an affidavit for the victim to use in seeking the dismissal of the charge against the firm's client. The court applied an objective standard in determining whether the interests of the firm client and those of the victim were in conflict. [DR 7-104(A)(2)]

- *In re Richardson*, 19 DB Rptr 239 (2005). [6-month suspension] While representing the defendant in a domestic violence case, attorney advised the alleged victim about the requirements for the valid service of a grand jury subpoena and that she was not required to appear before the grand jury unless service was valid. [DR 7-104(A)(2)]

- *OSB Legal Ethics Opinion No 2005-163*. Criminal defense lawyer may contact the complaining witness to suggest a civil compromise but may not give the witness legal advice regarding such a procedure.

- *OSB Legal Ethics Op No 2005-89*. A district attorney may suggest a civil compromise to a complaining witness.

- *OSB Legal Ethics Op No 2005-42*. An attorney who represents a prospective plaintiff and who speaks to an unrepresented prospective defendant may not give legal advice to the prospective defendant or otherwise misrepresent the identity of the attorney's client or the nature or purpose of any questions.

- *OSB Legal Ethics Op No 2005-16.* An attorney who represents a client injured in an automobile accident may not send a letter to the driver recommending that the driver instruct his or her insurance carrier to accept a policy limits demand.

- *OSB Legal Ethics Op No 2005-16.* An attorney who represents a criminal defendant may not recommend that a witness assert the Fifth Amendment privilege against self-incrimination before a grand jury.

4. Receipt of documents sent by mistake.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

a. "Document" in this context includes e-mail or other electronic modes of transmission subject to being read or put into readable form. *ABA Model Rules,* Rule 4.4, Comment [2].

b. This is a broad rule that is not limited to only those documents sent by another lawyer or even parties to litigation, although that is generally the contemplation of the rule.

c. The rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. *ABA Model Rules,* Rule 4.4, Comment [2]; *OSB Legal Ethics Op No 2005-150.*

d. The rule does not pertain to only the receipt of information protected by RPC 1.6.

e. The rule does not distinguish between litigation situations and documents received outside litigation. *OSB Legal Ethics Op No 2005-150.*

f. The rule does not address the legal duties of a lawyer receiving a document that he or she knows or suspects may have been wrongfully obtained by the sender. *See ABA Model Rules,* Rule 4.4, Comment [2].

g. Finally, the rule applies whether or not the recipient lawyer reads the document before realizing that it was inadvertently sent. *OSB Legal Ethics Op No 2005-150.*

Notes

HYPOTHETICAL

- You are engaged in protracted and particularly aggressive negotiations in a business transaction with opposing counsel, Irksome. Attorney Irksome has inadvertently included a privileged document in response to your letter requesting production of a series of letters that will be helpful in tracing the history of the transaction. Irksome called and advised you of the mistake as you were reviewing the documents. Irksome asks you to return the privileged document without examining it further.

Must you do so?

A. Yes. It would be inappropriate and unethical to retain the document after you have been advised of the error.

B. No. Irksome made the error and has waived the privilege and you can use it to your client's advantage.

C. No. The duty to return the document only applies in a litigation setting.

D. Probably not. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other measures is beyond the scope of the Oregon Rules of Professional Conduct. Local and court rules must be consulted.

DISCUSSION

Answer: _____

See OSB Legal Ethics Op No 2005-150.

Notes

Notes

ISSUES NEAR THE END OF/AFTER THE ATTORNEY-CLIENT RELATIONSHIP

Section 18 — Termination of the Attorney-Client Relationship

Unless the lawyer-client relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a lawyer-client relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. *ABA Model Rules,* Rule 1.3, Comment [4].

A. Reasons for the Relationship to End

- Supp 18-1: Helen Hierschbiel, *Tying Up Loose Ends: How to End a Relationship*, OSB Bulletin, Oct 2010

- Supp 18-2: Scott Morrill, *Breaking Up Is Hard to Do: How to End a Relationship, Part II,* OSB Bulletin, Nov 2010

1. Mandatory withdrawal.

   a. If any one of the conditions listed in RPC 1.16(a) applies, the lawyer is *required* to withdraw or decline the representation. His or her failure to do so violates the rule.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

- *In re Hudson*, 30 DB Rptr 40 (2016). [120-day suspension, 60 days stayed/one-year probation] A week before the date his suspension was to start in another disciplinary matter, Respondent appeared in court to argue his client's appeal in a child support mater. Respondent thereafter failed to withdraw from the client's case or inform the court that he could not represent her due to his suspension. When the court issued a judgment mostly favorable to the opposing party, the opposing party sought reconsideration and attorney fees. Respondent was unable to counsel the client due to his suspension.

- *In re Houston*, 29 DB Rptr 238 (2015). [150-day suspension/BR 8.1] After being administratively suspended, attorney failed to withdraw from client's employment claim or communicate further with the client, including the fact that he had been suspended

- *In re Throne*, 29 DB Rptr 104 (2015). [2-year suspension] After attorney was suspended for failing to pay his malpractice assessment, he failed to withdraw from his representation of one or more clients and failed to notify them of his suspension.

- *In re Koenig*, 28 DB Rptr 301 (2014). [reprimand] Respondent represented a client in a criminal matter in which the client was convicted of felony murder. The respondent agreed to continue the representation and pursue an appeal on the client's behalf. The client's parents paid the respondent a retainer to handle the appeal. The court of appeals affirmed the decision. The client and his parents were unable to pay for further appeal and asked respondent to withdraw and arrange substitute counsel through the Oregon Public Defense Services Appellate Division. Respondent did not withdraw and was not able to arrange the substitute counsel that the client requested.

- *In re Edelson,* 25 DB Rptr 172 (2011). [90-day suspension] In a workers' compensation appeal, attorney decided he could not file a brief that advanced a nonfrivolous position, but did not inform his client of this or respond to multiple inquiries from the client, opposing counsel or the court. Nor did attorney withdraw from the representation, which made it difficult for the client to communicate on her own behalf with the opposing party.

- *In re Hammond*, 24 DB Rptr 97 (2010) [30-day suspension] Without the knowledge, skill or experience necessary to handle land use litigation or appeals, attorney agreed to represent clients in a land use dispute and thereafter failed to withdraw when it became clear that she was in over her head.

- *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to on recons*., 347 Or 529 (2010). [disbarred] Attorney failed to withdraw from representing a number of clients in legal matters after his disciplinary suspension became effective.

- *In re Creem*, 23 DB Rptr 112 (2009). [30-day suspension] In a dissolution proceeding, attorney's client was awarded custody of three minor children and child support, with the parenting plan subject to on-going court review. Thereafter, attorney learned, but did not reveal to the court or the opposing party, that one of the minor children was arrested and incarcerated, a fact that was material to the issues before the court. Attorney counseled her client to disclose the child's incarceration, but did not withdraw after her client refused to do so. *Cf., In re A.,* 276 Or 244, 554 P2d 479 (1976) (when attorney knew through confidential information that testimony of client was false or misleading and client refused to allow disclosure to the court by the attorney, the attorney could not reveal the confidential information but was obligated to withdraw from further representation); *see also, OSB Legal Ethics Op No 2005-34*.

- *In re Clarke*, 22 DB Rptr 320 (2008). [60-day suspension] After deciding that a client's appeal had no merit, attorney decided not to file a brief, did not withdraw, allowed the appeal to be dismissed and thereafter failed to disclose the dismissal to the client.

- *In re Nicholls*, 22 DB Rptr 233 (2008). [disbarred + restitution] Attorney filed a pleading on behalf of a client one day before

attorney was suspended from the practice of law for disciplinary reasons. Thereafter, attorney failed to withdraw or inform the client that he was suspended, and attorney continued to negotiate with opposing counsel about the case.

- *In re Lombard*, 22 DB Rptr 202 (2008). [reprimand] While representing a client in litigation, attorney transferred to inactive status. Thereafter, he failed to withdraw, continuing to represent the client in a deposition and at an arbitration.

- *In re O'Dell*, 19 DB Rptr 287 (2005). [2-year suspension] After his suspension from practice for disciplinary reasons, attorney failed to withdraw from a pending criminal case and did not arrange for his client to appear for sentencing, resulting in a warrant being issued for the client's arrest. [DR 2-110(B)(2)]

- *In re Howser,* 329 Or 404, 987 P2d 496 (1999) [reprimand] Attorney failed to withdraw for nearly a year and a half after a conflict developed with a former client.

- *State v. Balfour,* 311 Or 434, 814 P2d 1069 (1991). An indigent defense attorney who believes that the only arguments on appeal are frivolous is not required to withdraw but may instead follow the special procedures set forth in this case.

- *OSB Legal Ethics Op No 2009-182*. A client filing a bar complaint against his attorney shortly before trial does not give rise to a *per se* conflict of interest requiring withdrawal. However, if there is a significant risk that the attorney's representation will be materially limited by the attorney's personal interest as a result of the complaint and the client does not provide informed consent to the conflict, or if the attorney does not reasonably believe that the attorney can provide competent and diligent representation to the client notwithstanding informed consent, the attorney must seek permission to withdraw.

- *OSB Legal Ethics Op No 2007-178*. Attorneys representing indigent criminal defense clients must refuse to accept an excessive workload that prevents them from rendering competent and diligent legal services to their clients. Attorneys who work in public defense organizations should seek assistance from supervisors and managers in order to achieve manageable workloads. If remedial

measures are not then approved, attorneys should continue up the chain of command and may have to file, without firm approval, motions to withdraw.

- *OSB Legal Ethics Op No 2005-119*. (1) An attorney who represents a widow-personal representative may not assist her in violating fiduciary duties that she owes to the beneficiaries of the estate. If the widow informs the attorney that she has breached fiduciary duties in the past, the attorney must ask her to reveal the breaches. If she fails to do so, the attorney may seek leave to withdraw. In fact, the attorney must seek leave to withdraw if the failure to do so would cause the attorney to become directly involved in wrongdoing.

- *OSB Legal Ethics Op No 2005-53*. An attorney who is told by a potential client that the potential client intends to defraud the court should inform the potential client that the potential client should not do so. If the client persists in expressing this intent, the attorney may not represent the potential client.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

- *In re Merrill*, 29 DB Rptr 306 (2015) [120-day suspension, all but 30 days stayed/2-year probation] During his representation of a client in her claim for damages to her mobile home caused by a sewage flood, attorney began experiencing personal issues that impaired his ability to timely or competently attend to the client's matter. Attorney did not thereafter withdraw or notify the client of his impairment.

- *In re Sheridan*, 29 DB Rptr 179 (2015). [60-day suspension, all stayed/3-year probation] Attorney failed to withdraw from an immigration matter, in spite of mental-health impairment.

- *In re Segarra*, 28 DB Rptr 69 (2014). [90-day suspension, all but 30 days stayed/2-year probation] Attorney suffering from debilitating migraines nevertheless accepted domestic relations cases which he was unable to attend to timely or adequately.

- *In re Andersen*, 28 DB Rptr 52 (2014). [6-month + 1-day suspension] Two clients retained respondent to represent them in an arbitration of an employment-contract dispute. Respondent performed some initial work on the case but then failed to take further action, including missing two scheduled phone hearings. Respondent discovered he was suffering from an emotional problem that materially impaired his ability to represent the clients but failed to withdraw from the representation.

- *In re Robins*, 26 DB Rptr 260 (2012). [6-month suspension/stayed, 2-year probation] Respondent failed to file the final accounting on behalf of his conservator client despite having been given the necessary documents. When the client retained new counsel, a show-cause order sought for respondent to deliver the financial records to the court. Respondent did not attend the show cause hearing or an arranged meeting to deliver the documents to the new attorney. Respondent's physical or mental condition materially impaired his ability to represent the client and he failed to withdraw or surrender the client's documents.

- *In re Morasch*, 26 DB Rptr 146 (2012) [2-year suspension] Respondent's alcohol abuse contributed to an accident in which respondent suffered serious physical injuries. The combined alcohol abuse and physical injuries materially impaired the respondent's ability to represent a number of clients. Respondent failed to withdraw from her cases or take steps to protect her clients' interests.

- *In re Soto*, 26 DB Rptr 81 (2012) [7-month suspension] Respondent's mental condition materially impaired her ability to represent her clients. Respondent failed to withdraw from representation and failed to take steps to protect her clients' interests.

- *In re McCaffrey,* 25 DB Rptr 190 (2011). [60-day suspension] Attorney was paid a flat fee to obtain a dissolution of marriage for a client, but neglected the matter such that it was dismissed by the

court for lack of prosecution. Thereafter, attorney quit the practice of law, in part due to physical and mental health problems, and failed to refund any portion of the fee to the client.

- *In re Sushida*, 24 DB Rptr 58 (2010). [3-year suspension] Attorney failed to withdraw from representing clients in domestic relations matters when attorney's mental condition materially impaired his ability to proceed timely and competently.

- *In re Witte*, 24 DB Rptr 10 (2010). [reprimand] Attorney failed to withdraw at a time when she recognized that her health was inhibiting her ability to communicate and effectively represent the client.

- *In re Runnels*, 22 DB Rptr 254 (2008). [1-year suspension] Attorney failed to withdraw from a probate matter even though he knew his ability to represent the client was impaired by a mental condition such that he was not even opening mail related to the estate. *See also, In re Loew,* 296 Or 328, 676 P2d 294 (1984) (a lawyer suffering from "burn out syndrome," making it unreasonably difficult to carry on effectively, has an obligation to withdraw from representing client).

- *In re Bottoms*, 23 DB Rptr 13 (2009). [reprimand] Attorney failed to withdraw from representing a client in a criminal case when attorney's chemical dependency problem made it unreasonably difficult to carry out the employment effectively. *See also, In re Biggs,* 318 Or 281, 864 P2d 1310 (1993) (attorney must withdraw if mental or physical condition, including excessive use of alcohol, makes it unreasonably difficult to effectively represent clients).

- *In re Abendroth*, 21 DB Rptr 205 (2007). [120-day suspension] Attorney knew that his depression was impairing his ability to represent clients, yet failed to withdraw.

- *In re Kolstoe*, 20 DB Rptr 28 (2006). [60-day suspension] Attorney failed to withdraw from representing a client in an appeal when attorney's mental or physical health made it unreasonably difficult for him to carry out the representation effectively, resulting in the appeal being dismissed by the court for lack of prosecution.

- *In re Marsh*, 19 DB Rptr 277 (2005). [9-month suspension] Attorney failed to withdraw from representation of a client in civil litigation when attorney suffered from a serious physical condition that required ongoing medical treatment and rendered it unreasonably difficult to carry out the employment effectively. In another matter, attorney failed to withdraw after being discharged by his client. [DR 2-110(B)(3) and (B)(4)]

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

- *In re Seligson,* 27 DB Rptr 314 (2013). [reprimand] Attorney's ten-month delay in withdrawing following client's termination of his services violated rule.

- *In re Dodge,* 16 DB Rptr 278 (2002) [2-year suspension/21 months stayed/2 years probation]. In one of six causes of complaint, attorney failed to withdraw after being discharged by a workers' compensation client, instead filing a request to abate the dismissal of her claim.

- *In re Mackin,* 12 DB Rptr 87 (1998) [reprimand] Lawyer failed to withdraw from representation of a personal-injury client after she terminated his services.

- PRACTICE TIP: For the lawyer's own protection, discharge by the client should be fully documented. *See* Termination Letters §18B, below.

2. Permissive withdrawal

a. RPC 1.16(b) describes those situations when a lawyer is permitted, but not required, to withdraw from a matter.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

b. Contrary to the former rules in Oregon, attorneys are essentially allowed under RPC 1.16(b)(1) to withdraw from any representation for any reason, when doing so does not adversely impact the client's interests, subject to approval by the court, where necessary.

c. However, the remaining provisions do not contain this same prohibition on adversely impacting the client's interests. Although there is currently no case law in Oregon on point, the drafters of the

ABA Model Rules appear to have intended to clarify that §§ (b)(2)-(b)(7) permit the lawyer to withdraw even if there will be a material adverse effect on the client. American Bar Association, Center for Professional Responsibility, *Annotated Model Rules* (6th ed.)*,* 242-43.

- *See* Supp 13-2: Helen Hierschbiel, *When is Withdrawal Warranted? Representing Clients Who File Claims Against You,* OSB Bulletin, Jan 2010

- *OSB Legal Ethics Op No 2005-33.* An attorney who is owed fees for handling a pending appeal and who cannot locate the client must either continue with the appeal or seek leave to withdraw. The attorney cannot simply cease work. Absent authorization from the client, the attorney may not settle the case, even on terms that attorney believes to be favorable to the client.

- *OSB Legal Ethics Op No 2005-1.* An attorney who agrees to represent a client in litigation on an hourly basis may not simply stop work if the client falls behind in making payments. The attorney may, however, seek leave of court to withdraw if the client fails to make payments after reasonable notice from the attorney. The attorney may only withdraw if the court permits withdrawal.

- Supp 18-3: Beverly Michaelis, *How to Fire a Client: Do's and Don'ts When Ending Representation*, OSB Bulletin, July 2007

B. Termination Letters (a/k/a Disengagement Letters)

1. Reasons to utilize termination letters

   a. Declining further representation. This type of letter is used to notify a client who consulted with the lawyer that the lawyer is not going to represent the client. This is usually sent in circumstances where the lawyer has heard nothing further from the client since the consultation (*e.g.,* a month or more prior).

- Supp 18-4: Sample Disengagement Letter—Declining Further Representation

b. Completion of the representation. This type of letter confirms that the lawyer's part in the legal matter is concluded, either due to completion of the legal matter, or completion of the specific task for which the lawyer was retained. *See* RPC 1.2(b). This kind of letter is especially helpful when the lawyer may have multiple matters that he or she is handling for the client.

- Supp 18-5: Sample Disengagement Letter—Closing Letter

c. Discharge by the client.

i. "In general, the lawyer should insist that the client confirm the discharge in writing. If the client refuses to place the discharge in writing, the lawyer should make every effort to document the discharge by writing a letter to the client documenting the discharge and, when appropriate, obtaining witness statements to this effect." *The Ethical Oregon Lawyer,* §4.13.

d. Failure by the client to adhere to terms of representation agreement. The need for this type of letter can vary, but it is usually related to the client's failure to pay fees pursuant to the engagement or other fee agreement. *See also, The Ethical Oregon Lawyer,* Form 4-4.

- Supp 18-6: Sample Disengagement Letter—Unpaid Fees

2. Contents of termination letters.

a. When the legal matter for which the lawyer was hired is *not* concluded.

i. Advise the client of (or confirm) the reason for termination.

ii. Avoid commenting on the merits of the case.

iii. Advise the client generally that time limitations may or do apply; and

iv. Stress the need to hire another lawyer immediately. *See* Michaelis*, How to Fire a Client* (Supp 18-3).

b. When the legal matter is concluded.

i. Notify the client of any items that he or she must take care of.

ii. Inform the client that the file is being closed.

iii. List the original documents being returned to the client.

iv. Include language about file retention and destruction.

C. Obligations Upon Termination of the Representation

1. Regardless of the reasons for the end of the attorney-client relationship, (and regardless of whether the contemplated withdrawal is mandatory or permissive,) there are certain duties a lawyer must perform for the withdrawal to comply with the ethical rules. The lawyer must notify or obtain permission from the court, and the lawyer must take reasonable steps to protect the client's interests.

2. Obligations to the court

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

- *In re Erm*, 30 DB Rptr 1 (2016). [30-day suspension] Respondent represented a wife who lived in Utah in a dissolution and custody determination filed by husband in Oregon. Respondent made an initial court appearance and moved to sever the custody matter from the dissolution proceeding but did not file a response to husband's petition for dissolution. The court held that Oregon had jurisdiction on all issues except custody. Shortly after the court's

ruling, it is disputed whether Respondent notified the wife that his representation was concluded, but Respondent failed to file a notice of withdrawal with the court and did not notify the wife's Utah attorney nor husband's attorney of record that he no longer wished to be involved in the case.

- *In re Baker*, 29 DB Rptr 204 (2015). [reprimand] After having made numerous appearances for defendants in civil litigation, respondent's request for a continuance of the trial date was denied. In response, respondent asserted that he was not defendants' attorney of record and therefore not obligated to appear at trial. The court disagreed and notified respondent that he should appear. Thereafter, respondent did not file either a consent to withdraw or a motion to withdraw but failed to appear at the scheduled trial. Because defendants were unrepresented, trial could not proceed.

- *In re Obert*, 29 DB Rptr 151 (2015) [9-month suspension, all but 90 days stayed/3-year probation] On behalf of two separate clients, respondent filed notices of appeal regarding their criminal convictions, advancing costs or filing fees to facilitate those filings. After the clients failed to repay his costs or attorney fees, respondent terminated the representations but failed to notify the court, as required by court rule.

- *In re Allen*, 28 DB Rptr 275 (2014) [6-month suspension, all stayed/3-year probation] After filing an appearance in a custody matter later assigned to mediation, respondent terminated the representation but failed to formally withdraw, update her information with the court or respond to inquiries from court staff and opposing counsel.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In response to an adverse outcome in a domestic relations proceeding, attorney stopped working on the matter, but failed to formally withdraw as required by rule or thereafter communicate with the client.

