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# State Bar Court of California
## Hearing Department
## Los Angeles
## ACTUAL SUSPENSION

**PUBLIC MATTER**

| Counsel For The State Bar | Case Number(s): | For Court use only |
|---|---|---|
| **Stacia L. Johns**<br>**Deputy Trial Counsel**<br>**845 South Figueroa Street**<br>**Los Angeles, CA 90017**<br>**(213) 765-1004**<br><br>Bar # **292446** | **16-J-17455-CV** | FILED<br>OCT 03 2017<br>STATE BAR COURT<br>CLERK'S OFFICE<br>LOS ANGELES |
| In Pro Per Respondent<br><br>**Robert S. Simon**<br>**PO Box 3706**<br>**Santa Monica, CA 90408**<br>**(310) 490-2778**<br><br>Bar # **187823** | Submitted to: **Settlement Judge**<br><br>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING<br><br>**ACTUAL SUSPENSION**<br><br>☐ PREVIOUS STIPULATION REJECTED | |
| In the Matter of:<br>**ROBERT SAMUEL SIMON**<br><br>Bar # **187823**<br><br>A Member of the State Bar of California (Respondent) | | |

**Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.**

## A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted **April 5, 1997**.

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **14** pages, not including the order.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

(6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):

- ☐ Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
- ☒ Costs are to be paid in equal amounts prior to February 1 for the following membership years: **three billing cycles following the effective date of the discipline**. (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
- ☐ Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
- ☐ Costs are entirely waived.

## B. Aggravating Circumstances [Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(h) & 1.5]. Facts supporting aggravating circumstances are required.

(1) ☒ **Prior record of discipline**

(a) ☒ State Bar Court case # of prior case **Case No. 00-J-10122; See attachment to Stipulation at page 10 and Exhibit 1.**

(b) ☒ Date prior discipline effective **August 19, 2000**

(c) ☒ Rules of Professional Conduct/ State Bar Act violations: **Two counts for violation of Rules of Professional Conduct, rule 3-110(A)**

(d) ☒ Degree of prior discipline **60 days' actual suspension**

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below.

(2) ☐ **Intentional/Bad Faith/Dishonesty:** Respondent's misconduct was dishonest, intentional, or surrounded by, or followed by bad faith.

(3) ☐ **Misrepresentation:** Respondent's misconduct was surrounded by, or followed by, misrepresentation.

(4) ☐ **Concealment:** Respondent's misconduct was surrounded by, or followed by, concealment.

(5) ☐ **Overreaching:** Respondent's misconduct was surrounded by, or followed by, overreaching.

(6) ☐ **Uncharged Violations:** Respondent's conduct involves uncharged violations of the Business and Professions Code, or the Rules of Professional Conduct.

(7) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(8) ☐ **Harm:** Respondent's misconduct harmed significantly a client, the public, or the administration of justice.

(9) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

(10) ☐ **Candor/Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct, or to the State Bar during disciplinary investigations or proceedings.

(11) ☒ **Multiple Acts:** Respondent's current misconduct evidences multiple acts of wrongdoing. See attachment to Stipulation at page 10.

(12) ☐ **Pattern:** Respondent's current misconduct demonstrates a pattern of misconduct.

(13) ☐ **Restitution:** Respondent failed to make restitution.

(14) ☐ **Vulnerable Victim:** The victim(s) of Respondent's misconduct was/were highly vulnerable.

(15) ☐ **No aggravating circumstances** are involved.

**Additional aggravating circumstances:**

## C. Mitigating Circumstances [see standards 1.2(i) & 1.6]. Facts supporting mitigating circumstances are required.

(1) ☐ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not likely to recur.

(2) ☐ **No Harm:** Respondent did not harm the client, the public, or the administration of justice.

(3) ☐ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct or `to the State Bar during disciplinary investigations and proceedings.

(4) ☐ **Remorse:** Respondent promptly took objective steps demonstrating spontaneous remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

(5) ☐ **Restitution:** Respondent paid $ on in restitution to without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ **Good Faith:** Respondent acted with a good faith belief that was honestly held and objectively reasonable.

(8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical or mental disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the

product of any illegal conduct by the member, such as illegal drug or substance abuse, and the difficulties or disabilities no longer pose a risk that Respondent will commit misconduct.

