

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,
Relator, :

v. :

Richard Todd Ricketts,
Respondent. :

CASE NO. 2010-0806
BOARD NO. 09-017

RELATOR'S ANSWER TO RESPONDENT,
RICHARD RICKETTS', OBJECTION TO
THE FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDATION OF
THE BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE

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BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

JONATHAN E. COUGHLAN (0026424)
Disciplinary Counsel
Relator

ALVIN E. MATHEWS, JR. (0038660)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone (614) 227-2312
Facsimile (614) 227-2390
amathews@bricker.com
Counsel for Respondent

STACY SOLOCHEK BECKMAN (0063306)
Assistant Disciplinary Counsel
Office of Disciplinary Counsel of
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Telephone (614) 461-0256
Facsimile (614) 461-7205
jonathan.coughlan@sc.ohio.gov
stacy.beckman@sc.ohio.gov
Counsel for Relator

RICHARD T. RICKETTS (0033538)
Respondent

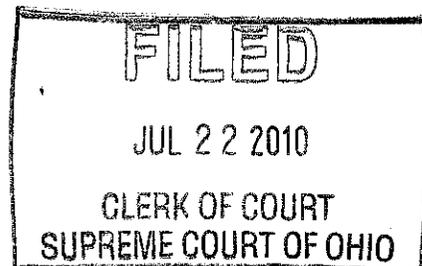


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INTRODUCTION

Now comes relator, Disciplinary Counsel, and submits the following answer to respondent's, Richard T. Ricketts, Objection to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline (the "Board"). Relator has attached the board's Findings of Fact, Conclusions of Law and Recommendation (the "findings") hereto as Appendix A. See S. Ct. Prac. R. VI (2)(B)(5)(b).

STATEMENT OF THE CASE

On February 17, 2009, relator, Disciplinary Counsel, filed a single count complaint alleging professional misconduct against respondent. Respondent filed an answer to the allegations on April 2, 2009.

A three-person panel of the Board held a hearing on this matter on September 17, 2009 and January 22, 2010. The Board issued its findings of fact, conclusions of law and recommendations on May 6, 2010 and recommended that respondent be suspended from the practice of law for six months, with the entire suspension stayed.

This Court issued a Show Cause Order on May 12, 2010. Pursuant to Gov. Bar R. V (8)(B), on June 21, 2010, respondent filed Objections to the recommendations of the Board with this Court. Relator timely files his answer to respondent's objections herewith.

STATEMENT OF FACTS

In September 2001, JRP Consulting, an investment banking firm, referred Christine Lemke ("Christine") to respondent for assistance with financial difficulties that Lemke Sales & Services ("Lemke Sales") was having at the time. Transcript ("Tr."), p. 145. Christine was the president and sole shareholder of Lemke Sales, a farm implement business. Findings, ¶ 3. Because of the problems facing Lemke Sales, Christine wanted to wind up the business. Tr., p. 146.

At the time that Christine initially met with respondent, the largest creditors of Lemke Sales were AGCO, Agri Credit and Bank One. Findings, ¶ 4. Christine was personally obligated on the majority of Lemke Sales' liabilities. Christine personally

owed Ag Credit ACA ("Ag Credit"), a Toledo, Ohio based credit company, money at the time, however, Lemke Sales had no outstanding debt with Ag Credit. Findings, ¶ 5.

In structuring a plan as to how Christine should proceed, Respondent sent an email communication to her. In the email, respondent indicated:

In those situations where the amount owed a secured vendor is close to their PMSI collateral we want to push them to accept their equipment back in full satisfaction of the debt. [T]o do this they must perceive that they will not otherwise collect from the company.

[W]e need to eliminate the potential for equity in the real estate being made available for general unsecured creditors of the company

Relator's Exhibit 3 (emphasis added).

On November 20, 2001, Lemke Sales purportedly entered into an open-end mortgage with Ag Credit. Findings, ¶ 9. See, also, Relator's Exhibit 1. The mortgage was prepared by respondent and recorded on December 28, 2001 and purported to give Ag Credit an interest in property located in the Township of Scott, Ohio, in Marion County that was owned by Lemke Sales. Relator's Exhibit 1.

At the time that Lemke Sales entered into the November 20, 2001 mortgage, it did not have a lending relationship with Ag Credit. Tr., p. 46. Christine personally had a loan with Ag Credit, which was in good standing. Tr., p. 59. Christine was in no way behind on her payments to Ag Credit or otherwise in default of the loan. Id. Respondent prepared and filed three other mortgages on behalf of Lemke Sales - one to Marion Bank, one to Bank One and one to Ray Hildreth - on December 28, 2001. Findings, ¶ 9. See, also, Relator's Exhibits 5, 6, and 7. Each of these mortgages was

recorded prior to the Ag Credit mortgage, took priority over the Ag Credit mortgage and totaled encumbrances of over \$465,000 on the Lemke Sales property. Findings, ¶ 9.

In addition to preparing the mortgages on Lemke Sales' behalf, respondent assisted Lemke Sales with a liquidation sale held in January 2002. Lemke Sales was dissolved shortly thereafter. Findings, ¶ 11.

In July 2007, the real property previously owned by Lemke Sales was transferred to Christine. Findings, ¶ 13. At that time, Christine was attempting to refinance the former Lemke Sales property with American General Credit. *Id.* After initially contacting Ag Credit regarding the November 2001 mortgage between Ag Credit and Lemke Sales, she contacted respondent seeking his assistance in getting the mortgage released. Findings, ¶ 14; *Tr.*, p. 151. Respondent's assistant contacted Ag Credit and requested that Ag Credit release the mortgage. *Tr.*, p. 422.

Upon review of its records, Ag Credit determined that it did not have a lending relationship with Lemke Sales as well as that Ag Credit had not prepared or otherwise approved of the November 20, 2001 mortgage. Findings, ¶ 15; *Tr.*, p. 41. Ag Credit refused to release the mortgage as requested by respondent. *Tr.*, p. 52.

On July 13, 2007, John J. Hunter, Jr., counsel for Ag Credit, wrote to respondent and advised respondent that Ag Credit had no record of the November 20, 2001 mortgage. Findings, ¶ 15; Relator's Exhibit 4. Hunter requested that respondent confirm the basis of the mortgage as well as provide any information that respondent had regarding who at Ag Credit requested the mortgage.

Upon receipt of Hunter's letter, respondent telephoned Hunter. Tr., pp. 44-45. During their conversation, respondent informed Hunter that Lemke Sales was in a difficult financial situation in 2001 when the mortgage was prepared. Hunter specifically recalled that respondent told him the mortgage was prepared to "create debt" between Ag Credit and Lemke Sales. Tr., p. 45. Hunter advised respondent during the call that Ag Credit would not sign the release. Respondent indicated that a quiet title action would need to be filed to resolve the matter and asked Hunter if Ag Credit would oppose the action; Hunter explained that he was not sure how Ag Credit would handle the matter. Id. Nevertheless, respondent never pursued the quiet title action on behalf of Lemke Sales. Tr., p. 427.

On August 1, 2007, respondent prepared and executed a document captioned "Release of Real Estate Mortgage in Favor of Ag Credit." Relator's Exhibit 2. Ag Credit did not authorize respondent to prepare or sign the release. Tr., p. 52. Until Ag Credit conducted a search, it was unaware that respondent had prepared and filed the release. Tr., p. 51. At the time respondent filed the release, Christine's mortgage with Ag Credit had been satisfied and released and Christine did not owe Ag Credit any money. Relator's Exhibits 10, 12 and 13.

SUBSTANTIVE LAW ANALYSIS

As respondent aptly noted in his objections, this case raised several interesting legal issues as well as ethical issues. While the witnesses spent significant time discussing preferential transfers, fraudulent conveyances and hypothecation agreements at the hearing, these concepts are not at issue and are not relevant to this matter. The testimony of the three expert witnesses, including Reginald Cooke,

relator's expert witness, was clear - Lemke Sales was likely not insolvent and never filed for bankruptcy.¹ Findings, ¶ 6. As such, the mortgages prepared by respondent and recorded on December 28, 2001 were neither preferential transfers nor fraudulent conveyances. The panel's analysis of the issues was thorough and the board's ultimate decision, that respondent acted improperly by preparing the mortgage without Ag Credit's knowledge and by releasing the mortgage without Ag Credit's assent or knowledge, was correct.

A MORTGAGE GIVEN WITHOUT THE KNOWLEDGE OF THE MORTGAGEE IS INVALID

Contrary to respondent's position, in order for a mortgage to be valid, the mortgagee, in this case Ag Credit, must have knowledge of the mortgage.

"A mortgage is frequently defined as a conveyance of property to secure the performance of some obligation, conditioned to become void on the due performance thereof." 69 O.Jur.3d, Mortgages and Deeds of Trust, §1. "Mortgages, being voluntary security agreements incident or collateral to a primary obligation, are susceptible to the same rules of interpretation and the same framework of analysis which apply to contracts generally." *Ogan v. Ogan*, (1997) 122 Ohio App.3d 580, 702 N.E.2d 472.

A contract, by its very nature, encompasses the premise that there must be an offer and acceptance between the parties to the contract, consideration and a meeting of the minds, and that lacking any of the requirements nullifies the contract. The same premise is equally true of a mortgage. The Richland County Court of

¹ In the findings at page 8, the panel incorrectly identified Reginald Cooke as respondent's expert witness. Relator offered the expert testimony of Cooke; respondent offered the expert testimony of James Nobile and J. Matthew Fisher.

Common Pleas considered the validity of a mortgage given by the plaintiff in a case to a fictitious person. *E.D. Houston v. H.S. Hettinger, John Berry, and Jacob Worst*, 23 Ohio N.P.(N.S.) 405, 1921 WL 1187 (Ohio Com. Pl.). The court stated:

It is a fundamental principle under the law of contracts, that in order to make a valid and binding contract it is necessary that there be parties capable of contracting and that their minds come together on the terms of the contract. A mortgage and note can be construed as nothing more than a contract between the parties whereby the grantee for consideration agrees to pay the grantor a certain sum of money.

Id.

In fact, the mortgage prepared by respondent on Lemke Sales' behalf contemplated two parties and an agreement. The mortgage included, among its provisions:

[T]he parties hereto intend for this Mortgage ...

...

Mortgagor grants Mortgagee a security interest therein and agrees to execute any and all financing statements, security agreements and other documents as Mortgagee shall reasonably request from time to time. ...

Mortgagor hereby irrevocably appoints Mortgagee as its power of attorney to execute any documents reasonably necessary to protect Mortgagee's interest ...

The policies shall contain the standard Ohio mortgage clause in the name of the Mortgagee and otherwise be on terms generally acceptable to Mortgagee.

...

Unless otherwise agreed, Mortgagee may apply said proceeds to the payment of the sums secured by this Instrument

Relator's Exhibit 1 (emphasis added). A mortgagee cannot "intend", "reasonably request", "generally accept" or "agree" if the mortgagee has no knowledge of the agreement. Any argument otherwise is wholly counterintuitive. See, Tr., p. 51.

Likewise, the Ohio Revised Code §5301.28 fully envisioned a mortgagee's knowledge of a mortgage by providing that the mortgagee release the mortgage to the extent the mortgagee received receipt of payment of the obligation.

Respondent's analysis of the *Alaska Seaboard Partners v. Godwin, et al.*, 2002-Ohio-5346, misses the point. In the case, the appellant, Hide A Way Hills Club, a subsequent mortgage holder, questioned the priority of another mortgage holder's, Alaska Seaboard's, position. Hide A Way Hills asserted that it had first priority because the Godwins, the property owner, did not own the property at the time they gave the mortgage. As support for its position, Hide A Way Hills pointed to the fact that the deed conveying the property to the Godwins was not recorded until after the Godwins gave the mortgage to Alaska Seaboard. Considering Hide A Way Hills' argument, the appellate court noted:

The flaw in appellant's argument is that it misinterprets when deeds and mortgages take operative effect. Contrary to the assertions in its brief, deeds do not transfer title when they are recorded. [Citations omitted.] Deeds pass title to real estate upon the execution, delivery and acceptance by the grantee. [Citations omitted.] Similarly, mortgages take effect upon their delivery to the mortgagee. *Sidle v. Maxwell* (1954), 4 Ohio St.236, 240; *Kemp v. Walker* (1847), 16 Ohio 119, 120-121; *Hood v. Brown* (1826), 2 Ohio 266, 269.

Id. (emphasis added). The court continued, noting that "[n]either side introduced any evidence as to when the deed was delivered to the Godwins or when the Godwins delivered the mortgage to the mortgagee" Id. Delivery

to the mortgagee requires receipt of the mortgage by the mortgagee. Ag Credit never received the mortgage from Lemke Sales - it was never delivered.

Contrary to respondent's argument, the mere recording of the mortgage is insufficient to give the mortgage holder notice. "The execution and delivery of a mortgage are intended to divest the mortgagor of his estate, and the recording of the mortgage to give notice to the world of its existence. So that a mortgage is valid and binding as such without record, as between the parties to the instrument." *John Sidle v. John Maxwell, et al.*, 4 Ohio St. 236, 1854 WL 74 (Ohio).

Similarly, in *Gatts, et al., v. E.G.T.G., GMBH, et al.* (1983), 14 Ohio App.3d 243, 246, 470 N.E.2d 425, 429, the appellate court, in considering the validity of a deed likened the deed to a mortgage, noting "[t]he general rule is that delivery is required to give effect to a mortgage, as well as acceptance." Continuing, the court stated "[t]he recording of a mortgage takes the place of a manual delivery, at least where there is an acceptance, or acceptance can be presumed . . ." *Id. quoting 37 Ohio Jurisprudence 2d (1959), 284, Section 98.*

Unlike the *Alaska Seaboard* and the *Gatts* matters, where the mortgagees were aware of the mortgages involved, Ag Credit, the mortgagee of the mortgage prepared by respondent on Lemke Sales' behalf, had no knowledge of the mortgage and the mortgage was never delivered to it. Acceptance by Ag Credit cannot be presumed. Hunter testified "[f]rankly, until we got the request to release the mortgage, we didn't even realize it was out there." *Tr.*, p. 47. Respondent does not dispute Hunter's statement.

Respondent cites several cases as support for whether there was consideration given to Ag Credit by Lemke Sales for the mortgage by Lemke Sales; respondent's reliance on these cases is mistaken. In every one of the cases cited by respondent as support for his position that the antecedent debt between Ag Credit and Christine was the consideration of the mortgage between Ag Credit and Lemke Sales, the mortgage holder was aware of and agreed to the new mortgage. Respondent has offered no cases that support his position that it was appropriate to give Ag Credit a mortgage that Ag Credit neither asked for nor knew of. One of respondent's experts, along with respondent, testified that he had never done what respondent did in this case. See, Tr., pp. 232 and 438.

The mortgage prepared by respondent between Ag Credit and Lemke Sales altogether lacked consideration. In the *Sur-Gro Plant Food* case cited by respondent, a third party, in that case the parents of a debtor, gave a mortgage to secure another's outstanding obligation, there, a son's debt. *Sur-Gro Plant Food Co. v. Morgan* (1985), 29 Ohio App.3d 124, 504 N.E.2d 445. While the court determined that the antecedent debt between the mortgagor's son and the mortgagee constituted sufficient consideration, it is the part of the court's opinion, however, that respondent omitted in his objections, which is particularly significant:

We find that the note and mortgage executed by Harry and Bertha Morgan were given in exchange for the antecedent debt of their son, Fred Morgan. As such, there was sufficient consideration for the instrument. While the parties may have contemplated that Fred Morgan would also sign the note, the absence of his signature does not affect his parents' obligation as makers of the note. The fact that the Morgans did not receive any actual proceeds

from the transaction does not invalidate the note for want of consideration. In accepting the note from the Morgans, Sur-Gro agreed to forbear from initiating an action against Fred Morgan to collect on the debt which he owed to Sur-Gro. Fred Morgan received the primary benefit of the transaction by receiving an extension on the payment of his obligation.

Id. at 130, 451 (emphasis added). Sur-Gro, the mortgage holder, was a party to the mortgage given by the Morgans and agreed, in exchange, to forgo initiating an action against their son, Fred Morgan. Contrarily, Ag Credit was unaware of the new mortgage and did not agree to do anything in exchange for the mortgage. "It is not necessary that the mortgagor receive the consideration or that it go directly to the mortgagor from the mortgagee; it is sufficient that the mortgagee part with the consideration." 69 O.Jur.3d, Mortgages and Deeds of Trust, §53. Ag Credit parted with no consideration. As the panel noted, "[t]hese mortgages were never requested by the mortgagees, the mortgage deeds were never delivered to the mortgagees, and the mortgages were not given for any extension of renewal of credit." Findings, ¶ 10.

Lemke Sales and Christine were not one and the same; this was true despite Christine's sole ownership of Lemke Sales. This was true despite Christine's personal guarantee on some of Lemke Sales' financial obligations. Christine was indebted to Ag Credit - her obligation was satisfied and Ag Credit accordingly released the mortgage; Lemke Sales never owed Ag Credit. Corporations and natural persons do not have the same rights and powers. For example, a corporation cannot initiate litigation in propria person or appear in court through an officer or agent of the corporation that is not an attorney. *Union Savings Ass'n. v. Home Owners Aid, Inc.* (1970), 23 Ohio St.2d 62, 262 N.E.2d 558.

Respondent repeatedly states that because relator cannot cite a case or a statute exactly on point he clearly cannot establish by clear and convincing evidence that respondent engaged in misconduct by preparing and filing a mortgage without the knowledge of the mortgagee. Respondent, however, has pointed to no case finding that it was proper to prepare and file a mortgage where the mortgagee was unaware of the mortgage.

Finally, even if the mortgage is determined to be valid, respondent's reason for providing it to Ag Credit - to create the appearance of debt - was improper. John Hunter, Ag Credit's counsel, testified that respondent told him that Lemke Sales gave the mortgage to Ag Credit to create debt to Ag Credit. Tr., p. 44. Hunter's testimony was fully supported by an email respondent wrote to Christine and the consulting firm setting forth exactly the same purpose - "they [Lemke's Sales creditors] must perceive that they will not otherwise collect from the company" and Lemke Sales must "eliminate the potential for equity in the real estate being made available for general unsecured creditors of the company." Relator's Exhibit 3. The panel, after assessing the credibility of the witnesses and hearing respondent's testimony as to why he did what he did, appropriately noted:

The panel feels that the arguments of Respondent regarding the legality of these instruments are questionable. Further, the panel does not conclude that the mortgages were given because of a concern that Lemke's creditors needed additional protection. Simply put, it believes that the mortgages were given for the reasons articulated by in his email: to create the appearance of debt.

Findings, ¶ 22.

ONLY A MORTGAGEE CAN RELEASE A MORTGAGE

Several sections in Chapter 53 of the Ohio Revised Code focus on the release of a mortgage. Each section refers to obligations of a mortgagee to release a mortgage that has been satisfied. For example, RC §5301.28 provides:

When the mortgagee of property within this state, ..., either by a separate instrument, or in writing on that mortgage, or on the margin of the record of the mortgage, ... receives payment of any part of the money due the holder of the mortgage, and secured by the mortgage, and enters satisfaction or a receipt for the payment ... will release the mortgage to the extent of the receipt.

RC §5301.34 provides:

A mortgage shall be discharged upon the record of the mortgage by the county recorder when there is presented to the county recorder a certificate executed by the mortgagee or the mortgagee's assigns

RC §5301.36 (B) provides, “[w]ithin ninety days from the date of satisfaction of a residential mortgage, the mortgagee shall record the fact of the satisfaction in the appropriate county recorder’s office” Furthermore, RC §5301.36 (C) offers direction as to what a mortgagor can do where a real estate mortgagee fails to timely record the release. Specifically, “[i]f a mortgagee fails to comply ..., the mortgagor may recover, in a civil action, damages of two hundred fifty dollars.” RC §5301.36 (C).

While certain circumstances may exist that would allow someone other than the mortgagee to release a mortgage, such as where an Affidavit of Facts is prepared and filed, none of those circumstances existed in this matter. See, Tr., pp. 52, 139, 226, 299 and 445.

“As a general rule, an effectual release of a mortgage may be made only by the owner of the obligation secured by the mortgage or, in other words, by the mortgagee or by his assignee or by someone authorized by such a mortgagee.” 69 O.Jur.3d, Mortgages and Deeds of Trust, §217. Exceptions to this general rule appear to be limited to where a mortgage is held by joint mortgagees, where the mortgagee is dead, and where the mortgagee has assigned its interest to another. Id., 69 O.Jur.3d, Mortgages and Deeds of Trust, §218.

Respondent relied on *Swartz v. Hurd and Leist*, 2 Ohio. Dec. Reprint. 134, 1858 WL 3798 (Ohio Com. Pl.), and *Snyder v. Castle* (1922), 16 Ohio App. 333, as support for his position that the statutory provisions regarding releases were not intended to be the exclusive means of releasing a mortgage. Neither *Swartz* nor *Snyder* suggest that someone other than a mortgagee can release a mortgage; rather, both detail situations where the requirements of the statute, such as the means of release, were not complied with, but the mortgagee still released the mortgage. In the *Swartz* matter, the original mortgagee of a mortgage released the mortgage after he had assigned it to another. 2 Ohio. Dec. Reprint. 134. In *Snyder*, the mortgagee signed a release, although the manner of doing so was not as prescribed by statute. *Snyder* at 3.

In *Springfield Fire & Marine Ins. Co., v. Wagner* (1906), 74 Ohio St. 484, 78 N.E.1137, this Court held “[i]t appearing from the plaintiff’s evidence that the mortgagee neither signed the release nor authorized it, it was error to admit in evidence the release on the mortgage record.” See, also, *German American Ins. Co., v. Wagner* (1906), 75 Ohio St. 580, 80 N.E.1127.

Additionally, while RC §1309.513 (UCC 9-513) permits a debtor to file a termination statement for the financing statement where the secured party fails to do so, no similar provision exists with regard to mortgages. Certainly, had the legislature so intended, it could have provided statutory authority permitting a mortgagor to release the mortgage where the mortgagee refused or failed to do so.

Lastly, the panel astutely noted that had respondent truly believed that someone other than Ag Credit could release the mortgage, he would never have contacted Ag Credit seeking its approval prior to the release. Findings, ¶ 31.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

RELATOR'S ANSWER TO PROPOSITION OF LAW NO. I

THE BOARD PROPERLY DETERMINED THAT RELATOR ESTABLISHED CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT ENGAGED IN MISREPRESENTATION BY EXECUTING THE MORTGAGE TO AG CREDIT

In 2001, respondent prepared and filed a mortgage purporting to give Ag Credit a secured interest on property owned by Lemke Sales. Ag Credit did not have a lending relationship with Lemke Sales at the time of the mortgage, or ever, having actually declined to give Lemke Sales a loan at one time. Tr., p. 55. While there was an outstanding loan by Ag Credit to Christine, Christine was in good standing on the loan, Ag Credit was fully secured and had not requested additional collateral. The November 20, 2001 mortgage, along with three others prepared and recorded by respondent, was given at a time that Lemke Sales was facing financial difficulties and was seeking to wind down the business. After December 28, 2001 when the mortgages were recorded, any of Lemke Sale' creditors conducting a title search of Lemke Sale' property in Marion County would have found four encumbrances on the

Lemke Sales property and would have believed the property to be encumbered for more than \$600,000.

Undoubtedly, if respondent "created debt" or prepared and recorded the November 20, 2001 mortgage to create the appearance of an encumbrance on the Lemke Sales property, where there was none, respondent's conduct violated DR 1-102 (A)(4). The question, whether respondent "created debt" in an effort to create the appearance of an encumbrance on the Lemke Sales property where there was none, was answered by the panel. Findings, ¶ 22. While the panel's analysis of the mortgage is at odds with the board's ultimate determination that respondent's conduct violated DR 1-102 (A)(4), the board properly reconciled the panel's finding that respondent's actions were both to create the appearance of debt and that there appeared to be no legal obstacle to Lemke Sale's doing so. Findings, ¶¶ 22 and 24.

Relator's expert, Reginald Jackson, testified:

I don't believe it's standard or appropriate to grant a mortgage or to file a mortgage in favor of a creditor without the creditor's knowledge and for the purpose of eating up or making the - having the appearance made that there's less equity in a particular piece of property than otherwise might exist in that property.

Tr., pp. 117-118. Jackson based his opinion, in part, on the email from respondent to Christine, noting: "there was a discussion of a strategy adopted by Mr. Ricketts on behalf of his client, the strategy being to give the appearance or to create the appearance of debt that perhaps did not exist." Tr., p. 118. See, also, Relator's Exhibit 3.

Respondent's experts also agreed that, if the mortgage created encumbrances where ones truly did not exist, a creditor could be misled. James E. Nobile testified

that the mortgage would “raise the specter of fraudulent transfer” and “[w]ithout further investigation, sure. It would be as a matter of record.” Tr., pp. 234-235. John M. Fisher further testified that “I would know there’s an encumbrance, but beyond that, I wouldn’t know to what extent that encumbers the property.” Tr., p. 297.

Hunter’s testimony at the hearing was particularly compelling. Hunter testified that Lemke Sales was not indebted to Ag Credit and, as such, the mortgage was “meaningless or valueless to Ag Credit.” Tr., p. 46. On cross-examination, Hunter continued:

In this case in particular we view the mortgage as fraudulent because, again, it was - it simply is an inappropriate mortgage, if that’s a better word. There never was a mortgage, there never was a debt. There was no underlying consideration out there.

In my opinion, that mortgage is fraudulent because it is out there on the public record and would mislead someone looking at the real estate records to suggest that Ag Credit properly had a mortgage against the two parcels of real estate described in that mortgage.

In my opinion, by publishing that in public record, you have created a document that gives a misperception that Ag Credit, in fact, had a mortgage when we didn’t. In my opinion, that’s a fraudulent mortgage.

Tr., p. 82.

Respondent, along with both of his experts, manipulated the facts to support their conclusion that, because Christine personally owed Ag Credit and because Christine was personally obligated on some of Lemke Sale’ obligations, the personal debt of Christine’s to Ag Credit was, as a matter of course, a debt owed by Lemke Sales as well. Christine and Lemke Sales are entities in their own right; one is not

automatically substituted for another merely out of convenience. Hunter, in response to relator's question as to whether Christine and Lemke Sales were interchangeable, replied, "Lemke Sales & Service is an entity in its own right. It is an Ohio corporation as recited by the mortgage. Ms. Lemke is an individual." Tr., p. 50.

Respondent's argument that he did not engage in "fraudulent" conduct or "fraud" wholly ignores that DR 1-102 (A)(4) as well as Prof. Cond. R. 8.4 (c) prohibits conduct involving "dishonesty, fraud, deceit or misrepresentation", not just fraud. Respondent violated DR 1-102 (A)(4) by preparing and filing a mortgage on behalf of Lemke Sales that purported to give Ag Credit an interest in Lemke Sales' property, where Ag Credit had no interest and had no lending relationship with Lemke Sales. This was a misrepresentation.

In *In re Eadie* (Or. 2000), 33 Or. 42, 53, 36 P.3d 468, 476, the Supreme Court of Oregon considered whether an attorney engaged in deceptive conduct during his representation of several clients, defining those misrepresentations that violate DR 1-102 (A)(3) as "an accused's misrepresentations, whether by direct or by omission, must be knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process."²

In *Columbus Bar Association v. Willette*, 117 Ohio St.3d 433, 2008-Ohio-1198, 884 N.E.2d 581, the Supreme Court of Ohio suspended an attorney for one year, with six months stayed, for, among other things, violating DR 1-102 (A)(4). Willette had entered into an agreement with Estate Planning Legal Services, P.C. ("EPLS") to

² Rule 1-102 (A)(3) of the Oregon Code of Professional Responsibility is identical to DR 1-102 (A)(4) of the Ohio Code of Professional Responsibility.

market and sell living trusts in Ohio. After being contacted by EPLS, Dale and Betty Trott retained Willette to assist them with their living trusts. Respondent met with the Trotts and obtained the information necessary to prepare the trusts, which he then provided to EPLS for completion of the trust documents. When the documents were finished, the Trotts met with an EPLS representative, who respondent explained would assist them in signing the trust documents and in funding the trust. During his representation of the client, Willette never advised the Trotts that he had a financial relationship with EPLS, that EPLS would be preparing the trust documents, or that the EPLS representative the Trotts met was going to try to sell them insurance. This Court determined that respondent had engaged in a number of misrepresentations by omission. Id. at 437, 586.

Respondent's actions created the false impression of a mortgage between Ag Credit and Lemke Sales where there was no loan to Lemke Sales and no outstanding obligation owed to Ag Credit. Ag Credit did not accept the mortgage and had no knowledge of the mortgage. By preparing and filing the November 20, 2001 mortgage between Lemke Sales and Ag Credit, respondent violated DR 1-102 (A)(4).

RELATOR'S ANSWER TO PROPOSITION OF LAW NO. II

THE BOARD PROPERLY DETERMINED THAT RESPONDENT ENGAGED IN MISCONDUCT BY PREPARING AND EXECUTING A RELEASE OF THE MORTGAGE PURPORTEDLY GIVEN TO AG CREDIT BY LEMKE SALES & SERVICES

In 2007, when Christine wanted to refinance the Lemke Sales property, she contacted Ag Credit regarding the November 20, 2001 mortgage. Ag Credit declined to release the mortgage because it had no record or knowledge of the mortgage. Thereafter, Christine contacted respondent, who, in turn, contacted Ag Credit,

because he knew that only a mortgagee could properly release a mortgage. When Ag Credit refused to release the mortgage, respondent prepared and filed a release of the mortgage, "Release of Real Estate Mortgage in Favor of Ag Credit." Relator's Exhibit 2. Ag Credit did not approve the release, was unaware of the release and did not authorize respondent to release the mortgage on its behalf.