- *In re Jordan,* 26 DB Rptr 191 (2012). [18-month suspension] Attorney knew that he was about to be suspended from the practice of law, but failed to move to withdraw from a criminal appeal, as required by ORAP 8.10(1), or take other steps to protect the client's interests.

- *In re Franklin,* 26 DB Rptr 122 (2012). [30-day suspension] Attorney filed a lawsuit on behalf of a client, but then neglected to follow through on the case. Attorney ultimately decided to no longer represent the client, but failed to file an application to resign, as required by UTCR 3.140(1), notify the court or opposing counsel that he was withdrawing, or otherwise protect the client's interests.

- *In re Cumfer,* 21 DB Rptr 48 (2007). [2-year suspension] Attorney made decision that client's appeal lacked merit and that he would do no further work for her, but failed to notify the client, continued to accept payments from the client, and failed take any steps to properly withdraw.

- *In re Shinn,* 19 DB Rptr 128 (2005). [reprimand] Attorney ceased all work on client's federal personal injury claim because service on the defendant was not timely accomplished due to an internal administrative error. However, attorney failed to obtain the court's permission to withdraw as required by district court rule.

- *In re Covert,* 16 DB Rptr 87 (2002). [reprimand] Attorney withdrew from bankruptcy representation without obtaining bankruptcy court's permission.

- *In re Thomsen,* 262 Or 496, 499 P2d 815 (1972). [reprimand]. A few months before trial client gave the attorney a check that stated "Attorney fees & court costs paid in full." There were no more conversations about fees until the day before trial when attorney called and demanded more money. The client refused and the attorney failed to appear, without seeking court approval to withdraw.

3. Protecting client's interests upon termination

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may

retain papers, personal property and money of the client to the extent permitted by other law.

a. Reasonable notice to client

- *In re Hudson*, 30 DB Rptr 40 (2016). [120-day suspension, 60 days stayed/1-year probation] Shortly before his suspension was to start in another disciplinary matter, Respondent argued his client's appeal in a child support mater. Respondent did not inform his client of his suspension, recommend that she consult with another lawyer, assist her in finding another lawyer, or provide her with her client file. Respondent did not withdraw from the client's case or inform the court that he could not represent her due to his suspension.

- *In re Aman*, 29 DB Rptr 334 (2015). [1-year suspension, all but 6 months stayed/2-year probation] After electing to take no further action on his client's patent infringement claim, respondent failed to notify client and instead did nothing. When client became frustrated and terminated respondent's representation, respondent failed to return her file, including the alleged infringing article.

- *In re Houston*, 29 DB Rptr 238 (2015). [150-day suspension/BR 8.1] After being administratively suspended, respondent failed to withdraw from client's employment claim or communicate further with the client, including the fact that he had been suspended.

- *In re Segarra*, 28 DB Rptr 69 (2014). [stipulated 90-day suspension, all but 30 days stayed/2-year probation] Respondent withdrew shortly before a show cause hearing, giving his client a week to find replacement counsel, and thereafter failed to provide the client her file, despite her requests.

- *In re Burns*, 27 DB Rptr 279 (2013). [210-day suspension] Attorney who was hired to file an affidavit of claiming successor of a small estate failed to file it and failed to notify her client that she would be or had been suspended from the practice of law and closed her law practice.

- *In re Kleinsmith*, S061057, Case No. 12-169 (2013). [90-day suspension] Attorney failed to give bank client advance notice of his intent to withdraw from litigation.

- *In re Jordan*, 26 DB Rptr 191 (2012). [18-month suspension] Attorney knew that he was about to be suspended from the practice of law, but failed to move to withdraw from a criminal appeal, as required by ORAP 8.10(1), or take other steps to protect the client's interests.

- *In re Castanza*, 350 Or 293, 253 P3d 1057 (2011). [60-day suspension] Attorney withdrew from representing two clients in a civil action, but failed to allow the clients sufficient time to employ other counsel, make any attempt to postpone the trial date, file a notice of change or withdrawal of counsel, respond to a pending motion to dismiss filed by the opposing party, respond to opposing counsel's proposed general judgment and cost bill, or communicate with the clients about the judgment and cost bill.

- *In re McCaffrey*, 25 DB Rptr 190 (2011). [60-day suspension] Attorney was paid a flat fee to obtain a dissolution of marriage for a client, but neglected the matter such that it was dismissed by the court for lack of prosecution. At the time, attorney was experiencing physical and mental health problems that impaired her ability to practice law, but she did not withdraw from the representation or inform her client.

- *In re Sushida*, 24 DB Rptr 58 (2010). [3-year suspension] Attorney transferred to inactive bar status without advance notice to his client. He also failed to account to the client for the unearned portion of a retainer or turn over the client's file to successor counsel.

- *In re Dixon*, 24 DB Rptr 1 (2010). [4-year suspension] While a client's criminal appeal was pending, attorney closed her law office and did not tell the client, provide the client with new contact information or inform him that attorney had been suspended from practice.

- *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to on recons*., 347 Or 529 (2010). [disbarred] On the day his disciplinary suspension was to start, attorney moved to postpone a custody case set for trial a few days later and moved to withdraw without notice to or communication with his client. Attorney also was slow to turn over his file to successor counsel.

- *In re Sunderland*, 23 DB Rptr 61 (2009). [3-year suspension] Attorney neglected a probate matter and then withdrew from the representation without notice to the personal representative or the return of papers and property to which the personal representative was entitled.

- *In re Cherry*, 20 DB Rptr 59 (2006). [30-day suspension] Attorney represented her sister in becoming guardian and conservator over the sister's granddaughter, despite attorney's reservations concerning the sister's suitability. Thereafter, attorney encouraged other family members to intervene and seek the sister's removal as guardian and conservator, and moved to withdraw without giving due notice to the sister or allowing time for her to obtain new counsel.

- *In re Grimes*, 18 DB Rptr 300 (2004). [1-year suspension/10 months stayed/2-year probation] Attorney concluded that several criminal, post-conviction and habeas corpus appeals had no merit and allowed them to be dismissed by the court without notice to her clients and without taking other reasonable steps to avoid client prejudice.

- *In re Johnson*, 17 DB Rptr 185 (2003). [reprimand] Attorney made one unsuccessful attempt to contact his criminal defense client the day before the client's appellate brief was due, and then moved to withdraw on the grounds he could not reach the client. The court granted the withdrawal, dismissed the appeal, revoked the client's stayed criminal sentence, and issued a warrant for the client's arrest. The client had not moved or changed his phone numbers from those given to the attorney, and the attorney's failure to give the client notice of the motion to withdraw violated the rule.

- *In re Hedges*, 17 DB Rptr 125 (2003). [reprimand] Attorney withdrew immediately before his client's deposition and then failed to notify the client of a subsequent offer of compromise.

b. Surrender of client money and property.

   i. An attorney who withdraws from representing a client must take reasonable steps to avoid foreseeable prejudice to the client, which generally includes the surrender of all papers and property to which the client is entitled, including the

original or copies of everything in the attorney's files that may reasonably be of benefit to the former client. *OSB Legal Ethics Op Nos 2005-90, 2005-125.*

- If the attorney has a valid lien on any client papers and property, the attorney may seek to enforce that lien. *OSB Legal Ethics Op No 2005-90*.

- However, if the client does not have sufficient resources to pay the attorney in full and if surrender of any property is necessary in order to avoid foreseeable prejudice to the client, the attorney's lien must yield to the fiduciary duties that the attorney owes to the client upon the payment of whatever amount the client can afford to pay (if anything). *OSB Legal Ethics Op No 2005-90*.

- The question of who pays for any photocopy charges or any charges for locating and segregating materials depends, *inter alia*, upon the nature of the documents, the terms of the fee agreement between attorney and client, and the extent to which the attorney had previously provided copies of documents to the client. The charges must not, in any event, be clearly excessive or unreasonable. *OSB Legal Ethics Op No 2017-192.*

- *In re Allen*, 30 DB Rptr 362 (2016) [60-day suspension/formal reinstatement/restitution] Respondent failed to take the required steps to properly withdraw from her client's legal matter. She failed to provide notice to the court or opposing counsel; failed to deliver a copy of the client's file to the client's new counsel; and failed to refund the unearned portion of the client's fees and expenses.

- *In re Ettinger*, 30 DB Rptr 173 (2016) [disbarred] Respondent failed to refund the unused portion of her clients' domestic relations retainer and did not respond to the clients' request for the unused funds.

- *In re Tibbetts*, 30 DB Rptr 73 (2016) [30-month suspension] Respondent failed to respond or comply with two former criminal

clients' requests for copies of their files, despite pending criminal matters that necessitated the files and Bar involvement.

- *In re Hudson*, 30 DB Rptr 40 (2016) [120-day suspension, 60 days stayed/1-year probation] Shortly before his suspension was to start in another disciplinary matter, Respondent argued his client's appeal in a child support mater. Respondent did not inform his client of his suspension, recommend that she consult with another lawyer, assist her in finding another lawyer, or provide her with her client file. Respondent did not withdraw from the client's case or inform the court that he could not represent her due to his suspension.

- *In re Aman*, 29 DB Rptr 334 (2015) [1-year suspension, all but 6 months stayed/2-year probation] After electing to take no further action on his client's patent infringement claim, respondent failed to notify client and instead did nothing. When client became frustrated and terminated respondent's representation, respondent failed to return her file, including the alleged infringing article.

- *In re Merrill*, 29 DB Rptr 306 (2015) [120-day suspension, all but 30 days stayed/2-year probation] Despite request from client's representative and the Bar, respondent could not account for client's retainer because he did not make and maintain records regarding those funds. He did not provide any funds to the client prior to her death and when respondent was unable to confirm to his satisfaction who the client's successor in interest was, he discontinued efforts and failed to return any portion of her retainer.

- *In re Sheridan*, 29 DB Rptr 179 (2015) [60-day suspension, all stayed/3-year probation] Respondent failed to promptly return the unearned portion of a flat fee in an immigration matter, after she was removed from the case by the immigration court for several unnecessary and incompetent actions.

- *In re Obert*, 29 DB Rptr 151 (2015) [9-month suspension, all but 90 days stayed/3-year probation] On behalf of two separate clients, respondent filed notices of appeal regarding their criminal convictions, advancing costs or filing fees to facilitate those filings. After the clients failed to repay his costs or attorney fees, respondent terminated the representations but failed to take reasonable steps to protect his clients' interests in their appeals

such as informing them of the status of the appeals and the need to file opening briefs; seeking extensions of time for the clients to file opening briefs; and forwarding the clients correspondence from the court regarding the appeals.

- *In re Simms*, 29 DB Rptr 133 (2015). [120-day suspension] After respondent settled and concluded his client's employment discrimination matter, he did not surrender the settlement funds his client was entitled to receive. In a second matter, respondent did not notify the court that he had closed his office in Multnomah County, failed to provide the court with a change of address, and did not refund his client's funds for costs that had not been incurred.

- *In re Throne*, 29 DB Rptr 104 (2015) [2-year suspension] After termination, respondent did not take steps to protect his water district client's interests by forwarding its files to its new attorney. However, the bar did not allege a violation of this particular rule, so no violation of this rule was found.

- *In re Meyer*, 29 DB Rptr 64 (2015) [reprimand] After personal injury client terminated his contingency representation, respondent asserted lien on client's personal injury file and refused to provide it to successor counsel until client paid attorney at his hourly rate for his time spent on the case.

- *In re Ireland*, 29 DB Rptr 53 (2015) [8-month suspension] Respondent neglected a number of domestic relations matters and then failed to account for or return client funds or property following her termination.

- *In re Allen*, 28 DB Rptr 275 (2014). [6-month suspension, all stayed/3-year probation] After being terminated for inaction by multiple clients, attorney failed to promptly return the unearned portions of their retainers.

- *In re Bertoni*, 28 DB Rptr 196 (2014). [6-month suspension] Following the termination of his employment in multiple privately-retained criminal matters, respondent failed to return client files and unearned funds.

- *In re Kaufman*, 28 DB Rptr 174 (2014). [disbarred] In three separate matters, responded failed to refund the unearned portion of fees and failed to account for and deliver to his clients all unearned fees and expenses upon the termination of his employment.

- *In re Eckrem*, 28 DB Rptr 77 (2014) [90-day suspension, all but 30 days stayed/2-year probation] Respondent utilized a flat fee agreement that contained the appropriate language required by RPC 1.5(c)(3), but after the client terminated the representation before completion, the respondent failed to make a prompt refund of the unearned portion the flat fee.

- *In re Segarra*, 28 DB Rptr 69 (2014) [90-day suspension, all but 30 days stayed/2-year probation] Respondent withdrew shortly before a show cause hearing, giving his client a week to find replacement counsel, and thereafter failed to provide the client her file, despite her requests.

- *In re Andersen*, 28 DB Rptr 52 (2014) [6-month + 1-day suspension] Two clients retained respondent to represent them in an arbitration of an employment-contract dispute. Respondent performed some initial work on the case but then failed to take further action, including missing two scheduled phone hearings. Respondent discovered he was suffering from an emotional problem that materially impaired his ability to represent the clients but failed to withdraw from the representation.

- *In re Zackheim*, 28 DB Rptr 9 (2014) [reprimand] In a personal injury action, clients terminated respondent's representation and instructed him to forward their files to new counsel. Respondent refused, improperly asserting that he was entitled to retain them.

- *In re Hudson*, 27 DB Rptr 226 (2013) [2-year suspension, all but 6 months stayed/2-year probation] Respondent mistakenly allowed a judgment to be entered providing for 50/50 child support when in fact his client was going to be the primary parent. When respondent made little effort to have the order corrected, the client terminated respondent's representation, and demanded both his client file and an accounting of his retainer. Respondent did not forward the file to the new attorney and failed to file and serve a notice of termination in the matter for nearly three months.

- *In re Kleen*, 27 DB Rptr 213 (2013). [reprimand] Attorney took nearly eight months after the end of the attorney-client relationship to return funds that the client had paid him to obtain an expert opinion that he never sought.

- *In re Ettinger*, 27 DB Rptr 76 (2013). [2-year suspension] Attorney violated rule when she failed to refund unearned portion of client funds following termination of the attorney/client relationship.

- *In re Rehm*, S061601, Case No. 13-90 (2013). [30-day suspension] Client paid attorney an advance fee to handle a child support matter. Attorney deposited the fee into his trust but performed no work on the case. Client requested updates on his case but attorney did not respond to his inquiries. Client then requested by certified letter that attorney refund his fee but attorney failed to respond and did not account for or return the advance fee until after the client complained to the bar.

- *In re Mahr*, S061496, Case No. 13-53 (2013). [disbarred] Attorney accepted fees for numerous immigration matters, failed to complete them, and failed to refund any of the unearned fees.

- *In re Soto*, 26 DB Rptr 81 (2012). [7-month suspension] After termination by clients, attorney failed to turn over the client files, return the unearned portion of retainers, or otherwise take steps to protect the clients' interests.

- *In re Jagger*, 25 DB Rptr 113 (2011). [6-month suspension + restitution] Although attorney's strategy of defending a client in a criminal case was not particularly effective and was below the standard of care in such matters, it did not constitute neglect of the client's legal matter. However, the quality and efficacy of the representation was such that, when the client fired attorney before the agreed-upon work was completed, attorney was obligated to refund a portion of the client's retainer.

- *In re Sushida*, 24 DB Rptr 58 (2010). [3-year suspension] Attorney transferred to inactive bar status without advance notice to his client. He also failed to account to the client for the unearned portion of a retainer or turn over the client's file to successor counsel.

- *In re Lounsbury*, 24 DB Rptr 53 (2010). [reprimand] Attorney failed to refund a portion of a client's fee when he was terminated by the client before the legal services were completed.

- *In re Witte*, 24 DB Rptr 10 (2010). [reprimand] Attorney withdrew from representing a client without returning her file materials to the client so that he could represent himself.

- *In re Perry*, 23 DB Rptr 99 (2009). [6-month suspension] After withdrawing from representing a client, attorney failed to provide successor counsel with the client file despite repeated demands for it. Nor did attorney comply with successor counsel's request that he file an actual notice of withdrawal with the court.

- *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007). [30-day suspension] Attorney had an obligation to refund to the client that portion of a retainer that was not yet earned at the time the attorney-client relationship ended. That attorney believed the retainer was nonrefundable and earned on receipt did not matter because the fee agreement was never reduced to writing.

- *In re Balocca*, 342 Or 279, 151 P3d 154 (2007). [90-day suspension] Attorney failed to return unearned client funds after closing his file.

- *In re Vance*, 20 DB Rptr 92 (2006). [reprimand] Attorney charged his clients a fixed fee to handle litigation through trial. The fee became excessive when attorney withdrew from the representation before the trial occurred but did not refund a portion of the fee that he had not yet earned.

c. Other reasonable measures.

i. Notifying the court.

- *In re Allen*, 30 DB Rptr 362 (2016). [60-day suspension/formal reinstatement/restitution] Respondent failed to take the required steps to properly withdraw from her client's legal matter. She failed to provide notice to the court or opposing counsel; failed to deliver a copy of the client's file to the client's new counsel; and failed to refund the unearned portion of the client's fees and expenses.

- *In re Hudson*, 30 DB Rptr 40 (2016). [120-day suspension, 60 days stayed/1-year probation] Shortly before his suspension was to start in another disciplinary matter, Respondent argued his client's appeal in a child support mater. Respondent did not inform his client of his suspension, recommend that she consult with another lawyer, assist her in finding another lawyer, or provide her with her client file. Respondent did not withdraw from the client's case or inform the court that he could not represent her due to his suspension.

- *In re Erm*, 30 DB Rptr 1 (2016) [30-day suspension] After the court's jurisdictional ruling in a dissolution and custody matter, it is disputed whether Respondent notified wife that his representation of her was concluded, but Respondent failed to file a notice of withdrawal with the court and did not notify wife's other attorney or husband's attorney of record that he no longer wished to be involved in the case. Respondent thereafter failed to take any other steps to protect the wife's interests.

- *In re Simms*, 29 DB Rptr 133 (2015). [120-day suspension] After respondent settled and concluded his client's employment discrimination matter, he did not surrender the settlement funds his client was entitled to receive. In a second matter, respondent did not notify the court that he had closed his office in Multnomah County, failed to provide the court with a change of address, and did not refund his client's funds for costs that had not been incurred.

- *In re Franklin*, 26 DB Rptr 122 (2012). [30-day suspension] Attorney filed a lawsuit on behalf of a client, but then neglected to follow through on the case. Attorney ultimately decided to no longer represent the client, but failed to file an application to resign, as required by UTCR 3.140(1), notify the court or opposing counsel that he was withdrawing, or otherwise protect the client's interests.

- *In re Eckrem*, 23 DB Rptr 84 (2009). [60-day suspension] After an adoption client terminated attorney for neglecting the legal matter, attorney failed to notify the court that he no longer represented the client and failed to refund promptly unearned fees and unincurred costs. In another client matter, attorney failed to return file material or funds to the client upon termination.

ii. Responding to the court

- *In re Odman*, 22 DB Rptr 34 (2008). [181-day suspension] Attorney failed to protect his client's interests when he did not respond to a court notice of intent to dismiss the client's lawsuit, did not respond to a court notice that the proceeds of a performance bond posted by the client would be distributed to the opposing party, and did not inform the client of case developments in time for the client to seek other counsel. [DR 2-110(A)(2)].

Notes

Notes

ISSUES NEAR THE END OF/AFTER THE ATTORNEY-CLIENT RELATIONSHIP

Section 19 — Post-Representation Issues

A. Former-Client Conflict

See also, §§ 10D & 16D, above.

- *See* Supp 16-2: Sylvia Stevens, *Conflicts, Part II: Former Client Conflicts*, OSB Bulletin, Dec 2009

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

*** * ***

(d) For purposes of this rule, matters are "substantially related" if

(1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or

(2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

1. All former-client conflicts are capable of being waived by the affected clients.

2. An attorney who leaves a firm can have a matter-specific conflict with the clients of that firm as a result of the attorney's own formal work for the client or as a result of participating in less formal discussions within the firm about a matter. *OSB Legal Ethics Op No 2005-120*.

3. Because RPC 1.0(d) defines a law firm to specifically include a public defender's office, if one lawyer in such an office is disqualified because of a former client information-specific conflict, all other attorneys in the office are disqualified as well, unless the conflict is waived. There is no exception for a public defender's office. *OSB Legal Ethics Op No 2005-174*.

4. Absent disclosure and consent, an attorney cannot represent a client in litigation against another party who had previously hired the attorney to investigate the same matter. *OSB Legal Ethics Op No 2005-11*.

    - *In re Simon*, 30 DB Rptr 214 (2016). [185-day suspension] Respondent represented a trust entity, through its trustee, in civil litigation. Thereafter, Respondent represented a number of creditors in an involuntary bankruptcy petition filed against the trust entity. The litigation and the involuntary bankruptcy litigation were substantially related because they both involved a dispute over whether title to real property belonging to the trust would stay in the trust, or it would be taken out and foreclosed upon. Further, the interests of the bankruptcy creditors were materially adverse to the interests of the debtor trust entity because the former wanted to force resolution of their debts against the latter. Neither the trust entity nor the bankruptcy creditors gave informed consent, confirmed in writing, to Respondent's representation of the creditors in the bankruptcy.