(9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.

(11) ☐ **Good Character:** Respondent's extraordinarily good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

**Additional mitigating circumstances:**

**Pre-filing Stipulation: See attachment to Stipulation at page 11**

## D. Discipline:

(1) ☒ **Stayed Suspension:**

(a) ☒ Respondent must be suspended from the practice of law for a period of **two years**.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1) Standards for Attorney Sanctions for Professional Misconduct.

ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii. ☐ and until Respondent does the following:

(b) ☒ The above-referenced suspension is stayed.

(2) ☒ **Probation:**

Respondent must be placed on probation for a period of **two years**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

(3) ☒ **Actual Suspension:**

(a) ☒ Respondent must be actually suspended from the practice of law in the State of California for a period of **six months**.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct

ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii. ☐ and until Respondent does the following:

## E. Additional Conditions of Probation:

(1) ☐ If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and present learning and ability in the general law, pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.

(2) ☒ During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.

(3) ☒ Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

(4) ☒ Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

(5) ☒ Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

(6) ☐ Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.

(7) ☒ Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.

(8) ☐ Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.

☒ No Ethics School recommended. Reason: **Respondent resides in another jurisdiction. A comparable alternative to Ethics School is provided in Section F(5) below.**

(9) ☐ Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.

(10) ☐ The following conditions are attached hereto and incorporated:

☐ Substance Abuse Conditions ☐ Law Office Management Conditions

☐ Medical Conditions ☐ Financial Conditions

## F. Other Conditions Negotiated by the Parties:

(1) ☒ **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**

☐ No MPRE recommended. Reason:

(2) ☒ **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

(3) ☐ **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

(4) ☐ **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension:

(5) ☒ **Other Conditions: As a further condition of probation, because respondent resides in Cape Town, South Africa, respondent must either 1) attend a session of State Bar Ethics School, pass the test given at the end of that session, and provide proof of same satisfactory to the Office of Probation within one (1) year of the effective date of the discipline herein; or 2) complete six (6) hours of live, in-person, or live online-webinar Minimum Continuing Legal Education ("MCLE") approved courses in legal ethics offered through a certified MCLE provider in California and provide proof of same satisfactory to the Office of Probation within one (1) year of the effective date of the discipline.**

**ATTACHMENT TO**

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF: ROBERT SIMON

CASE NUMBER: 16-J-17455-CV

**FACTS AND CONCLUSIONS OF LAW.**

Respondent admits that the following facts are true and that he is culpable of violations of the specified statutes and/or Rules of Professional Conduct.

Case No. 16-J-17455 (Discipline in Other Jurisdiction)

PROCEDURAL BACKGROUND IN OTHER JURISDICTION:

1. On April 27, 1990, respondent was admitted to the practice law in the State of Oregon.

2. Following a hearing on April 19, 20, 22, and 28, 2016, the Supreme Court of the State of Oregon Disciplinary Trial Panel filed an Opinion, in case number 13-58, on July 22, 2016, finding that the State Bar of Oregon had proven by clear and convincing evidence that respondent had committed violations of Oregon Rules of Professional Conduct, rules 1.9(a) (former client conflict of interest), 1.5(a) (charging an illegal or excessive fee), and 8.4(a)(3) (dishonest conduct). See Exhibit 2.

3. On July 22, 2016, the Disciplinary Trial Panel ordered that respondent be suspended for 185 days. Thereafter, that order became final. See Exhibit 3.

4. The disciplinary proceeding in the other jurisdiction provided fundamental constitutional protection.

FACTS FOUND IN OTHER JURISDICTION:

QPRT Matter

5. In 1998, Paul Brenneke ("Paul") hired respondent to work for him in a permanent capacity and provided an office, cell phone, healthcare reimbursements, travel expenses, and a monthly salary. Thereafter, almost all the clients respondent represented were individuals or companies involved in deals with Paul or his companies.

6. In November 2004, Paul formed Zoe Brenneke and Ava Brenneke Irrevocable Trust ("Z&A Trust"). Paul's daughters, Zoe and Ava, were beneficiaries of Z&A Trust. Also in November 2004, Paul established Paul Brenneke Qualified Personal Residence Trust ("QPRT"), which eventually held title to Paul's home ("Summerville residence") for his family. Paul's brother Tom Brenneke ("Tom") was trustee for QPRT until he resigned on March 21, 2011.