The Board properly determined that respondent, by preparing and filing the release, violated Rule 8.4 (c) and Rule 8.4 (h) of the Ohio Rules of Professional Conduct.

The body of the release recites that the mortgage "has been satisfied and is fully released and discharged" - statements normally coming from the creditor that extended the credit. Taking the document as a whole, the inescapable impression is that Respondent is releasing the mortgage on behalf of Ag Credit; an impression that he clearly intended to create.

Findings, ¶ 30.

Only a mortgagee can release a mortgage held by the mortgagee. If the November 20, 2001 mortgage prepared by respondent was a valid mortgage, which relator questions, only Ag Credit, the holder of the mortgage, was capable of releasing the mortgage. By releasing the mortgage without Ag Credit's approval or authority, respondent engaged in misleading conduct. That respondent signed his name to the release and did not state that he was representing Ag Credit on the release is of no impact. To the contrary, it is more telling that respondent never provided Ag Credit with a copy of the release once he prepared and filed it.

RELATOR'S ANSWER TO PROPOSITION OF LAW NO. III

THE BOARD PROPERLY DETERMINED THAT A SIX-MONTH STAYED SUSPENSION OF RESPONDENT WAS WARRANTED GIVEN THE MISCONDUCT AT ISSUE AND THE MITIGATING AND AGGRAVATING FACTORS IN THIS MATTER

This is a matter of first impression in Ohio. Other courts have considered cases where the attorneys engaged in similar, albeit not the exact same, conduct as respondent and imposed sanctions ranging from a public reprimand to disbarment.

The Supreme Court of Iowa publicly reprimanded Attorney Judith M. O'Donohoe for making a false statement of fact on a recorded deed. *Committee on Professional Ethics and Conduct of the Iowa State Bar Assn. v. O'Donohoe* (1988), 426 N.W.2d 166. O'Donohoe represented her clients, Mr. and Mrs. Thome, in two legal matters; the second case involved the collection of a promissory note signed by the Thomes. Prior to the initiation of the collection action, the Thomes retained a different attorney to incorporate their business and transfer certain personal property to the corporation. The attorney did not prepare a deed transferring the property at that time.

On November 13, 1985, immediately before a judgment being rendered against them in the collection case, the Thomes requested O'Donohoe's assistance in preparing and filing the deed. O'Donohoe quickly prepared the deed, which falsely indicated that it was signed the "30th day of June, 1985" by Mrs. Thome. O'Donohoe further notarized Mrs. Thome's signature, indicating that Mrs. Thome had appeared before her on that date. In finding that O'Donohoe violated DR 1-102 (4) and DR 7-102 (5) of the Iowa Code of Professional Responsibility, the court noted "[s]ometimes it is evil intent that gets a lawyer into trouble; sometimes it is merely a failure to recognize the significance of action deliberately taken. Here that failure led Judith

O'Donohoe to knowingly make a false statement of fact on a document filed for public record.” Id. at 168.

New Jersey attorneys, Dante De Pamphilis and Lawrence Friedman, were reprimanded after recommending to their clients that they transfer property in an attempt to defraud creditors. *In the Matter of De Pamphilis and Friedman* (1959), 30 N.J. 470, 153 A.2d 680. When De Pamphilis met with his clients, the Zuccarellis, they explained that they were faced with financial difficulties. De Pamphilis inquired of the Zuccarellis whether they had someone they could transfer their property to in confidence; the Zuccarellis suggested their uncle. De Pamphilis referred the Zuccarellis to Friedman, who prepared the documents necessary to effectuate the transfer. The Supreme Court of New Jersey found that both of the respondents had recommended the transfer to the Zuccarellis' uncle and participated in a scheme to defraud creditors. Id. at 483, 687. Commenting on the attorneys' position that they were only doing as the client asked, the court quoted from Canon 32 of the New Jersey Canons of Professional Ethics, “no lawyer should ‘render any service or advice involving disloyalty to the law whose ministers we are ...’ and ‘when rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation.’” Id. at 484, 687.

The Supreme Court of New Jersey disbarred Attorney John P. Breen for, among other things, engaging in the preparation, executing and recording of four mortgages against his residence in an effort to defraud a judgment creditor. *In the Matter of Breen* (1989), 113 N.J.522, 552 A.2d 105. The court found that the mortgages were false, given for no consideration and, in at least one instance, the mortgagees had no

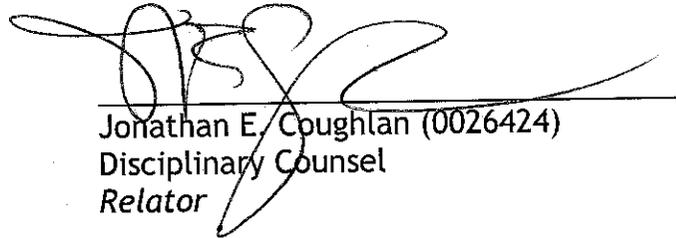
knowledge of the mortgage. *Id.* at 546, 116. See, also, *In re Levin* (2004), Commission No. 00 CH 72 [attorney suspended for 30 days after assisting his client transfer property while a citation to discover the client's assets and prohibiting the transfer of any property was pending]; *In re Doss* (1995), Commission No. 94 CH 220 [attorney publicly reprimanded for transferring his mother's property to himself, knowing that his mother would likely be without the assets necessary to satisfy her financial obligations].

At the hearing, the board appropriately considered the mitigation offered by respondent in determining that a stayed suspension, rather than an actual suspension, was warranted. This is not a matter similar to *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-120, where reasonable minds differ as to the "proper scope of advocacy." Rather, this is a case where the board, after considering all of the evidence presented, determined that respondent violated three different disciplinary rules and should be sanctioned. As such, relator requests that the Court adopt the Board's recommendation and suspend respondent for six months, with the entire suspension stayed.

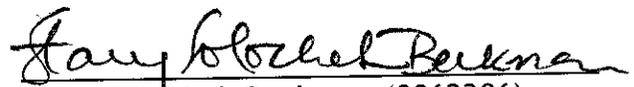
CONCLUSION

Relator established by clear and convincing evidence, and the Board properly found, that respondent violated DR 1-102 (A)(4) of the Code of Professional Responsibility and Rule 8.4 (c) and Rule 8.4 (h) of the Ohio Rules of Professional Conduct. Relator respectfully requests that the Board's Findings of Fact, Conclusions of Law and Recommendation be adopted in its entirety and that respondent be suspended from the practice of law for six months, with the entire suspension stayed.

Respectfully submitted,



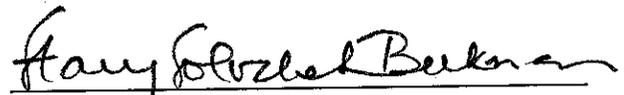
Jonathan E. Coughlan (0026424)
Disciplinary Counsel
Relator



Stacy Solochek Beckman (0063306)
Assistant Disciplinary Counsel
Counsel of Record
Office of Disciplinary Counsel of
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
Telephone (614) 461-0256
Facsimile (614) 461-7205
jonathan.coughlan@sc.ohio.gov
stacy.beckman@sc.ohio.gov

CERTIFICATE OF SERVICE

I hereby certify that RELATOR'S ANSWER TO RESPONDENT, RICHARD RICKETTS', OBJECTION TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE was served via U.S. Mail, postage prepaid, upon respondent's counsel, Alvin E. Mathews Jr., Esq., Bricker & Eckler LLP, 100 S. Third Street Columbus, OH 43215, and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215, this 22nd day of July 2010.



Stacy Solochek Beckman
Counsel for Relator

RECEIVED

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

MAY 06 2010

DISCIPLINARY COUNSEL
SUPREME COURT OF OHIO

| | | |
|----------------------------------|---|-------------------------------------|
| In Re: | : | |
| Complaint against | : | Case No. 09-017 |
| Richard Todd Ricketts | : | Findings of Fact, |
| Attorney Reg. No. 0033538 | : | Conclusions of Law and |
| | : | Recommendation of the |
| Respondent, | : | Board of Commissioners on |
| | : | Grievances and Discipline of |
| Disciplinary Counsel | : | the Supreme Court of Ohio |
| | : | |
| Relator. | : | |

¶1. This matter was heard on September 17, 2009, and January 22, 2010, upon a complaint filed by the Office of Disciplinary Counsel against Respondent, Richard Todd Ricketts of Pickerington, Ohio. The complaint charges the Respondent with violating DR 1-102(A)(4), and Prof. Cond. R. 8.4(c) and 8.4(h). The case was heard by a panel of members of the Board of Commissioners on Grievances and Discipline consisting of attorneys Janica A. Pierce Tucker, Joseph L. Wittenberg, and Stephen C. Rodeheffer, chair. None of the panel members resides in the appellate district from which the complaint originated or served on the probable cause panel that certified the complaint. Respondent appeared represented by Attorney Alvin E. Matthews, Jr., and appearing on behalf of Relator was Attorney Stacey Solochek Beckman.

FACTS

¶2. Cheryl Lemke is the widow of Michael Lemke who died in August 1993 as the result of a brain aneurysm that he suffered while operating a car. During his life Mr. Lemke had

developed a business known as Lemke Sales & Service that sold farm equipment and parts in Marion County, Ohio. Under his guidance the company grew to the point that it had two locations, and Mr. Lemke was contemplating a third location when he died.

¶3. Upon his death Ms. Lemke became the sole shareholder of the company. The new owner and operator attempted to keep the business going but apparently lacked her husband's business acumen, at least insofar as farm machinery was concerned. As the 1990's drew to a close, she found herself continually funneling personal funds into the enterprise to keep it going until finally she reached the determination that it was time to get out. Attempts were made to sell the business, but the high risk and low profit nature of the industry discouraged buyers. Finally in 2001 she reached the decision to liquidate the business, pay off her creditors and close the doors.

¶4. At this time Lemke Sales largest creditors were AGCO, to which it was indebted in the amount of \$830,000 for its equipment floor plan, Agri Credit (to be distinguished from Ag Credit referenced later) to which it owed \$130,000 for financing the parts division of the business, and Bank One in the amount of \$180,000 for a credit line. Bank One held a security interest in personal property owned by the business. It should be noted that Ms. Lemke was personally obligated on all of these debts. In addition to these three major creditors, Lemke Sales also owed a number of lesser, unsecured creditors. The total amount of the company indebtedness, both secured and unsecured, was approximately \$1,200,000. (Ex. A)

¶5. Aside from her ownership interest in Lemke Sales, Ms. Lemke personally owned a farm, some rental properties and a residence. At the time of the liquidation her personal assets were secured by mortgages to a variety of banks including Marion Bank, Bank One and a farm

credit company in Toledo, Ohio, by the name of Ag Credit. She testified that much of the debt that she personally owed were funds that had been used to keep Lemke Sales afloat financially.

¶6. While Lemke Sales was struggling, the undisputed testimony of all the witnesses in the case was that the company was solvent. It had assets, cash flow, and was meeting its obligations as they came due, albeit with difficulty.¹ Further, there was no pending or threatened litigation against the Company, and no assets had been repossessed.

¶7. The consulting company that Lemke hired to do an analysis of her business operations referred her to the Respondent for legal assistance in completing a liquidation of the company. Lemke told the panel that she expected Respondent to effect an orderly liquidation, and to keep company creditors from panicking and moving against their collateral or filing suit while the sale was being organized.

¶8. After being hired, Respondent analyzed the company's financial situation and was surprised to find that Lemke Sales owned two pieces of real estate on which the company operations took place that were entirely unencumbered. For reasons that will be discussed later in this Recommendation, Respondent decided that Lemke Sales would execute mortgages on these properties to four personal creditors of Lemke: Bank One, Marion Bank, Ag Credit and a man by the name of Ray Hildreth to whom Lemke owed \$15,000. Three of these creditors, Bank One, Marion Bank and Ag Credit, already held collateral in the form of mortgages on real property owned personally by Lemke. None of these creditors, except Bank One, had loans with Lemke Sales. In fact, Ag Credit declined to loan Lemke Sales money sometime prior to the events at issue in this disciplinary proceeding.

¹ Lemke did admit to being two payments behind to Bank One, but that she had spoken with the company about this. (Tr. 170)

¶9. The mortgages were signed by Lemke on behalf of Lemke sales in November, 2001, and were recorded with the Marion County Recorder on December 28, 2001. The mortgages were structured by Respondent as follows:

a. Business Property #1

- i. Bank One - \$173,000
- ii. Marion Bank - \$250,000
- iii. Ag Credit - \$300,00

b. Business Property #2

- i. Marion Bank - \$250,000
- ii. Bank One - \$200,000
- iii. Ray Hildreth - \$15,000
- iv. Ag Credit - \$300,000

(Ex. A)

¶10. These mortgages were never requested by the mortgagees, the mortgage deeds were never delivered to the mortgagees, and the mortgages were not given for any extension or renewal of credit. Indeed, Lemke was current on all of the obligations that she personally owed to these finance companies.

¶11. An auction of the company's personal property assets occurred sometime in 2002. The proceeds from the auction were insufficient to payoff all of the creditors, and Lemke provided \$60,000 of her personal funds to make up the deficiency. Only one creditor, Agri Credit, came up short in the amount of \$30,000. However, Lemke explained that Agri Credit agreed to absorb this deficit in return for Lemke not pursuing legal action against it based on the manner in which Agri Credit had valued the collateral Lemke Sales had surrendered to it.

¶12. It appears from the evidence that after the liquidation everyone was satisfied. The creditors had been paid and Lemke had managed to successfully wind up a business that was causing her a great deal of stress. Lemke was completely satisfied with the work that

Respondent performed for her and offered no criticism of his legal representation at the hearing on the Relator's complaint. (Tr. 157)

¶13. Five years later, in 2007, Lemke was in the process of constructing a building on the Lemke Sales real property (now titled to her) and she went to American General Finance to obtain a \$60,000 mortgage loan on the property to finance the project. American General performed a title search of the properties and discovered that the mortgages that had been placed against the property by the Respondent in 2001 were still of record and unreleased. When contacted, Marion Bank and Bank One released the mortgages. Ag Credit, on the other hand, would not.

¶14. Initially Lemke called Ag Credit herself and was told by a representative of the company that they never had a loan with Lemke Sales and had nothing on their records regarding a mortgage. The company declined to issue a release. Lemke then re-connected with Respondent and asked him to take care of the matter.²

¶15. Respondent directed his legal assistant to call Ag Credit and request a release. Again, Ag Credit declined for the same reasons given Lemke. At this point the matter was referred to the company's outside legal counsel, Attorney John Hunter of Toledo. Hunter wrote Respondent informing him of Ag Credit's position in the matter. This letter prompted Respondent to call Hunter and a phone conversation took place, the contents of which are subject to dispute. Hunter testified that he pointed out to Respondent that Ag Credit had no record of a loan transaction and did not have a mortgage. According to Hunter, Respondent responded as follows:

² It is unclear how and when the other mortgages encumbering the property were released. Suffice it to say that Marion Bank, Bank One and Ray Hildreth all voluntarily released their mortgages.

“[He] had indicated to me at that time that he understood that there was no obligation with Lemke Sales & Service. He indicated, as well, that there was some sort of financial difficulty at Lemke Sales & Service and that, as he put it, they had created debt to Ag Credit and that the mortgage was granted to Ag Credit to – I believe the term was to protect the interest of Ag Credit.” (Tr. 44-45) Hunter then told Ricketts that his client felt that a fraud had been perpetrated on creditors, and that it would not be a party to that fraud by issuing a release of the mortgage lien.

¶16. Respondent testified that he does not recall using the terms "create debt" in the phone conversation with Hunter. His version of the conversation is that he repeatedly asked Hunter whether Lemke owed Ag Credit any money and that Hunter admitted that she did not. When Hunter still declined to release the mortgage Respondent said he felt like he was being subjected to some kind of "April Fools Joke." He told the panel that he was simply "dumbfounded" by Hunter's position. (Tr. 424-428)

¶17. At this point Respondent decided that his only course of action was to file a quiet title or declaratory judgment action to get the title to the properties cleared. However, Lemke informed him that she could not wait for a legal proceeding of this type to run its course. She told him that she had outstanding obligations that needed to be paid and that she needed the American General loan to be completed immediately. Respondent, then, drafted and signed a release of Ag Credit's mortgage and had Lemke take it to the Marion County Recorder and file it. Apparently this document satisfied the individual doing the title work for American General, because the loan was eventually consummated.

¶18. Hunter, at his client's behest, ultimately complained of Respondent's actions to the Office of Disciplinary Counsel and these proceedings followed. Relator alleges that the

execution and recording of the mortgages and the execution and recording of the "release" constitute unethical conduct. Because the panel views these two events as being different in character they will be dealt with separately.

CONCLUSIONS OF LAW

MORTGAGE

¶19. Relator has alleged in its complaint that the filing of the mortgage on December 28, 2001,³ was a violation of DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation]. Relator contends that Respondent engaged in conduct designed to deceive creditors by having his client execute and then record a document whose purpose was to make creditors think that the real estate owned by Lemke Sales was encumbered by multiple mortgages when in fact the tracts were not. In support of this conclusion Relator points to the following:

a. Lemke Sales owed nothing to Ag Credit and no new loan had been transacted despite recitations in the documents that would indicate otherwise.⁴ Thus, says counsel for Relator, the mortgages were not supported by any consideration.

b. The mortgage was illegal because the mortgage was never requested by Ag Credit, was never delivered to Ag Credit and they were otherwise completely ignorant of the document's existence until 2007 when a release was requested by Lemke.

c. Respondent admitted in his phone conversation to Hunter that the purpose of the mortgage was to make it look like the properties were encumbered. Though Respondent says he

³ The complaint incorrectly alleges that it was filed in March 2001.

⁴ The mortgage recites that it is being given "for new consideration to secure the outstanding obligations of Mortgagor". The mortgage later provides that it is being given "as additional collateral security for the Obligation and any other obligations of Mortgagor to Mortgagee in any form or fashion..." (Rel. Ex. 1)

does not recall making this statement, Hunter's version of the conversation is supported by an email to Lemke and her consulting firm in the early stages of his representation of her in 2001. (Ex. 3 and M) In that communication that Respondent admits he authored, he sets forth a proposed strategic plan for his new client that included getting the secured creditors to take their equipment back in full satisfaction of their debt. He goes on to tell Lemke that in order to accomplish this "... they must perceive that they will not otherwise collect from the company." He further added that they needed to "... eliminate the potential for equity in the real estate being made available for general unsecured creditors of the company..." Id.

¶20. Respondent and his three expert witnesses understandably have a different perspective. They feel that the mortgages were legal because Lemke was personally in debt to Ag Credit, Bank One, and Marion Bank. Since much, if not all, of the borrowed funds owed to these banks went to keep Lemke Sales afloat the mortgages were legally given to these banks to provide additional security for Lemke's loans. They conclude that while one may disagree with the strategy of gratuitously using company property as collateral to secure the personal obligations of the company's sole shareholder, there is certainly nothing unethical in doing so.

¶21. Respondent also argues that placing the mortgages of record was indispensable to an orderly liquidation of the company's assets. It was Lemke's intention from the beginning to see that all of her creditors got paid. Indeed, for the secured creditors this was critical since she was obligated personally on those loans. Had the creditors gone into panic mode when the liquidation was announced and started racing to the courthouse to get a head start on obtaining a judgment, the liquidation would have been much more difficult, if not impossible. The mortgages were meant to discourage creditors from bolting and moving against the property outside the liquidation process.

¶22. The panel feels that the arguments of Respondent regarding the legality of these instruments are questionable. Further, the panel does not conclude that the mortgages were given because of a concern that Lemke's creditors needed additional protection. Simply put, it believes that the mortgages were given for the reasons articulated by in his email: to create the appearance of debt.

¶23. The panel also believes that the mortgages were of doubtful legality. Mortgages and the provisions contained in them have generally been construed in accordance with contract principles. See *Bank One v. Wilborn*, 121 Ohio St.3d 546, 2009-Ohio-306. Since Ag Credit was not a party to the issuance and execution of this mortgage thus there clearly was no contractual agreement underlying the document. Furthermore, it is generally held that a mortgage is not effective until there has been delivery and acceptance by the mortgagee. *Alaska Seaboard Partners v. Godwin* (2002), 4th App Dist No 02 CA5, citing *Sidle v. Maxwell* (1854), 4 Ohio St. 236.

¶24. Notwithstanding this conclusion, the panel feels that the legality of the mortgage is not the real issue in this case. At the worst these transfers were fraudulent transfers subject to being set aside by the creditor under R.C. §1336.07. Given the fact that the evidence in this case shows that Lemke Sales & Service was solvent, that it was meeting its obligations and paying its bills, that no creditor had attempted to repossess its collateral and no creditor had filed suit, there appears to be no legal obstacle to the company creating the "appearance of debt" as Ricketts described it. Lemke's right to pursue this course of action is further buttressed by the fact that from the beginning it was her intention to pay her creditors both for moral reasons and the practical reason that she was personally obligated on a great majority of these obligations.

¶25. Thus, the panel has concluded that if, under these circumstances, Respondent decides to attempt to give Lemke's personal creditors a mortgage, there appears to be no reason why he could not carry out this plan. Lemke was not under any contractual, statutory, or other restriction preventing her from alienating her property in any manner she deemed fit. One might call the conduct "sharp practice" but in the panel's opinion it falls within the Supreme Court's admonition in *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-120 that [I]awyers are permitted to advance claims and defenses for which "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." *Rust*, at 312 ¶42. In this same decision, the Supreme Court points to the following language in the comment to Prof. Cond. R. 3.1 saying: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." *Id* at 313 ¶44.

¶26. Respondent in this case wanted to employ the best means possible to maintain order in the liquidation of Lemke Sales. While granting Lemke's personal creditors a mortgage that they did not solicit may be of questionable legality, in the panel's opinion the conduct comes within "the proper scope of advocacy." The panel therefore recommends that the allegation that Respondent violated DR 1-102(A)(4) be dismissed.

RELEASE

¶27. The Relator has alleged in its complaint that the drafting and recording of the mortgage release is in violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation] and 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]. The panel agrees with Relator.

¶28. Respondent argues that once the underlying obligation supporting the mortgage is satisfied the mortgage is discharged.⁵ *Jennings v. Wood*, 20 Ohio 261 (1851). See 69 Ohio Jur. 3d Mortgages § 200.

¶29. While it may be true that the mortgage is "discharged" once the loan it secures is satisfied, the law clearly does not give the mortgagor the option of making that determination and discharging his own mortgage. R.C. §5301.34 states that a mortgage is to be released of record when the recorder is presented with "a certificate executed by the mortgagee ... certifying that the mortgage has been paid and satisfied." The case law on the subject also supports the proposition that the mortgagor is the proper party to release a mortgage. See *Upjohn v. Ewin*, 2 Ohio St. 13 (1853); *Bostian v. Cholley*, 47 Ohio App. 295 (1933).

¶30. Respondent argues that the document that he filed contains no incorrect statement of fact or law. This may be a correct statement, however, the document was clearly meant to mislead the recorder, the public and specifically American General Finance. It is headed with the words "RELEASE OF REAL ESTATE MORTGAGE IN FAVOR OF AG CREDIT". The body of the release recites that the mortgage "has been satisfied and is hereby fully released and discharged" -- statements normally coming from the creditor that had extended the credit. Taking the document as a whole, the inescapable impression is that Respondent is releasing the mortgage on behalf of Ag Credit; an impression that he clearly intended to create. (Ex. 2)

⁵ In this case Lemke's personal obligation to Ag Credit was paid off in 2005 when she sold her farm.

¶31. None of Respondent's experts who opined that there was no law preventing a mortgagor from releasing a mortgage could remember ever seeing it done. Respondent himself implicitly acknowledged the fact that the power to release the mortgage was held by Ag Credit when he called the company seeking the release. Had Respondent really believed that Lemke held the authority to release the company's mortgage he would never have phoned Ag Credit in the first place and requested a release. Furthermore, the evidence showed that had Lemke not impressed upon Respondent the urgency of getting something done, Respondent would have sought a resolution of the matter with legal action.

¶32. Respondent's conduct was intended to mislead, and the panel believes that Relator has proven by clear and convincing evidence that in preparing and recording the release of mortgage, Respondent violated Prof. Cond. R. 8.4(c) and 8.4(h) as alleged.

RECOMMENDED SANCTION

¶33. The panel has reviewed the guidelines for imposing lawyer sanctions found in BCGD Proc. Reg. 11 and makes the following findings:

¶34. Aggravating Facts The only aggravating fact that the panel finds present in this case is that Respondent steadfastly clings to his belief that what he did was both legal and ethical. To this extent he has refused to acknowledge the wrongful nature of his conduct. However, given the fact that three qualified lawyers that practice in this area agreed with him on this subject, the panel declines to put a great deal of weight on this fact.

¶35. Mitigating Facts. There are a great many mitigating facts to be considered:

- a. Respondent has practiced law 24 years with no disciplinary action against him.
- b. The drafting of the release was not the product of a selfish motive on his part. He impetuously filed the document in response to his client's need to conclude a loan with her bank.

c. There is no indication that Respondent was less than cooperative with Disciplinary Counsel. Relator admits in its post trial brief that Respondent cooperated, and counsel for the Respondent complained during the hearing and in his post trial brief that Relator did not include Respondent enough in the preliminary investigation that took place before the complaint was filed.

d. The panel was extremely impressed by Respondent's reputation not only in the legal community within which he practices, but also the community in which he lives. He has lectured at well over a hundred seminars dealing with farm property and debtor/creditor law and has testified as an expert witness in both state and federal cases. From all appearances he has a successful law practice and is well respected by his peers. Outside of his professional life he is active in community organizations, including his church. Furthermore he is involved with the activities of his family, and he volunteers many hours of his time to charitable organizations.

¶36. Respondent asks that the charges against him be dismissed, but that if an ethical violation is found that he receive no actual time off from the practice of law.

¶37. Relator asks that Respondent be suspended from the practice of law for six months. Noting that this is a fact situation without precedent in Ohio, Disciplinary Counsel cites a number of cases (all from jurisdictions outside of Ohio) noting that similar conduct has received a public reprimand to disbarment. In *Iowa State Bar v. O'Donohoe*, 426 N.W.2d 166 (1988), the Supreme Court of Iowa recommended a public reprimand for a lawyer that drafted and then back dated a deed for clients against whom a summary judgment was about to be entered for a substantial amount of money. The deed was executed to complete a transaction between the client and the corporation they had formed for their farming operations some five months earlier. As part of the incorporation process the client and his wife were to transfer land

to the company in exchange for stock certificates. For some reason the transfer had never been completed so the respondent used this transaction as a justification for moving the land out of the clients' names. The respondent dated the deed not the date it was executed, but the date of the formation of the company. The Iowa Supreme Court agreed with the characterization of the respondent's conduct as "an isolated incident in an otherwise exemplary career." *Id.* at 168. The same characterization could be used in this Respondent's case.

¶38. In a New Jersey case cited by Relator⁶ two attorneys were publicly reprimanded for engaging in the transfer of a clients' property to one of the client's uncles. In this transaction the pair engaged in creating sham documentation that the uncle had actually paid something for the properties. Further, the transfers were made when the clients were unquestionably in default of obligations owed on a business that had recently acquired.

¶39. Relator cited only one case that resulted in a sanction involving actual time off from the practice of law. *In the Matter of Breen*, 113 N.J.522 (1989), the respondent was disbarred for putting multiple mortgages on his property to avoid a judgment creditor. The panel finds this case clearly distinguishable for a number of reasons. First, the respondent was not only guilty of putting these mortgage against his property, he was disciplined for multiple other offenses involving neglect and dishonesty. The opinion also indicates that he was less than cooperative in the disciplinary process. Second, the respondent was clearly insolvent and on the verge of losing the home when he made the transfers.

¶40. The panel is mindful that the presumptive sanction for a lawyer found guilty of dishonesty, fraud or deceit is an actual suspension. *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 1995-Ohio-261; *Disciplinary Counsel v. Greene*, 74 Ohio St.3d 13, 1995-Ohio-97. On the other hand there have been instances where the Supreme Court found a violation of

⁶ *In re De Pamphilis*, 30 N.J. 470 (1959)

DR 1-102(A)(4) and imposed a stayed suspension or a public reprimand. *Lake County Bar Assn. v. Ezzone*, 102 Ohio St.3d 79, 2004-Ohio-1774; *Cleveland Bar Assn. v. Russell*, 114 Ohio St.3d 171, 2002-Ohio-3603.

¶41. The panel has found that Respondent's misconduct consists of his releasing a mortgage that was of questionable legality to begin with. Further, Ag Credit, Lemke Sales's creditors, and the public have sustained no harm. And while it is true that Respondent has failed to acknowledge that his conduct was wrong, this lack of remorse derives more from a difference of opinion than an inherent character flaw. Finally, the overwhelming mitigating factors, including character evidence, convince the panel that a public reprimand is the appropriate sanction.

¶42. The panel therefore recommends that Respondent, Richard Todd Ricketts, be publicly reprimanded.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on April 9, 2010. The Board adopted the Findings of Fact, and Conclusions of Law of the Panel except that it found that Respondent violated DR 1-102(A)(4) in executing the mortgages. In light of this finding, the Board recommends that Respondent, Richard Todd Ricketts, be suspended from the practice of law in the State of Ohio for six months with the entire six months stayed. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendations as those of the Board.



JONATHAN W. MARSHALL, Secretary

Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

**RELEASE OF REAL ESTATE MORTGAGE
IN FAVOR OF AG CREDIT**

KNOW ALL MEN BY THESE PRESENTS: That for good and valuable consideration, the mortgage in favor of AG Credit as against LEMKE SALES & SERVICE, an Ohio corporation, which Mortgage is recorded in Official Record Volume 594, Page 752, in the Recorder's Office of Marion County, Ohio has been satisfied and is hereby fully released and discharged.