- *In re O'Rourke*, 28 DB Rptr 3 (2014). [reprimand] Respondent who had represented spouses in preparing and executing wills and estate plans, subsequently represented husband in transferring certain parcels of real property out of wife's estate, contrary to the terms of wife's trust.

- *In re Matthews*, SC 061272, Case No. 13-39 (2013). [reprimand] As part of his fee for a development company client, attorney acquired an interest in his client's option to purchase an office building. When client's new management terminated attorney and decided to sell the option, attorney and one or more investors formed a corporation, conveyed an offer to purchase, and eventually acquired the option, without disclosing to the former client that he was an owner of the purchasing corporation.

- *In re Gerttula*, 26 DB Rptr 31 (2012). [reprimand] Two individual clients owned real property as joint tenants with right of survivorship. On behalf of both, attorney prepared deeds by which the clients conveyed the property to themselves as tenants in common. Later, after one client died, attorney represented the deceased client's children in attempts to force the surviving client to partition the property, without informed consent from his present and former clients.

- *In re Clark*, 25 DB Rptr 207 (2011). [reprimand] The Bar failed to prove that attorney used information gained in a former attorney-client relationship to the detriment of the former client because it did not establish that attorney obtained the information while representing the client, or that the information was of a confidential nature, or that attorney actually used the information to the former client's disadvantage.

- *In re Dole*, 25 DB Rptr 56 (2011). [reprimand] Attorney represented father and mother in estate planning and family business matters, and continued to represent father for a period after mother died. Attorney also began to represent the adult children regarding their concerns over the valuation, liquidation and distribution of assets from mother's estate to father, fathers' spending habits and control over the family business entities. Attorney stopped representing father, but failed to obtain informed consent from father or the children when he continued to represent the children in matters adverse to father. He also disclosed to the children information he

had obtained about estate and entity matters when he represented father and mother.

- *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010). [150-day suspension] Attorney represented one former client in loan transactions and drafted several promissory notes and mortgages to obtain loans from his new client. In the debt collection, the attorney then represented a new client in enforcing his rights arising out of those same documents. The debt collection was significantly and substantially related to the loan transactions, and the new client's interests were in likely conflict with and materially adverse to the first, former client's surviving interests during the subsequent representation.

- *In re Balocca*, 342 Or 279, 151 P3d 154 (2007). [90-day suspension] Attorney engaged in a former client conflict of interest when he represented a client in a paternity action after previously representing the opposing party in a bankruptcy. The bankruptcy client had provided attorney with confidential financial information that would have been useful to the paternity client's position on child support.

- *In re Bowker*, 20 DB Rptr 16 (2006). [30-day suspension] Attorney represented both lender and borrowers in a loan transaction. Later, when the loan was delinquent, attorney represented the lender to collect the debt from the borrowers.

- *In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005). [120-day suspension] Attorney who had previously met with husband about a domestic-relations matter and received pertinent confidential information from him subsequently represented the wife in a divorce proceeding. Attorney's delay in withdrawing to allow time to consult with ethics counsel prior to withdrawal was no excuse because the conflict of interest was so obvious.

- *In re Eichelberger*, 19 DB Rptr 329 (2005). [60-day suspension] Attorney represented a contractor and engaged in construction projects with the contractor without sufficient disclosure or consent. After the representation stopped, attorney asserted claims against the contractor on behalf of other clients that related to his prior representation of the contractor.

- *In re Drake*, 18 DB Rptr 225 (2004). Attorney had a conflict of interest when she represented a business concerning an employee's continued relationship with the company and the employee was a former client of the law firm concerning a significantly related matter.

- *In re Goldstein*, 18 DB Rptr 207 (2004). Attorney had a conflict of interest when, after briefly representing two clients in a criminal matter, he continued to represent one of them in that matter without full disclosure and consent when their interests were adverse.

- *In re Jennings*, 18 DB Rptr 49 (2004). [30-day suspension] Attorney's firm prepared estate planning documents for a client. Thereafter, the client went to a successor lawyer who asked first attorney for copies of the client's documents pursuant to signed authorizations from the client. Client's son, also a client of the first attorney, opposed the release of the documents. A conflict occurred in that the first attorney represented the son in the dispute over the release of the documents without the informed consent of the mother.

- *In re Marshall*, 17 DB Rptr 265 (2003). [reprimand] Attorney drafted a will for one client, then later represented the client's daughter as the petitioner in a guardianship for the mother in which the validity of the mother's will was challenged. In another matter, attorney drafted a will for a client wherein she expressed a desire to have two named persons serve as co-personal representatives. Thereafter, on behalf of one of those named persons, attorney challenged the qualifications of the other named person.

- *In re Carstens*, 17 DB Rptr 46 (2003). [30-day suspension] Attorney's associate agreed to represent an existing firm client (respondent) regarding a child custody proceeding initiated by a former client of the firm (petitioner). Upon learning this, attorney directed the associate not to represent the respondent in the custody case and the associate did not do so. Thereafter, attorney undertook to represent the petitioner against the respondent in the custody case without the consent of the respondent.

- *OSB Legal Ethics Op No 2005-160*. Attorney, formerly employed in the state public defender's office and now in private practice, may represent clients in post-conviction relief appeals in which the client

contends the public defender's office rendered ineffective assistance of counsel at trial, provided the attorney's interest in maintaining the goodwill of her former office does not rise to the level of a self-interest conflict and the attorney did not participate personally and substantially in the former office's representation of the client or any co-defendant. Disclosure and consent may cure any conflicts presented.

- *OSB Legal Ethics Op No 2005-148*. An attorney who previously represented spouses in estate planning matters may have a matter-specific conflict in a subsequent dissolution proceeding where the estate plan is sufficiently complex that the dissolution would deprive the former client spouse of the benefits of the former representation.

- *OSB Legal Ethics Op No 2005-120*. An attorney who previously represented a client in the defense of a robbery prosecution would probably have a matter-specific conflict if that attorney subsequently endeavored to prosecute that same client for another robbery that appeared to be part of the same pattern of robberies.

- *OSB Legal Ethics Op No 2005-120*. An attorney who had previously represented a client in the defense of a DUII matter would probably not have a matter-specific conflict if the attorney later prosecuted that client for robbery.

- *OSB Legal Ethics Op No 2005-110*. An attorney may represent a current client in a case in which the attorney will have to cross-examine a nonparty former client if the former client relationship did not involve the same matter and did not provide the attorney with confidences or secrets of the former client that could be used adversely to the former client. If the same matter was involved or if the attorney did acquire such confidences and secrets, the attorney could represent the current client only with the current and former clients' consent based on full disclosure.

- *OSB Legal Ethics Op No 2005-62.* Absent consent based on full disclosure, an attorney who previously represented the prior personal representative cannot represent a subsequent personal representative in defending against a claim for work done by the prior personal representative at the direction or with the advice of the attorney.

- *OSB Legal Ethics Op No 2005-11*. Absent disclosure and consent, an attorney who represents a husband in a marital dissolution proceeding may not subsequently represent the wife in seeking to modify the decree resulting from the prior proceeding.
- *OSB Legal Ethics Op No 2005-11*. Absent disclosure and consent, an attorney who represents co-defendants in a matter may not subsequently represent one co-defendant in pursuing a related claim or cross-claim against the other.
- *OSB Legal Ethics Op No 2005-11*. Absent disclosure and consent, an attorney who represented two parties in an incorporation or partnership may not represent one against the other in litigation or negotiations pertaining to the dissolution of the corporation or partnership.

Notes

B. Client Confidences and Secrets Following Representation.

See generally § 14, above; *see also, The Ethical Oregon Lawyer,* Chapter 6.

1. Termination of the attorney-client relationship has no impact on a lawyer's duties to maintain inviolate information relating to the representation. *See* RPC 1.9(c); *see also, Ethical Oregon Lawyer* §6.2-4 (duty to preserve client confidences and secrets is perpetual).

RULE 1.9 DUTIES TO FORMER CLIENTS

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

a. An attorney may represent a client in a case in which the attorney will have to cross-examine a nonparty former client if the former client relationship did not involve the same matter and did not provide the attorney with confidences or secrets that could be used adversely to the former client. If the same matter was involved or if the attorney did acquire such confidences and secrets, the attorney could represent the current client only with the current and former clients' consent based upon full disclosure. *OSB Legal Ethics Op No 2005-110*.

- *In re Quillinan*, 20 DB Rptr 288 (2006). [90-day suspension] Attorney sent an e-mail message to a listserv of workers' compensation attorneys disclosing personal and medical information about a former client and making disparaging remarks about the former client that were likely to be disadvantageous to the client's efforts to locate new counsel.

- *In re Bowker*, 20 DB Rptr 16 (2006). [30-day suspension] Contrary to the wishes of her former clients, attorney disclosed information about their legal matter to a third party.

- *OSB Legal Ethics Op No 2005-160*. Attorney, formerly employed in the state public defender's office and now in private practice, may represent clients in post-conviction relief appeals in which the client contends the public defender's office rendered ineffective assistance of counsel at trial, provided the attorney's interest in maintaining the goodwill of her former office does not rise to the level of a self-interest conflict and the attorney did not participate personally and substantially in the former office's representation of the client or any co-defendant. Disclosure and consent may be available to cure any conflicts presented.

- *OSB Legal Ethics Op No 2005-148*. Attorney who previously represented spouses in estate-planning matters may have information-specific conflict if confidences or secrets were obtained from one spouse that could be used in a subsequent dissolution. However, information obtained when both spouses are present is not confidential from the other.

- *OSB Legal Ethics Op No 2005-17.* Whether or not an information-specific former-client conflict exists if an attorney who prepared a will for a former client was subsequently asked to collect money from the former client would depend on whether the attorney learned confidences or secrets from the former client that could be detrimental to the former client in the collection proceedings.

- *OSB Legal Ethics Op No 2005-17.* Whether or not an information-specific former client conflict exists if an attorney who represented a former client in marital dissolution proceedings thereafter sought to represent a subsequent spouse of the former client in dissolution proceedings would depend on whether the attorney learned any confidences or secrets through the representation of the former client that were not already known to the spouse who subsequently sought to employ that attorney.

HYPOTHETICAL

- The State informed Mother Hubbard that it had received information alleging that Mother's domestic partner, Shaggy Skulk, had been improperly touching Mother's minor daughter ("child-abuse matter"). Shortly thereafter, Skulk retained an attorney to represent him in the child-abuse matter and a related criminal matter.

  Thereafter, Mother retained Attorney Advocate to represent her in the child-abuse matter. Advocate discussed the child-abuse matter with Mother and Skulk. At that time, Advocate knew that Skulk was represented by a lawyer in the matter.

  A number of years before the child-abuse matter arose, Advocate had represented Skulk in a juvenile proceeding in which Skulk had been found guilty of threatening to bomb a school. Advocate had thereafter represented Skulk in expunging the conviction from his juvenile record.

  Later, at a hearing in the child-abuse matter, Advocate appeared on behalf of Mother and told the court about Skulk's prior conviction and that the conviction had been expunged.

Which of the following is NOT true with respect to Advocate's conduct?

A. It was a violation of the Rules of Professional Conduct for Advocate to communicate with Skulk regarding the child-abuse matter.

B. It was a violation of the Rules of Professional Conduct for Advocate to reveal information related to his prior representation of Skulk.

C. It was a violation of the Rules of Professional Conduct for Advocate to use information related to Skulk's prior representation, for the benefit of Mother and to the detriment or disadvantage of Skulk.

D. It was a violation of the Rules of Professional Conduct for Advocate to undertake to represent Mother in the child-abuse matter because his representation of Mother was adverse to Skulk.

DISCUSSION

Answer: _____

In re Paulson, 341 Or 542, 145 P3d 171, 20 DB Rptr 244 (2006) (4-month suspension)

C. Collection of Fees

One of the most troublesome areas for lawyers is how to handle former clients who owe the lawyers money for services already rendered.

- Supp 19-1: Sylvia Stevens, *Fee Disputes: Preventable or Inevitable*, OSB Bulletin, Feb/Mar 2007.

There are several options for collection.

1. Lien client files and property.

ORS 87.430 Attorney's possessory lien.

An attorney has a lien for compensation whether specially agreed upon or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim.

a. Upsides:

i. This retaining lien is effective upon the attorney's possession of the client's money or property; it is not necessary that the services have been actually performed before the lien becomes effective. *In re Century Cleaning Servs*., 202 BR 149 (1996).

ii. Lawyer has leverage. Even if the client disputes some or all of the outstanding charges, paying those charges may be worth it to the client if the client can recover the property.

b. Downsides:

i. Lawyer may be ethically required to surrender client property despite valid charges and valid lien if the client needs the property and lacks ability to pay the lien. *See OSB Legal Ethics Op No 2005-90.*

ii. Loss of future business. A client is unlikely to return to (or recommend) a lawyer who withholds his or her property.

iii. Likelihood of a Bar complaint.

2. Lien client's judgment or settlement proceeds.

ORS 87.445 Attorney's lien upon actions and judgments.

An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, orders and awards entered therein in the client's favor and the proceeds thereof to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney.

a. Upside:

i. Highly effective means of recovering fees if money is exchanged by the parties to the litigation:

- Assuming that there are sufficient proceeds to cover attorney lien following payment of offset. *See Ketcham v. Selles,* 96 Or App 121, 772 P2d 419 (1989), *review denied by* 308 Or 315, 779 P2d 618 (1989) (statutes do not give attorney's lien priority over a judgment debtor's right to offset an existing judgment.).

- Regardless of whether the attorney is used to facilitate the payment because such liens are "charges on the action." *Potter v. Schlesser Co., Inc*., 335 Or 209, 63 P3d 1172 (2003) (payment of settlement amount by defendant to plaintiff does not excuse defendant from liability for attorney's lien by plaintiff's attorney). In other words, a judgment is not fully satisfied until the lawyer's lien is paid.

b. Downsides:

i. Loss of future business. If the client has not agreed to this plan of action in advance, the client is unlikely to return to (or recommend) a lawyer who asserts a lien on his or her recovery.

ii. Likelihood of a Bar complaint.

iii. Expensive and time-consuming.

3. File suit against the client.

- Supp 19-2: Mark J. Fucile, *Should You Ever Sue a Client? (And the Alternatives if You Don't)*, OSB Bulletin, June 2011

It rarely makes economic sense to sue a client.

a. Upside:

i. May recover outstanding fees, interest and costs of recovery.

b. Downsides:

i. Unpredictable. Even if a judgment can be obtained, collecting it can be another matter. Also, a lawyer can be responsible for costs and fees if the client prevails.

ii. Loss of future business. A former client will not use a lawyer's services again once he or she is sued.

iii. Clients sued for fees often counterclaim for malpractice.

- These counterclaims are often complicated and frequently require lawyers to obtain their own counsel.

iv. Likelihood of a Bar complaint.

v. Expensive and time-consuming.

4. Participate in fee arbitration. In 1976, the Bar began a voluntary fee arbitration program managed through General Counsel's Office.

   - Supp 19-3: Initiating Fee Arbitration Information and Petition
   - Supp 19-4: Fee Arbitration Rules (4/11 *rev.*)

   a. Upsides:

      i. Inexpensive. Current costs is $75, regardless of size of claim.

      ii. Relatively quick. The rules require the hearing to be held within 60 days of the appointment of the hearing panel, in the absence of leave from General Counsel, and opinion to be issued within 30 days of the hearing.

      iii. Binding.

      iv. Confidential.

   b. Downsides:

      i. Voluntary, so both sides must agree to participate.

      ii. Binding.

- PRACTICE TIP: Place a provision in fee agreements requiring clients to arbitrate fee disputes. The RPCs do not impose any limitations or qualifications on such a provision.

Notes

OTHER ISSUES

Section 20 — Misrepresentation & Dishonesty

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law. RPC 8.4(a)(3).

HYPOTHETICAL

- At 5:19 p.m. attorney Dilly Dally paid for two hours of parking at a private parking garage (through 7:19 p.m.) and placed the time-stamped receipt on the dash of her vehicle. The garage was managed by Charge-a-Ton parking service ("CAT").

  At 7:37 p.m., the parking attendant took a picture of Dally's dash, showing the expired parking receipt, and issued her a $44 ticket.

  Due to the contents of the ticket, including what she believed was questionable contact information for CAT, Dally was skeptical about the authenticity of the ticket. In addition, Dally was doubtful that CAT had the authority to issue her a parking ticket.

  However, rather than investigate the matter fully or pay the ticket, Dally altered the receipt—changing the "1" in both the 5:19 entry stamp and the 7:19 expiration time to a "4"—and sent it to CAT with a note arguing that the ticket was invalidly issued. Dally's note stated: "The pass expired at 7:49 pm and this ticket was issued at 7:37 pm."

  Along with CAT's denial of Dally's appeal of the parking ticket, they sent her a copy of the lot attendant's dash photo of the parking receipt (*i.e.,* prior to her alteration), showing the true time of her entry and verifying that time had in fact expired when her ticket was issued. Dally then paid the parking ticket.

Dally's conduct violated the ethics rules because:

A. She got a parking ticket.

B. She questioned CAT's authority to issue her a ticket.

C. She altered the parking receipt and presented it to CAT as authentic.

D. She did not pay the ticket at the time she appealed its validity.

DISCUSSION

Answer: _____

In re DeMuniz, 28 DB Rptr 113 (2014) (30-day suspension).

A. Misrepresentation

1. A dictionary definition of "misrepresentation" is "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." *Black's Law Dictionary, p. 1152* (1968).

2. To violate this rule, an attorney's misrepresentations must be knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process. *In re Eadie*, 333 Or 42, 53, 36 P3d 468 (2001), *In re Kluge*, 332 Or 251, 255, 19 P3d 938 (2001).

3. A lawyer commits misrepresentation when the lawyer makes a knowing false statement of material fact or knowingly fails to disclose a material fact. *In re Leonard*, 308 Or 560, 569, 784 P2d 95 (1989); *In re Gustafson*, 327 Or 636, 647, 968 P2d 367 (1998); *In re Claussen*, 331 Or 252, 261, 14 P3d 586 (2000).

4. Material information is information that, if it had been known by the court or other decision-maker, would or could have influenced the decision-making process. *In re Gustafson*, 327 Or 636, 968 P2d 367 (1998).

5. Failure to make disclosure, leaving discovery of facts to investigation by a skeptical opponent, is a misrepresentation. *In re Greene*, 290 Or 291, 298, 620 P2d 1379 (1980); *In re Hiller*, 298 Or 526, 533, 694 P2d 540 (1985).

6. Likewise, a lawyer's failure to correct a false impression made by an unintentional misstatement also constitutes misrepresentation under the rule. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992); *In re Boardman*, 312 Or 452, 822 P2d 709 (1991).

7. To violate the rule, it is unnecessary to establish either damage or detrimental reliance upon the false representation or omission, nor is it necessary to establish that the lawyer had an improper motive or an intent to defraud or deceive. *In re Hiller, supra*, 298 Or 526, 533, 694 P2d 540 (1985); *In re Boardman, supra*, 312 Or 452, 822 P2d 709 (1991); *In re Fulop*, 297 Or 354, 685 P2d 414 (1984); *In re McKee*, 316 Or 114, 125, 849 P2d 509 (1993); *In re Leonard, supra*, 308 Or 560, 569, 784 P2d 95 (1989). It is enough that the lawyer's representations were untrue and that he knew them to be untrue when making them.

B. Dishonesty

1. Dishonesty is conduct evidencing a disposition to lie, cheat, or defraud, as well as a lack of trustworthiness or integrity. *In re Claussen*, 331 Or 252, 260, 14 P3d 586 (2000); *In re Dugger*, 334 Or 602, 609, 54 P3d 595 (2002); *In re Kluge*, 335 Or 326, 66 P3d 492 (2003).

2. To engage in conduct involving dishonesty in violation of this rule, an attorney must have acted with a mental state of knowledge or intent. *See In re Martin*, 328 Or 177, 185-86, 970 P2d 638 (1998) (stating that "the term 'dishonesty' imports with it a notion of knowledge or intentionality" and reviewing prior case law suggesting knowledge or intent is required).

3. The characteristics that the definition of dishonesty embraces under the ethics rules are those that reflect on a lawyer's fitness to practice law. *In re Hockett*, 303 Or 150, 158, 734 P2d 877 (1987) ("Trustworthiness and integrity are key concepts in the Code of Professional Responsibility…."). Consequently, to violate *current* RPC 8.4(a)(3) by dishonesty, the lawyer's conduct must indicate that the lawyer lacks those characteristics of trustworthiness and integrity that are essential to the practice of law. *In re Carpenter*, 337 Or 226, 234, 95 P3d 203 (2004).