7. In March and April 2008, respondent represented QPRT and Z&A Trust in obtaining a one million dollar loan from Frontier Bank secured by the Summerville residence. The Frontier loan was intended to pay off the encumbrances on the Summerville residence other than the Bank of America first mortgage. To facilitate issuance of the loan, respondent located a lender, negotiated terms, coordinated documents, and prepared closing instructions. Frontier required that 1) Tom sign a personal guaranty for the loan, and 2) that the junior encumbrances be removed from the title, leaving the Frontier loan in second position after the Bank of America first mortgage.

8. Tom agreed to personally guarantee the loan after Paul, Z&A Trust, and QPRT agreed to indemnify and hold him harmless for costs, expenses, judgments, and losses related to the loan. Tom was represented by his own separate attorney when he entered into the guarantee and indemnification agreement with the other parties.

9. In April 2009, Western Pacific Building Materials ("Western Pacific"), one of Paul's creditors, brought a foreclosure action against QPRT. Respondent appeared as counsel of record in the Western Pacific litigation on behalf of Tom, in Tom's capacity as trustee for QPRT.

10. In July 2009, Travelers Casualty and Surety Company of America ("Travelers"), another of Paul's creditors, filed a petition to void the transfer of the Summerville residence into QPRT. The Travelers action named Paul individually and Tom as trustee for QPRT. Respondent remained as counsel of record for Tom in this litigation until Tom's resignation as trustee on March 21, 2011.

11. In November 2010, Z&A Trust fell increasingly behind in making mortgage payments on the Summerville residence. As a result, Bank of America began the foreclosure process on the residence and provided Tom with a Notice of Trustee's Sale, which was scheduled for March 17, 2011. Tom forwarded the Notice of Trustee's Sale to respondent, and respondent provided legal analysis to Tom regarding QPRT's options. The Summerville residence was QPRT's only asset, and Paul wanted to save his house. However, Tom wanted to surrender the house and collect the remaining equity. In light of this disagreement, Paul, as settlor of the trust, and Jimmy Drakos ("Jimmy"), as trustee of Z&A trust, sought to remove Tom as QPRT's trustee, but were unsuccessful.

12. In late January 2011, respondent learned that the Travelers litigation was nearing settlement. To resolve the matter, respondent discussed the possibility of representing both Paul and Tom, as trustee of QPRT, and noted that respondent would have to resign if the others could not agree to waive potential conflicts. Respondent sought a formal conflict waiver related to the Travelers litigation, which Jimmy and Paul signed. However, Tom did not sign a formal conflict waiver. After providing Tom with more information and telling Tom to consult with an outside attorney, respondent received new terms from Tom related to the representation. Respondent agreed to the terms and successfully settled the Travelers case and withdrew on March 11, 2011, the same day that Paul and Tom, as trustee of QPRT, were dismissed from the case.

13. Around that time, Tom asked Paul how he planned to pay the past-due mortgage payments on the Summerville residence and avoid Bank of America's foreclosure. Tom had recently learned that the junior encumbrances that were supposed to be extinguished with the Frontier loan remained on the title to the Summerville residence. With the Frontier loan unsatisfied, Tom was potentially exposed to significant financial risk because he personally guaranteed the Frontier loan. Tom requested that Paul have respondent ensure that the junior encumbrances be removed from the title. Tom suggested that the

best solution would be to sell the Summerville residence and use the proceeds to pay off the existing mortgage and satisfy the Frontier loan.

14. In an effort to halt the Bank of America foreclosure sale scheduled for March 17, 2011, Paul and respondent demanded that Tom file bankruptcy on QPRT's behalf. Paul and respondent asserted that Tom had a conflict of interest and was not fulfilling his fiduciary duties as trustee. When Tom declined to file bankruptcy, Paul demanded that he resign as trustee. Tom refused to resign. Respondent still represented Tom in his capacity as trustee of QPRT.

15. On March 11, 2011, respondent withdrew as counsel of record from the only two matters in which he represented Tom as trustee for QPRT: the Western Pacific litigation and the Travelers litigation.