IN WITNESS WHEREOF, the undersigned has executed this Release of Real Estate Mortgage this 1st day of August, 2007.

By: *Richard T. Ricketts*
Name: Richard T. Ricketts

Sworn to and subscribed before me this 1st day of August, 2007.



Richard T. Ricketts

AMY L. SLANE
Notary Public, State of Ohio
My Commission Expires
9.27.09

Amy L. Slane
Notary Public

THIS INSTRUMENT PREPARED BY:
RICHARD T. RICKETTS, ATTORNEY AT LAW
RICKETTS CO., L.P.A.
50 HILL ROAD SOUTH
PICKERINGTON, OHIO 43147
P: 614-834-8246 / F: 614-834-8238

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Westlaw

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(Cite as: 426 N.W.2d 166)

C

Supreme Court of Iowa.
COMMITTEE ON PROFESSIONAL ETHICS
AND CONDUCT OF THE IOWA STATE BAR
ASSOCIATION, Appellee,

v.

Judith M. O'DONOHUE, Appellant.
No. 87-1760.

July 20, 1988.

The Grievance Commission recommended that attorney be reprimanded for lack of due care resulting in misrepresentation in preparation of a deed. The Supreme Court, Neuman, J., held that a reprimand is warranted for knowingly making a false statement of fact on a document filed for public record.

Reprimanded.

Harris, J., dissented in part and filed opinion in which Snell, J., joined.

West Headnotes

Attorney and Client 45 ⇨ 59.8(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k59.1 Punishment; Disposition

45k59.8 Public Reprimand; Public
Censure; Public Admonition

45k59.8(1) k. In General. Most

Cited Cases

(Formerly 45k58)

Reprimand is warranted for knowingly making a false statement of fact on document filed for public record. Code of Prof.Resp., DR 1-102(A)(4, 6), DR 7-102(5)(A).

*166 Thomas J. Levis, Des Moines, for appellant.

James E. Gritzner of Nyemaster, Goode, McLaugh-

lin, Emery & O'Brien, P.C., Des Moines, for appellee.

Considered en banc.

NEUMAN, Justice.

The Committee on Professional Ethics and Conduct of the Iowa State Bar Association (committee) charged that attorney Judith M. O'Donohue intentionally falsified a warranty deed in order to obtain a fraudulent advantage for her client. A division of the Grievance Commission (commission) heard the evidence in support of the claim and found the committee failed to prove that O'Donohue willfully violated the Code *167 of Professional Responsibility. Nevertheless, it recommended that this court reprimand O'Donohue for lack of due care resulting in a misrepresentation. Reviewing this decision on appeal, we agree with the result reached by the commission and its recommended sanction.

I. *Background.* The facts in this disciplinary action are essentially undisputed. At issue are the inferences that follow from those undisputed facts.

Respondent Judith M. O'Donohue has been engaged in the practice of law in Charles City, Iowa, since her admission to the bar in 1976. This action arose out of her representation of Leon and Joan Thome in connection with two lawsuits brought by the Staceyville Lumber Company against them.

The first suit involved a mechanic's lien foreclosure, settled in 1983 upon Thome's execution of a short-term promissory note. When the Thomes failed to make the promised payments on the note, the lumber company commenced the second suit, a collection action, in September 1985. This matter was scheduled for a summary judgment hearing on November 13, 1985. O'Donohue advised her clients that they had no valid defense to the action and judgment would be entered accordingly.

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(Cite as: 426 N.W.2d 166)

Earlier, however, in April 1985, Thomes had incorporated their farming operation with the assistance of an attorney in Mason City. The minutes of the organizational meeting of the corporation reflected Joan Thome's intent to transfer thirty acres of Mitchell County farmland to the corporation in exchange for corporate stock. The record reveals, however, that the attorney handling these corporate matters did not prepare a deed to effect this conveyance.

Because of this incorporation, Joan Thome called O'Donohoe just prior to the lumber company's summary judgment hearing on November 13, 1985, to inquire whether the corporate minutes would suffice to insulate the property from the impending judgment lien. O'Donohoe advised that the minutes would not protect them. She suggested Mrs. Thome bring her abstract to the office immediately so that a deed could be prepared.

Over the noon hour, O'Donohoe hastily prepared a handwritten deed purporting to convey Joan Thome's thirty acres to the corporation. O'Donohoe misstated the name of the corporation and failed to join Leon Thome as a grantor for the purpose of releasing his dower interest. It was not these mistakes, however, but other details surrounding the execution of the deed, that formed the basis for the committee's complaint.

Specifically, the deed recited that it was "[s]igned this 30th day of June, 1985" by Joan Thome. The acknowledgement executed by O'Donohoe as notary public also specified that Thome personally appeared before O'Donohoe on June 30, 1985, for the purpose of executing the deed on that date. The date, of course, was really November 13, 1985, and Joan Thome recorded the deed just ten minutes before judgment in favor of the Staceyville Lumber Company was entered against the Thomes.

Further facts will be detailed as they become pertinent to the parties' arguments.

II. *Arguments.* The committee claims that by pre-

paring and notarizing the back-dated deed, O'Donohoe willfully violated the following provisions of the Iowa Code of Professional Responsibility for Lawyers: EC 1-5 (a lawyer should maintain high standards of professional conduct); DR 1-102(A), (1), (3), (4), (5) and (6) (a lawyer shall not violate a disciplinary rule; engage in illegal conduct involving moral turpitude; engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; engage in any other conduct adversely reflecting on fitness to practice law); and DR 7-102(A)(1), (3), (4), (5), (6) and (7) (a lawyer shall not take action on behalf of a client that merely serves to harass or maliciously injure another; conceal or knowingly fail to disclose that which is required by law to be revealed; knowingly make a false statement of law or fact; create or preserve evidence known to be false; counsel or assist a client in conduct known to be illegal or false).

*168 O'Donohoe's response to these allegations has four components. First, she contends that she deliberately dated the deed as she did, not for the purpose of **misleading** anyone, but to conform it to her understanding of the actual transaction between the parties. Second, she maintains that she fully intended to notarize the **document** using the actual date signed (November 13) but, in her haste, inadvertently carried the June date down to the acknowledgement. Third, she asserts that if the transfer of property to the farm corporation was not fraudulent (there being no evidence that the transaction was other than bona fide and for adequate consideration), then her careless preparation of the document to effect the transfer cannot be deemed fraudulent. Finally, she argues that her reputation as an attorney of honesty and integrity belies the suggestion that she would participate in a deceitful scheme to defraud a creditor.

Familiar rules guide our consideration of these conflicting arguments. The burden is upon the committee to prove its case by a convincing preponderance of the evidence. *Committee on Professional Ethics & Conduct v. Davidson*, 398 N.W.2d 856, 856

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(Iowa 1987). This quantum of proof is greater than that required in a civil trial, but less than required to sustain a criminal conviction. *Committee on Professional Ethics & Conduct v. Hurd*, 375 N.W.2d 239, 246 (Iowa 1985). Our review of the evidence is de novo. Iowa S.Ct.R. 118.11. Though we are not bound by the commission's findings, we give them weight, especially when considering the credibility of witnesses. Iowa R.App.P. 14(f)(7); *see also In re Marriage of Webb*, 426 N.W.2d 402, 404 (Iowa 1988) (court defers to fact finder who "has the opportunity to observe the demeanor of the witnesses as they testify and to formulate an appropriate impression of the witnesses' credibility based on that demeanor").

This case turns on the credibility of witnesses. In support of its petition, the committee offered the testimony of attorney Michael Gross, at whose behest the complaint was filed. He is the attorney for the Staceyville Lumber Company. After filing an action to set aside the November 13 deed, he received a phone call from O'Donohoe inquiring about the deadline to answer the petition. Although he professed no independent recollection of their conversation, his handwritten memorandum of the call cryptically suggested that O'Donohoe told him the Thomes were in fact in her office on June 30 to sign the deed and that she did not know why they waited until November 13 to file it.

Before the commission, O'Donohoe not only adamantly denied having discussed these dates with Gross, she disputed the committee's proffered translation of Gross' memo. In its findings, the commission clearly rejected the committee's version and accepted O'Donohoe's, stating:

The Commission believes the testimony of Respondent that she felt she was conforming the date of the deed to the minutes of the organizational meeting of her client's corporation formed earlier that year. The Commission further finds that her testimony that she acted under time pressure and without careful consideration of the circumstances explains the mistake she made in not-

arizing the deed with an incorrect date.

From our independent review of the record, we cannot quarrel with the commission's conclusion.

Contrary to O'Donohoe's assertion, however, her actions on November 13 are not entirely excusable. Even if we accept, as did the commission, that O'Donohoe mistakenly notarized the deed with an incorrect date, we are still left with her misrepresentation regarding the date on which the deed was executed by Joan Thome. By her own admission, this back-dating was a deliberate misstatement of the true facts that was not explained in the body of the deed.

As aptly observed by counsel for the committee, lawyers find themselves in disciplinary proceedings for a variety of reasons. Sometimes it is evil intent that gets a lawyer into trouble; sometimes it is merely a failure to recognize the significance of action deliberately taken. Here * that failure led Judith O'Donohoe to knowingly make a false statement of fact on a **document filed for public record**. A convincing preponderance of the evidence persuades us that her actions misled opposing counsel as well as the general public and thereby violated DR 1-102(4) and DR 7-102(5) of the Iowa Code of Professional Responsibility for Lawyers.

III: *Disposition*. We are convinced that O'Donohoe's actions fall far short of the committee's claim that she engaged in a deliberate scheme to defraud Thomes' creditors. Nevertheless, her conduct—both deliberate and inadvertent—adversely reflects on her fitness to practice law. *See* DR 1-102(6).

The commission viewed O'Donohoe's lapse in good judgment as an isolated incident in an otherwise exemplary career. We can reach no other conclusion from the record made before the commission. In this respect we find the case similar to *Committee on Professional Ethics & Conduct v. Roberts*, 312 N.W.2d 556 (Iowa 1981). There, a lawyer signed his client's name to a completed financial affidavit

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(Cite as: 426 N.W.2d 166)

and presented it to the court in order to promptly obtain temporary support in a dissolution proceeding. Although the client's rights were not adversely affected, the signature was unauthorized and the court was thereby misled by the false affidavit. *Id.* at 557. Because we recognized that it is prejudicial to the administration of justice to use untruthful means to accomplish even a lawful purpose, we found Roberts violated our ethical standards. However, because of his otherwise excellent reputation for truth and veracity, we reprimanded him rather than imposing a more grave sanction. *See id.* at 557-58.

Like Roberts, Judith O'Donohoe sought only to zealously represent her clients' interests. But in doing so she departed from her usual course of honesty and straightforwardness and misled opposing counsel and the public with a poorly drawn and falsely dated deed. For that unethical behavior, we hereby reprimand her.

ATTORNEY REPRIMANDED.

All Justices concur except HARRIS and SNELL, JJ., who dissent.

HARRIS, Justice (dissenting in part).

I respectfully dissent from the majority selection of a sanction. It seems inescapable to me that the respondent deliberately attempted to **mislead** her clients' creditors by notarizing a **document** with the wrong date. The record is clear that she believed at the time that the date was critical to her clients' rights and to those of their creditors. On this record I cannot believe the incorrect date was placed there in error.

I disagree that the facts here square with those in *Committee on Professional Ethics & Conduct v. Roberts*, 312 N.W.2d 556 (Iowa 1981). In *Roberts* the misconduct was serious enough, but there was no attempt to mislead. The facts which were furnished in the forged affidavit were true and opposing counsel consented to the procedure. This case is closer to *Committee on Professional Ethics & Conduct v. Hurd*, 325 N.W.2d 386 (Iowa 1982), where,

like here, there was an attempt to deceive and where we ordered a 60-day suspension. *Id.* at 390.

Under the circumstances, especially in view of respondent's otherwise unblemished record, I think a 90-day suspension would be appropriate.

SNELL, J., joins in this dissent.

Iowa, 1988.

Committee on Professional Ethics and Conduct of
The Iowa State Bar Ass'n v. O'Donohoe
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END OF DOCUMENT

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DECISION FROM DISCIPLINARY REPORTS AND DECISIONS SEARCH

Filed January 19, 1995

**BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION**

In the Matter of:

WILLIAM JUDSON DOSS,

Commission No. 94 CH 220

Attorney-Respondent,

No. 663328.

REPRIMAND

The Illinois Attorney Registration and Disciplinary Commission, by its Hearing Board, the members thereof whose names are affixed hereto, administer this reprimand to William Judson Doss, an attorney licensed to practice law on April 20, 1966:

FACTUAL BACKGROUND

1. Respondent, William Judson Doss, was licensed to practice law in Illinois on April 20, 1966, and there are no prior disciplinary proceedings against him.
2. On February 23, 1994, the Administrator of the Attorney Registration and Disciplinary Commission filed a one-count complaint against Respondent. The gravamen of the complaint was that Respondent participated in the preparation of, and recorded, a quit claim deed conveying real property owned by his mother to him for no consideration at a time when Respondent's mother may not have possessed sufficient assets to satisfy her financial obligations.
3. The Administrator and Respondent have entered into a stipulation. The Panel adopts that stipulation, and a copy of the stipulation is attached to this reprimand.
4. The Panel agrees with the Administrator and with Respondent that, based upon the uncontested facts described in the stipulation, a reprimand is the appropriate discipline herein.

PAGE 2:

5. The Panel has considered as mitigating factors Respondent's 28 years as an attorney without

prior discipline and his 28 years of service as an agent of the Federal Bureau of Investigations. In addition, there is no evidence of dishonest motive. Respondent participated in the conveyance at his mother's request and at her attorney's recommendation, and his mother retained a life estate in the property. Respondent has cooperated with the Administrator and the Hearing Board in these proceedings.

6. The purpose of disciplinary proceedings is to determine whether professional misconduct occurred and what sanction should be imposed. Sanctions are imposed not to punish the attorney but to protect the public and to maintain the integrity and reputation of the Bar, to protect courts and the administration of justice from reproach, and to deter the Respondent herein and other attorneys from misconduct. See, e.g., In re Levin (1984), 101 Ill.2d 535, 463 N.E.2d 715; In re Lamberis (1982), 93 Ill.2d 222, 443 N.E.2d 549.

7. In considering the sanction to be imposed, we have considered the principle that an attorney should refrain from conduct which is prejudicial to the administration of justice or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute. We have considered Supreme Court opinions imposing censure for cases involving conduct similar to that of Respondent, including In re Stern (1988), 124 Ill.2d 310.

8. In view of the matters set forth above, and because there is no evidence of dishonest motive and there is evidence in mitigation, the Panel has determined that the appropriate sanction in the instant case is a reprimand.

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REPRIMAND

To: William Judson Doss:

1. Your conduct in this matter as described in paragraph 2 of the Reprimand and described in the Stipulation was not proper. It was a violation of Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility and of Supreme Court Rule 771. You are therefore reprimanded and admonished not to repeat the conduct which resulted in the imposition of this discipline.

2. You are further advised that while this reprimand is not formally presented to the Illinois Supreme Court, it is a matter of record and is not to be taken lightly. This reprimand is a matter of public record and is on file with the Attorney Registration and Disciplinary Commission and may be admitted into evidence in subsequent proceedings against you.

3. Because reprimands are now public, it is the hope and desire of the below-named Panel that this reprimand will not only discourage you, but all other attorneys, from engaging in the same or similar misconduct in the future.

John B. Whiton, chair
on behalf of the Hearing Panel

Date entered: January 19, 1995

Hearing Board panel members Paula S. Tillman and Thomas A. Ascher concur in the consideration and decision of this matter.

BEFORE THE HEARING BOARD

**OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION**

In the Matter of:

WILLIAM JUDSON DOSS,

Commission No. 94 CH 220

Attorney-Respondent,

No. 663328.

STIPULATION

Mary Robinson, Administrator of the Attorney Registration and Disciplinary Commission, by her attorney Robert J. Verrando, and Respondent, William J. Doss, individually and by his attorney, Michael Hassan, stipulate that the following facts could be proven by clear and convincing evidence at hearing:

Matters which form the basis of the Administrator's Complaint:

1. On September 25, 1984, a judgment in the amount of \$6.5 million was entered against Respondent's father, Dwight Doss, in favor of Jacqueline Morris, as Guardian of the Estate of Eugene Bloomingdale, in a matter which had been pending in the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois. Morris v. Doss, docket number 80-L-42. The judgment was reduced to \$2.5 million on appeal in 1986. National Bank of Monticello v. Doss, 141 Ill. App.3d 1065, 491 N.E.2d 106 (4th Dist. 1986).

2. Dwight Doss died on May 28, 1989. On that date, Respondent knew of the judgment in Morris v. Doss and of the reduction of the judgment by the Appellate Court.

PAGE 2:

3. In March 1990, Respondent knew that the judgment creditors in Morris v. Doss and National Bank of Monticello v. Doss were attempting to recover the \$2.5 million judgment from the estate of Dwight Doss or from Arvilla Doss, the wife of Dwight Doss.

4. In 1989, the Circuit Court of the Sixth Judicial Circuit in Piatt County, Illinois entered judgment in favor of the defendants, including Arvilla Doss, in Crawford County State Bank v. Doss, et al., a suit alleging that Dwight Doss had fraudulently conveyed property to Arvilla Doss to defeat the claims of his creditors. In 1989, the plaintiff filed an appeal in the Appellate Court of Illinois, Fourth District. On March 14, 1990, the appeal in that matter was pending.

5. On March 14, 1990, Respondent knew that, should the Appellate Court reverse the judgment if the circuit court in Crawford County State Bank v. Doss, et al., Arvilla Doss might not have sufficient assets to satisfy the judgment against her in that matter.

6. In March, 1990, Respondent, with the advice of counsel, participated in the preparation of a quitclaim deed to improved real property in Piatt County, commonly known as "Lone Beech Farm," and Arvilla Doss executed the deed. The deed conveyed to Respondent, and his sister, Deborah Calhoun, title to the property, reserving to Arvilla Doss a life estate, in exchange for a return

consideration of \$1.00.

7. On March 14, 1990, Respondent delivered the purported quitclaim deed to the Piatt County Recorder of Deeds for recording. Administrator's Exhibit One is a true and correct copy of the deed recorded by Respondent on March 14, 1990.

8. On March 14, 1990, the property, in fee simple together with a life estate, described in the quitclaim deed had an appraised value in excess of \$300,000.00.

PAGE 3:

9. In June 1990, the Appellate Court reversed the judgment of the circuit court in Crawford County State Bank v. Doss, et al. and found that certain of the transactions alleged in that matter had been fraudulent conveyances. The Appellate Court remanded the cause and directed that judgment be entered against Arvilla Doss in the amount of \$390,000 (199 Ill.App.3d 236, 556 N.E.2d 842).

10. In September 1991, Arvilla M. Doss was charged by information with the offense of Fraudulent Conveyance of Real Property (Ill. Rev. Stat. 1991, Ch.30, ??202), arising from March 14, 1990 transaction described above. The Clerk of the Circuit Court of the Sixth Judicial Circuit in Piatt County docketed the matter as People v. Arvilla M. Doss and assigned it case no. 91-CM-101. Administrator's Exhibit Two is a true and correct copy of the information.

11. In May 1992, the Hon. John P. Shonkwiler of the Circuit Court of the Sixth Judicial Circuit found Arvilla Doss guilty of Fraudulent Conveyance of Real Property in case no. 91-CM-101.

12. Respondent's conduct described above could be found by the Hearing Board to constitute conduct which is prejudicial to the administration of justice in violation of Rule 1- 101(a)(5) and conduct which tends to defeat the administration of justice, or to bring the courts or the legal profession into disrepute, in violation of Supreme Court Rule 771.

Factors to be considered in mitigation of Respondent's conduct:

13. Respondent was admitted to practice law in Illinois in April 1966. At that time, he began employment as an agent of the Federal Bureau of Investigation. Respondent has been continuously employed with the FBI. Respondent has never practiced law and at the time of the conveyance had no experience in real estate matters or in the field of creditors' rights.

PAGE 4:

Mary Robinson, Administrator
Attorney Registration and
Disciplinary Commission

W. Judson Doss, Respondent

By: _____

By: _____

Robert J. Verrando
Counsel for the Administrator
130 East Randolph Drive
Chicago, Illinois 60601
Telephone: (312) 565-2600

Michael Hassan
Counsel for Respondent
Lord, Bissell & Brook
115 S. LaSalle Street
Chicago, Illinois 60603
Telephone: (312)443-0461

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Page 1

Supreme Court of Oregon.
 In re Complaint as to the CONDUCT OF L. Britton
 EADIE, Accused.
 OSB 96-80, 97-105, 97-109, 97-114; SC S47751.

Argued and Submitted Sept. 10, 2001.
 Decided Dec. 6, 2001.

Attorney disciplinary proceeding was commenced. The Supreme Court held that attorney's misconduct, including intentional misrepresentations, incompetence, ex parte contacts, and trial misconduct, warranted three-year suspension of his license to practice law.

Attorney suspended.

West Headnotes

[1] Attorney and Client 45 ⚡37.1

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k37.1 k. In General. Most Cited
 To violate the rule prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, an attorney's misrepresentations, whether direct or by omission, must be knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process. Code of Prof.Resp., DR 1-102(A)(3).

[2] Judgment 228 ⚡707

228 Judgment
 228XIV Conclusiveness of Adjudication
 228XIV(B) Persons Concluded
 228k706 Persons Not Parties or Privies
 228k707 k. In General. Most Cited
 Cases

Judgment 228 ⚡713(1)

228 Judgment
 228XIV Conclusiveness of Adjudication
 228XIV(C) Matters Concluded
 228k713 Scope and Extent of Estoppel in
 General
 228k713(1) k. In General. Most Cited

Cases
 Trial court's denial of motion to set aside default judgment obtained on behalf of client did not preclude attorney disciplinary panel from finding that attorney had violated rule prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation by intentionally misrepresenting question of payment of court costs in his settlement letter to opposing party and that opposing party had relied on the omission to her detriment; State Bar neither was a party nor was in privity with party in underlying action and did not have a full and fair opportunity to be heard in hearing on motion to set aside default judgment. Rules Civ.Proc., Rule 71, subd. B(1)(c); Code of Prof.Resp., DR 1-102(A)(3).

[3] Attorney and Client 45 ⚡37.1

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k37.1 k. In General. Most Cited
 Attorney's intentionally omitting from the settlement agreement his intent to seek costs from opposing party violated rule prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; settlement agreement that attorney sent to opposing party made no mention of costs, leading party to believe that settlement did not include them. Code of Prof.Resp., DR 1-102(A)(3).

[4] Attorney and Client 45 ⚡37.1

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45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k37.1 k. In General. Most Cited
 Attorney's submitting default judgment to court that
 contained award of costs to client, notwithstanding
 settlement of real estate dispute, wherein attorney
 concealed his intent to recover costs against oppos-
 ing party by not including them in settlement agree-
 ment, and his failure to correct false impression
 created by nondisclosure of material fact that settle-
 ment agreement did not resolve case completely vi-
 olated rule prohibiting an attorney from engaging in
 conduct involving dishonesty, fraud, deceit, or mis-
 representation. Code of Prof.Resp., DR 1-102(A)(3) .

[5] Attorney and Client 45 ↪42

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k42 k. Deception of Court or Ob-
 struction of Administration of Justice. Most Cited
 Cases
 To establish a violation of rule prohibiting an attor-
 ney from engaging in conduct that is prejudicial to
 the administration of justice, the State Bar must
 show: (1) that the accused attorney engaged in
 "conduct" by doing something that the attorney
 should not have done or by failing to do something
 that the attorney was supposed to do; (2) that the
 conduct occurred during the course of a judicial
 proceeding or another proceeding that has the trap-
 pings of a judicial proceeding; and (3) that the con-
 duct was prejudicial because it involved several
 acts that caused some harm to the administration of
 justice or because it involved a single act that
 caused substantial harm to the administration of
 justice. Code of Prof.Resp., DR 1-102(A)(4).

[6] Attorney and Client 45 ↪42

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k42 k. Deception of Court or Ob-
 struction of Administration of Justice. Most Cited
 Cases
 Attorney's applying for a default judgment for costs
 against opposing party, contrary to settlement
 agreement that called for dismissal of client's action
 against opposing party, did not violate rule prohib-
 iting an attorney from engaging in conduct that is
 prejudicial to the administration of justice, absent
 showing that attorney's conduct caused substantial
 harm to the administration of justice. Code of
 Prof.Resp., DR 1-102(A)(4).

[7] Attorney and Client 45 ↪37.1

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k37.1 k. In General. Most Cited
 Opposing party's letter to attorney, stating that she
 was opposed to paying costs related to real estate
 dispute with client, was not an "appearance," within
 meaning of statute requiring service of written no-
 tice prior to taking default against party who has
 filed an appearance, and, thus, attorney's failure to
 serve opposing party with notice that he intended to
 apply for a default judgment did not violate rule
 prohibiting ex parte communications with a court.
 Rules Civ.Proc., Rules 9, subd. A, 69, subd. A(1);
 Code of Prof.Resp., DR 7-110(B)(2).

[8] Attorney and Client 45 ↪37.1

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k37.1 k. In General. Most Cited
 Attorney's knowingly misrepresenting judge's intent

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regarding scheduling of personal injury action, which misrepresentation was material in that it affected judge's decision-making process about scheduling of trial, violated rule prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and rule prohibiting false statements of law or fact during representation. Code of Prof.Resp., DR 1-102(A)(3), 7-102(A)(5).

[9] Attorney and Client 45 ↪42

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

Attorney's knowingly misrepresenting to two judges that opposing counsel had made no effort to notify him before filing motion to quash attorney's subpoena in personal injury action violated rule prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and rule prohibiting false statements of law or fact during representation; even assuming attorney did not receive counsels' voice mail message or facsimile, opposing counsel attempted to consult with attorney, sending law clerk to attorney's office on evening before hearing, and clerk observed attorney, who refused to answer door, and left documents in door jamb while attorney watched. Code of Prof.Resp., DR 1-102(A)(3), 7-102(A)(5).

[10] Attorney and Client 45 ↪42

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

Attorney's knowingly misrepresenting judge's intent regarding scheduling of personal injury action viol-

ated rule prohibiting an attorney from engaging in conduct prejudicial to the administration of justice; attorney's conduct occurred during course of judicial proceeding, proposed scheduling order that attorney submitted to judge contained misrepresentation that was calculated to induce judge to acquiesce to trial date that attorney preferred, and changing trial date substantially harmed administration of justice. Code of Prof.Resp., DR 1-102(A)(4).

[11] Attorney and Client 45 ↪37.1

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k37.1 k. In General. Most Cited

Attorney violated rule prohibiting ex parte communications with a court by failing to serve notice of the written motion to disqualify judge on opposing counsel in personal injury action. Rules Civ.Proc., Rule 9, subd. A; Code of Prof.Resp., DR 7-110(B).

[12] Attorney and Client 45 ↪44(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k44 Misconduct as to Client

45k44(1) k. In General. Most Cited

Cases

Attorney failed to represent client competently at trial of client's personal injury action, in violation of rule governing attorney competence; attorney repeatedly attempted to inject issue of defendant's insurance at trial, despite trial court's repeated admonitions not to mention insurance, repeatedly posed questions to witnesses seeking hearsay or other incompetent evidence, even after trial judge had ruled evidence inadmissible, made multiple unfounded objections, and moved for new trial after accepting satisfaction of judgment on client's behalf, contrary long-established rule against such conduct. Code of Prof.Resp., DR 6-101(A).

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[13] Attorney and Client 45 ↪37.1

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k37.1 k. In General. Most Cited Attorney's intentional reference to defendant's insurance in client's personal injury action violated rules prohibiting alluding to inadmissible evidence and intentionally or habitually violating rules of procedure or evidence; despite having sought trial court's aid in preventing defendant's witnesses from mentioning any collateral sources of payment that client could have possibly received, attorney repeatedly attempted to inform jury that defendant had insurance coverage. Code of Prof.Resp., DR 7-106(C)(1, 7).

[14] Attorney and Client 45 ↪44(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k44 Misconduct as to Client

45k44(1) k. In General. Most Cited

Cases

Attorney's failing to supervise associate's opposition to the defense motions for summary judgment in personal injury matter violated rule governing attorney competence. Code of Prof.Resp., DR 6-101(A).

[15] Attorney and Client 45 ↪53(2)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k47 Proceedings

45k53 Evidence

45k53(2) k. Weight and Sufficiency. Most Cited Cases

State Bar failed to prove by clear and convincing

evidence that attorney engaged in a "course" of

negligent conduct in violation of rule prohibiting neglect of client matter by entrusting opposition of the summary judgment motions in personal injury action to his associate. Code of Prof.Resp., DR 6-101(B).

[16] Attorney and Client 45 ↪44(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k44 Misconduct as to Client

45k44(1) k. In General. Most Cited

Cases

To prove a violation of rule prohibiting neglect of client matter, the State Bar must show a "course" of negligent conduct. Code of Prof.Resp., DR 6-101(B).

[17] Attorney and Client 45 ↪59.5(2)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k59.1 Punishment; Disposition

45k59.5 Factors Considered

45k59.5(2) k. Standards and

Guidelines. Most Cited Cases

(Formerly 45k58)

In arriving at the appropriate sanction for attorney misconduct, the Supreme Court makes a preliminary determination by consulting the American Bar Association's *Standards for Imposing Lawyer Sanctions*, which directs the Court to analyze the attorney's misconduct in light of the duty violated, the accused's mental state at the time of the misconduct, the actual or potential injury that the accused's misconduct caused, and the existence of any aggravating or mitigating circumstances.