4. "Embezzlement is dishonesty. …[A] lawyer who holds money in trust for another and converts that money to his own use has engaged in conduct 'involving dishonesty' within the meaning of [*current* RPC 8.4(a)(3)]." *In re Holman*, 297 Or 36, 57-58 682 P2d 243 (1984); *In re Phelps*, 306 Or 508, 760 P2d 1331 (1988). *See also*, *In re Phinney*, 354 Or 329, 335, 311 P3d 517 (2013); *In re Renshaw*, 353 Or 411, 298 P3d 1216 (2013).

C. Fraud/Deceit

1. Fraud and deceit require, among other things, a false representation to another, with the intent that the other act upon the false representation to his or her damage. *In re Hockett*, 303 Or 150, 158, 734 P2d 877 (1987).

D. Targets of Practice-related Dishonesty

1. Dishonesty toward a tribunal.

a. **An attorney may not take notarial acknowledgments over the phone or direct the attorney's secretary to do so**. *OSB Legal Ethics Op No 2005-5.*

- *In re Beach*, 29 DB Rptr 92 (2015). [6-month suspension] Client hired attorney to prepare urgent estate planning and trust documents. After several months delay, attorney met with client and the client's mother to execute a will, a living trust agreement, a special needs trust, and an advance directive for health care. Despite the fact that the will and directive required declarations or attestations by two witnesses that had personally witnessed the maker sign those documents, attorney had her legal assistant sign the declaration and attestation, falsely swearing that she had personally witnessed client sign both documents. Attorney then notarized all signatures, and allowed her client to believe that both documents were fully and properly executed.

- *In re Moore,* 20 DB Rptr 150 (2006). [reprimand] Lawyer received a signed, un-notarized Uniform Support Affidavit from his domestic relations client. He contacted the client by telephone and obtained verification that his client was the person who signed the affidavit

  and that his client swore to the truth of the statements in the affidavit. The respondent then used his notary stamp to attest to and verify his client's signature, even though his client was not personally present. The respondent noted that his client had not personally appeared by handwriting the words "by telephone" in the jurat on the affidavit and filed it with the court.

- *In re Shilling,* 9 DB Rptr 53 (1995). [reprimand] Lawyer procured notarization of signature on affidavit that was not signed in notary's presence.

- *In re Walter,* 247 Or 13, 427 P2d 96 (1967). [reprimand] Attorney violated notary statutes by his blind acknowledgment of a deed as a notary public without seeing the grantor.

b. **An attorney may not assist a potential client in defrauding a court**. *OSB Legal Ethics Op No 2005-53.*

- *In re Abrell*, 30 DB Rptr 289 (2016). [one-year suspension] Respondent, who is not licensed in Oregon, properly appeared in a federal case via pro hac vice admission. Shortly thereafter, Respondent filed a lawsuit in state court, falsely claiming to be applying for pro hac vice admission and to have associated local counsel on the matter.

- *In re Gifford*, 29 DB Rptr 299 (2015). [60-day suspension] One of six heirs to her uncle's intestate estate hired attorney to assist her in the administration of the estate. After preparing the court documents reflecting the six heirs, attorney learned that one of the heirs might be in jail, and another might be transient. Attorney then revised portions of the documents previously signed by his client to represent that there were only four heirs, rather than six, and filed the altered (now false and inaccurate) documents with the probate court.

- *In re Krueger*, 29 DB Rptr 273 (2015). [6-month suspension, 90 days stayed/2-year probation] After prematurely removing settlement funds from trust that required court approval for attorney to take, attorney and his paralegal filed declarations that represented or allowed the court to believe that the funds had remained in trust. Attorney also failed to correct his client's representations to the court that the settlement funds were in trust—when attorney knew better but the client did not.

- *In re Creem*, 23 DB Rptr 112 (2009). [30-day suspension] In a dissolution proceeding, attorney's client was awarded custody of three minor children and child support, with the parenting plan subject to on-going court review. Thereafter, attorney learned but did not reveal to the court or the opposing party that one of the minor children was arrested and incarcerated, a fact that was material to the issues before the court. Attorney counseled her client to disclose the child's incarceration but did not withdraw after her client refused to do so.

- *In re Sunderland*, 22 DB Rptr 140 (2008). [9-month suspension] After one judge directed that a default judgment not be entered until the defaulting party's motion to set aside the order of default was

heard, attorney presented a default judgment to another judge without disclosing that a set-aside motion had been filed, that a hearing on the motion had been scheduled, and that the first judge had directed no judgment be entered until the motion was heard. Attorney also lied to the court about giving timely notices to opposing counsel.

- *In re Willes*, 22 DB Rptr 82 (2008). [30-day suspension] Defense attorney appeared in a criminal case with a person at counsel table posing as the defendant and did not disclose the imposter until after cross-examining the State's witness. By presenting the imposter as the defendant, attorney engaged in fraudulent conduct.

- *In re Sunderland*, 21 DB Rptr 257 (2007). [1-year suspension] Attorney represented a client in a dissolution while the client's bankruptcy proceeding was simultaneously pending. Attorney was aware that the client had not disclosed certain assets in her bankruptcy petition, including funds that were being held by a third party. Attorney obtained an *ex parte* judgment in the dissolution case awarding the funds held by the third party to attorney's client, without disclosing to the state court that the bankruptcy case was still pending or that the funds had not been disclosed to the bankruptcy court. Thereafter, attorney attempted to collect the funds from the third party and from the state court after the third party paid the funds into court, without disclosing the circumstances of the bankruptcy. Attorney also did not disclose the existence of these funds to the bankruptcy court or trustee.

- *In re Matthews*, 19 DB Rptr 193 (2005). [1-year suspension] Attorney represented father in a custody proceeding in which the court split custody of the minor children between the parents with visitation for each parent with their non-custodial children. Father died unexpectedly and mother took physical custody of all the children. On behalf of father's second wife, attorney then obtained an *ex parte* writ of assistance from a different judge ordering mother to return the children. To obtain the writ and a subsequent restraining order, attorney made false statements to the court about mother's fitness, the safety of the children, and whether other litigation involving the children was pending. Attorney also failed to disclose that father had died, that attorney was acting for second wife who had no legal standing in the matter, and that the original judge had retained jurisdiction over the case.

- *In re Myles*, 18 DB Rptr 77 (2004). [60-day suspension] Attorney signed and submitted an affidavit to an administrative law judge supporting his client's claim for unemployment benefits, in which he falsely stated that a potential witness had a reputation for untruthfulness in the community.

c. **Other misrepresentations or dishonest conduct directed at a court or other tribunal include**:

- *In re Roe*, 28 DB Rptr 87 (2014) [2-year suspension, all but 6 months stayed/2-year probation] Attorney made numerous misrepresentations in court filings in an effort to recover attorney fee judgment against former client.

- *In re Tank*, 28 DB Rptr 35 (2014) [90-day suspension] Attorney represented a corporation on matters related to its corporate records. Because the corporation did not have complete records, some were drafted by an associate in attorney's firm and purported to memorialize corporate records, events and actions dating back 20 years. In litigation a few months later, where an issue was ownership and control of the corporation, attorney stated or implied in open court that the corporate records were prepared well before the litigation began, and failed to explain or clarify that representation.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In connection with a bar investigation, fee arbitration, and civil proceedings brought by his former client, attorney separately submitted documents and made statements that materially misrepresented the true facts regarding the client's claims and their timing with respect to the attorney-client relationship, intending that these false statements and documentation be relied upon by the bar, the arbitrator, and the court in their respective evaluations of his former client's claims.

- *In re Billman*, 27 DB Rptr 126 (2013). [30-day suspension] Attorney agreed to settlement of a domestic relations matter and recited terms into the record without having confirmed with his client whether she was agreeable to the terms and conditions, and allowed a judgment to be entered to that effect.

- *In re Mahr*, S041496, Case No. 13-52 (2013) [disbarred] Attorney made misrepresentations to the court regarding the fee he received in an immigration matter and knowingly converted client funds in connection with numerous immigration matters.

- *In re Partington*, S060387, Case Nos. 12-51 & 12-65 (2013). [60-day suspension] Attorney filed a disingenuous appeal of his client's criminal convictions, in which he knowingly misrepresented the record and which was "wholly unsupported."

- *In re Slayton*, 24 DB Rptr 106 (2010). [60-day suspension] Lawyer seeking setover for a civil trial date represented he must appear in another court for a vehicular homicide case. When the judge asked the name of the client, the lawyer said he could not recall the client's name. The municipal matter proved to involve charges of jaywalking and the accused jaywalker was the lawyer himself.

- *In re Jackson*, 347 Or 426, 223 P3d 387 (2009). [120-day suspension] While representing a client in a dissolution of marriage proceeding, attorney falsely represented to the court that burglaries at his office were the reason he was unable to proceed with the case in a timely manner.

- *In re Paulson*, 346 Or 676, 216 P3d 859 (2009), *adhered to on recons*., 347 Or 529 (2010). [disbarred] The day his disciplinary suspension became effective, attorney filed motions to abate and postpone several client matters then pending before the court, his supporting declaration falsely representing that his disciplinary case was on appeal.

- *In re Sunderland*, 23 DB Rptr 61 (2009). [3-year suspension] Attorney filed a petition for a conservatorship in which he misrepresented the mental capacity of the protected person and the extent of estate assets. He also made misrepresentations to a successor personal representative concerning the disposition of estate assets.

- *In re Levie*, 342 Or 462, 154 P3d 113 (2007). [1-year suspension] In a dispute concerning his client's compliance with the terms of a settlement agreement, attorney falsely represented to opposing counsel that all the client's sculptures had been turned over to a gallery for sale, when in fact three sculptures were on display in

attorney's law firm. Attorney also falsely represented that no security interests encumbered the sculptures. Finally, attorney falsely represented to an arbitrator that opposing counsel knew of and consented to the three sculptures being displayed in attorney's law firm. [DR 1-102(A)(3)]

- *In re Cathcart*, 21 DB Rptr 299 (2007). [reprimand] Attorney filed a lawsuit on behalf of a minor child in which he falsely alleged that the child's mother was the child's duly appointed conservator for the purposes of the suit. Although attorney had intended to petition for the mother's appointment as conservator, he knew he had not yet done so when the suit was filed.

- *In re LaBahn*, 21 DB Rptr 107 (2007). [disbarred] Attorney obtained an *ex parte* custody order from the court by falsely representing that opposing counsel had been given notice. Attorney also falsely represented on a reinstatement application that he had not practiced law while suspended for non-payment of bar dues.

- *In re Driscoll*, 21 DB Rptr 81 (2007). [60-day suspension] Attorney obtained an *ex parte* default judgment, advising the court that there "supposedly" was a defense lawyer involved but that he hadn't appeared. This representation was misleading in that attorney and the defense lawyer had engaged in settlement negotiations, exchanged discovery requests, deposed the named parties, and had conferred about defense counsel's Rule 21 motions to which attorney filed a response. Defense counsel's active participation in the litigation was material information that attorney failed to disclose to the court.

- *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006). [6-month suspension] Attorney falsely represented to opposing counsel that the court had postponed the trial of a domestic relations case set for the following day, and then falsely represented to the court, both orally and in a subsequent affidavit, that opposing counsel had withdrawn her objection to the reset.

- *In re Pacheco*, 20 DB Rptr 293 (2006). [4-year suspension] Attorney falsely represented in a motion to the court that opposing counsel had no objection to setting aside a judgment of dismissal that had been entered against attorney's client.

- *In re Kent*, 20 DB Rptr 136 (2006). [2-year suspension] In support of a motion to postpone a trial in one matter, attorney falsely stated that he had another case set for trial the same day and that the other case had already been rescheduled several times. In another matter, attorney filed a motion to withdraw in which he falsely stated that a multiple client conflict of interest precluded his continued representation.

- *In re Duffy*, 20 DB Rptr 125 (2006). [reprimand] Attorney found not guilty of removing his letter to his expert from that expert's file before disclosing the file to opposing counsel. However, attorney made a misrepresentation when he denied knowing of the letter's existence to the court.

- *In re Botta*, 19 DB Rtpr 10 (2005). [90-day suspension] Attorney misrepresented the availability of a psychiatric report and a witness to improperly obtain setovers from the court.

- *In re Magar*, 337 Or 548, 100 P3d 727 (2004). [1-year suspension] Attorney filed pleadings and sent letters on his letterhead to the court and opposing counsel and issued subpoenas when he was not an active member of the bar and therefore was ineligible to practice law. He also misrepresented in a court proceeding the credentials of a witness and that he himself was a notary when he was not.

- *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004). [90-day suspension] Attorney's firm represented a client charged with domestic violence. Attorney gave legal advice to the victim and assisted in preparing an affidavit for the victim to use in seeking the dismissal of the charge against the firm's client. Thereafter, the attorney misrepresented to the judge whether she had given legal advice to the victim and concealed material information about the extent of her contact with the victim.

- *In re Worth*, 337 Or 167, 92 P3d 721 (2004). [120-day suspension] Attorney made misrepresentations to the court regarding why he had not moved his client's civil case forward or complied with the court's order that an arbitration of the matter be set by a date certain.

- *In re Van Loon*, 18 DB Rptr 152 (2004). [6-month suspension] In support of an *ex parte* motion to modify a parenting plan in a domestic relations case, attorney presented his client's affidavit and testimony, both of which were misleading because they did not accurately represent the hours opposing party had available to spend with the minor child.

- *In re Koessler*, 18 DB Rptr 105 (2004). [6-month suspension] Attorney made material misrepresentations to the court when she falsely stated that she had a medical expert who would testify in support of her client's malpractice claim.

- *In re Kluge*, 335 Or 326, 66 P3d 492 (2003). [2-year suspension] Attorney presented to one judge a motion to disqualify another judge without informing the motions judge that the judge to be disqualified had already made a substantive ruling in the case. Attorney also violated the rule by intentionally failing to give notice of the motion to opposing counsel or to the judge he sought to disqualify.

- *In re Mikkelsen*, 17 DB Rptr 237 (2003). [1-year suspension, all but 90 days stayed/3-year probation] Attorney made misleading statements to opposing counsel and the court concerning his clients' intentions to pursue their lawsuit and the extent to which attorney had been able to communicate with his clients. Attorney also failed to inform his clients that their lawsuit had been dismissed.

- *In re Allen*, 17 DB Rptr 84 (2003). [60-day suspension] After his client refused to use part of the funds awarded to her in a divorce to pay his fee, attorney prepared a new form of judgment directing this payment and subsequently prepared an amended judgment to permit distribution of these funds to himself from the client's investment company without informing either his client or the court that he was not authorized to do so.

2. Dishonesty toward a Client

a. **Theft of client funds or property is dishonest conduct**.

- *In re Einhorn*, 30 DB Rptr 283 (2016). [disbarred] Respondent knowingly converted client funds to his own use and then essentially walked away from his practice without notice to his client and refused to respond to the Bar's investigative inquiries.

- *In re Ettinger*, 30 DB Rptr 173 (2016). [disbarred] After respondent closed her law practice and her lawyer trust account, she withdrew the unearned portion of her clients' retainer and knowingly converted the clients' remaining funds for her own personal use.

- *In re Landers*, 30 DB Rptr 89 (2016). [disbarred] When respondent closed her practice, she converted remaining unearned client funds in her lawyer trust account to her own personal use.

- *In re Cullen*, 26 DB Rptr 173 (2012). [disbarred] After settling personal injury matters and disbursing portions of the proceeds to the clients, attorney failed to pay medical providers with the remaining proceeds as he agreed to do, but converted the funds to his own use.

- *In re Richardson*, 350 Or 237, 253 P3d 1029 (2011). [disbarred] Attorney represented both an elderly incompetent woman and her estranged nephew in a property transaction that transferred woman's home and only asset to the nephew for no consideration.

- *In re Bertak*, 22 DB Rptr 216 (2008). [disbarred] Attorney took a retainer from a client in a domestic relations matter, failed to perform the agreed-upon legal services despite his representation to the client that he had done so, failed to return any portion of the retainer, and converted it to his own use.

- *In re Watson*, 22 DB Rptr 160 (2008). [disbarred] After an incarcerated client released his wallet and three money orders to attorney for safekeeping, attorney failed to account to the client for the funds and converted them to his own use, committing the crimes of theft and forgery in the process.

- *In re Eames*, 20 DB Rptr 171 (2006). [disbarred] Attorney settled a personal injury claim for a client and then converted the settlement proceeds to his own use.

- *In re Barrett*, 322 Or 422, 29 P3d 1137 (2001). [disbarred] Attorney disbarred for, among other things, converting an unearned fee and falsely informing a client that certain legal work had been performed.

- *In re Martin*, 328 Or 177, 970 P2d 638 (1998). [disbarred] Attorney who genuinely believed that spending client money for the services of another lawyer and a law clerk were "costs," was not guilty of conversion when he made those expenditures. However, in a second matter, the attorney spent client money on personal expenses knowing the money was not yet earned. In disbarring the attorney, the court rejected defenses that the attorney was unaware of the applicable disciplinary rule, that the attorney's mental condition negated any intent to convert the funds, or that the money was ultimately earned.

- *In re Taub*, 326 Or 325, 951 P2d 720 (1998). [disbarred] Attorney who fabricated documents regarding his trust account and converted client funds was disbarred, despite his claim that because of depression he lacked the cognitive ability to appreciate the wrongfulness of his acts.

- *In re Maroney*, 324 Or 457, 927 P2d 90 (1996) [disbarred] Attorney violated rule by endorsing his client's name on a settlement check in order to be able to use the funds. Even in the absence of prior discipline, court held that intentional conversion of client funds to attorney's own use warranted disbarment.

b. **Failure to notify client of dismissal of client's case is a misrepresentation by omission**. *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (attorney's failure to inform his client for five months that the client's appeal had been dismissed due to attorney's untimely filing was a material misrepresentation by omission).

- *In re Hall*, 27 DB Rptr 93 (2013). [150-day suspension] Attorney failed to take any steps to serve defendant in a civil matter, despite court notices of the need to do so, and the case was dismissed. When attorney learned that the case had been dismissed, he did

not notify client for multiple months. When client learned of the dismissal on her own, attorney did not respond to client's inquiries as to the status of her case.

- *In re Morasch*, 26 DB Rptr 146 (2012). [2-year suspension] Attorney was instructed by the court to prepare a form of judgment in a custody matter, but failed to do so which resulted in the client's case being dismissed. Attorney did not inform the client of the dismissal for six months, when client terminated attorney.

- *In re Petranovich*, 26 DB Rptr 1 (2012). [60-day suspension] After concluding that his client's civil lawsuit had no merit, attorney decided not to respond to defense motions for summary judgment, did not communicate that decision to the client, did not respond to status inquiries from the client, did not inform the client that summary judgment had been granted and the lawsuit dismissed, and did not tell the client that the opposing party had filed a motion for sanctions against the client. Attorney's knowing failure to disclose this information that was material to the client was a misrepresentation by omission.

- *In re Cullen*, 23 DB Rptr 182 (2009). [9-month suspension] After attorney's neglect caused the circuit court to dismiss a client's case for lack of prosecution, attorney failed to notify the client about the dismissal or respond truthfully to inquiries from the client about the status of the case.

- *In re Clarke*, 22 DB Rptr 320 (2008). [60-day suspension] After deciding that a client's appeal had no merit, attorney decided not to file a brief, allowed the appeal to be dismissed, and thereafter failed to disclose the dismissal to the client.

- *In re Nicholls*, 22 DB Rptr 233 (2008). [disbarred + restitution] Attorney filed a pleading on behalf of a client one day before attorney was suspended from the practice of law for disciplinary reasons. Thereafter, attorney failed to inform the client that he was suspended but continued to negotiate with opposing counsel about the case, thereby misleading the client about his qualifications to practice.

- *In re Hilborn*, 22 DB Rptr 102 (2008). [9-month suspension, 7 months stayed/2-year probation] Attorney mishandled a client's

claim in federal court, resulting in the matter's dismissal upon a defense motion. Attorney failed to notify the client of the dismissal even after the client inquired about the status of the case.

- *In re Abendroth*, 21 DB Rptr 205 (2007). [120-day suspension] Attorney neglected a defamation lawsuit he filed on behalf of a client resulting in its dismissal by the court for lack of prosecution. Thereafter, attorney knowingly failed to advise the client of the dismissal.

- *In re Marsh*, 19 DB Rptr 277 (2005). [9-month suspension] Attorney mistakenly represented to his client that he had obtained a judgment on the client's behalf and, when he realized that no judgment had been obtained, failed to disclose both this and the fact that the action had been dismissed by the court to the client.

c. **Examples of other affirmative representations directed toward clients include**:

- *In re McVea*, 29 DB Rptr 163 (2015). [6-month suspension] In a personal injury claim for a slip and fall accident that occurred on a marina walkway, attorney failed to comply with a discovery order, which was set for hearing on the defendant's motion to dismiss. Attorney failed to notify his client of the hearing date and affirmatively misrepresented that the hearing was on a later date and for a different purpose. After case was dismissed for attorney's discovery violations, he affirmatively misrepresented to the client that the dismissal had been on the merits.

- *In re Ifversen (I),* 27 DB Rptr 150 (2013). [1-year suspension] Attorney failed to explain to his client that the statute of limitations for her claims was about to expire, and later that they had. When he spoke with his client, attorney lied both about filing a case and the existence of settlement offer, and continued to do so for several months.

- *In re Ifversen (II),* 27 DB Rptr 269 (2013). [1-year suspension]. For four months, attorney falsely represented to his client that motions for expungement of his criminal matters had been filed with the courts and that he had been working with the district attorneys to pursue judgments.

- *In re Lang*, 22 DB Rptr 158 (2008). [45-day suspension] Attorney neglected a client's criminal appeal, resulting in the appeal's dismissal. Thereafter, he misrepresented to both the client and a second lawyer with whom the client consulted that he had filed the client's appellate brief.

- *In re Groom*, 22 DB Rptr 124 (2008). [1-year suspension, 10 months stayed/1 year probation] Attorney neglected a post-conviction relief appeal resulting in the appeal's dismissal. Thereafter, attorney falsely represented to client that the appeal was still pending and that he was actively working on the matter.

- *In re Cumfer*, 21 DB Rptr 48 (2007). [2-year suspension] Attorney misrepresented the status of a legal matter to the client, sought additional money from the client after concluding that the matter had no merit, and then refused to make any refund.

- *In re Dunn*, 20 DB Rptr 255 (2006). [1-year suspension] Estate-planning attorney also sold unregistered securities in violation of the state securities laws and made misrepresentations to investors.

- *In re Johnson*, 19 DB Rptr 324 (2005). [90-day suspension] Attorney neglected his client's guardianship matter and then made false statements to the client about attorney's health and the status of the guardianship so as to cover up the neglect.

- *In re Bowles*, 19 DB Rptr 140 (2005). [1-year suspension] Knowing that the time to file a petition for attorney fees and costs on behalf of a client had passed, attorney represented to the client that he was in the process of recovering those fees and costs. Attorney also made misrepresentations to the bar in response to the client's complaint.

- *In re Crews*, 19 DB Rptr 122 (2005). [disbarred] Attorney committed a forgery and presented it to his client to conceal his prior inaction. Attorney also made false statements to his clients about the status of their legal matters.

- *In re Castanza*, 17 DB Rptr 106 (2003). [120-day suspension] Personal injury attorney misrepresented to his client that he had requested medical records on her behalf. Subsequently, when his client asked to see evidence of the medical records request,

attorney created and backdated a letter addressed to the defendant's insurance company indicating that he was waiting for its response, when in fact the letter had not been sent.

d. **Examples of other misrepresentations by omission made to clients include**:

- *In re Simon*, 30 DB Rptr 214 (2016) [185-day suspension] Client was involved in a business entity that needed to be dissolved, and was its managing member. Respondent was placed in control of the logistics for transfers from an escrow account established for the payment of creditors of the business entity. Respondent arranged for payment from this escrow fund of a $75,000 fee to another attorney for bankruptcy consultation services, $25,000 of which was subsequently sent by that attorney to one of respondent's personal creditors at respondent's direction. Respondent's conduct was dishonest as there was no evidence that client agreed to pay, or authorized, the fees to either respondent or the bankruptcy attorney.

- *In re Billman*, 27 DB Rptr 126 (2013). [30-day suspension] Attorney agreed to settlement of a domestic relations matter and recited terms into the record without having confirmed with his client whether she was agreeable to the terms and conditions, and allowed a judgment to be entered to that effect.

- *In re Schwindt*, SC S060906, Case No. 12-128 (2013). [2-year suspension] Attorney did not inform credit repair clients about the nature of his representation or that they would not be receiving any independent legal advice regarding their loan modification, nor did he inform them of his personal relationship with the credit repair company, of which he owned an interest.

- *In re Jordan*, 26 DB Rptr 191 (2012). [18-month suspension] In an immigration matter, attorney failed to attend court appearances for his client and failed to tell his client that attorney was about to be, and then was, suspended from the practice of law. Knowing that his suspension was about to start, attorney nevertheless asked the client to pay additional attorney fees and failed to refund those fees he received after the suspension took effect.

- *In re Phillips*, 338 Or 125, 107 P3d 615 (2005). [36-month suspension] Attorney made misrepresentations by omission when he failed to disclose to his clients that insurance agents who would be coming to their homes to review their living trusts would use the information they gained thereby to attempt to sell them insurance products and that the attorney had a financial interest in such sales. [DR 1-102(A)(3)]

- *In re Monson*, 17 DB Rptr 191 (2003). [1-year suspension] Attorney who accepted referrals from a living trust company that utilized unsupervised non-lawyer agents to solicit business, give advice about estate planning options, and attempt to sell insurance products to members of the public violated the rule when she did not fully disclose to the clients the true nature of her relationship with the living trust company, that the non-lawyer agents were not her employees, and that she had only an incidental presence in Oregon. [DR 1-102(A)(3)]

3. Dishonesty toward a Third Party

a. **Theft of third-party funds or property where the lawyer is acting in a fiduciary capacity is dishonest conduct**.

- *In re Herman*, 357 Or 273, 348 P3d 1125 (2015). [disbarred] Attorney improperly diverted corporate assets to his own use from a corporation equally owned by him and two partners, excluded his partners from business affairs, and filed dissolution documents with the Secretary of State that indicated that the attorney was sole director and that corporation's board of directors had adopted resolution authorizing him, as president, to dissolve corporation, which did not reflect true state of corporation as having three equal principals at time of filing. Although there is no explicit rule requiring lawyers to be candid and fair with their business associates or employers, such an obligation is implicit in the disciplinary rule prohibiting dishonesty, fraud, deceit, or misrepresentation.

- *In re Phinney*, 354 Or 329, 311 P3d 517 (2013). [disbarred] In his capacity as treasurer for the Yale Alumni Association of Oregon, attorney repeatedly took association funds for his personal use for over a two-year period. Court found that attorney's breach of his

fiduciary duties to the association called into question his trustworthiness in handling client money. The attorney's fiduciary relationship with the association distinguished the attorney's conduct from other types of common theft where the attorney was not acting in such a capacity, and justified disbarment.

- *In re Renshaw*, 353 Or 411, 298 P3d 1216 (2013). [disbarred] Managing shareholder of law firm engaged in dishonest conduct and committed theft by deception when he took unauthorized shareholder distributions; used firm funds to pay personal expenses and coded them to accounts receivable; and used the firm's credit card and line of credit to pay personal expenses.

- *In re Goff*, 352 Or 104, 280 P3d 984 (2012). [18-month suspension] Attorney disciplined by Supreme Court without discussion for conduct involving dishonesty and misrepresentation. Trial panel opinion reflects that attorney falsely represented to various persons that funds would remain in attorney's trust account until a final determination was made as to who was entitled to them.

- *In re Cullen*, 26 DB Rptr 173 (2012). [disbarred] After settling personal injury matters and disbursing portions of the proceeds to the clients, attorney failed to pay medical providers with the remaining proceeds as he agreed to do, but converted the funds to his own use.

- *In re Porras*, 25 DB Rptr 42 (2011). [disbarred] As executive director of an indigent criminal defense consortium, attorney committed theft when he converted to his own use funds paid by the state to the consortium for defense services.

- *In re Black*, 16 DB Rptr 52 (2002) [2-year suspension] Attorney violated dishonesty rule when he utilized funds he had received following a sale but failed to remit the unacknowledged portion of the proceeds to a business partner.

- *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998) [disbarred] Associate attorney embezzled earned fees intended for his law firm paid by clients and by the state court administrator in indigent defense cases. Although there is no explicit rule requiring a lawyer to be candid with his law firm, it is implicit within the disciplinary rules and the duty of loyalty arising from their contractual or agency

relationship. Disbarment generally will follow whether a lawyer converts client or law firm funds.

b. **Lawyers who seek to mislead by misrepresenting their identity** (or by directing others to do so) in the course of the practice of law have been held to violate *current* RPC 8.4(a)(3).

- *In re Ositis,* 333 Or 366, 40 P3d 500 (2002). [reprimand] Lawyer who directed a private investigator to pose as a journalist to interview a party to a potential legal dispute engaged in a ruse in violation of *current* RPC 8.4(a)(3).

- *In re Gatti*, 330 Or 517, 8 P3d 966 (2000). [reprimand] Lawyer who misrepresented his identity in two telephone calls for purpose of obtaining useful information for a client was subject to discipline.

- *In re Miller*, 11 DB Rptr 165 (1997). [60-day suspension] Attorney who represented wife in a divorce proceeding falsely misrepresented herself as the husband's bookkeeper when calling his creditors.

- *In re Melmon,* 322 Or 380, 908 P2d 922 (1995). [90-day suspension] Attorney helped create an aircraft bill of sale that falsely stated attorney was seller of aircraft and falsely identified pilot as buyer.

c. **Lawyers who attempt double-recoveries engage in dishonest conduct.** An attorney who represents a client who was injured in two separate accidents may claim the same item of damages against the defendants in each case if it is not clear which accident caused which injuries. If, however, one case settles and the client obtains recovery for some of the specific damage items that are also claimed in the other case, the attorney may not endeavor to collect those same items of damage again in the other case. *OSB Legal Ethics Op No 2005-19*.

- *In re Summer*, 338 Or 29, 105 P3d 848 (2005). [180-day suspension] Attorney who represented a client regarding two personal injury accident cases misrepresented his client's injuries from the first accident to the insurer for the second accident,

including submission of the same medical records. He also failed to disclose to the second insurer prior payment from the first insurer, which was a misrepresentation by omission.

d. Misrepresentations to the Bar in the course of a Bar investigation or formal proceeding can be independent causes of action against an respondent attorney.

- *In re Bosse*, 30 DB Rptr 311 (2016). [24-month suspension] During its investigation of his client's complaint, Respondent misrepresented to Disciplinary Counsel's Office that it was his client who had not communicated with him for over a year despite his purported attempts to contact her. He further claimed that the client had disappeared and he did not know how to reach her when in fact the client's contact information had not changed during the representation.

- *In re Noble*, 30 DB Rptr 116 (2016) [4-year suspension/2 years stayed/2-year probation] During deposition in the disciplinary matter, Disciplinary Counsel's Office specifically inquired into Respondent's distribution of his client's funds and Respondent represented under oath that the client's funds were only used to pay the client's creditors when Respondent knew he had exhausted the client's funds and was using other clients' funds to pay the client's creditors.

- *In re Dickey*, 30 DB Rptr 19 (2016) [disbarred] In response to Disciplinary Counsel's Office's requests for information regarding Respondent's improper use of a debit card to deplete his client's bank account and other of the client's property, Respondent falsely stated that it was his domestic partner who had accidentally used the debit card, that his partner had made all of the withdrawals from the client's account, and that Respondent was unaware of the partner's activity with regard to the client's property. Respondent further falsely stated that his receipt of settlement proceeds from the client's forfeiture claim had been deposited into his IOLTA account with the proper percentage paid to his client. When pressed, Respondent admitted to having personally used the debit card for some of the purchases and withdrawals from the client's account but falsely claimed that the client had authorized him to use the bank account to compensate him for his services.

- *In re Krueger*, 29 DB Rptr 273 (2015) [6-month suspension, 90 days stayed/2-year probation] In response to inquiries from Disciplinary Counsel's Office, attorney refuted complainant attorney's speculation that respondent attorney may have prematurely removed sums representing attorney fees and costs from their mutual client's settlement proceeds. Through counsel, attorney represented that the funds were kept continuously in trust and maintained that position in subsequent responses until Disciplinary Counsel's Office demanded bank records to support respondent attorney's contention. Along with providing the requested records, counsel for respondent attorney admitted that the funds had not remained in trust but had been taken and restored.

- *In re Foster*, 29 DB Rptr 35 (2015) [30-day suspension] After a trial panel decision suspending her for unlawful practice and at a time when attorney was also administratively suspended, she held herself out to the public in a television and internet advertising as an attorney at law. When asked about the content of the ads by the Bar, the attorney knowingly misrepresented that the ads had been removed and that she been unaware that the ads described her as an attorney at law. [RPC 8.1(a)(1)]

- *In re Sanchez*, 29 DB Rptr 21 (2015) [1-year suspension] Attorney affirmatively misrepresented to Bar that he completed 48 hours of CLE courses (toward his 45-hour minimum requirement) in a one-day period (less than 7 hours) via an online CLE provider.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In connection with a bar investigation, fee arbitration, and civil proceedings brought by his former client, attorney separately submitted documents and made statements that materially misrepresented the true facts regarding the client's claims and their timing with respect to the attorney-client relationship, intending that these false statements and documentation be relied upon by the bar, the arbitrator, and the court in their respective evaluations of his former client's claims.

- *In re Ifversen*, 27 DB Rptr 150 (2013). [1-year suspension] In response to a complaint that he failed to timely file a personal injury case on behalf of his client, attorney told the bar that he had "mis-filed" the lawsuit when no case had ever been filed.

- *In re Summer*, 27 DB Rptr 39 (2013). [disbarred] Attorney who failed to respond to the Bar was referred to LPRC for additional investigation. After he failed to respond to the LPRC investigator for several months, attorney submitted false information designed to conceal his misconduct and mislead the LPRC investigators.

- *In re Goff*, 352 Or 104, 280 P3d 984 (2012). [18-month suspension] Attorney made false statements to the bar when responding to a disciplinary complaint.

- *In re Kocurek*, 26 DB Rptr 225 (2012). [6-month suspension] Attorney made a material misrepresentation to her insurance company regarding damage to her vehicle out of a concern that her premiums would increase or her coverage would be cancelled. Attorney repeated the false statements when she responded to a bar complaint.

- *In re Barker*, 24 DB Rptr 246 (2010). [60-day suspension] Attorney, practicing law in Idaho, represented a client in an Oregon court at a time when he was suspended from practice in Oregon for MCLE non-compliance. In response to a bar inquiry, attorney falsely stated that he was only tangentially involved in the Oregon case.

- *In re Hendrick*, 24 DB Rptr 138 (2010). [2-year suspension] Attorney made several false statements to the bar during a disciplinary investigation and also testified falsely in a subsequent disciplinary trial.

- *In re Olson*, 23 DB Rptr 130 (2009). [180-day suspension] Attorney, a deputy district attorney, prosecuted a father for alleged sexual contact with his minor child. Father was acquitted after trial in which grandmother testified on father's behalf. Thereafter, upon learning that the Department of Human Services was considering placement of the minor child with grandmother and believing that such a placement should not occur, attorney falsely stated to DHS that grandmother had lied during father's trial and was warned several times by the judge about her behavior on the stand. DHS then decided against the placement. In response to grandmother's subsequent complaint to the bar, attorney made further misrepresentations in explanation of his conduct.

- *In re Boehmer*, 23 DB Rptr 19 (2009). [60-day suspension] In response to a bar request, attorney falsely represented that she had mailed copies of her trust account client ledger cards to the bar.

- *In re Sunderland*, 22 DB Rptr 140 (2008). [9-month suspension] In response to a complaint that he engaged in improper ex parte contact with the court, attorney falsely stated to the bar that he had given timely notice of the contact to opposing counsel.

- *In re Dunn*, 22 DB Rptr 47 (2008). [disbarred] Attorney made a false, material statement to the bar in response to a disciplinary inquiry.

- *In re Dobie*, 22 DB Rptr 18 (2008). [2-year suspension] When arrested for shoplifting an electronic device from a retail store, attorney made false statements to the arresting office in explanation of his conduct. Attorney also made misrepresentations, by affirmative statements and by omissions, when he later responded to the bar.

- *In re Ryan*, 21 DB Rptr 321 (2007). [18-month suspension] During a bar investigation, attorney submitted a billing statement to justify the fee he charged a client, without disclosing that he had recently created the statement from recollection and that it was not a record prepared contemporaneously with the services rendered.

- *In re Black*, 21 DB Rptr 6 (2007). [1-year suspension] Attorney disciplined, in part, for false representations to the bar in response to an ethics complaint.

- *In re Bowles*, 19 DB Rptr 140 (2005). [1-year suspension] Attorney made misrepresentations to the bar in response to a complaint about his conduct.

- *In re Lawrence*, 337 Or 450, 98 P3d 366 (2004). [90-day suspension] Attorney's firm represented a client charged with domestic violence. Attorney was not truthful or complete in her response to a bar complaint when she falsely denied contacting or giving legal advice to the victim, and failed to provide material facts that would have informed the bar's analysis of her conduct.

- *In re Smith*, 18 DB Rptr 200 (2004). [6-month suspension] Attorney continued to practice law after suspension for nonpayment of bar dues and then falsely represented in a reinstatement affidavit that he had not done so.

- *In re Worth*, 336 Or 256, 82 P3d 605 (2003). [90-day suspension] In response to a client complaint, attorney misrepresented to the bar that he had obtained a trial transcript and used it to prepare an amended post-conviction relief petition for the client.

- *In re Castanza*, 17 DB Rptr 106 (2003). [120-day suspension] Attorney made misrepresentations to the bar in defense of a complaint from a client.

- *In re Wyllie*, 327 Or 175, 957 P2d 1222 (1998). [2-year suspension] Intentional use of known false documentation n an attorney's response to the Bar is a serious offense. Note: case includes a list of supporting cases.

e. **Examples of other misrepresentations or dishonest conduct directed toward a third-party include**:

- *In re Lupton*, 30 DB Rptr 80 (2016). [six-month suspension, all stayed/1-year probation] Respondent owned a property management company and a property maintenance company for which she maintained a trust account for the tenants' security deposits and one for property management. Upon learning of a significant shortfall in the tenant trust account, she did not report the deficit to the Oregon Real Estate Agency (OREA) as required by statute, or notify the property owners. She secured training for her bookkeeper but made no other changes in the way the accounts were managed. A year later, she learned that an additional, larger sum, had been transferred from both trust accounts without authorization. She terminated her bookkeeper but still did not report the situation to OREA or the property owners until after she was notified of an upcoming audit by OREA. Respondent entered into a stipulated order with OREA in which she acknowledged dishonest conduct that reflect adversely on her fitness to practice law.

- *In re Tibbetts*, 30 DB Rptr 73 (2016). [30-month suspension] Respondent was a member of the Linn County Legal Defense Consortium, whose membership conditions required compliance with state and federal tax regulations. Respondent failed to file his state or federal tax returns for three consecutive years and falsely certified to the Consortium that he was not in violation of any Oregon tax laws for each of those three years.

- *In re Aman*, 29 DB Rptr 334 (2015). [1-year suspension, all but 6 months stayed, 2-year probation] Attorney was administratively suspended for failing to respond to inquiries from Disciplinary Counsel's Office but nevertheless continued to practice law without notifying his clients or his law partners of his suspension.

- *In re Walton*, 352 Or 548, 287 P3d 1098 (2012). [reprimand] After leaving employment as a public prosecutor, attorney continued to use his former employer's Westlaw password and account for 14 months without authorization or payment.

- *In re Kocurek*, 26 DB Rptr 225 (2012). [6-month suspension] Attorney made a material misrepresentation to her insurance company regarding damage to her vehicle out of a concern that her premiums would increase or her coverage would be cancelled. In addition, attorney made a misrepresentation in an affidavit she filed in her own divorce proceeding, falsely asserting that her husband's girlfriend had a criminal record that justified restrictions on the husband's access to marital property. Attorney also made false statements to the bar.

- *In re McCallie*, 26 DB Rptr 207 (2012). [120-day suspension] During a period when he was suspended from the practice of law, attorney undertook to advise a client in a foreclosure matter and represented to the client, the opposing party and opposing counsel that he was an active bar member.

- *In re Fuller*, 26 DB Rptr 166 (2012). [90-day suspension] Attorney provided her employees with paystubs indicating that taxes and retirement contributions had been withheld from the employees' paychecks and paid over to taxing authorities and the retirement fund. In fact, the payments had not been made and the funds had been used to pay other firm obligations.

- *In re Smith*, 348 Or 535, 236 P3d 137 (2010). [90-day suspension] Attorney made knowing false statements to several individuals that he had an order or some other written authorization from the Attorney General or a court permitting the takeover of a non-profit clinic by his client. The statements were intended to convince the employees or the police that his client was authorized to take over the clinic and so they should permit her to do so. The statements were, therefore, material.

- *In re Olson*, 23 DB Rptr 130 (2009). [180-day suspension] Attorney, a deputy district attorney, prosecuted a father for alleged sexual contact with his minor child. Grandmother testified on father's behalf at trial, and father was acquitted. When the attorney learned that the Department of Human Services was considering placing the minor child with the grandmother, the attorney, believing that should not happen, falsely stated to DHS that grandmother had lied during father's trial and that the judge had warned her several times about her behavior on the stand. DHS then decided against the placement. In response to grandmother's subsequent complaint to the bar, attorney made further misrepresentations when explaining his conduct.

- *In re Lane*, 22 DB Rptr 227 (2008). [30-day suspension] Upon the request of a client, attorney backdated a promissory note and transmittal letter to make it appear as if a loan transaction took place a year earlier than it actually did.

- *In re Chancellor*, 22 DB Rptr 27 (2008). [1-year suspension] Prosecutor met socially with the victim of a rape case assigned to the prosecutor and engaged in sexual contact with her. He later falsely denied to the district attorney and police that he had done so.