[18] Attorney and Client 45 ↪59.5(3)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

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45k59.1 Punishment; Disposition
 45k59.5 Factors Considered
 45k59.5(3) k. Comparable Disposition
 Within Jurisdiction. Most Cited Cases
 (Formerly 45k58)

In imposing sanction for attorney misconduct, the Supreme Court analyzes case law to determine the sanction that should be imposed in the particular situation.

[19] Attorney and Client 45  59.13(3)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.13 Suspension
 45k59.13(2) Definite Suspension
 45k59.13(3) k. In General. Most

Cited Cases
 (Formerly 45k58)

Attorney's intentional misrepresentations and conduct prejudicial to the administration of justice, incompetence, ex parte contacts with judges, and misconduct at trial of personal injury claim warranted three-year suspension of his license to practice law; even though attorney cooperated during initial disciplinary investigation and his record of discipline was limited to one instance of misconduct for which he received only a public reprimand, attorney, who had substantial experience in the practice of law, engaged in misconduct involving four different client matters, three of which involved multiple ethical violations, and failed to acknowledge wrongful nature of any misconduct.

[20] Attorney and Client 45  59.5(4)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.5 Factors Considered
 45k59.5(4) k. Factors in Aggravation. Most Cited Cases
 (Formerly 45k58)

In weighing a prior offense as an aggravating circumstance, in imposing attorney discipline, the Supreme Court considers its relative seriousness and the resulting sanction; the similarity of the prior offense to the offense in the present case; the number of prior offenses; the relative recency of the prior offense; the timing of the current offenses in relation to the prior offense and resulting sanction; and whether the attorney had been sanctioned for the prior offense before engaging in the misconduct at issue in the present case.

**471 *43 L. Britton Eadie, West Linn, argued the cause and filed the brief in propria persona.

Mary A. Cooper, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

Before CARSON, Chief Justice, and GILLETTE, DURHAM, LEESON, De MUNIZ, and BALMER, JJ.^{FN*}

FN* Riggs, J., did not participate in the consideration or decision of this case.

*44 PER CURIAM.

In this lawyer discipline proceeding, the Oregon State Bar (Bar) charged the accused with statutory violations and multiple violations of the Code of Professional Responsibility in connection with his representation of several clients: Disciplinary Rule (DR) 1-102(A)(3) (dishonesty and misrepresentation); DR 1-102(A)(4) (conduct prejudicial to administration of justice); DR 6-101(A) (incompetence); DR 6-101(B) (neglect of client matter); DR 7-102(A)(5) (false statement during representation); DR 7-106(C)(1) (alluding to inadmissible evidence); DR 7-106(C)(7) (intentionally or habitually violating rules of procedure or evidence); DR 7-110(B) (*ex parte* communications); ORS 9.460(2) (misleading statements); and ORS 9.527(4) (willful deceit or misconduct). A trial panel of the Disciplinary Board concluded that the ac-

cused had violated DR 1-102(A)(3), DR 1-102(A)(4), DR 6-101(A), DR 7-102(A)(5), DR 7-106(C)(7), and ORS 9.460(2), and recommended that the accused be disbarred. Our review is automatic. BR 10.1. On *de novo* review, BR 10.6, we find that the accused violated DR 1-102(A)(3), DR 1-102(A)(4), DR 6-101(A), DR 7-102(A)(5), DR 7-106(C)(1), and DR 7-106(C)(7). We conclude that a three-year suspension from the practice of law is the appropriate sanction.

I. FACTS AND TRIAL PANEL FINDINGS

The Bar has the burden of establishing misconduct by clear and convincing evidence. BR 5.2. "Clear and convincing evidence" means evidence establishing that the truth of the facts asserted is highly probable. *In re Johnson*, 300 Or. 52, 55, 707 P.2d 573 (1985). We find proof of the following facts by clear and convincing evidence.

A. *Burke Matter*

The accused represented Shon in a dispute with her neighbor, Burke, regarding an easement.**472 On January 31, 1995, the accused filed a complaint seeking to terminate Burke's easement over Shon's property. The complaint also sought costs and disbursements. Burke did not retain a lawyer to represent her, and the parties thereafter negotiated a settlement agreement. The agreement provided that Shon *45 would dismiss the complaint in return for Burke's promises to execute and return a quitclaim deed, and to remove structures and debris from the property. Burke did not file an answer to the complaint.

On March 8, 1995, in response to a letter that Burke had written to the accused about the settlement, the accused wrote a letter to Burke summarizing the terms of the settlement and concluding:

"The easement is terminated as indicated in your letter. *The complaint will be dismissed when the properly executed quit-claim deed is returned*

and recorded, as indicated above."

(Emphasis added.)

Burke executed and returned the quitclaim deed, and fulfilled her other duties under the settlement agreement. The accused thereafter submitted a proposed form of judgment to the trial court, with a copy to Burke, that included an award of costs to Shon. In his cover letter, the accused informed the court that he was seeking a prevailing-party fee. The trial court returned the proposed judgment to the accused, explaining that, unless stipulated, Shon was not a prevailing party and that she therefore was not eligible to recover costs. Burke also wrote a letter to the accused stating that she "d[id] not agree to pay [Shon's] costs and disbursements."

The accused thereafter attempted to recover costs by applying to the trial court for a default judgment against Burke, alleging that Burke had "failed to answer or appear" and not mentioning the settlement agreement. The accused did not serve a copy of the application on Burke. The court entered the default judgment, which included an award of costs. Burke became aware of the entry of the default judgment only after the accused demanded payment under the judgment.

Burke moved to set aside the default judgment on the basis of "fraud, misrepresentation, or other misconduct." ORCP 71 B(1)(c). The trial court denied the motion.

*46 In its cause of complaint relating to the Burke matter, the Bar charged the accused with violating DR 1-102(A)(3), DR 1-104(A)(4), and DR 7-110(B). The Bar maintained that the accused made a misrepresentation and engaged in prejudicial conduct when he reached an agreement with Burke that did not mention costs, then later attempted to improve on the settlement by filing a judgment of dismissal that included an award of costs. The Bar also alleged that the accused engaged in a written communication with the court on the merits of an adversary proceeding without delivering a

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copy to the opposing party when he submitted the proposed default judgment to the court without serving a copy on Burke.

The trial panel concluded, apparently on grounds of issue preclusion, that the trial court's denial of Burke's motion to set aside the default judgment under ORCP 71 B(1)(c) precluded the trial panel from finding a disciplinary violation. The trial panel also found that, because Burke had not filed an answer to Shon's complaint, she "had not filed an appearance in the litigation that would have entitled her to notice" from the accused regarding the accused's application for a default judgment. Accordingly, the trial panel concluded that the accused had not violated DR 1-102(A)(3), DR 1-102(A)(4), or 7-110(B) as charged.

B. Collins Matter

In 1996, the accused represented Collins in a personal injury action against Harbertson, the driver of a car that allegedly had struck Collins. Safeco, Harbertson's insurer, retained lawyers Brisbee, Mead, and Johnston to represent Harbertson.

After the accused had filed a complaint against Harbertson, the trial judge set pretrial conference and trial dates. Harbertson's lawyers thereafter moved to strike portions of the complaint. After successfully arguing the motion to strike, Mead gave the accused a proposed order for submission to **473 the judge. The accused objected to the proposed order and added:

" * * * My notes indicate that [the judge] specifically stated that this matter would be put back on the trial docket, I *47 think he intended that it would be scheduled for trial earlier than May 1996? An order to that effect would be appropriate." (Question mark in original.)

The accused then submitted a proposed order to the judge, rescheduling the pretrial conference and trial dates. In a letter accompanying the proposed order, the accused stated:

"I believe that this proposed form of order accurately reflects your findings and rulings on defendants' motion and *your intent as to rescheduling the pre-trial and trial dates in this case.*"

(Emphasis added.) After the judge signed the accused's proposed order, Brisbee reminded the judge that he had not discussed changing the pretrial conference and trial dates, and questioned whether the judge had contemplated doing so. The judge agreed with Brisbee and modified the order to delete the date changes that the accused had submitted to the judge.

In April 1996, Brisbee scheduled a hearing before a different judge on a motion to compel production. The day before the hearing, the accused, without serving Harbertson's lawyers, filed a written motion to disqualify that judge. Harbertson's lawyers did not learn about the accused's motion until they appeared before the judge, who sent them to a courtroom where a different judge was presiding. When they arrived at that courtroom, however, the accused announced that he planned to file an affidavit of prejudice against that judge as well. After a period of delay, a third judge heard the defense motion to compel production.

Several months later, on October 6, 1996, a judge in the Collins litigation imposed a sanction on the accused for filing a meritless discovery motion. Ten days later, on October 16, 1996, the accused served a subpoena *duces tecum* on a Safeco employee to produce Safeco's file on the Collins/Harbertson accident by October 24, 1996. Brisbee told Johnston to file a motion to quash the subpoena. Because the accused's subpoena required production in only eight days, Johnston acted quickly. On October 16, the day that the accused served the subpoena, Johnston called the accused and left a telephone voice message, stating that she wanted to discuss her intent to file a motion to quash and that, if she *48 did not hear from him, she would appear in court *ex parte* on October 18, 1996, to request an expedited hearing on the motion. Johnston's secretary also telephoned the accused and told him of Johnston's

plan. In response to that information, the accused told the secretary, among other things, "I object," and hung up. Later, Johnston's secretary attempted to send the accused a facsimile copy of the motion to quash, but the facsimile would not go through, and no one answered the telephone at the accused's office. Johnston then told her law clerk, Morrow, to deliver a copy of the motion to the accused's office. Morrow went to the accused's office on the evening of October 17, 1996. Morrow saw the accused through a glass door and told him that he had documents to deliver. The accused would not open the door, so Morrow told the accused that he was leaving the documents and placed them in the door jamb while the accused watched.^{FN1}

FN1. The accused admitted that he had heard pounding on his office door that evening and had seen someone outside, but he denied that he had seen Morrow deliver anything or that he had found documents left in the door jamb.

On October 18, 1996, Johnston appeared in court and received a date for the hearing on the motion to quash. The accused did not appear. Johnston then sent the accused a facsimile letter stating the date and time for the hearing. The accused responded by writing a letter that accused Brisbee and Johnston of "judge shopping," and stated that the accused neither had been served with the motion to quash nor had been advised that Johnston planned to appear in court to request a hearing date on the motion. The accused sent copies of that letter to two Washington County judges. At a hearing on October 22, 1996, the accused told the judge: "[T]hey didn't even attempt to **474 confer with me. There was no one that made any effort to communicate with me in my office in any way whatsoever."

The case of *Collins v. Harbertson* eventually was tried to a jury, which returned a defense verdict. The court thereafter imposed sanctions on the accused for failing to obey discovery orders.

In its causes of complaint relating to the Collins

matter, the Bar alleged that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), DR 7-102(A)(5), ORS 9.460(2), and *49 ORS 9.527(4) by seeking to have the judge change the pretrial conference and trial dates. The Bar alleged that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), DR 7-102(A)(5), ORS 9.460(2), and ORS 9.527(4) by telling several judges that opposing counsel had made no effort to notify him of Johnston's *ex parte* court appearance. Finally, the Bar alleged that the accused had violated DR 7-106(C)(7) and DR 7-110(B) by failing to serve the written motion to disqualify the trial judge on Harbertson's lawyers. According to the Bar, an established rule of procedure required him to do so.

The trial panel found that the accused had violated DR 1-102(A)(3), DR 1-102(A)(4), and ORS 9.460 by misrepresenting to the court his intentions regarding scheduling in *Collins v. Harbertson*. However, the trial panel held that the accused did not violate ORS 9.527(4) or DR 7-110(B).^{FN2}

FN2. The trial panel stated that the accused had not violated DR 7-102(A)(5) when he failed to serve opposing counsel with the motion to disqualify the trial judge. However, it is clear from the trial panel's opinion that it meant to state that the accused had not violated DR 7-110(B).

The trial panel did not address the Bar's allegation that the accused also had violated DR 7-102(A)(5) by knowingly making a false statement of law or fact in the Collins matter.

The trial panel also found that it could not determine whether the accused had received the telephone messages from Johnston or her secretary, or Johnston's facsimile about the hearing on scheduling the defense motion to quash. However, the trial panel accepted Morrow's testimony that Morrow had delivered the papers, and it specifically refused to credit the accused's testimony on that point. The trial panel found that the accused violated DR

1-102(A)(3) and DR 1-102(A)(4).^{FN3}

FN3. The trial panel did not address the Bar's allegation that the accused had violated DR 7-106(C)(7) by intentionally or habitually violating rules of procedure or evidence in his handling of the Collins matter, and the Bar has abandoned that issue on review.

C. Cassady Matter

The accused represented Cassady against Huber in a personal injury action in which the sole issue was damages. During jury selection in the case, the accused improperly mentioned Huber's insurance coverage. See OEC 411 (limiting admissibility of evidence concerning liability insurance); *50 *Johnson v. Hansen*, 237 Or. 1, 4, 389 P.2d 330 (1964) (unnecessary injection of insurance information prejudicial). Although the jury selection proceedings were not transcribed, the judge who presided over the trial testified at the disciplinary hearing that, when a potential juror raised the issue of insurance, the accused responded that there was plenty of insurance to go around and that the jury should not worry about it. During trial, the accused again raised the issue of Huber's insurance coverage, contrary to the judge's repeated admonitions not to do so.

During the course of the trial in *Cassady v. Huber*, the accused did not appear to be prepared for trial and was either unfamiliar with or unwilling to comply with the rules of evidence. For example, during his direct examination of a physician that the accused had called as an expert on Cassady's behalf, he handed the witness a stack of medical bills that the witness had not seen previously and asked him whether the bills were reasonable and necessary. It also became evident during the trial that the accused had failed to order a copy of the transcript of Cassady's deposition. Accordingly, he was unprepared when defense counsel used that deposition transcript at trial to impeach Cassady.

The accused also ignored the trial court's evidentiary rulings. For example, the accused repeatedly attempted to introduce hearsay, despite the trial court's repeated rulings that those reports and opinions were inadmissible. Moreover, during his direct **475 examination of Cassady's treating physician, the accused asked the physician questions about which the physician had no personal knowledge and then ignored the court's rulings about those questions.

The jury began its deliberations in *Cassady v. Huber* late on the second day of trial. According to the trial judge, the case could have been tried more quickly if the accused had been prepared and competent. The jury awarded Cassady compensatory damages.

Huber promptly paid the amount that she owed under the judgment, and the accused accepted satisfaction of the judgment on Cassady's behalf. Thereafter, the accused filed a motion for a new trial. Huber opposed the motion, arguing that there was no legal basis for the motion and *51 requesting sanctions against the accused for having filed it. See *Nickerson and Nickerson*, 296 Or. 516, 520, 678 P.2d 730 (1984) (party cannot accept benefits of judgment and also pursue course that might overthrow right to benefits). The court set a hearing date on the motion for a new trial and notified the accused of that date. The accused failed to appear despite the court's efforts to contact him. The court held the accused in contempt and, in its contempt order, noted that the accused's affidavit accompanying his motion for a new trial was "full of inaccuracies." ^{FN4} The court also denied Cassady's motion for a new trial. Following a subsequent hearing on the defense motion for sanctions against the accused for having filed the motion for a new trial, the trial court imposed sanctions on the accused for filing the baseless motion for a new trial and for making false statements in the affidavit that accompanied the motion.^{FN5}

FN4. The court eventually vacated the contempt order so that the matter could be

heard by another judge. The record does not reveal the outcome.

FN5. The court thereafter vacated that order for lack of jurisdiction, because the accused already had filed an appeal from the order denying his motion for a new trial.

In its cause of complaint relating to the Cassady matter, the Bar charged the accused with violating DR 6-101(A), DR 6-101(B), DR 7-106(C)(1), and DR 7-106(C)(7).^{FN6}

FN6. Although the Bar's cause of complaint alleged that the accused had made misleading statements to the court and in affidavits in connection with a discovery dispute over a photograph of Cassady's damaged car that fell out of the accused's file during the trial, the Bar did not charge the accused with violating DR 7-102(A)(5) or ORS 9.460. Nonetheless, as we note below, the trial panel concluded that the accused violated DR 7-102(A)(5) and ORS 9.460 by making misleading statements regarding the photograph. The Bar does not ask this court to hold that the accused violated any disciplinary rules in connection with the photograph incident at Cassady's trial.

The trial panel concluded that the accused had failed to represent Cassady competently, in violation of DR 6-101(A), and that he intentionally or habitually had violated procedural and evidentiary rules, in violation of DR 7-106(C)(7). However, the trial panel concluded that the Bar had not shown that the accused had neglected a legal matter in representing Cassady, in violation of DR 6-101(B), or that he had alluded to inadmissible evidence, in violation of DR 7-106(C)(1).^{FN7}

FN7. The trial panel also concluded that the accused had violated DR 7-102(A)(5) and ORS 9.460 in the Cassady matter, even though the Bar did not charge those viola-

tions in its complaint. The Bar does not argue those violations on review. In addition, on review, the Bar has abandoned its charge of neglect under DR 6-101(B) in the Cassady matter.

**52 D. Martin Matter*

The accused represented Martin in a personal injury case for injuries that she received when a kitchen cabinet in her apartment fell on her. The complaint that the accused filed on Martin's behalf named many defendants, including various subcontractors and others, some of whom later provided evidence that they should not have been named as defendants.

Several of the defendants named in the complaint filed motions for summary judgment, and the accused delegated responsibility for opposing those motions to a new associate in his office, Gresham. Gresham had minimal legal experience and never before had opposed a motion for summary judgment. The accused was aware of Gresham's inexperience, but he assigned the matter to Gresham nonetheless.

****476** To respond to each defendant's motion for summary judgment, Gresham needed to submit documents or affidavits on Martin's behalf that would show the court that there was a genuine issue of material fact requiring a trial. ORCP 47 C. Rather than doing so, Gresham opposed the motions orally, relying solely on legal arguments. The trial court granted the defense motions, then stated:

"I will be fairly blunt. I suspect that at least half the motions I just granted could have been overcome by appropriate documents had they been filed. Without their being filed, I can't do the right thing. I have to do the legally required thing
 * * *"

Thereafter, the trial court imposed sanctions on the accused for failing to investigate information suggesting that claims against several of the defendants

whom he had named in the complaint should have been dismissed. See ORCP 17 C (authorizing imposition of sanctions against lawyers who file pleadings not based on lawyer's "reasonable knowledge, information and belief, formed after the making of such *53 inquiry as is reasonable under the circumstances"). According to the court, the accused's conduct was "the most egregious set of circumstances I have ever seen."

In its cause of complaint relating to the Martin matter, the Bar charged the accused with violating DR 6-101(A) and DR 6-101(B). The trial panel concluded that the accused did not represent Martin competently, in violation of DR 6-101(A). However, the trial panel concluded that the Bar had not shown that the accused had neglected a legal matter entrusted to him, and it therefore dismissed the charge under DR 6-101(B).

E. Trial Panel Sanction Determination

The trial panel concluded that, in view of the prior disciplinary record and the ethical violations found by the trial panel arising out of four separate cases, and involving numerous and factually separate circumstances, "disbarment is the only way to protect the public and the integrity of the profession."

II. ISSUES ON REVIEW

A. Burke Matter

1. DR 1-102(A)(3)

[1] It is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 1-102(A)(3). To violate the rule, an accused's misrepresentations, whether direct or by omission, must be knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process. See *In re Kluge*, 332 Or. 251, 255, 27 P.3d 102 (2001) (so stating).

[2] As a threshold matter, we address whether the trial court's denial of Burke's motion to set aside the default judgment under ORCP 71 B(1)(c) precluded the trial panel from holding that the accused had violated DR 1-102(A)(3). Although there may be circumstances in which the doctrine of issue preclusion would prevent consideration of a claim that a lawyer had violated a disciplinary rule, issue preclusion plays no role here. Issue preclusion requires, among *54 other things, that the party sought to be precluded was a party (or was in privity with a party) to the prior proceeding and that the party sought to be precluded had a full and fair opportunity to be heard on that issue. See *Nelson v. Emerald People's Utility Dist.*, 318 Or. 99, 104, 862 P.2d 1293 (1993) (setting out elements of issue preclusion). The Bar neither was a party nor was in privity with a party in *Shon v. Burke*. Even assuming that the terms "fraud, misrepresentation, or other misconduct" under ORCP 71 B(1)(c) mean the same as "dishonesty, fraud, deceit, or misrepresentation" under DR 1-102(A)(3), the Bar did not have a full and fair opportunity to be heard in the hearing on Burke's motion under ORCP 71 B(1)(c) to set aside the default judgment. The trial panel was not constrained by principles of issue preclusion from finding that the accused intentionally had misrepresented the question of payment of court costs in his settlement letter to Burke and that Burke had relied on the omission to her detriment.

We turn to the merits on this issue. The Bar contends that the accused violated **477DR 1-102(A)(3) and DR 1-102(A)(4) by making a misrepresentation by omission to Burke in the settlement agreement and by applying for a default judgment that included costs after he had told Burke that he would dismiss the complaint once she had complied with the terms of the settlement agreement. The accused contends that his conduct was not unethical.

[3] We find that the accused intentionally omitted from the settlement agreement his intent to seek costs. The complaint that the accused filed in *Shon*

v. Burke made clear that the accused sought costs. However, Burke objected to paying costs. Burke's objection indicates that, to her, the matter of costs was an important element of the settlement. The settlement agreement that the accused sent to Burke made no mention of costs, leading Burke to believe that the settlement did not include them. The accused intentionally failed to disclose a material fact—namely, that he intended to seek costs—to obtain Burke's acquiescence to settle her dispute with Shon. The accused violated DR 1-102(A)(3).

[4] We turn to the accused's submission of a default judgment to the court that contained an award of costs to *55 Shon after the parties had settled the case. As we have explained, the accused concealed his intent to recover costs against Burke by not including them in the settlement agreement. After Burke had agreed to the settlement and had complied with its terms, she was entitled to believe that the matter was resolved and that the accused would dismiss the action. The accused did not inform Burke that he intended to seek a default judgment notwithstanding the settlement. The accused's failure to correct a false impression created by nondisclosure of a material fact—that the settlement agreement did not resolve completely the case of *Shon v. Burke*—was a misrepresentation under DR 1-102(A)(3).

2. DR 1-102(A)(4)

[5] It is professional misconduct for a lawyer to “[e]ngage in conduct that is prejudicial to the administration of justice.” DR 1-102(A)(4). To establish a violation of that rule, the Bar must show: (1) that the accused lawyer engaged in “conduct” by doing something that the lawyer should not have done or by failing to do something that the lawyer was supposed to do; (2) that the conduct occurred during the course of a judicial proceeding or another proceeding that has the trappings of a judicial proceeding; and (3) that the conduct was prejudicial because it involved several acts that caused some harm to the administration of justice or because it

involved a single act that caused substantial harm to the administration of justice. *In re Gustafson*, 327 Or. 636, 643, 968 P.2d 367 (1998).

[6] The Bar argues that the accused violated DR 1-102(A)(4) by applying for a default judgment for costs against Burke, contrary to the settlement agreement that called for dismissal of Shon's action against Burke, and by failing to give Burke notice, under ORCP 69 A(1), of his intent to apply for a default judgment. The Bar contends that Burke's “substantive interests were substantially and adversely affected by the Accused's conduct.”

As we have explained above, to establish a violation of DR 1-102(A)(4), the Bar must satisfy all three prongs of the test summarized in *Gustafson*. Here, the Bar has not demonstrated that the accused's conduct in applying for the default judgment was an act that caused substantial harm to *56 the administration of justice. To the extent that the Bar makes an argument regarding the “prejudice” prong of that test in this matter, it focuses solely on prejudice to Burke, not on prejudice to the administration of justice. The Bar has not met its burden of proving that the accused violated DR 1-102(A)(4).

3. DR 7-110(B)

[7] Unless otherwise authorized by law, it is professional misconduct for a lawyer to communicate in writing on the merits with a judge or an official before whom the proceeding is pending unless the lawyer “promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.” DR 7-110(B)(2). This court has construed the term “on the merits” in that rule to include **478 procedural as well as substantive matters. *In re Schenck*, 320 Or. 94, 103, 879 P.2d 863 (1994).

The Bar contends that the accused violated DR 7-110(B) by failing to notify Burke of his intent to apply for a default judgment. The accused responds that he was not required to provide Burke with no-

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tice because he was “authorized by law” under ORCP 69 A(1) not to do so.

ORCP 69 A(1) requires a party seeking a default judgment to provide the opposing party with written notice at least ten days prior to the entry of the order of default

“[i]f the party against whom an order of default is sought *has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default* [.]”

(Emphasis added.) It is undisputed that Burke did not file an answer to Shon's complaint and sought instead to settle the case. The Bar contends that, by informing the accused before the settlement that she objected to paying his costs, Burke triggered the ten-day notice requirement in ORCP 69 A(1). The Bar relies on *Morrow Co. Sch. Dist. v. Oreg. Land and Water Co.*, 78 Or.App. 296, 300 n. 4, 716 P.2d 766 (1986), for the proposition that “almost anything that indicates that a party is interested in the case will suffice” to trigger the ten-day notice requirement in ORCP 69 A(1).

*57 The Bar reads too much into that statement in *Morrow*. By its terms, ORCP 69 A(1) requires notice to an opposing party only if the party has filed an appearance or provided written notice of an intent to file an appearance. The legal meaning of the word “appearance” is “[a] coming into court as a party” or “[a] formal proceeding by which a defendant submits himself to the jurisdiction of the court.” *Black's Law Dictionary*, 97 (6th ed. 1990). Burke's letter to the accused stating that she was opposed to paying costs was not an “appearance” as that term is used in ORCP 69 A(1). The accused was not required to serve Burke with notice that he intended to apply for a default judgment. See ORCP 9 A (no service required on parties in default for failure to appear). Because an exception to the general rule requiring notice was “authorized by law,” the accused did not violate DR 7-110(B).

B. *Collins Matter*

1. DR 1-102(A)(3) and DR 7-102(A)(5)

[8] As we have discussed above, a lawyer commits professional misconduct by knowingly engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 1-102(A)(3). The misrepresentation must be material. Moreover, in representing a client or the lawyer's own interests, the lawyer shall not “[k]nowingly make a false statement of law or fact.” DR 7-102(A)(5).

The Bar contends that the accused knowingly caused the trial judge in the *Collins* matter to sign an order containing a provision that the judge had not considered regarding the pretrial and trial dates in *Collins v. Harbertson*. The accused does not respond.

At the trial panel hearing, the accused testified that he recalled hearing the judge mention that he wished to change the pretrial conference and trial dates in *Collins v. Harbertson*. Harbertson's lawyers testified that the judge had made no such statement. Assessing the witnesses' testimony, which was the only evidence regarding those charges, we agree with the trial panel that the accused knowingly misrepresented the judge's intent regarding the scheduling of *Collins v. Harbertson*. The misrepresentation was material in that it affected the judge's decision-making process about *58 the scheduling of the trial. The accused violated DR-102(A)(3) and DR 7-102(A)(5).

[9] We agree with the trial panel's finding that the accused made a knowing misrepresentation to two Washington County judges when he stated that Johnston and Brisbee had made no effort to notify him before filing the motion to quash the accused's subpoena. Even assuming that the accused did not receive either Johnston's voice mail message or the facsimile, the record nonetheless establishes that Johnston and Brisbee attempted to consult with the accused through *Morrow*, and that the accused's contrary assertion was a knowing **479 misrepres-

entation in violation of DR 1-102(A)(3) and DR 7-102(A)(5).

2. DR 1-102(A)(4)

[10] Our finding that the accused made misrepresentations in violation of DR 1-102(A)(3) establishes that the accused did something that he was not supposed to do, thus satisfying the first prong of the three-pronged test for finding a violation of DR 1-102(A)(4), described earlier in this opinion. See *Gustafson*, 327 Or. at 643, 968 P.2d 367 (summarizing three-pronged test). The accused's conduct occurred during the course of a judicial proceeding in the case of *Collins v. Harbertson*, thereby satisfying the second prong. The proposed order that the accused submitted to the judge changing the pretrial and trial dates contained a misrepresentation that was calculated to induce the judge to acquiesce to a trial date that the accused preferred. Changing the trial date substantially harmed the administration of justice, satisfying the third-or prejudice-prong. The accused's misrepresentation made it necessary for the judge to resolve the dispute that arose as a result of the accused's misrepresentation and to redraft his order. See *In re Meyer (I)*, 328 Or. 211, 214, 970 P.2d 652 (1999) (harm under DR 1-102(A)(4) can occur when procedural functioning of a case or hearing is impaired; harm may be actual or potential). The accused violated DR 1-102(A)(4).

*59 3. DR 7-110(B)

[11] As previously noted, DR 7-110(B) provides that, unless otherwise authorized by law, it is professional misconduct for a lawyer to communicate in writing on the merits with a judge or an official before whom the proceeding is pending unless the lawyer "promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer."

The Bar contends that the accused violated that rule by failing to serve opposing counsel with his writ-

ten motion to disqualify the trial judge. The motion was "on the merits" in *Collins v. Harbertson*. The accused does not dispute that he filed a written motion on the merits. However, he contends that he filed his motion to disqualify under ORS 14.270^{FN8} and that nothing in that statute requires service "upon anyone or any entity other than the court."

FN8. ORS 14.270 provides:

"An affidavit and *motion for change of judge* to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer. *Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day.* No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section."

(Emphasis added.)