- *In re Dobie*, 22 DB Rptr 18 (2008). [2-year suspension] Attorney falsely stated in a request for exemption from the Professional Liability Fund assessment that his principal office was outside of Oregon.

- *In re Fitzhenry*, 343 Or 86, 162 P3d 260 (2007). [120-day suspension] Attorney was in-house counsel for a publicly held corporation regulated by the SEC. In connection with an independent audit of the corporation's financial statements and

assertions of received revenue, attorney signed a management representation letter to the auditors confirming that a particular transaction the prior year was a fixed commitment by a purchaser to buy over $ 4 million in company product. In fact, attorney knew that the corporation did not have a fixed commitment for the sale, and that this information was material to the auditors' determination of whether or not the corporate financial statements accurately represented the corporation's revenue.

- *In re Rasmussen*, 21 DB Rptr 304 (2007). [120-day suspension] In-house corporate attorney participated in structuring a sales transaction in which the company illegally recognized a gain on the sale. At the direction of a company accountant, attorney later removed the transaction documents from the company file in anticipation of an independent financial audit.

- *In re Reed*, 21 DB Rptr 222 (2007). [reprimand] Pursuant to a power of attorney provided by his client, attorney signed his client's name to a release of all claims without disclosing to the opposing party on the release that the signature was not that of the client or that attorney had signed the client's name as an attorney-in-fact.

- *In re Merkel*, 21 DB Rptr 211 (2007). [reprimand] While representing a client in a personal injury claim, attorney falsely asserted to the defending insurance carrier that a statute upon which the carrier relied had been found to be unconstitutional by the court of appeals in a particular case. Attorney knew the court had made no such finding because he was counsel for one of the parties in that appeal.

- *In re Hall*, 21 DB Rptr 123 (2007). [reprimand] Parties in a civil dispute each agreed to deposit funds into their respective attorney's trust account to be used to retain an accountant who would analyze financial information and determine what was owed. Attorney's client was also to provide attorney with documents, including a quitclaim deed, that were to be delivered to the opposing party if the accountant's ultimate determination was adverse to the client. The client never provided attorney with the funds or documents required by the agreement, but attorney did not disclose this to opposing counsel or the accountant even though attorney knew they were relying on their belief that the funds and documents were in attorney's possession.

- *In re O'Connor*, 20 DB Rptr 42 (2006). [1-year suspension] Concerned about possibly failing a pre-employment drug test for a job as a deputy district attorney because of prior marijuana use, attorney surreptitiously diluted her urine samples during the test and consumed a detoxifier. When her prospective employer confronted her with the anomalous test results, attorney initially denied any drug use or test tampering.

- *In re Richardson*, 19 DB Rptr 239 (2005). [6-month suspension] While employed as a deputy district attorney, attorney illegally used a police officer to serve a small claims notice on a defendant in a civil matter that attorney was handling for a friend. Attorney misled police officer into thinking the service was related to a criminal investigation and instructed the police officer to so state to the defendant.

- *In re Steele*, 19 DB Rptr 87 (2005). [180-day suspension] In connection with her request for payment from the State for her representation of an indigent criminal defendant, attorney altered a prior email she had sent to the State to delete that portion in which she waived any fee. Attorney then denied that any waiver had occurred.

- *In re Peters*, 18 DB Rtpr 238 (2004). [180-day suspension] Attorney who had sexual relations with a client denied this relationship when questioned by a police detective regarding the client's whereabouts, knowing that this information was material to the investigation.

- *In re Shatzen*, 18 DB Rptr 213 (2004). [120-day suspension + formal reinstatement] Attorney made misrepresentations when he continued to advertise that he was a certified public accountant years after his CPA certificate had lapsed.

- *In re Gilbert*, 17 DB Rptr 215 (2003). [30-day suspension] Attorney misrepresented to the adverse insurance carrier that he had authority to settle his client's claim and then settled the claim without the client's knowledge or authority.

- *OSB Legal Ethics Op No 2005-167*. An attorney acting as a mediator in a domestic relations matter may not continue with the mediation if one party discloses to the mediator the existence of

hidden assets and instructs the mediator to withhold this information from the other side. To continue with the mediation without disclosure would amount to a participation in a fraud upon the other party. On the other hand, disclosure of the attempted fraud would be contrary to statutory confidentiality for communications made in mediation.

- *OSB Legal Ethics Op No 2005-92*. An attorney may assist a client in breaching a contract or in minimizing the damages likely to flow from that breach as long as the attorney refrains from defrauding others or engaging in other, similarly wrongful conduct.

- *OSB Legal Ethics Op No 2005-42*. An attorney who speaks to an unrepresented party may not misrepresent the identity of the attorney's client or the nature or purpose of any questions.

Notes

Notes

OTHER ISSUES

Section 21 — Criminal Conduct

At least two rules are potentially implicated when a lawyer engages in criminal conduct: ORS 9.527(2) and RPC 8.4(a)(2).

A. ORS 9.527(2) provides that the Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that the member has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of the conviction shall be conclusive evidence.

1. The court does not look behind the conviction to determine the guilt or innocence of the attorney. *In re Howard*, 297 Or 174, 177, 681 P2d 775 (1984).

2. A no contest plea serves as a conviction on that criminal charge. *See* ORS 135.345 (providing that "[a] judgment following entry of a no contest plea is a conviction of the offense to which the plea is entered").

3. By the plain language of the rule, any felony can subject a lawyer to discipline.

    - *In re Cyr,* SC S063187 (2015). [Form B resignation] Respondent specializing in tax matters was convicted of felony tax evasion.

    - *In re Steele*, 27 DB Rptr 115 (2013). [disbarred] Attorney was convicted of numerous felonies in connection with his efforts to arrange for the murder of his wife and mother-in-law.

    - *In re Highet*, 26 DB Rptr 8 (2012). [1-year suspension, part stayed/3-year probation] Attorney was disciplined following her

criminal plea to felony possession of cocaine, resisting arrest and attempted assault on a police officer.

- *In re Carl*, 24 DB Rptr 17 (2010). [1-year suspension/part stayed, 3-year probation] Attorney's possession of more than one ounce of marijuana and knowledge that his wife sold marijuana out of their home where their two minor children resided led to attorney's conviction for felony drug possession and endangering the welfare of a minor

- *In re Okai,* 23 DB Rptr 73 (2009). [4-year suspension] Knowing that a client had no funds to pay a retainer, attorney encouraged the client to obtain a prescription for a narcotic and then accepted the drugs from the client. Attorney later pled guilty to felony drug possession. Attorney also passed bad checks and was convicted of theft for doing so.

- *In re Epstein*, 22 DB Rptr 222 (2008). [1-year suspension] Attorney was convicted of statutory offenses prohibiting possession or duplication of child pornography.

- *In re Nehring*, 21 DB Rptr 227 (2007). [30-day suspension] Attorney was convicted of second degree theft (felony) for taking and disposing of personal property of a former girlfriend and a romantic rival.

- *In re Pacheco,* 20 DB Rptr 293 (2006). [4-year suspension] Attorney made unwanted sexual advances toward employees in his law office, one of whom was a minor, for which attorney was convicted of criminal sex abuse.

- *In re Leonhardt,* 324 Or 498, 930 P2d 844 (1997). [disbarred] Former District Attorney altered indictments against two officers, resulting in her conviction for four felony counts of forgery in the first decree.

- *In re Martin,* 308 Or 125, 775 P2d 842 (1989). [disbarred] Attorney was convicted of bribing a police officer witness to "fix" a prosecution for driving under the influence of intoxicants.

- *In re Hendricks*, 306 Or 574, 761 P2d 519 (1988). [disbarred] Attorney engaged in a conspiracy to defraud the United States by

obstructing the IRS and aided and advised others in the preparation and presentation of tax forms that were materially false, resulting in multiple felony convictions.

4. The court has established a two-part test for determining whether a misdemeanor involves moral turpitude: first, the record of conviction must establish the crime was knowingly or intentionally committed; second, the crime must involve "fraud; deceit; dishonesty; illegal activity for personal gain; or an act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *In re Nuss*, 335 Or 368, 376-77, 67 P3d 386 (2003).

   - *In re Light*, 29 DB Rptr 263 (2015) [7-month suspension, all but 30 days stayed/3-year probation] Attorney placed a camera in his minor step-daughter's bedroom with the intention of filming her without her knowledge or consent. When the step-daughter located the camera, it contained footage of her in a state of undress that constituted invasion of personal privacy, resulting in the attorney's misdemeanor conviction.

   - *In re Overton*, 25 DB Rptr 184 (2011). [60-day suspension] Deputy district attorney was convicted of official misconduct when, while representing the state in enforcing child support obligations, he made sexually inappropriate comments to a child support obligor who was required to report to attorney monthly as part of her contempt probation.

   - *In re Araiyama*, 18 DB Rptr 191 (2004). [6-month suspension] Attorney who was a caregiver to a person receiving social security disability benefits gave false answers in an interview with an investigator regarding the extent of the recipient's disability, and was convicted of theft because she also received public funds as a caregiver.

   - *In re Yacob,* 318 Or 10, 860 P2d 811 (1993). [disbarred] Misdemeanor conviction of menacing is a crime involving moral turpitude that violates this statute.

- *In re Howard,* 297 Or 174, 681 P2d 775 (1984). [reprimand] Attorney was convicted of prostitution (a misdemeanor involving moral turpitude) when he exchanged sex for legal services.

NOTE: Driving while suspended does not require an intentional mental state, *State v. Buttrey*, 293 Or 575, 651 P2d 1075 (1982), nor does it contain any of the other elements necessary to establish moral turpitude. Thus, an attorney's misdemeanor conviction for driving while suspended does not invoke ORS 9.527(2). *In re Sonderen*, 303 Or 129, 734 P2d 348 (1987).

5. A determination of whether a conviction for a misdemeanor involved moral turpitude is made by reference to the nature and elements of the crime and without consideration of the specific circumstances of the case. *In re Nuss, supra*. 335 Or 368, 371, 67 P3d 386 (2003).

- *In re Carl,* 26 DB Rptr 36 (2012). [18-month suspension] Attorney was convicted of tampering with evidence when he attempted to conceal a bottle of alcohol during an unannounced home visit by his wife's probation officers. He also was convicted of endangering the welfare of a minor after the probation officers found marijuana and marijuana residue in several locations in the family home in which attorney, his wife and their minor children resided.

- *In re Levy*, 25 DB Rptr 32 (2011). [reprimand] Attorney, as a guest at a law office party, subjected another guest to offensive physical conduct, for which he pled guilty to the misdemeanor charge of harassment.

- *In re Bernabei*, 23 DB Rptr 1 (2009). [reprimand] Attorney was convicted of public indecency which is a misdemeanor involving moral turpitude under the law.

- *In re Fehlman*, 21 DB Rptr 177 (2007). [1-year suspension by trial panel] Attorney was convicted of public indecency for masturbating in view of an involuntary spectator. He then re-offended, resulting in a probation violation and a second conviction.

- *In re Steinke Healy*, 17 DB Rptr 59 (2003). [60-day suspension] Attorney convicted of misdemeanor public and private indecency.

HYPOTHETICAL

- Attorney Arrears employed individuals from whose wages he was required to deduct and withhold federal income, social security, and Medicare taxes, and to pay those amounts to the government each quarter. Arrears was also required to file quarterly Form 941 to report employee wages and the amount of payroll taxes withheld from those wages.

  Due to a marital dissolution, Arrears was distracted from his practice for a time, causing his firm revenues to dip, and he was unable to pay the withholding taxes. That, combined with subsequent personal issues, resulted in depression that prevented Arrears from regularly dealing with his tax obligations over a period of nine years, despite regular reminders from his bookkeepers of the need to do so.

  During that time, Arrears withheld funds from his employees' wages and issued paystubs to them reflecting the amounts withheld for their state and federal income, Social Security and Medicare taxes ("payroll taxes"). However, Arrears did not timely file the employer quarterly Form 941 reports and did not pay over the funds until the federal government filed a foreclosure action against him.

  What rules were implicated by Arrears' conduct?

  A. None. Arrears was simply a debtor on tax-related matters; his tax issues had nothing to do with his practice of law.

  B. Arrears' actions were criminal and dishonest, in violation of RPC 8.4(a)(2) & (3).

  C. RPC 8.4(a)(2) because they were criminal but not dishonest.

  D. RPC 8.4(a)(3) because Arrears' actions were dishonest but not criminal.

DISCUSSION

Answer: _____

In re Millar, 29 DB Rptr 197 (2003) (6-month suspension)

B. RPC 8.4(a)(2) states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

1. RPC 8.4(a)(2) does not require a criminal conviction; rather, it requires only that the lawyer commit a criminal act that reflects adversely upon the lawyer's honesty, trustworthiness, or fitness to practice. *In re Hassenstab,* 325 Or 166, 176, 934 P2d 1110 (1997); *In re Morin*, 319 Or 547, 559, 878 P2d 393 (1994).

2. Not every criminal act gives rise to a violation of *current* RPC 8.4(a)(2). In *In re White*, 311 Or 573, 589, 815 P2d 1257 (1991), the court explained:

> "Each case must be decided on its own facts. There must be some rational connection other than the criminality of the act between the conduct and the actor's fitness to practice law. Pertinent considerations include the lawyer's mental state; the extent to which the act demonstrates disrespect for the law or law enforcement; the presence or absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a pattern of criminal conduct."

- *In re Chase*, 30 DB Rptr 384 (2016). [6-month suspension, all stayed/18-month probation] After respondent engaged in a verbal altercation with a man who had been a witness in a criminal matter he had prosecuted, he had a second encounter with the man outside the bar. Respondent drew his semi-automatic pistol, for which he had a concealed weapon permit, pointed it at the former witness, and pressed him against the building. When another person, who had been the defendant in the same criminal matter, sought to intervene, respondent covered both of them with his gun and called to request police assistance. When the police arrived, respondent promptly surrendered his gun. Respondent pled no contest to two counts of unlawful use of a weapon with a firearm, a felony, and two misdemeanor counts of menacing.

- *In re Day*, 30 DB Rptr 162 (2016) [36-month suspension] Respondent admitted to sexual relations with two female clients while they were incarcerated. Respondent pled no contest to one count of harassment, a misdemeanor.

- *In re Lupton*, 30 DB Rptr 80 (2016). [6-month suspension, all stayed/1-year probation] Respondent owned a property management company and a property maintenance company for which she maintained a trust account for the tenants' security deposits and one for property management. Upon learning of a significant shortfall in the tenant trust account, she did not report the deficit to the Oregon Real Estate Agency (OREA) as required by statute, or notify the property owners. She secured training for her bookkeeper but made no other changes in the way the accounts were managed. A year later, she learned that an additional, larger sum, had been transferred from both trust accounts without authorization. She terminated her bookkeeper but still did not report the situation to OREA or the property owners until after she was notified of an upcoming audit by OREA. Respondent entered into a stipulated order with OREA in which she acknowledged violating six separate statutes governing real estate licensees.

- *In re Light*, 29 DB Rptr 263 (2015). [7-month suspension, all but 30 days stayed/3-year probation] Attorney placed a camera in his minor step-daughter's bedroom with the intention of filming her without her knowledge or consent. When the step-daughter located the camera, it contained footage of her in a state of undress that constituted invasion of personal privacy, resulting in the attorney's misdemeanor conviction.

- *In re Bottoms*, 29 DB Rptr 210 (2015). [2-year suspension, 1-year stayed/2-year probation] Attorney and his wife were longtime friends of victim of criminal defendant represented by attorney. Attorney visited the victim at her home, expressed a romantic interest in her, and made inappropriate advances toward her. Police responded to victim's call and found attorney in possession of cocaine, for which he was later convicted. A second charge resulted from attorney's later arrest and conviction for carrying a loaded concealed weapon in public.

- *In re Millar*, 29 DB Rptr 197 (2015). [6-month suspension] Attorney employed individuals from whose wages he was required to deduct and withhold federal income, social security, and Medicare taxes, and to pay those amounts to the government each quarter. Attorney was also required to file quarterly Form 941 to report employee wages and the amount of payroll taxes withheld from

those wages. Attorney willfully failed on repeated occasions over nine years to pay over amounts deducted and withheld from employee wages at the time said amounts were due, and willfully failed to file federal Form 941 on a quarterly basis, both in violation of federal law.

- *In re Cyr*, SC S063187 (2015). [Form B resignation] Respondent specializing in tax matters was convicted of felony tax evasion.

- *In re Dang*, 29 DB Rptr 46 (2015). [3-year suspension] Bankruptcy attorney filed her own voluntary Chapter 7 petition and schedules, in which she knowingly made numerous false statements under oath about her property and income, in violation of federal statutes.

- *In re Rosenthal*, 28 DB Rptr 317 (2014). [reprimand] Respondent was convicted of five counts of patronizing a prostitute (Class A misdemeanor) with whom he had a long-term relationship over several years.

- *In re Bowman*, 28 DB Rptr 308 (2014). [180-day suspension, all but 30 days stayed/2-year probation] Respondent repeatedly and knowingly drove a motor vehicle wile under the influence of intoxicants, and while his driving privileges were suspended or revoked.

- *In re Kolego*, 28 DB Rptr 289 (2014). [90-day suspension] Respondent employed one or more individuals from whose wages he was required to deduct and withhold federal income, social security, and Medicare taxes, and to pay those amounts to the government each quarter. Respondent was also required to file quarterly Form 941 to report employee wages and the amount of payroll taxes withheld from those wages. Respondent willfully failed on repeated occasions over nine years to pay over amounts deducted and withheld from employee wages at the time said amounts were due, and willfully failed to file federal Form 941 on a quarterly basis, both in violation of federal law. NOTE: no allegation of misrepresentation to employees or others; criminal conduct only. Respondent also had significant mitigation.

- *In re Cobb*, 28 DB Rptr 41 (2014). [30-day suspension] Respondent failed to pay over funds withheld from employees' wages for federal

and state taxes over a three-year period, in violation of federal statutes.

- *In re Phinney*, 354 Or 329, 311 P3d 517 (2013). [disbarred] In his capacity as treasurer for the Yale Alumni Association of Oregon, attorney repeatedly took association funds for his personal use for over a two-year period. Court found that attorney's breach of his fiduciary duties to the association called into question his trustworthiness in handling client money. The attorney's fiduciary relationship with the association distinguished the attorney's conduct from other types of common theft where the attorney was not acting in such a capacity, and justified disbarment.

- *In re Renshaw*, 353 Or 411, 298 P3d 1216 (2013). [disbarred] Managing shareholder of law firm committed theft by deception (which reflected adversely on his honesty and trustworthiness) when he took unauthorized shareholder distributions; used firm funds to pay personal expenses and coded them to accounts receivable; and used the firm's credit card and line of credit to pay personal expenses.

- *In re Steele*, 27 DB Rptr 115 (2013). [disbarred] Attorney was convicted of numerous felonies in connection with his efforts to arrange for the murder of his wife and mother-in-law.

- *In re Ettinger*, 27 DB Rptr 76 (2013). [2-year suspension] In a one-year period, attorney was arrested for numerous crimes including two instances of DUII, reckless driving, failing to perform the duties of a driver, failure to appear, providing false information to a police officer, criminal trespass, initiating a false police report, resisting arrest. She was also found in violation of a diversion agreement and to have failed to obey a court order.

- *In re Walton*, 352 Or 548, 287 P3d 1098 (2012). [reprimand] After leaving employment as a public prosecutor, attorney continued to use his former employer's Westlaw password and account for 14 months without authorization or payment. This was deemed to be dishonest, but not criminal, conduct.

- *In re Steves*, 26 DB Rptr 283 (2012). [1-year suspension] Over a period of years, attorney willfully failed to file federal income tax returns timely or pay the tax due.

- *In re Cullen*, 26 DB Rptr 173 (2012). [disbarred] After settling personal injury matters and disbursing portions of the proceeds to the clients, attorney failed to pay medical providers with the remaining proceeds as he agreed to do, but converted the funds to his own use.

- *In re Carl*, 26 DB Rptr 36 (2012). [18-month suspension] Attorney was convicted of tampering with evidence when he attempted to conceal a bottle of alcohol during an unannounced home visit by his wife's probation officers. He also was convicted of endangering the welfare of a minor after the probation officers found marijuana and marijuana residue in several locations in the family home in which attorney, his wife and their minor children resided.

- *In re Highet*, 26 DB Rptr 8 (2012). [1-year suspension, part stayed/3-year probation] Attorney was disciplined following her criminal plea to possession of cocaine, resisting arrest and attempted assault on a police officer.

- *In re Richardson,* 350 Or 237, 253 P3d 1029 (2011). [disbarred] Attorney engaged in theft of client's real property.

- *In re Overton*, 25 DB Rptr 184 (2011). [60-day suspension] Deputy district attorney committed official misconduct when, while representing the state in enforcing child support obligations, he made sexually inappropriate comments to women who were child support obligors.

- *In re Porras*, 25 DB Rptr 42 (2011). [disbarred] As executive director of an indigent criminal defense consortium, attorney committed theft when he converted to his own use funds paid by the state to the consortium for defense services.