The accused's reliance on ORS 14.270 is misplaced. That statute provides that, under certain circum-

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stances, notice to the court may be oral. The statute creates no exception to the general rule regarding service of a written motion on opposing counsel. See ORCP 9 A (unless excepted by rule, "every written motion * * * shall be served upon each of the parties"). The accused violated DR 7-110(B) by failing to *60 serve notice of the written motion to disqualify on opposing counsel.^{FN9}

FN9. We decline to address the Bar's charges under ORS 9.460(2) and ORS 9.527(4), because they are redundant of its charges under DR 1-102(A)(3) and DR 7-102(A)(5), and the Bar does not argue that a finding that the accused had violated those statutes would enhance or otherwise affect the sanction. See *In re Kimmell*, 332 Or. 480, 487, 31 P.3d 414 (2001) (illustrating point); *In re Lawrence*, 332 Or. 502, 511, 31 P.3d 1078 (2001) (same).

****480 C. The Cassady Matter**

1. DR 6-101(A)

[12] A lawyer must provide "competent representation to a client," which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." DR 6-101(A). This court has held that determining whether a lawyer acted incompetently, in violation of that rule, is a fact-specific inquiry:

"The question whether a lawyer has competently represented a client is, of course, a fact-specific inquiry. A review of this court's cases shows that incompetence often is found where there is a lack of basic knowledge or preparation, or a combination of those factors.

"In contrast, lawyers have been found not guilty of providing incompetent representation where the lawyers showed experience and professional ability to perform work, or where the Bar failed to prove that a position taken by the lawyer was 'advanced in pretense or bad faith, or in culpable

ignorance.' In sum, competence or incompetence can best be measured on a case-by-case basis using the standard stated in DR 6-101(A) itself."

In re Gastineau, 317 Or. 545, 553-54, 857 P.2d 136 (1993) (footnote and citations omitted).

In its cause of complaint, the Bar alleged that the accused failed to represent Cassady competently at trial. The Bar identifies many deficiencies in the accused's performance, ranging from repeatedly asking witnesses questions about which they had no knowledge and asking witnesses to give opinions about reports that were not in evidence, to his inability to authenticate or establish proper foundations for evidence. The accused responds that Greene "did not offer *61 any specific basis * * * as to whether the accused had performed his duties in a competent manner in the Cassady trial."

Our review of the record substantiates the Bar's contention that the accused did not represent Cassady competently at trial. Several examples demonstrate the accused's lack of legal knowledge, skill, or preparation. First, the accused repeatedly attempted to inject the issue of Huber's insurance at the trial. The trial judge admonished the accused many times not to mention insurance. Nonetheless, the accused continued to do so. The accused persists in his belief that the jury was entitled to hear evidence about Huber's insurance coverage and that the evidence would have been admissible had it not been for the judge's bias against the accused.

Second, the accused was not prepared for trial. The Bar's expert witness, Greene, testified that it is "absolutely essential" for a lawyer to have a copy of the client's deposition transcript at trial so that the client does not mistakenly make statements inconsistent with the client's prior testimony. The accused did not order a copy of Cassady's deposition transcript for use at trial. In addition, the accused failed to show Cassady's medical bills to his own medical expert before trial, causing the expert to be unprepared to testify at trial.

Third, during the trial, the accused attempted to show the jury through the testimony of Cassady's treating physician that Cassady had a good work ethic, even though the physician had no knowledge of her work ethic. The accused appeared to be oblivious to that problem.

Fourth, the accused repeatedly posed questions to witnesses seeking hearsay or other incompetent evidence, a practice that he continued even after the trial judge had ruled the evidence inadmissible. Fifth, the accused made multiple unfounded objections during the trial. Finally, the accused moved for a new trial after accepting satisfaction of judgment on Cassady's behalf, despite the long-established rule that a party cannot move for a new trial after accepting the benefits of a judgment in its favor. *See Snipes v. Beezley*, 5 Or. 420, 422 (1875) (too late to move for new trial after receiving payment on judgment). The accused's conduct at *62 Cassady's trial reveals a lack of understanding of basic legal concepts concerning the conduct of a trial and the consequences of accepting satisfaction of a judgment.

Both the trial judge in the Cassady trial and Greene testified that the accused had **481 performed incompetently in the Cassady trial. According to the judge, "in 14 years, it was the worst presentation by an attorney I've ever seen." On *de novo* review, we find that the accused performed incompetently in his representation of Cassady at trial. The accused violated DR 6-101(A).

2. DR 7-106(C)(1) and DR 7-106(C)(7)

[13] In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not "[s]tate or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence," DR 7-106(C)(1), or "[i]ntentionally or habitually violate any established rule of procedure or of evidence," DR 7-106(C)(7).

The Bar contends that, in the Cassady matter, the accused violated both those rules by referring to Huber's insurance coverage during *voir dire* and during the trial itself after the judge had admonished him not to do so. The accused acknowledges that he made several references to insurance but apparently believes that he was entitled to do so.

Greene testified that the rules do not allow a lawyer to discuss insurance during *voir dire* in a personal injury case and that the accused's repeated references to Huber's insurance could have caused a mistrial. Even without instruction from the court, the accused should have known that evidence of Huber's insurance was not admissible. However, in light of the judge's repeated warnings that the accused was not to mention insurance coverage, the accused had no reasonable basis for believing that he was entitled to do so.

The accused's reference to insurance was intentional. The accused had filed a motion *in limine* to prevent Huber's witnesses from mentioning any collateral sources of payment that Cassady might have received. That motion established that the accused understood that insurance could be a sensitive subject at trial. Although he had sought the *63 trial court's aid in preventing Huber's witnesses from referring to insurance payments that Cassady might have received, the accused nonetheless repeatedly attempted to inform the jury that Huber had insurance coverage. The accused violated DR 7-106(C)(1) and DR 7-106(C)(7).

D. Martin Matter

1. DR 6-101(A)

[14] As discussed above, DR 6-101(A) requires a lawyer to represent clients competently. The Bar alleged that the accused had violated that rule by delegating Martin's response to the defense motions for summary judgment to Gresham and then failing to supervise Gresham adequately. The accused responds that he provided what he believed to be

reasonable supervision of Gresham, but he faults Gresham for failing to confer with the accused on important matters. The accused also contends that Gresham's testimony that the accused did not give him any guidance in preparing to oppose the summary judgment motions was biased, that Gresham obviously had been coached by the Bar regarding his testimony, and that time records should clearly demonstrate Gresham's failure to confer with the accused on important matters.

Before the trial panel, Gresham testified that, when the accused assigned him to oppose the defense motions for summary judgment in the Martin case, Gresham had had no experience in handling such matters and that he had received no guidance from the accused. In his deposition, the accused stated that he had not conferred with Gresham about how to oppose the motions for summary judgment and that, when the accused learned that Gresham had not filed the documents required to create material issues of fact, the accused, like everyone else in his office with whom he spoke about the matter, was appalled. Before the trial panel, by contrast, the accused testified that he thought he had supervised Gresham adequately. As noted, the accused contends before this court that he provided Gresham what the accused believed to be reasonable supervision in the Martin case.

The accused does not dispute that he had supervisory responsibility for Gresham or that he was Martin's *64 attorney of record. We find it highly probable that, consistent **482 with the accused's deposition testimony, the accused did not supervise Gresham's opposition to the defense motions for summary judgment in the Martin matter. The accused violated DR 6-101(A). See *In re Spies*, 316 Or. 530, 538, 852 P.2d 831 (1993) (lawyer failed to act competently, in part, by failing to prepare certified law student to handle hearing).

2. DR 6-101(B)

[15] DR 6-101(B) provides that a lawyer "shall not

neglect a legal matter entrusted to the lawyer." The Bar also alleged that, by entrusting opposition of the summary judgment motions to Gresham, the accused violated that rule. The accused responds that Gresham had the requisite qualifications to be an effective advocate for clients in litigation.

[16] To prove a violation of DR 6-101(B), the Bar must show a "course" of negligent conduct. *In re Meyer (II)*, 328 Or. 220, 225, 970 P.2d 647 (1999). The Bar has failed to prove by clear and convincing evidence that the accused has engaged in a "course" of negligent conduct in violation of DR 6-101(B).

E. Summary

In sum, we find that the accused violated DR 1-102(A)(3) in both the Burke and Collins matters; DR 1-102(A)(4), DR 7-102(A)(5), and DR 7-110(B) in the Collins matter; DR 6-101(A), DR 7-106(C)(1) and DR 7-106(C)(7) in the Cassady matter; and DR 6-101(A) in the Martin matter. Those violations fall into four categories: misrepresentation and conduct prejudicial to the administration of justice; incompetence; *ex parte* contact; and misconduct at trial. We turn to the appropriate sanction. In that regard, the Bar argues that this court should affirm the trial panel sanction and disbar the accused. The accused responds that the complaint should be dismissed.

III. SANCTION

[17][18] In arriving at the appropriate sanction for lawyer misconduct, this court makes a preliminary determination by consulting the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (ABA *65 Standards). *Gustafson*, 327 Or. at 652, 968 P.2d 367. The ABA Standards direct us to analyze the accused's misconduct in light of the following factors: the duty violated, the accused's mental state at the time of the misconduct, the actual or potential injury that the accused's misconduct caused, and the existence of any aggravating or mitigating circumstances.

ABA Standard 3.0. Finally, we analyze this court's case law to determine the sanction that should be imposed in the particular situation. *In re Devers*, 328 Or. 230, 241, 974 P.2d 191 (1999).

[19] We analyze the factors described above with respect to each of the categories of misconduct identified in this case: misrepresentation and conduct prejudicial to the administration of justice; incompetence; *ex parte* contact; and misconduct at trial.

A. Preliminary Determination

1. Misrepresentation and Conduct Prejudicial to Administration of Justice

The accused's misrepresentations in the Burke and Collins matters violated his duty to the public to maintain personal integrity. ABA Standard 5.1. The accused violated his duty to the legal system to refrain from making false statements and misrepresentations. ABA Standard 6.1.

We find that the accused's misrepresentations were intentional. That is, the accused acted with a conscious objective or purpose to accomplish a particular result. ABA Standards at 7. In the Burke matter, the accused intentionally submitted a default judgment for the purpose of being awarded costs after leading Burke to believe that he would dismiss Shon's action if Burke agreed to the settlement. The accused's dishonesty caused Burke actual injury, because a default judgment was entered against her.

In the Collins matter, the accused wanted the pretrial and trial dates changed, and he intentionally misrepresented to the trial judge that the judge had intended to change those dates. The accused also intentionally **483 told several judges in the Collins matter that opposing counsel had made no effort to notify the accused of the hearing to quash *66 the subpoena that the accused had issued to the Safeco employee, apparently with the motive to impugn the integrity of opposing counsel. The accused's intentional misrepresentations created the potential

for significant injury. As noted, the accused's misrepresentations to the trial judge regarding the "changed" pretrial conference and trial dates caused substantial harm to the administration of justice. The accused's misrepresentations in the Burke and Collins matters seriously adversely reflect on his fitness to practice law.

ABA Standard 5.11(b) makes disbarment the appropriate sanction when a lawyer engages in intentional, albeit noncriminal, misconduct that involves dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects upon the lawyer's fitness to practice law. ABA Standard 6.11 generally makes disbarment the appropriate sanction when a lawyer, with the intent to deceive the court, makes a false statement and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding. The ABA Standards call for such a harsh sanction because, as explained in the introduction to ABA Standard 5.0, "[t]he most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies." The ABA Standards suggest that disbarment is the appropriate sanction for the accused's misrepresentations.

2. Incompetence

Having agreed to represent a client, a lawyer must be competent to perform the services requested. ABA Standard 4.0. It is evident from the record that the accused tenaciously represented Cassady and believes that he did so competently. However, tenacity is not the same as competence, and, as our review of the record has shown, the accused did not represent either Cassady or Martin competently. In the Cassady litigation, the accused's incompetent trial techniques harmed the legal system and the parties. In the Martin matter, the accused's incompetence harmed his client. Disbarment generally is appropriate when a lawyer demonstrates a lack of understanding of the most fundamental legal doctrines or procedures and the client is actually or *67

potentially injured. ABA Standard 4.51. However, disbarment as a sanction should be imposed only on lawyers "whose course of conduct demonstrates that they cannot or will not master the knowledge and skills necessary for minimally competent practice." *Commentary* to ABA Standard 4.51. Suspension generally is appropriate when a lawyer engages in an area of practice in which the lawyer knows that he or she is not competent and causes injury or potential injury to the client. ABA Standard 4.52. Reprimand generally is appropriate when a lawyer: (1) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (2) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client. ABA Standard 4.53.

Our review of the record in this case leads to the conclusion that disbarment would not be an appropriate sanction for the accused's incompetence in the Cassady and Martin matters, because we are not persuaded that the accused is incapable of mastering the knowledge and skills necessary for minimally competent practice. Neither is it clear to us that the accused engaged in practice in an area of the law in which he knew he was not competent. However, the records of the Cassady and Martin matters reveal that the accused failed to understand relevant legal doctrines or procedures, and caused actual injury. In light of the significant sanction we impose for all the accused's misconduct, discussed below, we need not address what sanction would be appropriate if this proceeding involved only the accused's incompetence.

3. *Ex parte* contact

The accused violated his duties as a lawyer by engaging in *ex parte* communications with a judge in the Cassady matter. ABA Standard 6.3. We find the accused's mental state **484 in filing the written disqualification motion without serving opposing counsel to be negligent, as he misunderstood his legal obligation to do so. In failing to serve oppos-

ing counsel with the disqualification motion, the accused caused actual injury. Opposing counsel arrived to argue the motion to compel, only to discover that the accused *68 had succeeded in disqualifying the judge who was assigned to hear the motion and delaying the hearing.

ABA Standard 6.33 provides that reprimand generally is appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party. Standing alone, the accused's misconduct regarding his *ex parte* contact would merit a reprimand.

4. Trial misconduct

The accused abused the legal process by repeatedly raising the issue of Huber's insurance to the jury during the Cassady trial. ABA Standard 6.2. As we have explained, we find that the accused acted intentionally. Injecting the existence of Huber's insurance at trial caused potential injury, because the threat of a mistrial hung over the proceedings after the accused mentioned insurance. The trial judge testified that he would have granted a mistrial if the defense had moved for one.

ABA Standard 6.21 provides that disbarment generally is appropriate when a lawyer knowingly violates a rule with the intent to obtain a benefit for the lawyer or another and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

It appears that, in raising the issue of Huber's insurance in the Cassady trial, the accused intended to obtain a benefit for Cassady, namely, assuring the jury that it could award Cassady damages without harming Huber. The ABA Standards indicate that disbarment is the appropriate sanction for the accused's misconduct in intentionally and persistently attempting to interject the fact of Huber's insurance at trial.

In summary, the ABA Standards point to disbarment as the appropriate sanction for the accused's intentional misrepresentations and his trial misconduct. The ABA Standards point to a sanction short of disbarment for the accused's incompetence and his *ex parte* contact. We turn to aggravating and mitigating circumstances.

***69 B. Aggravating and Mitigating Circumstances**

"[A]ggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed." ABA Standard 9.21. The first aggravating factor in this proceeding is that the accused has a prior disciplinary offense. ABA Standard 9.22(a). In 1994, the accused stipulated to discipline for contacting a represented party without the permission or presence of that party's counsel, in violation of DR 7-104(A)(1). The accused received a public reprimand for that violation. ^{FN10}

FN10. The Bar had charged the accused with violating several disciplinary rules, but the stipulation for discipline involved only DR 7-104(A)(1).

[20] In weighing the prior offense as an aggravating circumstance, we consider its relative seriousness and the resulting sanction; the similarity of the prior offense to the offense in the present case; the number of prior offenses; the relative recency of the prior offense; and the timing of the current offenses in relation to the prior offense and resulting sanction. We also consider whether the accused lawyer had been sanctioned for the prior offense before engaging in the misconduct at issue in the present case. *In re Jones*, 326 Or. 195, 200, 951 P.2d 149 (1997). Applying those considerations, we conclude that the accused's prior offense deserves little weight as an aggravating factor in this proceeding. His record of discipline is limited to one instance of misconduct for which he received only a public reprimand. That sanction regarded a matter that is not similar to the misconduct at issue here, and the

misconduct occurred several years ago. We turn to other aggravating circumstances.

****485** The accused has engaged in misconduct involving four different client matters. In three of those matters, the accused committed multiple ethical violations. ABA Standard 9.22(d). The accused has failed to acknowledge the wrongful nature of any of his misconduct. ABA Standard 9.22(g). The accused has substantial experience in the practice of law, having been admitted to the bar in 1987. ABA Standard 9.22(i).

Mitigating circumstances are "any considerations or factors that may justify a reduction in the degree of discipline *70 to be imposed." ABA Standard 9.31. The only mitigating factor here is that the accused cooperated with the Bar during its initial investigation. ABA Standard 9.32(e).

C. Oregon Cases

In past cases, when this court has found misrepresentation in addition to other misconduct, the court has imposed lengthy suspensions or disbarment. *See In re Gallagher*, 332 Or. 173, 190, 26 P.3d 131 (2001) (two-year suspension for two misrepresentations plus other misconduct); *In re Wyllie*, 327 Or. 175, 184, 957 P.2d 1222 (1998) (two-year suspension for submitting false MCLE forms and failing to cooperate with investigation); *In re Recker*, 309 Or. 633, 641, 789 P.2d 663 (1990) (two-year suspension for misrepresentation to court plus other disciplinary rule violations). However, multiple misrepresentations to courts, the Bar, or clients, combined with other serious ethical violations, has led to disbarment. For example, this court disbarred a lawyer who notarized false documents and made misrepresentations to clients in an unlawful living trust scheme. *In re Morin*, 319 Or. 547, 566, 878 P.2d 393 (1994). The accused in that proceeding also failed to respond truthfully to the Bar's inquiries during its investigation. *Id.* at 564, 878 P.2d 393. This court also disbarred a lawyer who filed a false affidavit with a probate court, committed a

misdemeanor, and violated several other disciplinary rules. *In re Hawkins*, 305 Or. 319, 326, 751 P.2d 780 (1988). Further, this court disbarred a lawyer who, among other things, made multiple misrepresentations to clients and court staff, represented a client incompetently, and neglected a legal matter. *Spies*, 316 Or. at 541, 852 P.2d 831. However, the lawyer's conduct in that proceeding was part of a downward personal spiral of "increasingly irresponsible" conduct. *Id.* at 540, 852 P.2d 831. Other situations in which this court has disbarred a lawyer have involved serious misconduct on the heels of an already lengthy record of disciplinary violations. *See, e.g., In re Miller*, 310 Or. 731, 739, 801 P.2d 814 (1990) (multiple misrepresentations, excessive fee, lengthy disciplinary record).

In this proceeding, the accused not only made misrepresentations in the Burke and Collins matters, he provided incompetent representation in the Cassady and Martin *71 matters. We note that, in *Spies*, misrepresentation and incompetence played a significant role in the decision to disbar the lawyer. *Spies*, 316 Or. at 540, 852 P.2d 831. However, in the case that is most similar factually to this case, this court imposed a lengthy suspension rather than disbaring the lawyer. In *In re Chambers*, 292 Or. 670, 642 P.2d 286 (1982), the lawyer negligently failed to prepare and return a proper summons and failed to communicate with his client. In a criminal matter, the lawyer was incompetent in conducting his investigation of exculpatory evidence on behalf of his client and subsequently trying the case "by the seat of his pants." *Id.* at 678, 642 P.2d 286. In a third matter, the lawyer knowingly made a false statement of fact when he represented to an accident victim that he was an insurance agent. *Id.* at 680-81, 642 P.2d 286. When *Chambers* was decided, the maximum suspension possible short of disbarment was three years. *See* BR 6.1(a)(iii) (three-year suspension maximum length for proceedings commenced before January 1, 1996).^{FN11} This court held that a two-year suspension was the appropriate sanction. *Chambers*, 292 Or. at 682,

642 P.2d 286.

FN11. Under BR 6.1(a)(iv), the maximum period of suspension short of disbarment in proceedings commenced after December 31, 1995, is five years.

In this proceeding, the Bar, like the trial panel, asserts that disbarment is required to protect the public and the integrity of the profession. However, this court's case law **486 does not support disbarment for the accused's misconduct, although it does support a lengthy suspension.

The accused's conduct is more egregious than the conduct in *Chambers*. The accused acted dishonestly in submitting a default judgment after settling the dispute with Burke. The accused intentionally misrepresented to the trial judge that the judge had ordered a change in the pretrial conference and trial dates in the Collins matter. The accused intentionally sought to impugn the integrity of opposing counsel in the Collins matter when he claimed that opposing counsel had made no effort to notify him of a hearing to quash the subpoena that he had served on a Safeco employee. The accused deliberately and repeatedly injected the issue of insurance into a trial to prejudice the jury in favor of his client, Cassady. The trial judge found the accused's representation of Cassady to have been the worst performance he had *72 seen as a trial judge, resulting in prejudice to Cassady's interests. The accused's failure to assure that evidence was presented to defeat the motions for summary judgment in the Martin matter also damaged his client.

The foregoing examples, taken together, reveal a disturbing pattern of a lawyer who disrupts the functioning of the legal system and the interests of parties in that system through a combination of intentional and negligent misconduct. Considering together the ABA Standards, the aggravating factors, and this court's case law, we conclude that a three-year suspension from the practice of law is the appropriate sanction. Requiring the accused to show the requisite character and fitness to practice law

36 P.3d 468
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for readmission under BR 8.1(a)(iv) following that suspension will protect the public and the integrity of the profession.

The accused is suspended for three years, effective 60 days from the date of the filing of this decision.

Or.,2001.
In re Conduct of Eadie
333 Or. 42, 36 P.3d 468

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DECISION FROM DISCIPLINARY REPORTS AND DECISIONS SEARCH

Filed April 16, 2004

IN RE ALAN SHELDON LEVIN
Respondent-Appellee

No. 00 CH 72

Synopsis of Review Board Report and Recommendation
(April 2004)

Levin was charged in a one-count complaint with misconduct in relation to his representation of a client in post-judgment proceedings. The complaint charged him with assisting a client in conduct he knew was criminal or fraudulent, doing so while appearing before a tribunal, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, conduct that was prejudicial to the administration of justice and conduct that tended to defeat the administration of justice or bring the courts or legal profession into disrepute. Respondent admitted most of the factual allegations but denied the allegations of misconduct.

The Hearing Board found that the Administrator had proved by clear and convincing evidence that Respondent had engaged in conduct prejudicial to the administration of justice and that tended to defeat the administration of justice or bring the courts or legal profession into disrepute, in that he had assisted his client in transferring property while a citation to discover assets prohibiting such transfers was pending. The Hearing Board found Respondent had not been proved to have engaged in any of the remaining charges of the complaint, and it recommended that those charges be dismissed. It further recommended that Respondent be reprimanded.

The case was before the Review Board on the exceptions of the Administrator. She challenged the Hearing Board's finding that the remaining charges of misconduct were not sufficiently proved, and objected to the recommended sanction.

The majority of the Review Board found that while the transfers of property by Respondent's client were fraudulent in law under the Illinois Uniform Fraudulent Transfer Act, there was not clear and convincing evidence that Respondent was aware of this at the time he assisted with the transfer. One member of the Review Board concurred in part, as he would merely have affirmed the Hearing Board's analysis.

The Review Board affirmed the Hearing Board's findings of fact and affirmed its findings of misconduct. It recommended that Respondent be suspended for thirty days.

**BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION**

In the Matter of:

Alan Sheldon Levin,

Commission No. 00 CH 72

Respondent-Appellee,

No. 1629999.

REPORT AND RECOMMENDATION OF THE REVIEW BOARD

The Administrator-Appellant filed a one-count complaint against Respondent-Appellee Alan Sheldon Levin, charging him with misconduct related to his representation of a client in post-judgment proceedings. Specifically, the complaint alleged that he assisted a client in conduct he knew was criminal or fraudulent, in violation of Rule 1.2(d) of the Illinois Rules of Professional Conduct, [FN1] assisted a client in conduct he knew was criminal or fraudulent while appearing before a tribunal, in violation of Rule 3.3(a)(6), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(a)(4), that was prejudicial to the administration of justice, in violation of Rule 8.4(a)(5), and that tended to defeat the administration of justice or bring the courts or legal profession into disrepute, in violation of Supreme Court Rule 771.

Respondent admitted most of the factual allegations of the complaint, but denied all of the allegations of misconduct. He stated affirmatively that he did not violate Rule 1.2(d), as the transfers of property that were the subject of the complaint were never concealed from, nor intended to impair the rights of judgment creditors and that further, his attempt to quash service and vacate the underlying judgment due to lack of service did not violate Rule 3.3(a)(6).

PAGE 2:

The Hearing Board found that the Administrator had proved by clear and convincing evidence that Respondent had engaged in conduct prejudicial to the administration of justice and that tended to defeat the administration of justice or bring the courts or legal profession into disrepute, in that he had assisted his client in transferring property while a citation to discover assets prohibiting such transfers was pending. The Hearing Board found Respondent had not been proved to have engaged in any of the remaining charges of misconduct, and recommended that those charges be dismissed.

Although the transfer of property contributed to the plaintiffs' inability to collect any of the \$1,750,000 judgment obtained against Respondent's client, the majority of the Hearing Board did not consider this to be an aggravating factor as Respondent owed no duty to the plaintiffs and had no role in the sale and mortgaging of the property. One panel member dissented, finding that the plaintiffs' inability to collect on the judgment as a direct result of Respondent's conduct was an aggravating factor, but joined the majority in recommending that Respondent be reprimanded.

This case is now before the Review Board on the exceptions of the Administrator. She challenges the Hearing Board's finding that violations of Rule 1.2(d), 3.3(a)(6) and 8.4(a)(4) were not proved by clear and convincing evidence. She also objects to the recommended sanction, suggesting that a nine-month period of suspension would be more appropriate under the circumstances. Respondent urges us to affirm the findings and the reprimand recommended by the Hearing Board.

The facts are briefly summarized below for purposes of this report. Further details can be found in the Hearing Board's Report and Recommendation. In July or August 1997 Herbert A. Beigel, a client of Respondent's who owned rental property that Respondent

PAGE 3:

described as "[not] the best kind of properties," brought Respondent a citation to discover assets that he claimed to have found on his front porch. The citation followed a \$1,750,000 judgment entered against him two years earlier in favor of Deborah A. Selvy and seven of her children, who had suffered repeated hospitalizations and injury caused by the lead paint in their apartment. [FN2] Beigel denied being the owner of the apartment building, and denied knowing anything about the lawsuit.

Respondent examined the court file. The suit had been filed in July 1990 and an order of default entered in 1991. The prove-up was held, and judgment entered in 1995. Beigel had been served by special process server. The file was very large and Respondent did not spend a lot of time looking, but he did not see an affidavit of service in the file. He ordered a title search to determine if Beigel was the owner of the property. The result of the title search was not in evidence.

Respondent advised his client that it would be difficult to vacate the judgment as so much time had passed. Mr. Beigel continued to insist that he did not own the building and had not been served, so on August 13, 1997, Respondent filed his special and limited appearance and a motion to quash service and vacate the default judgment entered in the case. Hearing on the motion was set for November 12, 1997, and the citation to discover assets was continued pending the outcome of the motion.

During the week of November 3, 1997 or possibly the week before, Herbert Beigel consulted Respondent about transferring five pieces of property he owned into a land trust. Mr. Beigel was 83 years old and not in good health. His wife, Catalina, who was forty years younger, had been taking care of the properties for him. If something happened to him, he wanted her to own the properties without incurring the expense of probate. Therefore, he wanted

PAGE 4:

to put the properties into a land trust with Catalina as the beneficiary, and himself as the successor beneficiary.

Respondent showed Mr. Beigel the citation to discover assets, which stated that

YOU ARE PROHIBITED from making or allowing any transfer, or other disposition of, or interfering with any property not exempt from execution or garnishment belonging to the judgment debtor or to which the judgment debtor may be entitled to or which may become acquired by or may become due to the judgment debtor and from paying over or otherwise disposing of any money not so exempt, which is due or becomes due to the judgment debtor until further order of court or termination of the proceedings. You are not required to withhold the payment of any money beyond double the amount of the judgment.

He explained that Beigel's creditors could bring suit to set aside any transfer of the properties. He also advised him that it might violate the Illinois Uniform Fraudulent Transfer Act. According to Respondent, his client still "felt it was very important to make this transfer."

On November 10, 1997 Respondent's secretary prepared the land trust documents, the Beigels executed them and Respondent recorded them. Four parcels of real estate owned by Herbert Beigel in fee simple were placed in trust with Chicago Trust Company. A fifth piece of property owned by both Herbert and Catalina Beigel was to be placed in trust with American National Bank, but while the documents were executed, the conveyance was never completed. There was no evidence that any consideration was paid for the transfers. Respondent assumed that Catalina Beigel's assets would not

be attachable by the Selvy Family, since she was not a party to the lawsuit.

Hearing was held on Beigel's motion to quash two days later. The motion stated that Respondent was unable to find any return of service in the court file, and that Beigel denied ever being served. As the process server's affidavit of service *was* in the court file, the Court

PAGE 5:

found that Beigel's bare-bones denial did not overcome the affidavit to the contrary, and denied the motion without a hearing.

Beigel's deposition for the citation to discover assets began on January 7, 1998. He admitted that he had owned the Selvys' building at some point in time, but "lost it to taxes." He denied having put any property in trust, or being the settlor of any trust. His wife had not put any property in trust that he knew of. When asked specifically whether one of his properties, 5301 W. Lake Street, had been placed in trust, Beigel did not recall. Respondent did not correct any of these misstatements during Beigel's deposition. Beigel denied having any assets or income, except for social security.

Randi Elias, one of the Selvy family's attorneys, conducted an asset search the day before the deposition. She found only the trust containing the four properties, as the fifth had been sold at Catalina Beigel's direction on December 27, 1997. Ms Elias showed Mr. Beigel the Cook County property transfer record conveying 5301 W. Lake Street into the trust. Beigel stated that he could not read the document as he had no reading glasses with him. He did not remember if he owned the property, or placed it in trust. He abruptly left the deposition, over Ms. Elias' objection, as his wife was waiting for him.

In court the next day on the plaintiffs' motion, Respondent acknowledged the existence of the trusts. The deposition continued the following week and Beigel testified truthfully about them.

Following the denial of his motion to quash, Respondent filed a motion to vacate the judgment. The motion was denied, and sanctions of approximately \$5000 were imposed against Respondent and his client. After discovering the land trusts, Plaintiffs' counsel filed a fraudulent conveyance suit against Beigel and the Respondent. However, in addition to placing

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the properties in trust, the Beigels had also obtained mortgages on them. The mortgages were executed on October 10 and 24, and November 10 and 12, 1997. All four properties were foreclosed upon, so that Beigel had nothing left from which the Selvy family could recover any portion of their judgment. There was no evidence Respondent knew about the mortgages or played any part in obtaining them.

In a disciplinary proceeding, the Administrator has the burden of proving the misconduct charged by clear and convincing evidence. *In re Imming*, 131 Ill.2d 239, 250, 545 N.E.2d 715, 137 Ill. Dec. 62 (1989). Factual findings of the Hearing Board must be affirmed unless they are against the manifest weight of the evidence. *In re Witt*, 145 Ill.2d 380, 390, 583 N.E.2d 526, 164 Ill. Dec. 610 (1991); *Leonardi v. Loyola University*, 168 Ill.2d 83, 100, 658 N.E.2d 450, 212 Ill. Dec. 968 (1995). Its legal conclusions are not binding, but are subject to *de novo* review. *In re Discipio*, 163 Ill.2d 515, 527, 645 N.E.2d 906, 206 Ill. Dec. 654 (1994).

We have reviewed the Hearing Board's factual findings and findings of misconduct. They are

supported by the evidence and accordingly, these findings are affirmed. We turn now to the Administrator's objections.

The Administrator first disputes the Hearing Board's finding that she did not present clear and convincing evidence that Respondent violated Rule 1.2(d). The Hearing Board's analysis resulted in a finding that there was no evidence that *Respondent* placed the property in trust to perpetuate a fraud. We find that this is not the right analysis. The Hearing Board's legal conclusions are not binding, but are subject to *de novo* review. *In re Discipio*, 163 Ill.2d 515, 527, 645 N.E.2d 906, 206 Ill. Dec. 654 (1994).

The rule provides in part that "[a] lawyer shall not counsel a client to engage, or assist in conduct he knows is criminal or fraudulent?" The first question for our consideration,

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therefore is whether Beigel's conveyance of the property was fraudulent. We analyze this issue pursuant to the Illinois Uniform Fraudulent Transfer Act, (IUFTA), which provides in part that:

a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor? if the debtor made the transfer or incurred the obligation:

- 1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
- 2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: * * *

(B) ?reasonably should have believed that he would incur debts beyond his ability to pay as they became due.

740 ILCS 160/5.

Courts have described such conveyances as those fraudulent in fact (740 ILCS 160/5 (a)(1)) and those fraudulent in law (740 ILCS 160/5(a)(2)). The Administrator contends that Beigel's transfers are both. The IUFTA suggests eleven factors that may be considered, among others, in determining whether an actual intent to hinder creditors exists and the conveyance is fraudulent in fact, and many of them are satisfied in this case. [FN3] However, the difference between a conveyance fraudulent in fact and one fraudulent in law is that the latter requires a transfer for inadequate consideration. *Wilkey v. Wax*, 82 Ill. App. 2d 67, 70, 225 N.E.2d 813 (4th Dist. 1967). Fraud in law is presumed from the circumstances if there is no consideration for the transfer of property. *Id.* Under a fraud in law theory, the actual intent of Beigel is irrelevant. Under the provisions of IUFTA, we find that Beigel's transfer of the properties was fraudulent in law, as it was a voluntary transfer, for which there was no evidence of consideration, made while Beigel had a \$1,750,000 judgment pending against him, and following the transfer he had no assets with which to satisfy the judgment. *See Casey National Bank v. Roan*, 282 Ill. App. 3d 55, 59, 668 N.E.2d 608, 218 Ill. Dec. 124 (4th Dist. 1996). Whether or not the transfers also had the legitimate basis suggested by Beigel?his age, infirmity

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and desire to make handling his estate easier for his wife-is therefore of no concern. *Adams v. Deem*,

296 Ill. App. 571, 579-80, 16 N.E.2d 817 (2nd Dist. 1938).

The second step in our analysis is to determine whether Respondent knew that he was assisting his client in fraudulent conduct. The terminology section of the Illinois Rules of Professional conduct defines "knowing" as "actual knowledge of the fact in question." There is no direct evidence that Respondent had actual knowledge that this was a fraudulent transaction. However, the definition adds that "[a] person's knowledge may be inferred from the circumstances." We must decide whether there is clear and convincing evidence from which we may infer that Respondent knew he was assisting his client in conduct fraudulent in law.

To determine whether actual fraud could be inferred from the circumstances in *Wilkey v. Wax*, the court "looked to the sequence of events and the events themselves." 82 Ill. App.2d at 73, 225 N.E.2d 813. Doing the same here, the evidence shows that Respondent knew of the judgment against Beigel, knew the amount of the judgment, and knew the Selvys were attempting to collect it. Respondent testified that he knew of no consideration involved in the transfer. He also knew that the transfer might violate the provisions of the IUFTA, as he admitted in his answer that he advised Beigel of this. He presumed that conveyance of the property into the trust would remove it from the Selvys' reach, which it appears logical to assume was Herbert Beigel's primary intent.

However, a conveyance is neither fraudulent in law nor fraudulent in fact if the transferor retains sufficient property to pay his debts. *See Falcon v. Thomas*, 258 Ill. App. 3d 900, 910-12, 629 N.E.2d 789 (4th Dist. 1994). There was no direct evidence that Respondent was aware at the time of the transfer that these five pieces of property were Beigel's only assets and that placing them in trust would leave him insolvent, and the Hearing Board chose not to

PAGE 9:

make the inference that he knew. The Hearing Board ruled that the evidence did not "support the conclusion that the Respondent placed the properties in trust in order to perpetrate a fraud" and that his actions were not "criminal, fraudulent or intentionally deceitful." In support of this conclusion, the Hearing Board pointed to evidence that the Respondent recorded the conveyance documents, made no attempt to hide them from any judgment creditor, and advised his client that he would have to disclose them at his citation examination. In determining whether the Hearing Board's factual findings are against the manifest weight of the evidence, the issue is not whether we would have reached a different conclusion, had we determined the facts in the first instance. Instead, a finding is against the manifest weight of the evidence when an opposite conclusion is apparent or the finding appears unreasonable, arbitrary or not based upon the evidence. *Leonardi v. Loyola University*, 168 Ill.2d at 106, 658 N.E.2d 450, 212 Ill. Dec. 968. While we might have reached the opposite conclusion, had we been making the initial decision, we cannot say that the Hearing Board's finding that Respondent did not violate Rule 1.2(d) is against the manifest weight of the evidence.

Next, the Administrator argues that she presented clear and convincing evidence that Respondent violated Rule 3.3(a)(6), which prohibits counseling or assisting a client in conduct a lawyer knew to be illegal or fraudulent when "appearing in a professional capacity before a tribunal."

An attorney is entitled to reasonable notice of the misconduct he is alleged to have committed. *In re Smith*, 168 Ill.2d 269, 289, 659 N.E.2d 896, 213 Ill. Dec. 550 (1995). The critical issue is whether the complaint reasonably informs Respondent of the conduct he must defend, and whether it states every fact essential to prove the specific charged misconduct. *In re Gerard*, 132 Ill.2d 507, 526, 548 N.E.2d 1051, 139 Ill. Dec. 495 (1989); *In re Beatty*, 118 Ill.2d

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489, 499-500, 517 N.E. 1065, 115 Ill. Dec. 379 (1987). While Respondent raised no objection to the charge on this basis, we are not clear what specific acts of his are alleged to violate Rule 3.3(a)(6).

Respondent took it to refer to his motion to vacate the judgment. His answer affirmatively stated that he did not violate the rule as no wrongful acts were taken before a tribunal, he merely tried to quash the summons and vacate the judgment. However, when questioned at oral argument, counsel for the Administrator replied that his office interpreted the rule to apply to conduct in a litigation setting, i.e., circumstances other than appearing in court. Evidently, then, it refers to either Respondent's failure to correct the deposition testimony, when Beigel denied having transferred any property, or Respondent's preparation of the land trust documents. It is apparent from the Report and Recommendation that the Hearing Board believed that it referred to the former.

A tribunal is defined as "the seat of a judge, the place where he administers justice? a judicial court." Black's Law Dictionary 1350 (5th Ed. 1979). The Administrator does not suggest, and we are unable to find a situation where a violation of Rule 3.3(a)(6) was found based on conduct so remote from the tribunal. While filing documents containing a false statement, (as opposed to actually appearing before the court), violates the rule, e.g., *In re Ingersoll*, 186 Ill.2d 163, 710 N.E.2d 390, 237 Ill. Dec. 760 (1999), the case law appears to require a stronger connection to the "tribunal" itself than is present here. Therefore, the Hearing Board's determination that the Administrator did not present clear and convincing evidence that Respondent counseled or assisted a client in conduct a lawyer knew to be illegal or fraudulent when appearing in a professional capacity before a tribunal was not against the manifest weight of the evidence.

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We turn now to the proper sanction. The Hearing Board's recommendation as to discipline is advisory only. *Imming*, 131 Ill.2d at 260, 545 N.E.2d 715, 137 Ill. Dec. 62. In making its own recommendation, the Review Board must consider each case, based on its own particular facts and circumstances, while keeping in mind that the purpose of discipline is not to punish the individual respondent, but to protect the public, to maintain the integrity of the profession and to protect the administration of justice from reproach. *In re Timpone*, 157 Ill.2d at 197, 623 N.E.2d 300, 191 Ill. Dec. 55. Aggravating and mitigating factors are relevant. *Witt*, 145 Ill.2d at 398, 583 N.E.2d 526, 164 Ill. Dec. 610.

We have considered the cases relied upon by the Hearing Board in recommending a reprimand. Respondent cannot claim a lack of expertise as reason for his misconduct, like the Respondent in *In re Doss*, 94 CH 220 (1995), as real estate was one of the areas of concentration of his practice. This also is not a case where ultimately no harm resulted from Respondent's poor judgment, as was the case in *In re Davila*, 99 CH 108(2000), *In re Lee*, 96 SH 655 (1996) and *In re Snell*, 88 CH 175 (1990). Respondent, an officer of the court, counseled his client that his intended actions would violate the court's order and possibly the law, and then assisted him in doing so. The end result was that seven people who had each suffered injury worth a quarter of a million dollars were unable to collect dollar one, and we agree with the dissenting member of the Hearing Board panel that this should be taken into account. Such conduct has "brought the legal profession?.[in]to disrepute and made it the subject of castigation." See *In re Trezise*, 118 Ill.2d 346, 351, 515 N.E.2d 80, 113 Ill. Dec. 271 (1987). Respondent does not help himself by attempting to lay blame on the plaintiffs' attorneys for failing to record the judgment or to do "whatever they should have done to prevent subsequent conveyances."

PAGE 12:

We consider in mitigation Respondent's more than 36 years in practice with no other discipline imposed, and the testimony that his character and reputation were of the highest. We note also that his misconduct was not for personal gain, as he received no fee for his services. Under the circumstances, we find that a thirty-day suspension is warranted to satisfy disciplinary requirements, and we urge counsel who find themselves in Respondent's position in the future heed the advice of the Appellate Court:

Every lawyer has had the experience of being importuned at one time or another by frantic clients who wish to be stripped of their properties and have them shed in favor of spouses, relatives or friends. Such generosity is rightly suspect for largess is not the way of the world. A little friendly cross-examination to plumb the depths of motive quite often brings forth the intelligence that the client has been sued, or rather, is about to be sued?. *Wilkey v. Wax*, 82 Ill. App. 2d at 69, 225 N.E.2d 813.

For all of the foregoing reasons we affirm the Hearing Board's factual findings and findings of misconduct, and recommend that Alan Sheldon Levin be suspended from the practice of law for thirty days.

Respectfully submitted,

Cheryl I. Niro
Thomas A. Zimmerman, Jr.

DATED: April 16, 2004

Lefstein, Stuart R., Panel Member, concurring in part:

I concur in the Report and Recommendation of the majority, both as to its affirmance of the Hearing Board's findings and its recommendation of a thirty day suspension.

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I write separately, however, to express my misgivings about the majority's finding that the Hearing Board did not perform "the right analysis" under Rule 1.2(d). That finding stems from the Hearing Board's determination that the evidence did not "support the conclusion that Respondent placed the properties in trust in order to perpetrate a fraud." The majority read that statement as meaning that the Hearing Board had required that the Respondent, and not just the client, perpetrate fraud in order to have a violation of the rule.

The majority is, of course, correct in observing that the rule literally requires only that the lawyer know his client is engaging in fraudulent conduct. The rule does not, in terms, require that the lawyer also be acting fraudulently in order to have a violation.

But, in giving due deference to the Hearing Board, I believe that it implicitly concluded that Respondent did not "know" his client was engaging in fraudulent conduct, assuming for the sake of argument that such conduct occurred. This implicit conclusion is apparent because, in my judgment, if a lawyer possesses "actual knowledge" that his client is engaging in fraudulent conduct and then assists him in that conduct, he would have joined with the client to "perpetrate a fraud."

As a result, a *de novo* evidentiary analysis under the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/5) was unnecessary. [FN4] Instead, I would simply affirm the Hearing Board on the basis of its core factual findings that Respondent did not "know" his client was engaging in fraudulent conduct if such was the case and that "Respondent's conduct was not motivated by anything other than poor judgment."

The Hearing Board arrived at these conclusions after observing and listening to Respondent, with the Chair of the panel specifically asking him why he prepared the documents,

PAGE 14:

knowing that the citation to discover assets prohibited the transfers. Respondent replied, "I wouldn't be here, I suppose, if I could answer that." He then explained further:

I believed, first of all, that, number one, the judgment was going to be vacated, or if not, that it would be fully disclosed at the time of the citation that he was intended to give if he lost the motion.

There was no intent to violate what I felt the spirit of the citation would be; in other words, no intent to hide anything.

I felt that Mr. Beigel's reasons for making the request for the transfer were legitimate. I also felt that the judgment creditor could not be harmed by this transaction because I presumed since the judgment had been entered in '95, that they had filed a memorandum of judgment and they had done whatever they should have done to prevent subsequent conveyances, anyway. In other words, this transfer into the citation into the trust would not have prejudiced the judgment creditor because of all those factors.

Earlier, when called by the Administrator, Respondent had testified in part as follows:

Well, he felt it was very important to him to make this transfer. Mr. Beigel was 83, 84 years old and was not in the best of health. He was walking, shuffling along. He had a serious leg injury a year or two prior to that and he was with a walker and he was no longer able to take care of the properties that he owned in the depressed areas.

As a result, his wife was, in fact, collecting the rents and overseeing the properties and the contact person. And he believed at that point that he wanted her to be protected in case something happened to him.

He was feeling mortal at that time. He wasn't his health wasn't the best. And he wanted to make sure his wife didn't have the expense of probate. And she, if it was put into a land trust, would be the beneficial owner. But he also said if something happens to her, I want to be the successor beneficiary.

The Hearing Board obviously accepted Respondent's testimony, observing "that he presented reasonable explanations for his conduct," even though the Board did not condone it.

PAGE 15:

Unfortunately, lawyers often act improperly as a result of "poor judgment," as in this case, or even bad

or terrible judgment. Every case of lawyer impropriety does not result from "actual knowledge" of a client's fraud or criminal conduct.

At oral argument counsel for the Administrator disavowed any claim that a lawyer's transfer of property, by itself and without more, in the face of a citation's prohibition, would automatically trigger a Rule 1.2(d) violation. The issue of credibility and the drawing of inferences as to what Respondent knew or didn't know was for the Hearing Board. *Kokinis v. Kotrich*, 81 Ill.2d 151, 154, 407 N.E.2d 43, 40 Ill. Dec. 812 (1980); *In re Demuth*, 126 Ill.2d 1, 12, 533 N.E.2d 867, 871, 127 Ill. Dec. 785 (1988).

As a result, the Hearing Board's determination that clear and convincing evidence was lacking in establishing a Rule 1.2(d) violation was not against the manifest weight of the evidence. I therefore concur with the majority in its affirmance of the Hearing Board's findings.

Respectfully submitted,

Stuart R. Lefstein

FN1: Unless otherwise indicated, all citations to Rules are to the Illinois Rules of Professional Conduct.

FN2: *Deborah A. Selvy, et al., v. Herbert A. Beigel, et al.*, Circuit Court of Cook County case number 90 CH 07362.

FN3: As Beigel testified that he and his wife managed their household and financial affairs together, it could be argued that he retained possession and control over the property after the transfer. He was also the successor beneficiary of the trust. (740 ILCS 160/5(b)(2)) The transfer was made after Beigel had a \$1.75 million judgment entered against him. (740 ILCS 160/5(b)(4)) The transfer was of essentially all of Beigel's assets. (740 ILCS 160/5(b)(5)) The value he received was not equivalent to the value of the assets transferred, as he received no consideration. (740 ILCS 160/5(b)(8)) Beigel essentially became insolvent after the transfer. (740 ILCS 160/5(b)(9)) The transfer did not occur shortly after the debt was incurred, (740 ILCS 160/5(b)(10)), but it was shortly after Beigel learned the plaintiffs were attempting to collect it.

FN4: No such analysis had been performed by either the Hearing Board or the parties in the proceedings below, and the record reveals that the issue of Beigel's fraud was to be litigated in a separate civil suit. Additionally, Respondent argued in his appellate brief that a violation of the cited statute could not be considered, as the complaint predicated misconduct solely on a violation of the prohibition contained in the citation to discover assets, not the Fraudulent Transfer Act. He further argued that the Administrator had changed her argument on appeal to include that act.

Westlaw.

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C

Supreme Court of New Jersey.
 In the Matter of John P. BREEN, an Attorney at Law.
 Jan. 9, 1989.

SYNOPSIS

In attorney disciplinary proceeding the Supreme Court held that numerous ethical violations warrant disbarment.

Disbarment ordered.

West Headnotes

[1] Attorney and Client 45 ↪59.8(1)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.8 Public Reprimand; Public
 Censure; Public Admonition
 45k59.8(1) k. In General. Most

Cited Cases

(Formerly 45k58)

Representing wife and husband in divorce matter breaching client confidentiality, failing to avoid appearance of impropriety, improperly communicating with unrepresented, adverse party, and refusing to deliver proceeds to which former wife is entitled from sale of marital home warrant more than public reprimand. Code of Prof.Resp., DR 2-106, DR 4-101, DR 7-104, DR 9-101, DR 9-102(B)(4).

[2] Attorney and Client 45 ↪38

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k38 k. Character and Conduct. Most

Cited Cases

Fraudulently preparing, executing, and recording four mortgages against residence in attempt to defraud judgment creditor or approving or directing that action by another person, transferring title to residence to attorney's female companion, failing to appear at hearings, failing to comply with court order on production of documents, and causing warrants to be issued for arrest violate disciplinary prohibitions against dishonesty and fraud, adversely reflect on fitness to practice law, prejudice administration of justice, violate prohibition against criminal act adversely reflecting on honesty or fitness as lawyer, or violate prohibition against violation of disciplinary rule through acts of another. Code of Prof.Resp., DR 1-102(A)(1, 3-6), DR 7-102(A)(8); RPC 8.4(a-d).

[3] Attorney and Client 45 ↪38

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k38 k. Character and Conduct. Most

Cited Cases

Misrepresenting existence of agreement between client and landlord at hearing, producing false, unsigned agreement between client and landlord, filing fraudulent notice of appeal, and communicating directly with landlord with knowledge of its representation by counsel violate prohibition against assisting client in fraudulent conduct; requirement to advise client of limitations on conduct under rules of professional conduct; rules governing candor toward tribunal; prohibition against falsified evidence; prohibition against communication with person represented by counsel; adversely reflect on honesty or fitness as lawyer; involve dishonesty, fraud, deceit, or misrepresentation; and violate prohibition against violating professional rules through acts of another. RPC 1.2(d, e), 3.3(a)(1, 2, 4, 5), (c, d), 3.4(b), 4.2, 8.4(a-c).

[4] Attorney and Client 45 ↪44(1)

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45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k44 Misconduct as to Client
 45k44(1) k. In General. Most Cited

Cases

Neglecting to prepare written agreement on client's assumption of liabilities of equipment lessee, failing to fulfill promise to represented lessees to file answer to lessor's action for payments, and failing to file motion to vacate default judgment against lessees go beyond conflict of interest and neglect and are fraud against innocent lessees. RPC 1.1(a), 1.2(a), 1.3, 1.4, 1.7(a), 3.2, 8.4.

[5] Attorney and Client 45 ↪ 44(2)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k44 Misconduct as to Client
 45k44(2) k. Misappropriation and

Failure to Account. Most Cited Cases

Refusing promptly to deliver to client funds which client is entitled from sale of marital home violates disciplinary rule on prompt payment of funds, even though funds are ultimately released pursuant to court order. Code of Prof.Resp., DR 9-102(B)(4).

[6] Attorney and Client 45 ↪ 21.5(1)

45 Attorney and Client
 45I The Office of Attorney
 45I(B) Privileges, Disabilities, and Liabilities
 45k20 Representing Adverse Interests
 45k21.5 Particular Cases and Problems
 45k21.5(1) k. In General. Most

Cited Cases

Representing husband and wife in divorce is impermissible conflict of interest. Code of Prof.Resp., DR 5-105.

[7] Attorney and Client 45 ↪ 44(1)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k44 Misconduct as to Client
 45k44(1) k. In General. Most Cited

Cases

Attorney and Client 45 ↪ 44(2)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k44 Misconduct as to Client
 45k44(2) k. Misappropriation and

Failure to Account. Most Cited Cases

Failing to take appropriate action to institute suit and to protect clients' interests, failing to carry out contracts of employment, misrepresenting status of actions, ignoring clients' legitimate request about status of cases, failing to maintain property and records received from client, and failing to turn over file when requested exhibit pattern of neglect, violate rule on zealous representation, violate rule on handling client property, prejudice administration of justice, adversely reflect on fitness to practice law, or violate rules on scope of representation and communication with client. Code of Prof.Resp., DR 1-102(A)(1, 5, 6), DR 6-101(A)(3), DR 7-101(A)(1-3), (B)(1), DR 7-102(A)(8), DR 9-102(B)(1, 3, 4); RPC 1.2-1.4, 8.4.

[8] Attorney and Client 45 ↪ 43

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k37 Grounds for Discipline
 45k43 k. Contempt of Court. Most

Cited Cases

When attorney shows disrespect to ethics committee, attorney shows disrespect to New Jersey Supreme Court.

[9] Attorney and Client 45 ↪ 59.14(1)

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45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.14 Disbarment; Revocation of
 License

45k59.14(1) k. In General. Most
 Cited Cases
 (Formerly 45k58)

Pattern of neglect, disregard for court orders, disregard for ethics process, other ethical violations, and continuing, ongoing, consciously planned course of conduct involving deceit and dishonesty warrant disbarment. Code of Prof.Resp., DR 1-102(A)(1, 3-6), DR 5-105, DR 7-102(A)(8), DR 9-102(B)(4); R. 1:19-6; RPC 1.2(d, e), 3.3(a)(1, 2, 4, 5), (c, d), 3.4(b), 4.2, 8.1(b), 8.4(a-d).

ORDER

****106 *524** This matter coming before the Court on an order to show cause why JOHN P. BREEN of PLAINFIELD should not be disbarred or otherwise disciplined, and said JOHN P. BREEN having failed to appear before this Court on the return date of said order to show cause, and good cause appearing;

It is ORDERED that the report of the Disciplinary Review Board recommending that respondent be disbarred is hereby adopted; and it is

***525** ORDERED that JOHN P. BREEN be disbarred and that his name be stricken from the roll of attorneys of this State, effective immediately; and it is

ORDERED that JOHN P. BREEN be and hereby is permanently restrained and enjoined from practicing law; and it is further

ORDERED that respondent reimburse the Ethics Financial Committee for appropriate administrative costs; and it is further

ORDERED that respondent comply with Adminis-

trative Guideline 23 of the Office of Attorney Ethics dealing with disbarred attorneys.

APPENDIX

Decision and Recommendation of the Disciplinary Review Board

This matter is before the Board based on 13 presentments filed by the District XII (Union County) Ethics Committee and one presentment filed by the District V-C (Essex County) Ethics Committee.

The Haupt Matter

This matter arose out of a Michigan judgment obtained by Marv Haupt ("grievant") against respondent. By way of background, on November 5, 1976, grievant filed an action in Michigan based upon a financing transaction with a certain corporation, whereby the latter was to obtain financing for a coal mining operation in West Virginia. Grievant paid the corporation the sum of \$10,890.00, to be held in escrow by respondent, the corporation's New Jersey attorney. When the corporation failed to secure the financing, grievant requested the return of the monies in escrow. They were not returned. Grievant then filed an action against the corporation and respondent for restitution and damages based on fraud, conspiracy and other related grounds.

***526** Upon being served with the summons and complaint, respondent forwarded them to the client corporation without further action because he "knew they had nothing to do with [me]." Respondent did not file an answer, thereby causing a default to be entered against him. Respondent then moved to set aside the default, but failed to appear on the return date of the motion. On May 18, 1977, a default judgment was entered in the Michigan action against respondent in the amount of \$6,943,102.70, on proofs by expert testimony as to grievant's dam-

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ages, including interests and costs. The basis for the judgment was fraud, conspiracy to defraud, material misrepresentation and breach of trust agreement.

Respondent next filed a motion to vacate the default judgment and to dismiss the matter for lack of jurisdiction. On October **107 6, 1977, the court granted the motion to set aside the default judgment and scheduled the matter for trial, subject to respondent's payment of \$4,000.00 in attorney's fees which, the court found, resulted from respondent's "negligence and obtuseness in the case." Respondent never paid the counsel fees.

On November 9, 1977, the default judgment was reinstated and grievant sought to enforce the Michigan judgment in New Jersey. By order dated October 10, 1980, the New Jersey court ruled that the Michigan judgment was entitled to full faith and credit and entered a judgment against respondent in the amount of \$6,943,102.70, together with interest from May 18, 1977. Respondent did not appeal said order.

On August 14, 1980, or less than two months before the entry of the New Jersey order recognizing the Michigan judgment, four mortgages were recorded against his Plainfield house. The first mortgage was given to Dorothy Hammer, believed to be respondent's female companion; the second was given to Donald Frandsen, an old friend of respondent's; the third was given to Theresa and Dominick Giordano, respondent's sister and brother-in-law; and the fourth was given to respondent's brother, Thomas Breen, Jr. Furthermore, a title search revealed*527 a deed from respondent to Dorothy Hammer, dated March 10, 1980 but recorded on September 29, 1980, only 21 days before the New Jersey judgment was docketed.

On December 4, 1984, the court ordered respondent to attend a supplementary proceeding and to produce all relevant documentation. Respondent did not appear.

On February 1, 1985, the court ordered respondent

to appear before it on March 1, 1985, to show cause why he should not be held in contempt. Again, respondent did not appear. Whereupon the court signed a warrant for respondent's arrest.

Respondent was arrested on June 17, 1985. He was ordered to testify at the supplementary proceeding and to furnish all requested documents to grievant's attorney. Although he appeared, respondent failed to bring any documents. He testified that he had no office records, other than notes in his checkbook. He was unable to produce proof of any consideration for the mortgages and the deed. At a prior deposition, his sister and brother-in-law testified that they had no knowledge of a mortgage in their name against respondent's house.

A further hearing was scheduled for July 2, 1985. Once again, respondent did not appear. Although further warrants for his arrest have been signed, it appears that respondent has successfully evaded them.

The district ethics committee hearing was held on May 22, 1986. Respondent did not appear. The panel report found that respondent had violated *R.P.C.* 8.4 through acts of "misconduct of the most egregious nature," by committing fraud and conspiring to commit fraud against grievant in the Michigan matter; by failing to return grievant's deposit; by failing to respond to court orders and to appear at supplementary proceedings; by being arrested for breach of court orders; by failing to provide documents, pursuant to court orders; by illegally placing mortgages against his home in order to defraud*528 a judgment creditor; and by illegally transferring his house, for no consideration, to defraud a judgment creditor.^{FN1}

FN1. At the committee hearing, reference was made to a possible ethical infraction arising out of respondent's appearance in the *Berger* matter at a time when he was ineligible to practice law for failure to pay the Client Security Fund. The committee concluded that the record before it did not

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support a finding of an ethical violation. For similar reasons, the Board is unable to reach a conclusion in this regard.

The committee submitted a unanimous presentment and recommended that, on the Haupt matter alone, respondent be disbarred.

The Berger Matter

Complainant, Daniel E. Berger, is an attorney-at-law of the State of New Jersey. On April 3, 1985, complainant represented his father's corporation, Lakechef, Inc. ("Lakechef"), as landlord, in a tenancy matter**108 to evict respondent's client, Main Answer, Inc. ("Main Answer"), for failure to pay rent.

At the tenancy proceeding, respondent made false statements to the court concerning the amount of rent due by Main Answer. Specifically, respondent produced an agreement between Lakechef and Main Answer which purported to set off certain credits against the rent. The agreement, which was unsigned by Lakechef, was false. It was prepared by respondent or by someone at his direction, with his consent or approval. With the knowledge that it was false, respondent introduced it into evidence at the tenancy proceeding. Nevertheless, the court granted a judgment of eviction on that date.