- *In re Smith*, 348 Or 535, 236 P3d 137 (2010). [90-day suspension] Attorney represented a client who had disputes with her employer, a nonprofit corporation that operated a medical marijuana clinic. Attorney advised his client that, because the nonprofit was administratively dissolved, the client had a right to enter the clinic premises and attempt to take control of the operations, a position attorney knew to be frivolous. Attorney was present during the attempted takeover and thereby committed criminal trespass. Because the trespass was committed as part of his representation

of the client, the conduct reflected adversely on his fitness as a lawyer.

- *In re Street*, 24 DB Rptr 258 (2010). [1-year suspension/part stayed, 2-year probation] Attorney disciplined for failing to file personal income tax returns for several years or pay the taxes due.

- *In re Bowman*, 24 DB Rptr 144 (2010) [1-year suspension/part stayed, 2-year probation] Attorney was disciplined for willful failure to file income tax returns, or pay income tax due, over a three-year period.

- *In re Hendrick*, 24 DB Rptr 138 (2010). [2-year suspension] Attorney testified falsely under oath in a disciplinary trial regarding his trust account records and his law firm advertising.

- *In re Antell*, 24 DB Rptr 113 (2010). [1-year suspension/10 months stayed, 1-year probation] Acting on a belief that her romantic partner was being unfaithful, attorney used the name of another person to send to the partner and others electronic communications that were harassing, intimidating and obscene. Attorney later was convicted of identity theft and cyberstalking for the conduct.

- *In re Carl*, 24 DB Rptr 17 (2010). [1-year suspension/part stayed, 3-year probation] Attorney's possession of more than one ounce of marijuana and knowledge that his wife sold marijuana out of their home where their two minor children resided, led to attorney's conviction for felony drug possession and endangering the welfare of a minor.

- *In re Okai*, 23 DB Rptr 73 (2009). [4-year suspension] Knowing that a client had no funds to pay a retainer, attorney encouraged the client to obtain a prescription for a narcotic and then accepted the drugs from the client. Attorney later pled guilty to drug possession. Attorney also passed bad checks and was convicted of theft for doing so.

- *In re Bernabei*, 23 DB Rptr 1 (2009). [reprimand] Attorney who was convicted of public indecency did not violate this rule because the evidence did not disclose a close enough connection between the criminal conduct and the practice of law.

- *In re Barton*, 22 DB Rptr 266 (2008). [reprimand] Attorney was disciplined following his conviction for possessing more marijuana plants than allowed under his Oregon Medical Marijuana Act permit. [DR 1-102(A)(2)]

- *In re Epstein*, 22 DB Rptr 222 (2008). [1-year suspension] Attorney was convicted of statutory offenses prohibiting possession or duplication of child pornography.

- *In re Watson*, 22 DB Rptr 160 (2008). [disbarred] After an incarcerated client released his wallet and three money orders to attorney for safekeeping, attorney failed to account to the client for the funds and converted them to his own use, committing the crimes of theft and forgery in the process.

- *In re Chancellor*, 22 DB Rptr 27 (2008). [1-year suspension] Attorney committed a series of alcohol-related offenses, and thereafter failed to comply with diversion and probation orders in three counties.

- *In re Dobie*, 22 DB Rptr 18 (2008). [2-year suspension] Attorney committed theft when he shoplifted an electronic device from a retail store. [DR 1-102(A)(2)]

- *In re Arnold*, 22 DB Rptr 13 (2008). [reprimand] After an 18-year-old entered into a diversion agreement on a DUII charge, the prosecutor took the defendant to dinner and bought her alcohol. For doing so, the prosecutor pled guilty to the charge of providing alcohol to a minor.

- *In re Nehring*, 21 DB Rptr 227 (2007). [30-day suspension] Attorney was convicted of second degree theft for taking and disposing of personal property of a former girlfriend and a romantic rival.

- *In re Fehlman*, 21 DB Rptr 177 (2007). [1-year suspension] Attorney was convicted of public indecency for masturbating in view of an involuntary spectator. He then re-offended, resulting in a probation violation and a second conviction.

- *In re Kolstoe*, 21 DB Rptr 43 (2007). [4-year suspension] Knowing and willful failure to file income tax returns over a several year

period is criminal conduct reflecting adversely on honesty, trustworthiness or fitness to practice law.

- *In re Pacheco*, 20 DB Rptr 293 (2006). [4-year suspension] Attorney made unwanted sexual advances toward employees, one of whom was a minor, for which attorney was convicted of criminal sex abuse.

- *In re Eames*, 20 DB Rptr 171 (2006). [disbarred] Attorney settled a personal injury claim for a client and then converted the settlement proceeds to his own use, thereby committing the crime of theft.

- *In re Oden*, 20 DB Rptr 76 (2006). [180-day suspension] After colliding with a parked car while intoxicated, attorney left the scene of the collision and falsely reported to the police that his vehicle had been stolen. Thereafter, during the course of the police investigation, attorney repeated his assertion that his vehicle had been stolen and denied he had been at the scene of the collision.

- *In re O'Connor*, 20 DB Rptr 42 (2006). [1-year suspension] Concerned about possibly failing a pre-employment drug test for a job as a deputy district attorney because of prior marijuana use, attorney surreptitiously diluted her urine samples during the test and consumed a detoxifier. When her prospective employer confronted her with the anomalous test results, attorney denied any drug use or test tampering.

- *In re Strickland*, 339 Or 595, 124 P3d 1225 (2005). [1-year suspension] Attorney, upset about a construction project in his neighborhood, falsely reported to police that he had been threatened and assaulted by construction workers. Attorney's resulting criminal convictions for initiating a false police report, improper use of the emergency reporting system and disorderly conduct adversely reflected on his honesty, trustworthiness or fitness in violation of the rule.

- *In re Leisure*, 338 Or 508, 113 P3d 412 (2005). [18-month suspension] Attorney repeatedly issued checks on her business account knowing that the account held insufficient funds, thereby committing the crime of negotiating a bad check.

- *In re Summer*, 338 Or 29, 105 P3d 848 (2005). [180-day suspension] Attorney was convicted of attempted theft by deception in Idaho based on his deliberate misrepresentations by omission to an insurance company regarding his client's claim.

- *In re Gibbons*, 19 DB Rptr 265 (2005). [reprimand] Following a neighbor's death and the medical examiner sealing the neighbor's premises, attorney, despite the police expressly advising him not to enter the premises, arranged for the neighbor's locks to be changed and for the house's contents to be videotaped in anticipation of initiating a probate proceeding. Attorney committed criminal trespass and the obstruction of governmental administration.

- *In re Goyak*, 19 DB Rptr 179 (2005). [6-month suspension] Attorney violated the rule by negotiating checks on his business account knowing that he had insufficient funds to cover them.

- *In re Bowles*, 19 DB Rptr 140 (2005). [1-year suspension] Attorney failed to file income tax returns over a period of several years.

- *In re Crews*, 19 DB Rptr 122 (2005). [disbarred] Attorney committed a forgery and presented it to his client to conceal his prior inaction.

- *In re Araiyama*, 18 DB Rptr 191 (2004). [6-month suspension] Attorney who was a caregiver to a person receiving social security disability benefits gave false answers in an interview with an investigator regarding the extent of the recipient's disability, and was convicted of theft because she also received public funds as a caregiver.

- *In re Flinders*, 18 DB Rptr 115 (2004). [2-year suspension] Attorney was disciplined following his conviction for possession of methamphetamine, his failure to comply with court-ordered release conditions, and his failure to comply with terms of his probation and conditional discharge.

- *In re Howlett*, 18 DB Rptr 61 (2004). [6-month + 1-day suspension, stayed/2 years probation] Attorney violated the rule by felony drug possession.

- *In re McDonough*, 336 Or 36, 77 P3d 306 (2003). [18-month suspension] Attorney who, over the course of years, repeatedly chose to drive a vehicle while his license was suspended or while intoxicated engaged in criminal conduct that demonstrated substantial disrespect for the law and adversely reflected on his fitness to practice law under the rule.

- *In re Kumley*, 335 Or 639, 75 P3d 432 (2003). [reprimand] An attorney who had not practiced law in years and was precluded by statute from doing so because of his inactive membership status, described himself as an "attorney" in various forms he filed as a legislative candidate and stated that his occupation was “attorney at law.” By doing so, he committed the crimes of knowingly making a false statement under elections laws and false swearing that reflected on his honesty and fitness to practice law.

- *In re Dye*, 17 DB Rptr 31 (2003). [reprimand] Attorney who simulated a civil subpoena containing false information to obtain copies of her telephone records committed the crime of simulating legal process.

- *In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001). [60-day suspension] Attorney violated rule when he failed to file income tax returns for several years despite knowledge that it was unlawful not to do so. It was not a defense that the attorney did not know the failure to file returns was a crime.

- *OSB Legal Ethics Op No 2005-156*. Whether an attorney may ethically tape record an in-person or telephone conversation with another individual without informing that individual in advance or employing some sort of beep or tone that would indicate the presence of a recording device depends upon whether such conduct is lawful. Even if lawful, however, a recording could not be made if the individual were led to believe that no recording would be made. [*Supersedes Op No 2005-74.*]

- *OSB Legal Ethics Op No 2005-105*. An attorney may ethically accept stolen property from a defendant for the purpose of returning it to the victim of the crime.

- *OSB Legal Ethics Op No 2005-105.* An attorney may accept a cash retainer from a client who is charged with obtaining money under

false pretenses unless the attorney knows that the funds are the fruits of the crime.

- *OSB Legal Ethics Op No 2005-105.* An attorney who is asked by a client to take possession of a murder weapon may not take possession unless the attorney intends to make it available to the prosecutor.

Notes

Notes

OTHER ISSUES

Section 22 — Other Personal Conduct

Some conduct that occurs outside the practice of law may nevertheless have repercussions on an attorney's professional standing. The conduct could arise from an attorney's dependency issues, personal circumstances or poor choices.

HYPOTHETICAL

- A few years ago, Attorney Anxious and his wife encountered marital difficulties. Although they underwent counseling and decided to remain together, Anxious recently began experiencing fears and anxieties regarding the marriage. He decided to review the couple's home telephone records but could not locate them at the residence. Anxious contacted the telephone company and was instructed that he would need to subpoena them.

  Anxious modified a form of subpoena using a fictitious case name and his firm's address and sent the document. The telephone company honored the subpoena.

What rules were implicated by Anxious' conduct?

A. Anxious' actions were criminal and dishonest, in violation of RPC 8.4(a)(2) & (3).

B. None. Anxious' actions did not violate the disciplinary rules because they did not have anything to do with his law practice and therefore did not reflect adversely on his fitness to practice law.

C. RPC 8.4(a)(2) because they were criminal but not dishonest.

D. RPC 8.4(a)(3) because Anxious' actions were dishonest but not criminal.

DISCUSSION

Answer: _____

In re Dye, 17 DB Rptr 31 (2003) (reprimand)

HYPOTHETICAL

- Attorney Aficionado was permitted access to the apartment of his ex-girlfriend, Tina Two-Timer, to use her internet connection while she was on vacation. While inside the apartment, Aficionado found correspondence that suggested to Aficionado that Two-Timer had been unfaithful to him at a time when they were romantically involved and that she had lured Aficionado to engage in sexual relations while being secretly watched by a romantic rival, Sordid. Emotionally distraught and angry, Aficionado gathered items that belonged to Two-Timer (including an iPod and an autographed photo of Justin Bieber) and to Sordid (a video camera and a pair of in-line skates) and tossed them into a nearby dumpster. The items were never recovered.

  After Two-Timer returned home, she noticed the missing items and asked Aficionado whether he knew what had happened to them. Aficionado said he did not.

  A couple of months later, Aficionado admitted to Two-Timer that he had thrown the items in the dumpster. Two-Timer reported Aficionado to the police, and Aficionado was subsequently convicted of Theft in the Second Degree (a felony) in circuit court.

Aficionado's conduct was NOT a violation of the ethics rules because:

A. He was under severe distress and did not act intentionally. Rather, Aficionado acted on impulse in discarding Two-Timer and Sordid's property.

B. It was purely personal conduct that had nothing to do with the practice of law.

C. It was justified.

D. None of the above. It was a violation of the ethics rules.

DISCUSSION

Answer: _____

In re Nehring, 21 DB Rptr 227 (2007) (30-day suspension).

A. Types of private conduct that may implicate an ethics rule.

1. Contempt of court in personal proceedings

- *In re McDonald*, 28 DB Rptr 30 (2014). [reprimand] After the circuit court entered an order which memorialized attorney's agreement to the entry of a permanent stalking order prohibiting him from contacting the petitioner in a civil case, attorney nonetheless knowingly contacted the petitioner, in violation of order, and was found in willful contempt of court for so doing.

- *In re Gonzalez (I),* 25 DB Rptr 1 (2011). [60-day suspension] Attorney failed to comply with three court orders issued in his own domestic relations proceeding for which he was found in contempt. The disciplinary prohibition against knowingly disobeying an obligation under the "rules of a tribunal" was considered broad enough to encompass attorney's violation of a court order.

- *In re Karlin*, 22 DB Rptr 346 (2008). [reprimand] Attorney was found in willful contempt of court for failing to pay obligations and comply with other requirements arising out of a general judgment of dissolution of marriage.

- *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006). [3-month suspension + formal reinstatement] Attorney was charged with resisting arrest and criminal mischief and was thereafter found in contempt of court for consuming alcohol on two occasions despite being prohibited from doing so by the terms of his conditional release. Attorney was not permitted to collaterally attack the contempt findings in the disciplinary proceeding because he did not appeal those convictions in the underlying case.

- *In re Eames*, 20 DB Rptr 171 (2006). [disbarred] Attorney knowingly violated the terms of a restraining order issued against him in a FAPA matter, was found in willful contempt for the violation (for which he was placed on probation), and thereafter knowingly violated the terms of his probation.

- *In re Arsanjani*, 20 DB Rptr 23 (2006). [30-day suspension] Attorney willfully violated, and was found in contempt of, the terms of a

restraining order and deferred sentencing agreement in connection with a charge of assault against his wife.

- *In re Chase*, 339 Or 452, 121 P3d 1160 (2005). [30-day suspension] Attorney's willful failure to comply with his own child support order resulted in the court entering a judgment of contempt, which was also a violation of the disciplinary rule.

- *In re Rhodes,* 331 Or 231, 13 P3d 512 (2000). [2-year suspension] Lawyer was held in contempt on two separate occasions in his dissolution of marriage proceeding for failing to comply with court orders (one to provide discovery and one to pay support).

2. Defrauding creditors

- *In re Levie*, 22 DB Rptr 66 (2008). [6-month suspension] By maintaining personal funds in a trust account at a time when he had creditors seeking his assets, attorney was falsely representing to others that the funds in the account were not his.

- *In re Andersen*, 19 DB Rptr 227 (2005). [6-month suspension] Claiming that he believed his personal and business accounts were vulnerable to fraud or theft, attorney used his trust account for all personal and professional deposits and disbursements.

- *In re McMurry*, 14 DB Rptr 193 (2000). [60-day suspension] Attorney violated rule when he deposited his own funds in his lawyer trust account so as to shield them from the claims of his creditors.

- *In re Whipple*, 1 DB Rptr 205 (1986) [60-day suspension/2-year probation] Respondent was disciplined for placing personal funds in his client trust account to prevent them from being discovered and obtained by his creditors.

3. Driving violations

- *In re Bowman*, 28 DB Rptr 308 (2014) [180-day suspension, all but 30 days stayed/2-year probation] Respondent repeatedly and knowingly drove a motor vehicle wile under the influence of intoxicants, and while his driving privileges were suspended or revoked.

- *In re Ettinger*, 27 DB Rptr 76 (2013) [2-year suspension] In a one-year period, attorney was arrested for numerous crimes including two instances of DUII, reckless driving, failing to perform the duties of a driver, failure to appear, providing false information to a police officer, criminal trespass, initiating a false police report, resisting arrest. She was also found in violation of a diversion agreement and to have failed to obey a court order.

- *In re McDonough*, 336 Or 36, 77 P3d 306 (2003). [18-month suspension] Attorney who, over the course of years, repeatedly chose to drive a vehicle while his license was suspended or while intoxicated engaged in criminal conduct that demonstrated substantial disrespect for the law and would cause the court to deny admission if the attorney were an applicant to the bar.

4. Drug and alcohol offenses

- *In re Carl*, 26 DB Rptr 36 (2012). [18-month suspension] Attorney was convicted of tampering with evidence when he attempted to conceal a bottle of alcohol during an unannounced home visit by his wife's probation officers. He also was convicted of endangering the welfare of a minor after the probation officers found marijuana and marijuana residue in several locations in the family home in which attorney, his wife and their minor children resided.

- *In re Highet*, 26 DB Rptr 8 (2012). [1-year suspension, part stayed/3-year probation] Attorney was disciplined following her criminal plea to possession of cocaine, resisting arrest and attempted assault on a police officer.

- *In re Carl*, 24 DB Rptr 17 (2010). [1-year suspension/part stayed, 3-year probation] Attorney's possession of more than one ounce of marijuana and knowledge that his wife sold marijuana out of their home where their two minor children resided, led to attorney's conviction for felony drug possession and endangering the welfare of a minor.

- *In re Okai*, 23 DB Rptr 73 (2009). [4-year suspension] Knowing that a client had no funds to pay a retainer, attorney encouraged the client to obtain a prescription for a narcotic and then accepted

the drugs from the client. Attorney later pled guilty to drug possession. Attorney also passed bad checks and was convicted of theft for doing so.

- *In re Barton*, 22 DB Rptr 266 (2008). [reprimand] Attorney was disciplined following his conviction for possessing more marijuana plants than allowed under his Oregon Medical Marijuana Act permit.

- *In re Dunn*, 22 DB Rptr 47 (2008). [disbarred] Attorney violated his probation from a DUII conviction by continuing to consume alcohol.

- *In re Chancellor*, 22 DB Rptr 27 (2008). [1-year suspension] Attorney committed a series of alcohol-related offenses and thereafter failed to comply with diversion and probation orders in three counties.

- *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006). [3-month suspension + formal reinstatement] Failing to respond to a show cause order and other inquiries from the court of appeals concerning a client's appeal was conduct prejudicial to the administration of justice. In a separate incident, attorney was charged with resisting arrest and criminal mischief, and thereafter was found in contempt of court for consuming alcohol on two occasions despite being prohibited from doing so by the terms of his conditional release.

- *In re Andersen*, 18 DB Rptr 172 (2004). [4-month suspension + formal reinstatement] Attorney who was referred SLAC for possible alcohol impairment, cooperated in the evaluation process but declined to participate in the remedial program as the committee directed.

- *In re Flinders*, 18 DB Rptr 115 (2004). [2-year suspension] Attorney was disciplined following his conviction for possession of methamphetamine, his failure to comply with court-ordered release conditions, and his failure to comply with terms of his probation and conditional discharge.

- *In re Howlett*, 18 DB Rptr 61 (2004). [6-month suspension + 1 day, stayed, 2-year probation] Attorney convicted of felony drug possession.

- *In re Wyllie*, 326 Or 447, 952 P2d 550 (1998). [1-year suspension] Attorney refused to participate in and comply with remedial program established by SLAC to deal with his alcoholism.

- *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994). [disbarred] Attorney's mental condition and excessive use of alcohol rendered it unreasonably difficult for attorney to effectively carry out his representation and caused him to abruptly leave his practice.

5. Failing to file personal income taxes

- *In re Millar,* 29 DB Rptr 197 (2015). [6-month suspension] Attorney employed individuals from whose wages he was required to deduct and withhold federal income, social security, and Medicare taxes, and to pay those amounts to the government each quarter. Attorney was also required to file quarterly Form 941 to report employee wages and the amount of payroll taxes withheld from those wages. Attorney willfully failed on repeated occasions over nine years to pay over amounts deducted and withheld from employee wages at the time said amounts were due, and willfully failed to file federal Form 941 on a quarterly basis, both in violation of federal law.

- *In re Cyr*, SC S063187 (2015). [Form B resignation] Respondent specializing in tax matters was convicted of felony tax evasion.

- *In re Kolego*, 28 DB Rptr 289 (2014). [90-day suspension] Respondent employed one or more individuals from whose wages he was required to deduct and withhold federal income, social security, and Medicare taxes, and to pay those amounts to the government each quarter. Respondent was also required to file quarterly Form 941 to report employee wages and the amount of payroll taxes withheld from those wages. Respondent willfully failed on repeated occasions over nine years to pay over amounts deducted and withheld from employee wages at the time said amounts were due, and willfully failed to file federal Form 941 on a quarterly basis, both in violation of federal law. NOTE: no allegation

of misrepresentation to employees or others; criminal conduct only. Respondent also had significant mitigation. [DR 1-102(A)(2) and RPC 8.4(a)(2)]

- *In re Cobb*, 28 DB Rptr 41 (2014). [30-day suspension] Respondent failed to pay over funds withheld from employees' wages for federal and state taxes over a three-year period, in violation of federal statutes.