On the next day, April 4, 1985, respondent filed a bankruptcy petition in behalf of Main Answer, thereby causing an automatic stay of the eviction. On May 22, 1985, complainant filed a motion in the bankruptcy court seeking a lift of the automatic stay, on the ground that the eviction had been ordered prior to the filing of the bankruptcy petition. The motion sought, also, to compel Main Answer to pay rent during the pendency of the bankruptcy.

*529 On the return date of the motion, respondent misrepresented to the bankruptcy judge that the rent due was \$275.00 per month when, in truth, Main Answer had previously made payments in the

amount of \$500.00 per month.^{FN2} Respondent misrepresented, also, that Main Answer was entitled to certain credits.

FN2. One of the \$500.00 checks had been returned for insufficient funds. Lakechef then filed a complaint in the municipal court charging Main Answer with issuing a bad check. The complaint was ultimately dismissed.

In view of the conflicting statements concerning the amount of rent, the bankruptcy judge adjourned the matter in order to conduct a hearing on that issue. He ordered, however, that Main Answer continue to pay the least amount of rent due, \$275.00 per month.

On July 13, 1985, a new bankruptcy judge heard the matter.^{FN3} Once again, respondent made serious misrepresentations to the court. Specifically, he falsely stated that the prior bankruptcy judge had ruled on the matter and had denied the motion to lift the automatic stay. The new judge, however, had reviewed the record prior to the hearing. In spite of respondent's misrepresentation, the judge lifted the automatic stay and granted complainant's motion to have Main Answer evicted.

FN3. The prior bankruptcy judge had retired by that date.

On August 6, 1987, respondent filed with the county clerk a false document purporting to be a Notice to Stay Execution of Removal Pending Appeal. Said document was designed to mislead the authorities and to prevent them from carrying out the eviction.

Nevertheless, the eviction began at 11:00 a.m. on August 21, 1984. At noon, respondent telephoned the clerk's and the constable's offices to advise them that he had obtained an order from a federal court staying the eviction. By the time the clerk's office contacted the constable, however, the eviction had been completed.

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*530 Respondent had, in fact, obtained a two-day stay of the eviction, at which time he misrepresented to the court that he had given notice of his application to the complainant, his adversary in the matter. The stay, however, was not granted until 4:30 p.m., hours after respondent telephoned the clerk's and constable's offices.^{FN4}

FN4. Complainant and the county officials were subsequently sued by Main Answer, this time represented by different counsel, for wrongful eviction. Coincidentally, the same federal judge heard the matter. The suit against complainant was dismissed on motion for summary judgment.

Thereafter, respondent filed a lawsuit in behalf of Main Answer against Lakechef for malicious prosecution in violation of civil rights, stemming from the municipal court complaint on the \$500.00 bad check. Lakechef was represented by attorneys for its insurance carrier. Although aware that Lakechef was represented by counsel, respondent communicated directly with principals**109 of Lakechef by sending letters and serving interrogatories on Lakechef.

The hearing before the district ethics committee took place on January 14, 1986. Respondent did not appear. Following the conclusion of the hearing, the committee found that respondent had been guilty of unethical conduct, in violation of *R.P.C.* 1.2(a), *R.P.C.* 3.2, *R.P.C.* 3.3(a), *R.P.C.* 3.4, *R.P.C.* 4.1, *R.P.C.* 4.2 and *R.P.C.* 8.4. Specifically, the committee concluded that respondent had made serious misrepresentations to three judges; had filed a fraudulent notice of appeal; had introduced false documents into evidence and made fraudulent statements on behalf of his client; had failed to make reasonable efforts to treat the court and other attorneys with reasonable courtesy and consideration; had knowingly made false statements of material fact or law and offered evidence which he knew to be false; had falsified evidence; had made false statements of material facts to third persons; had communicated directly with an adverse party rep-

resented by counsel; and had committed *531 numerous acts of misconduct. The committee recommended that a presentment be brought against respondent.

The Patria and Burrell Matter

In February 1984, Daniel Patria, Sr. and Darlene Burrell ("grievants"), uncle and niece, formed a corporation ("Darlynn"), the purpose of which was to operate a telephone answering service. Grievants were officers of Darlynn. Darlynn had signed an agreement with Atlantic Telephone Service, Inc. ("Atlantic") to install and lease an answering service system.

In March 1984, Darlynn entered into an oral agreement with Main Answer, Inc. ("Main Answer"), whereby the latter assumed all of Darlynn's liabilities and obligations, including those under the lease agreement with Atlantic. Grievants remained with Darlynn under an employment contract. The preparation of the written agreement was assigned to respondent, who was Main Answer's in-house attorney. Grievants were unrepresented by legal counsel.

In January 1984, Atlantic informed grievants that the lease was considered terminated for failure to make payments. Main Answer had not made the lease payments, as required by its oral agreement with Darlynn. Neither had respondent prepared the written agreement.

In October 1984, Atlantic served grievants with a summons and complaint, with Atlantic demanding payment and replevin of the equipment. Grievant then contacted respondent, who acknowledged that it was Main Answer's responsibility to make the lease payments and informed grievants that he would assume their representation in the litigation. Accordingly, grievants turned over to respondent the summons and complaint, relying on his promise to undertake their representation.

In January 1985, grievants discovered that respond-

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ent had failed to answer the complaint, thereby causing a default judgment to be entered against them, together with a writ of replevin. Grievants immediately contacted respondent, who acknowledged his failure to file an answer and assured grievants*532 that he would forthwith file a motion to vacate the default judgment against them.

In spite of his promise, respondent neglected to file the motion, as a result of which Atlantic recovered monies and equipment from grievants. Ultimately, grievants were forced to appear *pro se* before the court, in order to set aside the default judgment.

The district ethics committee hearing was held on July 16, 1986. Respondent did not appear. At the conclusion of the hearing, the committee found that, by representing Darlynn and Main Answer, respondent had created a definite conflict of interest, without any disclosure to grievants. The committee found, also, that he had acted against grievants' interests by favoring Main Answer and neglecting to act diligently and competently on grievants' behalf. In addition, the committee found that respondent had failed to communicate with grievants about the status of the litigation, all to grievants' detriment. The committee concluded that respondent had violated **110 R.P.C. 1.1(a), R.P.C. 1.2(a), R.P.C. 1.3, R.P.C. 1.4, R.P.C. 1.7(a), R.P.C. 3.2 and R.P.C. 8.4. The panel report revealed the committee's grave concern with respondent's ethical infractions. It stated "[i]t should be noted that the committee [is] extremely disturbed by the actions of Mr. Breen in this particular matter and that the misconduct in this particular case constituted more than negligence but gross misconduct and intentional wrongdoing on behalf of his clients. Essentially his actions constituted a fraud upon two innocent parties, namely Patria and Burrell." The committee recommended that a presentment be brought against respondent.

The Doley Matter

[1] In November 1977, Carolyn Doley, now known

as Carolyn Lombardi ("grievant"), engaged respondent to institute a divorce action against her then husband, who had been respondent's client from 1971 to 1975. In 1975 or 1976, respondent had also represented grievant in a matrimonial matter against *533 her first husband. In spite of the fact that respondent had represented both parties on prior occasions, he undertook to represent them in their divorce settlement. At no time did respondent advise grievant of a potential or actual conflict of interest arising out of the dual representation.

Ultimately, grievant retained new counsel. Respondent refused to release her share of the net proceeds of the sale of the marital home, which proceeds he was holding in escrow, demanding that grievant pay him the sum of \$2,500.00 from the escrowed proceeds. Grievant then instituted an action against respondent for the release of the escrow funds.

The matter was decided in favor of grievant. The court ruled that respondent had committed a tortious act of conversion by asserting control of escrowed funds belonging to grievant. Eventually, respondent released the funds to grievant, albeit with considerable delay.

The hearing before the district ethics committee took place on May 14, 1985. At the end of grievant's testimony, respondent requested an adjournment to afford him the opportunity to obtain legal representation. He advised the committee that he would have to make an application for the appointment of an attorney, in view of his indigent status. The committee granted an adjournment. No application, however, was ever made. The committee made numerous attempts to contact respondent by telephone and by letters, advising him that, unless an attorney were appointed, the matter would proceed without him. Respondent never replied. At the conclusion of the second hearing, the committee found that respondent had violated DR 2-106, DR 9-101, DR 7-104 and DR 4-101. Specifically, the committee concluded that respondent had been guilty of overreaching; had communicated with a

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party of adverse interest who was not represented by counsel; had breached the confidentiality of an attorney/client relationship; and had failed to avoid the appearance of impropriety. The committee recommended that respondent be publicly reprimanded.

***534 MATTERS INVOLVING PATTERN OF
 NEGLECT**

1. The Van Arsdale Matter

In November 1980, Barbara Van Arsdale ("grievant") contacted respondent for legal representation in connection with the institution of a personal injury action in her behalf. She met with respondent, for the first time, in December 1980. At that time, respondent advised her to obtain any medical records concerning her injuries. She did so. At a subsequent meeting with respondent, in July 1981, grievant submitted all medical records, bills and a narrative of her injuries, as instructed by respondent.

During the remainder of 1981 and the early part of 1982, grievant contacted respondent at least 20 times in order to obtain information about the status of her matter. On two occasions only did respondent return her telephone calls.

In August 1982, respondent informed grievant that he had received an offer from the insurance company in the amount of \$25,000.00. Said offer, actually made in March of 1982 and rejected by respondent, **111 was never communicated at the time to grievant, in writing or orally.

On October 29, 1982, two days before the statute of limitations was to run, respondent filed a complaint. It was not until sometime in 1983 that he forwarded to grievant a copy of the complaint, which was not stamped.

In June 1984, the matter was scheduled to be considered by an early settlement panel. Upon contact-

ing the clerk's office, grievant was advised that the matter was about to be dismissed as a result of respondent's failure to provide proof of service on certain defendants. When grievant contacted respondent, he told her that the clerk was a "liar."

In November 1984, grievant demanded that respondent immediately turn the file over to her so that she could obtain new counsel. Respondent complied, but several weeks later. Numerous important original documents were missing from the *535 file. Grievant's new counsel made numerous attempts to obtain the remainder of the file from respondent, all to no avail. New counsel was forced to obtain a court order requiring respondent to release the entire file. Respondent ignored the court order. In late 1985, new counsel settled the matter for \$34,875.00.

The district ethics committee hearing was held on December 13, 1985. Respondent failed to appear. The committee concluded that respondent had violated *DR 7-101(A)(1), (2), (3), DR 7-101(B)(1), DR 1-102(A)(1), (5), (6), DR 9-102(B)(1), (3), (4), DR 7-102(A)(8)* and superseding *R.P.C. 1.2., R.P.C. 1.3, R.P.C. 1.4 and R.P.C. 8.4*. Specifically, the committee found that respondent had failed to seek the lawful objectives of the client through reasonable, available means; had failed to act with due diligence and to maintain property and records received from the client; had failed to turn over the file when requested; had failed to carry out his contract of employment, to the client's prejudice; had failed to keep the client reasonably informed as to significant matters that affected her case; had engaged in conduct prejudicial to the administration of justice; and had been guilty of illegal conduct. The committee recommended that a presentment be brought against respondent.

2. The Gross Matter

In May 1982, Herbert Gross ("grievant") consulted with respondent about the institution of an employment-related action in his behalf. At respondent's

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request, grievant paid him a retainer of \$750.00. Between June 1982 and December 1983, grievant telephoned respondent 50 to 60 times in an attempt to obtain information about the status of his matter. On the very few occasions that respondent returned his calls, grievant was informed that the matter was not progressing because respondent was "busy renovating his house," "in court," or "working with diamond merchants in Michigan."

*536 In December 1983, when grievant consulted with another attorney, he was advised that the statute of limitations had run. It appears that the cause of action consisted of libel, slander or defamation, which carries a one-year statute of limitations.^{FN5}

FN5. Grievant also consulted respondent with respect to a lawsuit against the union of which grievant was a member. It was grievant's belief that various members of the union were misappropriating funds. The committee dismissed this charge against respondent on the basis of insufficient evidence to support a finding of unethical conduct.

A hearing was held before the ethics committee on December 13, 1985. Respondent failed to appear. The committee concluded that respondent had failed to represent his client zealously; had failed to act with due diligence, thereby causing the statute of limitations to run; had failed to communicate with the client; had failed to discuss the matter with the client to enable him to make an informed decision regarding representation by other counsel; and had been guilty of misconduct. Accordingly, the Committee found that respondent had violated DR 7-101(A)(1), (2), and (3), DR 9-102(B)(4), DR 1-102(A)(1), (5), (6) and superseding R.P.C. 1.2(a), R.P.C. 1.3, R.P.C. 1.4 and R.P.C. 8.4. The committee recommended**112 that a presentment be brought against respondent.

3. The Stevens Matter

In February 1984, Wanda M. Stevens ("grievant") retained respondent to represent a friend who was incarcerated at that time. The representation concerned certain unpaid sales taxes by a candy store owned by grievant's friend.

Shortly thereafter, grievant paid respondent a cash retainer of \$600.00 and submitted the essential documents requested by respondent to start the litigation. She did not hear from respondent again, in spite of her numerous attempts to reach him.

In October 1984, grievant retained new counsel, who requested that respondent turn over the file to him. One year later, in *537 October 1985, respondent still had not released the file. New counsel was then forced to file an order to show cause, which was granted. Respondent ignored the court order, thereby precluding grievant from pursuing the matter and from complying with the state tax reporting services.

At the conclusion of the district ethics committee hearing, which respondent did not attend, the committee found that respondent had violated DR 7-101(A)(1), (2), (3), DR 1-102(A)(1), (6), DR 7-102(A)(8) and superseding R.P.C. 1.2(a), R.P.C. 1.3, R.P.C. 1.4 and R.P.C. 8.4. Specifically, the committee concluded that respondent had failed to communicate with the client, the client's new counsel and the court; had failed to file a tax return, as instructed; had failed to act with reasonable diligence and promptness in representing the client; had failed to respond to the client's reasonable requests for information; had failed to release the file, as ordered by the court; had failed to explain the matter to the client to enable him to make an informed decision; and had been guilty of misconduct. The committee recommended that a presentment be brought against respondent.

4. The Griffin Matter

In June 1983, Oren Griffin ("grievant") consulted with respondent about representation in a divorce

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matter filed by his wife. Respondent scheduled a meeting with grievant at Howard Johnson's restaurant, at which time he asked for a \$600.00 retainer. No written agreement, however, was prepared or signed.

Grievant indicated to respondent that he was in need of support from his wife because he was a full-time student. He instructed respondent to file a counterclaim seeking support and also alleging desertion on the part of his wife. Respondent neglected to file the counterclaim.

From the period June 1983 to February 1984, respondent communicated very infrequently with grievant, in spite of the *538 latter's numerous attempts to contact him by leaving messages on a recording machine. On those infrequent occasions when respondent returned the calls, he assured grievant that the matter was proceeding "just fine." Between February 1984 and September 1984, grievant was able to speak to respondent on several occasions and, in fact, met with him personally, but always at some restaurant; never at respondent's office, which is located in his Plainfield home. On those occasions, respondent would advise grievant that the case was progressing "just fine."

From September 1984 through March 1985, grievant was unable to reach respondent. Eventually, in March 1985, respondent informed grievant that the divorce had been granted. He never sent grievant a copy of the final judgment of divorce, however.

Once again, respondent failed to appear at the committee hearing, which was held on January 14, 1986. The panel report concluded that all respondent had done in the matter was to collect the \$600.00 retainer. He did not file any papers in grievant's behalf, did not communicate with grievant and did not forward him copies of any documents. The committee found that respondent had failed to pursue the client's lawful objectives; had failed to act with reasonable diligence and promptness, thus **113 causing a judgment of divorce to be granted by default; had failed to take any neces-

sary action in the matter; had failed to communicate with the client; had misrepresented the status of the matter to the client; and had been guilty of misconduct. The committee concluded that respondent had violated DR 7-101(A)(1), (2), (3), DR 1-102(A)(1), (5), (6), DR 7-102(A)(8) and superseding R.P.C. 1.2(a), R.P.C. 1.3, R.P.C. 1.4 and R.P.C. 8.4. The committee recommended that a presentment be brought against respondent.

5. *The Skalski Matter*

In August 1983, Joseph Skalski ("grievant") was seriously injured in a motorcycle accident. On the advice of a friend, *539 grievant contacted respondent in September 1983, at which time respondent informed him that his fee would be one-third of any recovery. Respondent did not prepare a written retainer agreement.

At the initial meeting, grievant submitted to respondent all necessary medical bills and records to enable him to file suit. Because grievant was unable to return to work, he requested that respondent apply for P.I.P. benefits in his behalf. In fact, the insurance company who represented grievant did pay over to respondent the sum of \$17,000.00 for medical bills incurred by grievant. Respondent, however, never sent it to grievant or paid any medical or hospital bills. Ultimately, grievant's new counsel was able to obtain the \$17,000.00 and repay the various providers.

During the period September 1983 to May 1984, grievant became extremely anxious. He was still not receiving P.I.P. benefits. Every two or three days, he attempted to reach respondent. During all of 1984, respondent offered various excuses to grievant as to why he was not receiving P.I.P. benefits.

In December 1984, grievant retained new counsel to start the litigation and to take the necessary steps to pay his medical and hospital expenses. Respondent refused to return the file, in spite of numerous

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written requests from grievant and his new counsel. As a result, new counsel was forced to reconstruct the files in order to prosecute the tort claim. In January 1986, the suit was settled for \$90,000.00.

At the conclusion of the district ethics committee hearing, which respondent did not attend, the committee found that respondent had violated *DR* 7-101(A)(1), (2), and (3), *DR* 1-102(A)(1), (5), and (6), *DR* 7-102(A)(8), and superseding *R.P.C.* 1.2(a), *R.P.C.* 1.3, *R.P.C.* 1.4 and *R.P.C.* 8.4. Specifically, the committee concluded that respondent had failed to carry out his contract of employment; had failed to act with due diligence; had ignored the client's requests for information; had misrepresented*540 the status of the matter; had failed to explain the matter to the client to allow him to make an informed decision; had failed to prepare a written retainer agreement; and had been guilty of misconduct. Accordingly, the committee recommended that a presentment be brought against respondent.

6. *The Rich Matter*

In October 1984, Marion Nicholas Rich ("grievant") retained respondent to apply for the attachment of her ex-husband's pension funds to ensure the payment of alimony. For approximately four to six months, grievant telephoned respondent on a regular basis, most of the time reaching an answering machine. Eventually, respondent appeared at grievant's home on a Sunday evening, at which time he instructed her to sign a "legal document which was to be filed with the court." No retainer agreement or fees were ever discussed. Grievant testified that she and respondent had become friends and that, in 1981, she lent him the sum of \$3,000.00. It was her belief that any fee due and owing to respondent would be deducted from said loan.

In April 1985, grievant received a telephone call from the probation department advising her that the file would be closed as a result of her ex-husband's retirement from his employment. Following numer-

ous attempts by grievant to contact respondent, in May 1985 he advised her that an order for the wage execution had been **114 signed and forwarded to the probation department.

In August 1985, grievant received a document from the probation department, informing her that the wage execution was no longer enforceable. Whereupon grievant contacted respondent and requested that he file an application with the court seeking a modification of the order and the attachment of the pension fund. Respondent failed to appear at the hearing or otherwise pursue the matter in grievant's behalf.

In September 1985, grievant tried to contact respondent numerous times, leaving messages on his answering machine. *541 At the court's suggestion, she retained new counsel. He ignored her requests that the file be returned to her.

Additionally, in 1983, grievant instructed respondent to modify her will to make it self-proving. Respondent neither prepared a new will nor returned the old will to grievant.

The hearing before the district ethics committee was held on January 14, 1986. Respondent failed to appear. The committee concluded that respondent had violated *DR* 6-101(A)(3), *DR* 7-101(A) and superseding *R.P.C.* 1.3, *R.P.C.* 1.1(a), *R.P.C.* 1.4 and *R.P.C.* 8.4. Specifically, respondent had failed to abide by the client's decision concerning the representation of the matter; had failed to attach her ex-husband's pension funds and to revise her will; had failed to act with due diligence and competence; had failed to keep the client informed about the status of the matter; had misrepresented the status of the matter; and had been guilty of misconduct. The committee recommended that a presentment be brought against respondent.

7. *The Lawson Matter*

In April 1981, respondent represented Rose Lawson ("grievant") in a divorce action. Pursuant to the fi-

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nal judgment of divorce, grievant's ex-husband was to make alimony payments of \$50 per week, said payments to be made through respondent. Between 1981 and October 1985, grievant received the alimony checks from respondent, although not in a timely fashion. Commencing in October 1985 and thereafter through November and December 1985, the payments were never forwarded to grievant, although received by respondent. Starting in January 1986, respondent, or someone at his direction, returned the checks to grievant's ex-husband, who voided them and began to pay grievant directly. Grievant testified that she made repeated attempts to contact respondent, all to no avail. In addition, she appeared at respondent's house and left several messages which remained unanswered.

*542 Respondent did not appear at the committee hearing, which was held on June 17, 1986. The committee found that respondent had violated *R.P.C. 1.3, R.P.C. 1.4 and R.P.C. 8.4*.^{FN6} Specifically, the committee concluded that respondent had failed to act with due diligence in forwarding the checks to the client; had failed to communicate with the client; and had been guilty of misconduct. The committee recommended that a presentment be brought against respondent.

FN6. Respondent's conduct was also in violation of *DR 7-101(A)(2) and (3) and DR 1-102(A)(1), (6)*.

8. *The Gosen Matter*

The 1980, Rita Gosen ("grievant") paid a \$600.00 retainer to respondent to attempt to recover monies in connection with a real estate transaction, a promissory note and the repossession of an automobile. Grievant and respondent met at the Howard Johnson's restaurant, at which time he assured her that he would forthwith pursue all three matters. No written retainer agreement was prepared or signed.

After the initial meeting, grievant met respondent at different places, including Howard Johnson's and

Burger King, in order to discuss the progress of the matters. In addition, she made repeated phone calls to his office, invariably reaching an answering machine. Respondent never returned grievant's calls.

In November 1985, grievant wrote a letter to respondent, requesting that he return**115 all her documents or, in the alternative, forward them to her new attorney. Respondent refused to do so and failed to take any action in grievant's behalf.

At the conclusion of the district ethics committee hearing, which was held on June 17, 1986, and which respondent did not attend, the committee found that respondent had violated *R.P.*543 C. 1.2(a), R.P.C. 1.3, R.P.C. 1.4 and R.P.C. 8.4*.^{FN7} Specifically, the committee concluded that respondent had failed to abide by the client's decisions or objectives; had failed to act with due diligence; had failed to communicate with the client and to keep her reasonably informed about the status of the matter; and had been guilty of misconduct. The committee recommended that a presentment be brought against respondent.

FN7. Respondent's conduct was also in violation of *DR 7-101(A)(1), (2) and (3) and DR 1-102(A)(6)*.

9. *The Nowakowski, Monahan and Caulfield Matter*

On September 20, 1980, Matthew S. Nowakowski, Eugene Monahan and Eugene Caulfield ("grievants") retained respondent to represent them in a labor matter. In August 1985, respondent filed an action on grievants' behalf in federal court. On numerous subsequent occasions grievants attempted to contact respondent by telephone in order to request information about the status of the action. Respondent did not return any of grievants' telephone calls.

In January 1986, one of the grievants directly inquired of the court on the status of the matter. He was advised that it had been dismissed as a result of respondent's failure to serve the summons and com-

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plaint upon the defendant.

Numerous subsequent telephone calls to respondent remained ignored. Respondent also failed to appear at two scheduled meetings with grievants.

On June 17, 1986, the district ethics committee held a hearing, which respondent did not attend. The committee concluded that respondent had violated *R.P.C.* 1.3, *R.P.C.* 1.4 and *R.P.C.* 8.4, by failing to act with due diligence in representing the clients; by failing to communicate with the clients; and by being guilty of misconduct. The committee recommended that a presentment be brought against respondent.

*544 On October 15, 1985, amended on June 12, 1986, a formal complaint was filed by the District XII Ethics Committee, charging respondent with violations of *DR* 6-101(A)(3) and *R.P.C.* 1.1(b), the disciplinary rules dealing with a pattern of neglect. Respondent did not file an answer. A formal hearing was held on June 17, 1986. Respondent did not appear. At the conclusion of the hearing, the committee found that respondent's conduct had been clearly unprofessional and unethical and that, based on the findings of twelve separate cases, respondent had established a pattern of neglect and conduct unbecoming of an attorney, thereby violating *DR* 6-101(A)(3) and *R.P.C.* 1.1(b).

The committee found further that respondent's actions exceeded mere negligence. It concluded that defendant had "systematically devastated the rights of clients, willfully misrepresented facts to numerous judicial tribunals and Courts, and disgraced the legal profession." The committee's final conclusion was summarized in the panel report:

The respondent has refused to cooperate with the Courts of this State and this committee in assisting them or his clients. While the committee is unsure of what motivated the respondent in his behavior, the committee is convinced beyond a reasonable doubt that the respondent John Breen is totally unfit to practice law in this State. Therefore, this com-

mittee recommends that the respondent be permanently barred from the practice of law. Further, the committee recommends that the Office of Attorney Ethics be empowered with the authority to seize all books, records and files of John Breen, and to appoint a trustee to review same and to contact all clients to effect an orderly transfer of these records and files to clients.

CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board finds that the conclusions of the **116 committees are fully supported by clear and convincing evidence. The Board, however, disagrees with the committee's recommendation, in the Doley matter, that respondent be publicly reprimanded. Standing alone, that ethical infraction might very well merit the recommended discipline. The totality of the transgressions, however, calls for the imposition of more severe sanctions.

*545 [2] With regard to the Haupt matter, the Board finds that the record fully supports a finding of ethical transgressions of the most egregious nature. Respondent, or someone at his direction or with his knowledge and approval, fraudulently prepared, executed and recorded four mortgages against his house in an attempt to defraud a judgment creditor, the grievant herein. The mortgages were false and for no consideration. In fact, in at least one instance, the mortgagees had no knowledge of the mortgage. Respondent's sister and brother-in-law testified at their deposition that they were unaware of the mortgage to them and that respondent did not owe them any money.

Similarly, the three other mortgages were fraudulent. The mortgagees were respondent's female companion, an old friend, and his brother. When deposed on April 22, 1985, respondent testified that he and his wife were divorced in 1975 and that, in order to buy her share of the marital home, he had borrowed funds from Dorothy Hammer.^{FN8} This is in direct conflict with the statements made at his

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that the evidence clearly and convincingly shows that respondent committed grave ethical transgressions.

Respondent committed fraud upon the court when he represented, at the tenancy hearing, that an agreement existed between Lakechef and Main Answer. In furtherance of his oral misrepresentation, respondent produced an unsigned agreement, which he or his client, with his knowledge and approval, had prepared. The agreement was false.

Additionally, respondent misrepresented the same facts to the first bankruptcy judge and subsequently attempted to deceive the bankruptcy judge who presided at the later hearing. He also filed a false pleading with the county clerk, namely a fraudulent notice of appeal. He misrepresented that he had obtained an order staying the eviction and that he had provided his adversary, the complainant herein, with notice of his application to the federal court. Lastly, he communicated directly with Lakechef, with the knowledge that it was represented by counsel. See *In re Reiss*, 101 N.J. 475, 492 [502 A.2d 560] (1986).

*548 The Board concludes that respondent's conduct was grossly unethical and in violation of R.P.C. 1.2(d), (e), R.P.C. 3.3(a)(1), (2), (4), and (5), R.P.C. 3.3(c), (d), R.P.C. 3.4(b), R.P.C. 4.2 and R.P.C. 8.4(a), (b), (c).

[4] In the Patria and Burrell matter, after careful review of the record, the Board finds that the committee properly concluded that respondent's conduct was grossly unethical.

Respondent, as Main Answer's in-house counsel, was responsible for the preparation of the written document embodying the terms of the verbal agreement reached between grievant and Main Answer. Grievants, who were unrepresented, trusted respondent to formalize the terms of the agreement diligently and competently. Respondent, however, neglected to prepare the written agreement. Accordingly, when respondent's client, Main Answer,

breached its obligation to make lease payments to Atlantic, as provided by the terms of the oral agreement with Darlynn, Atlantic sought relief from the latter, the party with whom it had contracted. Hence the lawsuit against grievants.^{FN10}

FN10. Although the record is silent in this regard, it appears that grievants were personally responsible for the lease payments to Atlantic.

Grievants testified that, three days after being served with the summons and complaint, they met with respondent at the Lobster Shanty in Toms River. After reviewing the summons and complaint, respondent assured them that it was Main Answer's responsibility to make the payments and informed them that he would take appropriate action by answering "the summons and complaint and mak(ing) a motion or whatever legal steps would be necessary to have the summons and complaint **118 rewritten" [T1 15-17 to 19].^{FN11} Grievants were left, thus, with the distinct impression that the lawsuit against them was a mistake and that, as is expected of a responsible attorney, respondent would remedy the situation. Although grievants did not make any payment for legal services, it was *549 reasonable to believe that respondent would act as their attorney and, as such, protect their interests. Much to their dismay, however, respondent allowed a default judgment to be entered against them by failing to file an answer in the matter.

FN11. T1 denotes the transcript of the hearing on June 17, 1986.

After several consultations with respondent, grievants once again were assured that respondent would represent them diligently by filing a motion to vacate the default judgment. When he did not, grievants had the judgment vacated by appearing *pro se*. At all relevant times, respondent was Main Answer's attorney.