- *In re Steves*, 26 DB Rptr 283 (2012). [1-year suspension] Over a period of years, attorney willfully failed to file federal income tax returns timely or pay the tax due.

- *In re Street*, 24 DB Rptr 258 (2010). [1-year suspension, part stayed, two-year probation] Attorney disciplined for failing to file personal income tax returns for several years or pay the taxes due.

- *In re Bowman*, 24 DB Rptr 144 (2010). [1-year suspension, part stayed/2-year probation] Attorney willfully failed to file income tax returns, or pay income tax due, over a three-year period.

- *In re Kolstoe*, 21 DB Rptr 43 (2007). [4-year suspension] Knowing and willful failure to file income tax returns over a several year period is criminal conduct reflecting adversely on honesty, trustworthiness, or fitness to practice law.

- *In re Bowles*, 19 DB Rptr 140 (2005). [1-year suspension] Attorney failed to file income tax returns over a period of several years.

- *In re Lawrence,* 332 Or 502, 31 P3d 1078 (2001). [60-day suspension] Although mitigating factors far outweighed aggravating factors, attorney's failure to timely file personal tax returns for three years warranted suspension.

- *In re Desbrisay,* 288 Or 625, 606 P2d 1148 (1980). [4-year suspension] Attorney willfully and knowingly failed to file timely income tax returns for six years.

6. <u>False statements</u>

- *In re Lupton*, 30 DB Rptr 80 (2016). [6-month suspension, all stayed/1-year probation] Respondent owned a property

management company and a property maintenance company for which she maintained a trust account for the tenants' security deposits and one for property management. Upon learning of a significant shortfall in the tenant trust account, she did not report the deficit to the Oregon Real Estate Agency (OREA) as required by statute, or notify the property owners. She secured training for her bookkeeper but made no other changes in the way the accounts were managed. A year later, she learned that an additional, larger sum, had been transferred from both trust accounts without authorization. She terminated her bookkeeper but still did not report the situation to OREA or the property owners until after she was notified of an upcoming audit by OREA. Respondent entered into a stipulated order with OREA in which she acknowledged dishonest conduct that reflect adversely on her fitness to practice law.

- *In re Tibbetts*, 30 DB Rptr 73 (2016) [30-month suspension] Respondent was a member of the Linn County Legal Defense Consortium, whose membership conditions required compliance with state and federal tax regulations. Respondent failed to file his state or federal tax returns for three consecutive years and falsely certified to the Consortium that he was not in violation of any Oregon tax laws for each of those three years.

- *In re Kocurek*, 26 DB Rptr 225 (2012). [6-month suspension] Attorney made a material misrepresentation to her insurance company regarding damage to her vehicle out of a concern that her premiums would increase or her coverage would be cancelled. In addition, attorney made a misrepresentation in an affidavit she filed in her own divorce proceeding, falsely asserting that her husband's girlfriend had a criminal record that justified restrictions on the husband's access to marital property. Attorney also made false statements to the bar.

- *In re Foster*, 25 DB Rptr 201 (2011). [30-day suspension] Government attorney took a water sample from a pool near the property of a business then being criminally prosecuted for alleged pollution violations. Thereafter, attorney made misrepresentations to others, including his boss, about his role in the water sampling.

- *In re Porras*, 25 DB Rptr 42 (2011). [disbarred] As executive director of an indigent criminal defense consortium, attorney committed theft when he converted to his own use funds paid by the state to the

consortium for defense services. Thereafter, he made misrepresentations about his conduct to conceal what he had done.

- *In re Van Walleghem*, 21 DB Rptr 102 (2007). [reprimand] In an application for a family membership in a health club, attorney represented that she was married, named her spouse, and attached a marriage certificate. With a family membership, a spouse was eligible to be a member without any additional fee. Because attorney had divorced a few years earlier, it was a misrepresentation to claim the status of married in the application.

- *In re Dunn*, 20 DB Rptr 255 (2006). [1-year suspension] Attorney sold unregistered securities in violation of the state securities laws, and made misrepresentations to investors.

- *In re Mattox*, 20 DB Rptr 87 (2006). [1-year suspension] Attorney falsely denied a gambling problem when deposed in his own dissolution proceeding.

- *In re Strickland*, 339 Or 595, 124 P3d 1225 (2005). [1-year suspension] Attorney, upset about a construction project in his neighborhood, falsely reported to police that he had been threatened and assaulted by construction workers. Attorney's resulting criminal convictions for initiating a false police report, improper use of the emergency reporting system, and disorderly conduct adversely reflected on his honesty, trustworthiness, or fitness in violation of the rule.

- *In re Kumley*, 335 Or 639, 75 P3d 432 (2003). [reprimand] An attorney who had not practiced law in years and was precluded by statute from doing so because of his inactive membership status described himself as an "attorney" in various forms he filed as a legislative candidate and stated that his occupation was "attorney at law."

- *In re Flannery*, 334 Or 224, 47 P3d 891 (2002). [reprimand] Deputy district attorney committed a misdemeanor when he submitted a false application for a driver's license.

7. Fraudulent documents

- *In re Herman,* 357 Or 273, 348 P3d 1125 (2015). [disbarred] Attorney improperly diverted corporate assets to his own use from a corporation equally owned by him and two partners, excluded his partners from business affairs, and filed dissolution documents with the Secretary of State that indicated that the attorney was sole director and that corporation's board of directors had adopted resolution authorizing him, as president, to dissolve corporation, which did not reflect true state of corporation as having three equal principals at time of filing. Although there is no explicit rule requiring lawyers to be candid and fair with their business associates or employers, such an obligation is implicit in the disciplinary rule prohibiting dishonesty, fraud, deceit, or misrepresentation.

- *In re Dang*, 29 DB Rptr 46 (2015). [3-year suspension] Bankruptcy attorney filed her own voluntary Chapter 7 petition and schedules, in which she knowingly made numerous false statements under oath about her property and income, in violation of federal statutes.

- *In re Sanchez*, 29 DB Rptr 21 (2015). [1-year suspension] Attorney affirmatively misrepresented to Bar that he completed 48 hours of CLE courses (toward his 45-hour minimum requirement) in a one-day period (less than 7 hours) via an online CLE provider.

- *In re De Muniz*, 28 DB Rptr 113 (2014) [30-day suspension] Attorney altered her parking receipt and presented the altered receipt in defense of a parking ticket, misrepresenting the time she entered the parking facility both in the altered receipt and in her written dispute of the ticket that accompanied the altered receipt.

- *In re Kinney*, 28 DB Rptr 59 (2014). [1-year suspension, all but 60 days stayed/1-year probation] Attorney allowed his personal bankruptcy petition to be filed containing incomplete and inaccurate information and thereafter affirmed the accuracy of the information under oath, without having thoroughly reviewed the documents and without having verified the that information was correct.

- *In re Hudson*, 27 DB Rptr 226 (2013). [2-year suspension, part stayed/2-year probation] In connection with a bar investigation, fee arbitration, and civil proceedings brought by his former client, attorney separately submitted documents and made statements that

materially misrepresented the true facts regarding the client's claims and their timing with respect to the attorney-client relationship, intending that these false statements and documentation be relied upon by the bar, the arbitrator, and the court in their respective evaluations of his former client's claims.

- *In re Dang*, 22 DB Rptr 91 (2008). [reprimand] Attorney, a licensed contractor, agreed to build a home for buyers and signed a loan agreement with the buyers and a bank for a specific price. Knowing that bank approval was required for any contract modifications, attorney signed a second contract with the buyers for a greater price but without the bank's knowledge or consent.

- *In re Henricksen*, 19 DB Rptr 16 (2005). [60-day suspension] Attorney endorsed former wife's name on a check without her authority and deposited it into his personal account knowing he was entitled to receive only half of these funds.

- *In re Dye,* 17 DB Rptr 31 (2003). [reprimand] Attorney simulated a civil subpoena containing false information to obtain copies of her telephone records.

8. Impersonation or identity theft

- *In re Antell*, 24 DB Rptr 113 (2010). [1-year suspension/part stayed, 1-year probation] Acting on a belief that her romantic partner was being unfaithful, attorney used the name of another person to send to the partner and others electronic communications that were harassing, intimidating and obscene. Attorney later was convicted of identity theft and cyberstalking for the conduct.

- *In re Kane*, 21 DB Rptr 329 (2007). [reprimand] Attorney, a police lieutenant, completed online national security tests for officers under his command and submitted them to the Department of Homeland Security without informing the officers or DHS that he had taken the tests in the names of the officers.

- *In re Carpenter*, 337 Or 226, 95 P3d 203 (2004). [reprimand] Attorney engaged in dishonesty when he created an internet bulletin board account in the name of a high school teacher in his community and posted a message purportedly written by the teacher that suggested

the teacher had engaged in sexual relations with his students. While not every dishonest act subjects an attorney to discipline, here a sufficient nexus existed between attorney's conduct and his fitness to practice law because he created a significant risk that his actions would affect the teacher's legal rights adversely.

9. Improper business dealings

- *In re Simon*, 30 DB Rptr 214 (2016). [185-day suspension] Client was involved in a business entity that needed to be dissolved, and was its managing member. Respondent was placed in control of the logistics for transfers from an escrow account established for the payment of creditors of the business entity. Respondent arranged for payment from this escrow fund of a $75,000 fee to another attorney for bankruptcy consultation services, $25,000 of which was subsequently sent by that attorney to one of Respondent's personal creditors at Respondent's direction. Respondent's conduct was dishonest as there was no evidence that client agreed to pay, or authorized, the fees to either respondent or the bankruptcy attorney.

- *In re Herman*, 357 Or 273, 348 P3d 1125 (2015). [disbarred] Attorney improperly diverted corporate assets to his own use from a corporation equally owned by him and two partners, excluded his partners from business affairs, and filed dissolution documents with the Secretary of State that indicated that the attorney was sole director and that corporation's board of directors had adopted resolution authorizing him, as president, to dissolve corporation, which did not reflect true state of corporation as having three equal principals at time of filing. Although there is no explicit rule requiring lawyers to be candid and fair with their business associates or employers, such an obligation is implicit in the disciplinary rule prohibiting dishonesty, fraud, deceit, or misrepresentation.

- *In re Renshaw,* 353 Or 411, 298 P3d 1216 (2013). [disbarred] Attorney committed theft-by-deception when he intentionally miscoded personal expenses as business expenses to obtain funds from law firm where he was a partner with two other shareholders.

- *In re Daniels*, 22 DB Rptr 72 (2008). [reprimand] Attorney entered into a partnership with long-time client to purchase parcels of land for Christmas trees. Attorney performed all legal services for

partnership without obtaining the client's informed consent following full disclosure. Attorney also allowed client to be personally and financially responsible for the attorney's obligation for the purchase price of one or more of the properties without obtaining the client's informed consent to such an arrangement.

- *In re Dickerson*, 19 DB Rptr 363 (2005). [reprimand] Attorney and his business partners were in negotiations to purchase a restaurant when attorney also undertook to represent the restaurant owner in assisting with the termination of a sublease to a third party. The objective interests of the attorney and his partners was adverse to those of the restaurant owner, but no consent following disclosure was obtained.

- *In re Brown*, 18 DB Rptr 257 (2004). [30-day suspension] Attorney's self-help in taking funds owed to him by a business in which he was an owner, without notice to the other owners, was improper and a violation of the dishonesty rule.

10. Improperly obtaining government benefits

- *In re Araiyama*, 18 DB Rptr 191 (2004). [6-month suspension] Attorney who was a caregiver to a person receiving social security disability benefits gave false answers in an interview with an investigator regarding the extent of the recipient's disability. She was convicted of theft because she also received public funds as a caregiver.

- *In re Unrein,* 323 Or 285, 917 P2d 1022 (1996). [120-day suspension] Attorney applied for and received unemployment compensation benefits on four separate occasions while knowing that she was ineligible for such benefits.

11. Sexual misconduct

- *In re Day*, 30 DB Rptr 162 (2016). [36-month suspension] On multiple occasions, Respondent had inappropriate contact with two incarcerated clients by engaging in sexual relations or conduct with

them. Respondent believed the conduct with both clients to be consensual, however sexual relations between a lawyer and an incarcerated client cannot be consensual.

- *In re Salisbury,* 28 DB Rptr 128 (2014) [reprimand/2-year probation] Attorney made unsolicited and unwanted sexual advances toward two vulnerable female clients, inviting both to engage in intimate conduct that would expose them to potential criminal sanctions and which would jeopardize at least one's parental status with her children both in a pending custody dispute and in an unresolved investigation/agreement with DHS.

- *In re Gough*, 27 DB Rptr 179 (2013). [reprimand] Attorney began a sexual relationship with his court-appointed client, a mother in a juvenile proceeding. He thereafter continued to represent her for a number of months when there was a significant risk that the representation would be materially limited by his personal interest.

- *In re Goode*, 26 DB Rptr 213 (2012) [120-day suspension] Attorney engaged in sexual relations with a client shortly after he undertook to represent her in litigation.

- *In re Overton*, 25 DB Rptr 184 (2011). [60-day suspension] Deputy district attorney was convicted of official misconduct when, while representing the state in enforcing child support obligations, he made sexually inappropriate comments to a child support obligor who was required to report to attorney monthly as part of her contempt probation.

- *In re Bernabei*, 23 DB Rptr 1 (2009). [reprimand] Attorney who was convicted of public indecency was disciplined, despite significant mitigation, because public indecency is a misdemeanor involving moral turpitude.

- *In re Epstein*, 22 DB Rptr 222 (2008). [1-year suspension] Attorney was convicted of statutory offenses prohibiting possession or duplication of child pornography.

- *In re Chancellor,* 22 DB Rptr 27 (2008). [1-year suspension] Prosecutor met socially with the victim of a rape case assigned to the prosecutor and engaged in sexual contact with her. Thereafter, he

falsely denied to the district attorney and to the police that he had done so.

- *In re Fehlman,* 21 DB Rptr 177 (2007). [1-year suspension] Attorney was convicted of public indecency for masturbating in view of an involuntary spectator. He then re-offended, resulting in a probation violation and a second conviction.

- *In re Pacheco,* 20 DB Rptr 293 (2006). [4-year suspension] Attorney made unwanted sexual advances toward employees, one of whom was a minor, for which attorney was convicted of criminal sex abuse.

- *In re Matthews,* 19 DB Rptr 193 (2005). [1-year suspension] Attorney commenced a sexual relationship with a domestic relations client.

- *In re Peters*, 18 DB Rtpr 238 (2004). [180-day suspension/BR 8.1] Attorney who had sexual relations with a client denied this relationship when questioned by a police detective regarding the client's whereabouts, knowing that this information was material to the investigation.

- *In re Baldwin*, 17 DB Rptr 280 (2003). [reprimand] Without full disclosure and consent, attorney represented a client in a dissolution proceeding at a time when he was engaged in a personal and sexual relationship with the client.

- *In re Steinke-Healy,* 17 DB Rptr 59 (2003). [60-day suspension] Attorney was convicted of both public and private indecency.

- *In re Hassenstab*, 325 Or 166, 934 P2d 1110 (1997) [disbarred] Attorney disciplined following criminal proceedings relating to sexual relationships with several clients.

- *In re Wolf*, 312 Or 655, 826 P2d 628 (1992). [18-month suspension] Lawyer had sex with his female, minor client and was indicted for contributing to the sexual delinquency of a minor, sexual abuse, and furnishing alcohol to a minor.

12. Shoplifting

- *In re Dobie*, 22 DB Rptr 18 (2008). [2-year suspension] Attorney committed theft when he shoplifted an electronic device from a retail store.

- *In re Kimmell*, 332 Or 480, 31 P3d 414 (2001). [6-month suspension] Attorney shoplifted a jacket from a department store. Act reflected adversely on his honesty.

- *In re Drew*, 11 DB Rptr 67 (1997). [2-year suspension] Attorney disciplined following misdemeanor shoplifting conviction and several other criminal acts.

- *In re Mahr*, 276 Or 939, 556 P2d 1359 (1976). [90-day suspension] Attorney's conviction for shoplifting was deemed misdemeanor involving moral turpitude resulting in attorney's suspension.

13. Writing bad checks

- *In re Okai*, 23 DB Rptr 73 (2009). [4-year suspension] Attorney passed bad checks and was convicted of theft for doing so.

- *In re Leisure*, 338 Or 508, 113 P3d 412 (2005). [18-month suspension] Attorney repeatedly issued checks on her business account knowing that the account held insufficient funds, thereby committing the crime of negotiating a bad check.

- *In re Goyak*, 19 DB Rptr 179 (2005). [6-month suspension] Attorney violated ethics rules by negotiating checks on his business account knowing that he had insufficient funds to cover them.

HYPOTHETICAL

- Late one weekend evening, attorney Tayka Chance and his wife decided to spend the night at a motel in Pebble Beach. While Chance's wife walked to a nearby motel, Chance walked to his truck with the intent of locking it and then walking to the motel to meet his wife. Instead, Chance decided to drive his truck to the motel. While moving his truck, Chance collided with an unoccupied parked car, causing damage to it. He thereafter left the scene of the collision without attempting to locate or notify the operator or owner of the vehicle he struck and walked to the motel.

  When Chance arrived at the motel, he called 911 and reported that his truck had been stolen. Police officers were dispatched to the motel to investigate.

  Chance told the dispatched police officers that his truck had been stolen and that he had not been at the scene of the collision.

  Chance was criminally charged with driving under the influence of intoxicants, criminal mischief in the second degree, failure to perform the duties of a driver when property is damaged, and initiating a false report. Chance pled guilty to criminal mischief. The other charges were dismissed.

What was the <u>first act</u> by Chance that violated the disciplinary rules?

A. Deciding to stay in Pebble Beach.

B. Driving under the influence.

C. Leaving the scene of an accident.

D. Making a false report and lying to the police officers dispatched to the scene.

DISCUSSION

Answer: _____

In re Oden, 20 DB Rptr 76 (2006) (180-day suspension).

HYPOTHETICAL

- Justa Minor appeared at a court hearing on a charge of driving under the influence of intoxicants. Assistant District Attorney Adult was present at the hearing and learned that Minor was 18 years old. Minor pleaded guilty to the charge and entered into a diversion agreement.

  The next week, Adult contacted Minor, ostensibly for the purpose of checking up on her, and suggested that they meet. Later that night, Adult took Minor out to dinner and purchased two glasses of wine for her.

Adult:

A. Committed a criminal act (purchasing alcohol for a minor) but did not violate any of the Rules of Professional Conduct because the crime was only a misdemeanor.

B. Committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer.

C. Did not violate any of the Oregon Rules of Professional Conduct because he was not acting as a lawyer when he met up with Minor.

D. Violated the special ethical responsibilities of a prosecutor.

DISCUSSION

Answer: _____

In re Arnold, 22 DB Rptr 13 (2008) [reprimand]

Notes

OTHER ISSUES

Section 23—Professionalism

Lawyers should keep in mind that the Rules of Professional Conduct are the minimum standards required of our profession. In addition to compliance with these rules, lawyers should aspire to demonstrate professionalism in all aspects of their practice.

"Professionalism" and "professional identity" are difficult concepts to define, since they are based on historical and aspirational views of the role of lawyers in society.

However, some of the professional traits that lawyers should pursue include: competence, knowledge, skill, honesty, trustworthiness, reliability, respect for legal obligations, responsibility, civility in dealings with others, personal integrity, and empathy. Professional identity also includes a commitment to and respect for the administration of justice, the institutions of the law, and public service in general. NOBC, *Law School Professionalism Initiative Report*, Dec 2009; *see also,* The Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law*, Ch 4, 2007.

- Supp 23-1: Hon. Daniel L. Harris and John V. Acosta, *Conduct Counts: Professionalism for Litigation and Courtroom Practice*, OSB Bulletin, Aug/Sept 2007

In 2006, the Bar published a Statement of Professionalism for lawyers in Oregon. Lawyers are encouraged to follow and promote its stated principles.

Statement of Professionalism

Adopted by the Oregon State Bar House of Delegates and Approved by the Supreme Court of Oregon effective December 12, 2011

As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good. Because we are committed to professionalism, we will conduct ourselves in a way consistent with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts, and the public.

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of unlawful or unethical discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.

- I will work to achieve my client's goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support *pro bono* activities.

Notes

CLOSING HYPOTHETICAL

We just received an Ethics Hotline request for advice on how to handle the following situation:

> The attorney was appointed by the federal court to represent a woman in a drug conspiracy case. Trying to appease the feds, the client agreed to cooperate in an ongoing police corruption case involving the receipt of bribes from organized gambling. The client's cooperation consisted of providing grand jury testimony that resulted in federal indictment against a police official. After the indictment, the client informed the attorney of the true facts of the case and admitted she had lied to the grand jury.
>
> The true facts are:
>
> The client is married to a member of organized gambling and delivered bribes to the police for her husband. However, the client has a drug habit and kept the money for herself. The client is now remorseful that she is on the verge of putting an innocent police official behind bars. She does not know what to do and neither does the lawyer.

What can be done? This case is all over the media and trial is fast approaching…

Notes