Had respondent's misconduct been confined to dual representation and neglect, the discipline imposed

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might not be more severe than a public reprimand or a short-term suspension. See *Matter of Reiss*, 101 N.J. 475 [502 A.2d 560] (1986); *In re Palmieri*, 75 N.J. 488 [383 A.2d 1142] (1978); *In re Rigg*, 57 N.J. 288 [271 A.2d 714] (1970); *In re Kamp*, 40 N.J. 588 [194 A.2d 236] (1963); *In re Lanza*, 24 N.J. 191 [131 A.2d 497] (1957).

The Board finds, however, that respondent's misconduct was nothing short of unconscionable. It went beyond the instances of conflict of interest and neglect which have been the subject of review by the Board and the Supreme Court. It was tainted with overreaching and fraud. Respondent knew that grievants, who were relatively unsophisticated, had no independent legal advice and relied on his acknowledgment that Main Answer, not grievants, was responsible for the payments. For who better than Main Answer's own counsel to concede that Main Answer had full responsibility for the obligations under the lease agreement with Atlantic?

Moreover, they placed complete reliance on respondent's assurance that he would act as their own attorney in the litigation with Atlantic. Not once did respondent disclose to grievants the serious conflict of interest which he consciously created. Not once did he inform grievants about the actual danger involved in his dual role in the matter.

The conclusion is unavoidable that respondent, from the outset, unscrupulously led grievants to believe that he would *550 protect their interests, all the while conscious that, if no action were taken in their behalf, his other client, Main Answer, would benefit therefrom and, thus, escape liability. The Board concurs with the committee's insightful conclusion that respondent deviously embarked on a predetermined course of action designed to commit a fraud upon two trusting innocent parties, the grievants herein.

[5] With respect to the Doley matter, the Board concludes that respondent violated DR 9-102(B)(4) when he refused to promptly deliver to the client the funds to which she was entitled, namely her

share of the proceeds of sale of the marital home. That respondent ultimately released the funds to her, pursuant to court order, does not exonerate his conduct.

[6] The Board finds, also, that respondent violated DR 5-105 by representing both grievant and her husband in the divorce matter. See *Advisory Committee on Professional Ethics Opinion No. 216*, 94 N.J.L.J. 677 (1971). R. 1:19-6.

[7] With regard to the matters evidencing a pattern of neglect, the Board is satisfied that each instance of ethical violation is amply supported by the record. The Board is satisfied, also, that respondent's actions, taken together, exhibit a pattern of neglect. In the nine relevant cases, the instances of misconduct are similar. Respondent deliberately failed to take appropriate action to institute suit and to protect his clients' interests. In each case, respondent undertook to represent the grievants after an initial meeting, demanded a payment of a retainer fee, failed to carry out his contracts of employment, and misrepresented**119 the status of the various actions. These serious ethical transgressions cannot be condoned. See *In re Netchert*, 78 N.J. 445 [396 A.2d 1118] (1979) (where pattern of neglect in 4 separate cases and contumacious failure to cooperate with the ethics proceedings merited disbarment). See also *In re Goldstein*, 97 N.J. 545 [482 A.2d 942] (1984) (where pattern of neglect clearly emerged from 11 instances of misconduct; coupled with attorney's violation of agreement to limit his practice to criminal matters, misconduct warranted disbarment).

*551 Here, in 12 cases respondent ignored his clients' legitimate request for information about the status of their matters. An attorney's failure to communicate with his clients diminishes the confidence reposed by the public on members of the bar. *Matter of Stein*, 97 N.J. 550, 563 [483 A.2d 109] (1984). The financial and emotional hardship which respondent deliberately inflicted upon his clients cannot be forgiven. *Matter of Dailey*, 87 N.J. 583, 594 [436 A.2d 1341] (1981). In addition, the record

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discloses no redress to grievants.

The Board is particularly disturbed by respondent's flagrant, contumacious disregard for the solemnity of the ethics process. In 13 of the 14 matters presently under review, respondent failed to file an answer. Although provided with proper notice, respondent failed to appear at seven of the eight hearings which required extensive preparation by the members of the ethics committees who investigated these matters.^{FN12}

FN12. The Board wishes to extend its appreciation to the members of the district ethics committees who handled the within matters, particularly to Douglas W. Hansen, Esq., Chair of the District XII Ethics Committee, for their contribution to the ethics process, as shown by their countless hours of preparation that these matters required and by their demonstrated commitment to the legal profession and the judicial system.

[8] When an attorney shows disrespect to an ethics committee, he shows disrespect to the New Jersey Supreme Court inasmuch as the committee is an arm of that Court. *In re Grinchis*, 75 N.J. 495, 496 [384 A.2d 137] (1978). What emerges in this shocking state of affairs is a pattern of contumacious disdain for the courts, the district ethics committees and this Board. The Board finds that respondent violated DR 1-102(A)(5) and superseding R.P.C. 8.1(b), by his obstreperous disregard for the ethics process.

The Board noted that respondent has been suspended since February 4, 1986, and until further order of the Court, as a result of his egregious conduct in numerous complaints that *552 had to be investigated. Based on the foregoing and on the record before it, the Board concludes that respondent has consciously forfeited his privilege to practice law.

It is well-settled that membership in the profession is a privilege burdened with conditions. Some of

the basic conditions are good moral character, a capacity for fidelity to the interest of the clients and the fairness and candor in dealings with the courts. Those conditions are not only prerequisite for admission to the bar, they are equally essential afterward. Whenever they are broken, the privilege is lost. *In re Pennica*, 36 N.J. 401, 433-434 [177 A.2d 721] (1962).

[9] Respondent's deceit and dishonesty did not consist of an aberrational act, but a continuing, ongoing, consciously planned course of conduct, which is shocking to the minds of decent individuals and tarnishes the public image of the honorable members of the legal profession.

As Justice Brennan observed in *In re Herr*, 22 N.J. 276, 300 [125 A.2d 706] (1956), "(t)here is no profession, save perhaps the ministry, in which the highest morality is more necessary than that of the law." By his numerous acts of misconduct, respondent exhibited conscious, willful, callous disregard for the truth and for his duty of good faith and honorable dealing with his opponent and the judicial tribunals. Such conduct diminishes public confidence in the legal profession and goes "to the heart of every attorney's obligation to uphold and honor the law." *In re Schleimer*, 78 N.J. 317, 319, [394 A.2d 359] (1978) (where an attorney with 40 years of unblemished**120 legal service received a one-year suspension for one instance of false swearing at his deposition).

Respondent's conduct has poisoned the well of justice. It was so immoral that it destroyed any expectation that he can ever again abide by the high standards required of the profession. Accordingly, the Board must recommend that respondent be disbarred. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for appropriate administrative costs.

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C

Supreme Court of New Jersey.
 In the Matter of Dante DE PAMPHILIS, Attorney-
 at-Law of the State of New
 Jersey. In the Matter of Lawrence FRIEDMAN, At-
 torney-at-Law of the State of New Jersey.
 Nos. D-12, D-10.

Argued April 20, 1959.
 Decided July 31, 1959.

Disciplinary proceedings against attorneys. On or-
 ders to show cause why attorneys should not be dis-
 ciplined, the Supreme Court, Hall, J., held that
 evidence of unprofessional conduct warranted reprimand.

Respondents reprimanded.

West Headnotes

[1] Attorney and Client 45 ↪ 59.8(1)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.8 Public Reprimand; Public
 Censure; Public Admonition
 45k59.8(1) k. In General. Most
 Cited Cases
 (Formerly 45k58)
 Evidence of unprofessional conduct by attorneys
 warranted imposition of reprimand.

[2] Attorney and Client 45 ↪ 32(7)

45 Attorney and Client
 45I The Office of Attorney
 45I(B) Privileges, Disabilities, and Liabilities
 45k32 Regulation of Professional Con-
 duct, in General
 45k32(7) k. Miscellaneous Particular
 Acts or Omissions. Most Cited Cases

(Formerly 45k32)

Conduct by attorneys in recommending transfers of
 property and participating in scheme to defraud
 creditors is unethical and unprofessional despite the
 fact it may be thought to serve the client and no one
 may be actually injured. R.S. 25:2-13, 15, N.J.S.A.;
 Canons of Professional Ethics, American Bar Asso-
 ciation, canon 29.

*470 **680 Abram A. Lebson, Englewood, argued
 the causes for Bergen County Ethics and Grievance
 Committee.

*471 Albert S. Gross, Hackensack, argued the
 cause for respondent DePamphilis (Gross & Gross,
 Hackensack, attorneys; Albert S. Gross of counsel).

Walter D. Van Riper, Newark, argued the cause for
 respondent Friedman (Van Riper & Belmont, Ne-
 wark, attorneys; Walter D. Van Riper of counsel).

The opinion of the court was delivered by
 HALL, J.

The Bergen County Ethics and Grievance Commit-
 tee filed separate presentments charging each re-
 spondent with unethical and unprofessional conduct
 'in recommending the transfer of properties in an
 attempt to defraud creditors and to file bankruptcy
 proceedings and in his participation in the actual
 transfer of properties * * *.' The ethical problem
 involved has not previously been the subject of
 consideration by this court.

The matter originated from a self-prepared written
 complaint against both attorneys made by their cli-
 ents, Mr. and Mrs. James Zuccarelli, and filed with
 the committee early in March 1957. At that time the
 Zuccarellis were engaged in a controversy**681
 with respondent DePamphilis, whom they had re-
 tained several months previously in connection
 with financial difficulties in the operation of their
 retail confectionery business and who had early
 brought respondent Friedman into the matter, con-
 cerning the amount of the fee to be paid for the ser-

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vices actually rendered. The burden of the rather vitriolic complaint was that the fee agreed upon at the inception with both attorneys, a small part of which was paid in cash and the balance represented by a series of monthly notes then given which had been discounted by DePamphilis at a bank, was excessive because all of the legal work contemplated when the amount was fixed was not performed by reason of a change in the course of events. It was further claimed in effect that considerable of the advice given amounted to misguidance and the services actually rendered were in large part unnecessary. The document *472 asserted that a reduction in the original amount had been agreed to, but that DePamphilis had subsequently changed his mind, refused to return the remainder of the notes and threatened suit when the one currently due was not met. The document said: 'We would like a refund on the counsel fees paid and a return of the signed notes to us.'

In detailing in the complaint the chronology of happenings to support their charges, the Zuccarellis mentioned that DePamphilis originally advised them that, since they owned real estate, 'we should turn our property over to someone and later on go bankrupt,' and that subsequently the real estate was transferred to Zuccarelli's uncle, Edward Curran, at Friedman's office. They contended, not that such was unethical conduct on the part of the attorneys, but rather that it was bad legal advice because, as they claimed: 'We could not go bankrupt' and 'Transfer of property must set for 2 years before filing bankruptcy.'

Only DePamphilis was called upon to answer the complaint, since Friedman practiced in another county and the committee had no express jurisdiction over him.R.R. 1:16-2(a). The answer, beside asserting the necessity and soundness of the services and that the agreed fee was not excessive, denied any original advice to turn over the real estate to anyone and then to file a petition in bankruptcy. It did say, however, that the transfer came about when shortly thereafter the Zuccarellis ap-

peared at a conference in Friedman's office with the uncle and suggested they would like to convey their real estate to him because they owed him money for loans, said to have been evidenced by withdrawals shown in the uncle's savings account pass book over a period of 17 years, approximately equal to the equity in the properties. Following preliminary investigation, in which the whole matter was explored with the complainants and the attorney, the committee determined that a hearing be held and all witnesses examined including Friedman. At the several sessions which followed, it most properly and in conscientious performance of its plain duty *473 went thoroughly into and considered not only the matter of the fee, but also the question of any unprofessional conduct relating to the services performed, especially the conveyance of the real estate. Friedman appeared at the hearings as associate counsel for DePamphilis, was called as a witness in his behalf and examined and cross-examined by the members of the committee and the designated prosecutor as thoroughly as if the charges against him were then being heard and considered.

The unanimous presentment against DePamphilis was dated October 4, 1957, charging him as to the property transfers as previously set forth, but finding that there was insufficient evidence of unethical or unprofessional conduct in connection with the complaint as to counsel fees. We are not therefore further concerned with that phase.

After the Bergen County presentment was filed, that committee referred the complaint**682 as against Friedman for action in Essex County where he practiced. In due time he filed an answer and, at the request of that committee, a supplement thereto, the latter dated January 7, 1958. With respect to the question now before us, Friedman stated he advised the Zuccarellis bankruptcy would not lie because they were solvent and the real estate transfers were made at their request under circumstances similar to those related by DePamphilis. Friedman stressed, in his pleading, as had DePamphilis, that the complaint was motivated by a desire to avoid payment

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of agreed legal fees. We must comment that such a purpose in no way excuses unprofessional conduct disclosed on consideration of the complaint and appropriate disciplinary action if clear and convincing evidence establishes violation of the pertinent rules of conduct.

The Essex County Committee, after reviewing the Friedman case, quite correctly decided that it would be necessary to reexamine the witnesses who had testified in Bergen County and so sought the instructions of this court. To avoid duplication of effort, we directed the complaint as to *474 Friedman to be returned to that county for determination and withheld action meanwhile on the DePamphilis presentment. Because of the press of other matters the Bergen County Committee could not reach it for attention until September 1958. At the scheduled hearing Friedman by his counsel stipulated, in view of the full testimony already taken, in which he had participated, that the complaint be considered and determined on the record of that evidence. He knew that in the interim several new members who had not heard the witnesses had been appointed to the committee. Of the six members who considered the Friedman case, only three had been among the five participating in the presentment against DePamphilis. On December 22, 1958 the committee returned a presentment against Friedman, almost identical with that filed in the DePamphilis matter as to the property transaction, but naturally making no mention of the fee matter already determined. One of the six members dissented; he had sat in the former case.

Consideration of the presentment must be had in the light of the pertinent evidence in order to determine respondents' contention that the findings are not supported by adequate clear and convincing evidence. In October 1956 the Zuccarellis operated a confectionery store business in Newark which they had purchased in July 1955. The price had been paid partly in cash and the remainder by a purchase money chattel mortgage on the stock and fixtures held by the sellers. The payments on the debt

secured thereby were \$150 a month, plus interest. The instrument contained a provision making any balance due upon a sale of the business by the Zuccarellis. They also had assumed the balance of an obligation for the soda fountain on which \$79 had to be paid each month. Sometime subsequently they had received a \$2,000 loan from an ice cream company on which they required monthly payment was also about \$79. Rent was \$125 per month. While there had been no written contract of purchase the closing statement showed the gross receipts for the trial period prior to the transfer of the *475 business had met the sellers' guarantee of \$850 per week. After the purchase the receipts steadily declined until by winter the gross was \$600 or less a week and the venture was becoming unprofitable. In the early months of 1956 Mrs. Zuccarelli visited the attorney who had represented them in the purchase, probably on several occasions, complaining about the state of the business and wanting to know how they could get out of it. Obviously an emotional and excitable person, she expressed worry about the chattel mortgage and the attorney informed her personal liability on the obligation would remain even if the mortgage was foreclosed. On one visit she mentioned bankruptcy as a possible avenue of escape, an indication she was not entirely **683 unfamiliar with procedures that might be resorted to by hard-pressed debtors. She was dissatisfied with suggestions made by this attorney, but did nothing further for a time and the store continued to lose financial ground. By October of that year the situation had apparently become precarious and the chattel mortgages payments were in default or about to become so.

Shortly before the middle of that month she and her husband consulted DePamphilis at his office in Lyndhurst. He had represented each of them in other matters some years before. They laid their situation before him and asked how it could be relieved. At that time they claimed in effect that the sellers' guarantee of the gross receipts of the business was intended to extend beyond the trial period, and that this representation had been written down

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informally on a scrap of paper (which they were never able to produce) at the time of the deal. Mrs. Zuccarelli testified (the husband appeared as a witness only with respect to the later controversy over the fee) that DePamphilis thereupon advised that a suit could be brought to rescind the purchase (although it was 15 months since it took place) which would get the Zuccarellis their money back, with the extravagant assurance, as she put it, of a 99% Chance of success. She also testified that the matter of bankruptcy was discussed *476 and that DePamphilis had said, since business was as bad as it was, he thought the time would come when they would actually have to close the store down and go bankrupt, but that 'since we had property, he thought that it should be safeguarded and turned over to someone' and he 'asked us if we knew of someone that we could turn the property over to and someone we could trust and have confidence in.' The property referred to was the Zuccarellis' home in Belleville and a rented drug store property in the same town producing rent of \$100 per month. DePamphilis did not specifically deny recommending a rescission suit and admitted bankruptcy was discussed at the conference, but said that he had advised against it upon learning of their other assets and that he had at no time suggested a conveyance of the real estate. He did not say whether or not the possibility had been raised by his clients or discussed.

DePamphilis personally did but little of his own legal work and had for some time been calling in Friedman to assist in litigation and complicated matters. This was done in this instance after the initial consultation, with the Zuccarellis' consent, and some few days later the first conference with Friedman was held in his office in Newark, with DePamphilis also present (as he was at all such sessions). There is no indication whether the latter had discussed the situation with Friedman in the interim. The picture was again canvassed and Friedman advised an action to rescind should be brought, with good chance of success. It was authorized. Bankruptcy was certainly discussed and Friedman was

made aware of the Belleville real estate. He testified Mrs. Zuccarelli said she understood a bankruptcy proceeding could be instituted, placing this conversation however at his second and not the first meeting with the clients, but he advised it would not lie in view of the other assets and says it was never mentioned again. She testified on the contrary that bankruptcy was planned at the conference, to be instituted some six months later, and that she and her husband were asked by the lawyers 'to see if we could get *477 someone who we would have confidence in who we could turn the property over to, and my husband said, 'Well, the only one I could think of is my uncle.' (Such a course of action would only be of importance, of course, as a possible hedge against the contingency that the prospective rescission suit ultimately proved unsuccessful, the chattel mortgage was foreclosed and there was a complete failure of the business.)

**684 Friedman denied he made any suggestion of a conveyance, but said that at the same conference, after bankruptcy was discussed and discarded, Mrs. Zuccarelli told him they owed Curran between \$6,000 and \$7,000 for loans he had been making to them for some time and wished to transfer the properties to him. He did not say any arrangements to do so were planned at that time, but testified that a few days later Curran came to his office with the Zuccarellis and DePamphilis and produced the bank book to his surprise, since proof of the indebtedness had not been asked for. Friedman said the book showed withdrawals totalling about \$6,600, which Curran told him represented the loans and which Friedman computed would approximately equal the equity in the properties on figures of value and mortgage debt given him by the Zuccarellis. He said deeds to Curran were subsequently prepared, executed and recorded. Mrs. Zuccarelli testified that the bank book was produced at the suggestion of DePamphilis because he wanted to know whether there were any entries which would show a great deal of money had been withdrawn, because it had to be shown money had been received in exchange

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for the property. She further swore that when the book was examined by the lawyers, DePamphilis said the total withdrawals did not meet 'the certain required amount,' and that Curran was to withdraw and give them some more and that he in fact did shortly give them two checks for \$650 each. They cashed the checks and the next day returned the proceeds to him. She was emphatic that they had never previously borrowed any money from him and did not owe him a cent.

*478 Curran, an elderly gentleman, was called as a witness by the committee before Friedman and DePamphilis testified. His testimony as a whole obviously impressed the committee, and properly so. It, together with the physical facts surrounding the conveyance and subsequent happenings, convincingly established that there was no present or antecedent consideration for the conveyance, and that it was a pure sham undertaken for the purpose of concealing assets and defrauding or hindering creditors if such became necessary. The substance of his testimony was: late in October his nephew, whom he saw very infrequently, telephoned him and said he was probably going to lose his property, wanted to put it in the uncle's name, and asked him to come to Friedman's office and bring his bank book. He went to the office on a Saturday and met the Zuccarellis there, along with Friedman and DePamphilis, whom he had not previously known. The lawyers examined his bank book, saying that the Zuccarellis could not turn the property over to him without showing that they owed him money to be verified by withdrawals. He was not asked nor did he say whether they were indebted to him. In fact, up to this date he had had no business dealings with them, they had never borrowed from him and owed him nothing. The lawyers said the book didn't show enough withdrawals to take the property over and they told him to withdraw \$1,300 more and give it to the Zuccarellis. He did this on Monday, October 29, (at the hearing his pass book showed such an entry), and gave the checks for the amount to Mr. Zuccarelli, who cashed them and gave him back the money the next day. He still had this cash at his

home and offered to show it to the committee if any members wished to come to the house to examine it. He received no income from the properties after the conveyance and paid no taxes or other charges. He said he had participated reluctantly, 'I didn't want to do it, it was crooked work,' but had done so to save the house for his nephew who was partly blind and for whom he felt sorry.

*479 The properties were conveyed to Curran, subject to existing mortgages, by two deeds prepared by Friedman, dated October 31, 1956 and acknowledged before him by the Zuccarellis the same day. They were recorded on November 2 and, when returned **685 to Friedman after recording, were sent on to DePamphilis. Each deed bore \$5 in revenue stamps, cancelled by Friedman, which would indicate on the face an outright conveyance for an identical consideration in each instance of not over \$4,500. No instrument evidencing satisfaction of any debt was prepared or executed, Friedman testifying that he did not know or inquire whether the transfers were in satisfaction or only for security. There was no title examination.

During the course of his testimony, Friedman produced a slip of paper, which he said was not in his handwriting but in that of one of the Zuccarellis, purporting to set forth a checked list of the withdrawals shown in the Curran bank book, compiled at the time of its examination in his office. The list is in two handwritings. In the first are set down eight amounts with dates—one in 1939, two in 1940, two in 1941, two in 1950 and one in April 1956. In a different handwriting is another item of \$500 in 1948 (no specific date given), with a total for the nine items of \$5,312.04. Then is listed, also in the different handwriting, the \$1,300 withdrawal of October 29, 1956, giving a grand total of \$6,610.04. The 1948 item, the second 1950 item and the April 1956 item are not found in the pass book presented to the committee by Curran when he testified. The total of the withdrawals shown therein over the same period, including the \$1,300, was only \$5,272. Friedman testified that he was surprised to

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see the recent \$1,300 withdrawal in the book, but made no inquiry to determine the circumstances or what the Zuccarellis did with the money. The committee called the attention of both lawyers to the fact that a considerable portion of the items would have been long since barred by the statute of limitations. It appeared this question had not been mentioned or discussed with the clients.

*480 Friedman produced before the committee the originals of two closing statements which he said he had prepared to cover each transaction, presumably at the closing on October 31. Admittedly neither had been signed by anybody or copies given to anyone. The instruments are not dated but say 'as of November 1, 1956.' In each instance there is set forth 'purchase price' (a value figure given by the Zuccarellis), tax and insurance adjustment figures and an exact amount as 'Balance due on mortgage.' In the statement covering the home property the balancing item is denominated 'Amount due to (sic) Purchaser-\$4495.87.' The balancing figures in the statement relating to the drug store premises are two in number, one of which is strange indeed. It reads: 'Cash-\$1300.00' and is followed on the next line by 'Due to (sic) Purchaser-\$1334.22.' Friedman was not asked about this mysterious cash item. Concededly, no cash passed at the closing. It, of course, corresponds in amount to Curran's withdrawal of October 29, turned over to the Zuccarellis and repaid to him in cash the next day.

Friedman could give the committee no explanation as to the \$5 in revenue stamps on each deed, nor could DePamphilis for that matter. The total stamps would evidence an approximate consideration of \$9,000, whereas he had testified he had computed the antecedent debt amounted to only \$6,600. Based on the balancing figures in the closing statements, the amount of stamps required for one deed would have been \$4.95 and for the other \$3.30.

The rescission suit was commenced against the sellers of the store business on the same day as the closing. An answer and counterclaim for foreclosure of the chattel mortgage were filed. Cross-

depositions were taken of all parties from which it appeared to Friedman that his clients' case for rescission was not at all strong. Shortly thereafter, however, a broker produced a buyer for the business and the original sellers consented to a sale without acceleration of the mortgage balance. The sale was closed on December 26, with **686 the purchaser assuming the mortgage. The Zuccarellis gave a *481 release to their sellers on the claim for rescission, and the suit and counterclaim were discontinued. Their financial difficulties were thereby alleviated, for the time being at least, and there had been no loss to creditors.

The true nature and purpose of the conveyances to Curran are further conclusively demonstrated by events which transpired with respect to the handling of the properties after the transfer and the ultimate disposition of them. These were matters handled by DePamphilis, and, incidentally, had not been mentioned at all in his answer to the complaint. Friedman testified he had no connection or acquaintance with them. By instrument dated December 10, 1956, prepared by DePamphilis and sent to Curran for execution, the latter gave the lawyer power of attorney to collect the rents and manage the drug store property. No mention of the Zuccarelli home was made therein. DePamphilis purported to say that Curran asked him to manage the properties for him, but it is clear from the latter's testimony that he did not, since he considered himself nothing more than a nominee of the title and signed the power at DePamphilis' request without fully understanding the nature of it.

The Zuccarellis had continued to live in their home. DePamphilis at first testified they paid him, representing Curran, \$80 a month after the conveyance, but later said they paid him only enough, which together with the \$100 rent from the drug store, would equal the total monthly mortgage payments of \$173.52 on both properties, and sent Curran the difference. The latter had testified he never got a cent from anyone. The record was silent as to the collection of rents or payment of mortgage install-

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ments between October 31 and December 10, although prior to the latter date DePamphilis had procured insurance endorsements in Curran's name and forwarded them to the mortgagees with advice of the change of title. After December 10 he wrote the drug store tenants informing them that 'My client, Edward Curran' had 'purchased' the property and had authorized him to collect the rents. In testifying before the *482 committee he was most evasive as to the amounts he had collected and his disposition thereof. He was asked to submit, after the hearing, copies of his records thereon, but all he sent the committee were photo copies of checks and letters of transmittal, showing payment late in December of the mortgage installments due December 1 and after the middle of January of those due on the first of that month.

The properties were reconveyed by Curran, by deeds dated February 4, 1957, to 291 Union Avenue, Inc., a corporation formed shortly before that date by DePamphilis for the Zuccarellis, in which Mrs. Zuccarelli's son by a prior marriage held ten shares of the stock and Mr. and Mrs. Zuccarelli one share each. DePamphilis' testimony concerning how this came about was most unconvincing. He said that not too long after the sale of the store business, the Zuccarellis came to him and said that they wanted to form a corporation, that they had settled their financial matters with Curran, and that the properties were to be conveyed to the new entity. He further asserted Curran thereafter called him in confirmation. On the other hand, Curran testified that he was asked to sign the February deeds by DePamphilis, and Mrs. Zuccarelli said that right after the sale of the business in December they wanted their property back as soon as possible and asked DePamphilis to form the corporation, but completion of the matter was delayed until February because the latter told them 'these things take time and we had to wait.' DePamphilis stated to the committee that he represented Curran, whom he had not seen since the previous October, and not the Zuccarellis, in the reconveyance, although he did not charge him a fee, and made no effort to inquire or

be assured that the former alleged debt owed him by the **687 Zuccarellis had been taken care of to his satisfaction. There was no closing statement or revenue stamps affixed to the deeds because he then realized, for the first time, so he asserted, that the transfer to Curran had been only in the nature of security.

*483 The evidence is overwhelming and there cannot be the slightest doubt but that the two deeds to Curran were made by the Zuccarellis with actual intent to hinder, delay or defraud present or future creditors, and so were fraudulent as to such creditors at the time of delivery and subject to being set aside if any creditor was injured thereby. R.S. 25:2-13 and 15, N.J.S.A. Consideration was nonexistent.

[1] We are fully satisfied that there was adequate clear and convincing evidence justifying the committee in reaching the conclusion that both respondents recommended the transfers and participated in a scheme to defraud creditors. Much depended on the credibility of witnesses whom the committee saw and heard. Their assessment thereof, as demonstrated by the conclusion reached, is entitled to due regard on review. Even more convincingly supportive here are the incontrovertible physical facts and course of events to which we have alluded. Such clearly overcomes any doubts that might arise as to the complete reliability of the testimony of Mrs. Zuccarelli in view of some of her extravagant assertions and her motive in seeking to gain a reduction in legal fees. Even if it be considered that the idea of the transfers did not originate with the lawyers, there was ample credible evidence to establish that they participated in and handled the transaction with actual knowledge of its true character and purpose. We perceive no distinction in principle between the acts of Friedman and those of DePamphilis in this respect.

[2] Any such conduct is unquestionably unethical and unprofessional despite the fact it may be thought to serve the client and no one may be actually injured. It is dishonorable, enables violation of

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the law and brings the profession into disrepute. Cf. *In re Greenberg*, 21 N.J. 213, 221, 121 A.2d 520 (1956). Canon 29 of the Canons of Professional Ethics imposes on all attorneys the obligation to 'strive at all times to uphold the honor and to maintain the dignity of the profession.' 'The office of attorney does not permit, much less does it demand of him for any client, violation of law or *484 any manner of fraud or chicanery.' Canon 15. No lawyer should 'render any service or advice involving disloyalty to the law whose ministers we are * * *' and 'when rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation.' Canon 32. The attitude of respondents is best expressed in their own words; Friedman said: 'I did what I was requested to do, namely draw a conveyance,' and DePamphilis: 'I was only following the wishes of my clients.' The lawyer 'must obey his own conscience and not that of his client.' Canon 15. He 'advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law.' Canon 32.

Since this type of conduct has not previously been before us in a disciplinary proceeding, we feel that the fulfillment of our duty and the interests of the profession and the public will be best and properly served in this particular instance by the imposition of a reprimand.

Respondents are accordingly reprimanded.

For granting reprimands: Chief Justice WEINTRAUB and Justices BURLING, JACOBS, FRANCIS, PROCTOR, HALL and SCHETTINO-7.

Opposed: None.

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