16. On March 14, 2011, respondent filed a petition for involuntary bankruptcy against the QPRT, on behalf of three named creditors, including the Z&A Trust, which stopped the foreclosure sale scheduled for three days later. The debtor identified in this filing was "Paul Brenneke Personal Residence Trust aka Thomas B. Brenneke, Trustee of Paul Brenneke Personal Trust."

17. Tom resigned as QPRT trustee on March 21, 2011. Tom stated that he would possibly become a creditor of QPRT because of QPRT's agreement to indemnify Tom for claims arising out of his personal guaranty of the Frontier loan. Tom therefore had a potential conflict of interest in continuing to act as the QPRT trustee.

Sperry Matter

18. In late summer 2008, Tom and Paul each contributed $600,000 to buy a 50% partnership (via Tom's entity Guardian Real Estate Services LLC ("GRES")) with Mr. Rand Sperry and Mr. Mark Van Ness, who owned Sperry Van Ness, a national real estate brokerage firm that sold franchises. The new entity was called Sperry Van Ness Real Estate Services ("Sperry"). Given the distressed economy at that time, Sperry was losing significant amounts of money and Tom made a cash call to the Sperry partners. Tom raised $500,000 by January 2009 to keep the company afloat. However, the Sperry partners were having conflicts. Thus, on January 29, 2009, the partners signed a settlement agreement agreeing that GRES would take over and remain obligated on Sperry's leases. Thereafter, Tom was legally in charge of Sperry.

19. On February 22, 2010, the Sperry partners entered an Amendment to the January 2009 agreement that terminated the venture, stating: "it is the intention of [Sperry] to shut down all offices and terminate all leases except West LA and Phoenix." Sperry partners funded an escrow account with $500,000 to be used to negotiate settlements with Sperry's creditors, primarily the leaseholders of Sperry's office space. These settlements protected the Sperry partners from the personal guarantees they made for some leases.

20. According to escrow instructions, the Sperry partners directed that the $500,000 be applied first to resolve the lease claims, with any remaining funds used to pay Sperry's "non-leasehold creditors," including attorneys. Under the escrow instructions, the GRES parties, including Tom personally, could be liable if there was a dispute or misuse of the escrow funds. Tom entrusted respondent with the task of negotiating the settlements and administering the disbursements from escrow.

21. Soon after the escrow agreement went into effect, attorney John Durkheimer's name appeared on a list of accounts payable, dated March 9, 2010. Respondent and Durkheimer had history because Durkheimer was Paul's "go-to" bankruptcy attorney and had worked on an earlier failed Brenneke venture. Respondent instructed Durkheimer to send an invoice for $75,000.

22. Mr. Durkheimer sent respondent an invoice dated March 31, 2010. Respondent knowingly directed an escrow payment to Durkheimer in the amount of $75,000 without authorization by Tom or the Sperry partners. The $75,000 payment was issued to Durkheimer on May 12, 2010.

23. Shortly after payment was issued to Durkheimer, respondent called Durkheimer requesting that Durkheimer reduce his fee. Respondent, knowingly and without authorization by Tom or the Sperry partners, directed Durkheimer to send $25,000 of the $75,000 payment to the Stoel Rives law firm. The $25,000 payment was for respondent's benefit because the Stoel Rives law firm was respondent's creditor. Mr. Durkheimer made the $25,000 payment on May 14, 2010.

24. Restitution was not ordered in the Oregon proceeding. Respondent paid restitution prior to the initiation of the Oregon proceeding as a result of a separate civil case. See Exhibit 4.

CONCLUSIONS OF LAW:

25. As a matter of law, respondent's culpability of professional misconduct determined in the proceeding in Oregon warrants the imposition of discipline under the laws and rules binding upon respondent in the State of California at the time respondent committed the misconduct in the other jurisdiction, pursuant to Business and Professions Code section 6049.1, subdivision (a).

**AGGRAVATING CIRCUMSTANCES.**

**Prior Record of Discipline (Std. 1.5(a)):** Respondent has one prior record of discipline in connection with a stipulation entered March 17, 2000 in State Bar Court case number 00-J-10122. Effective August 19, 2000, discipline was imposed as to respondent consisting of a 60 day actual suspension. Respondent stipulated that he failed to perform legal services competently in two matters in Oregon, which constituted two violations of RPC 3-110(A) in California. In the first matter, respondent helped a client obtain a land use permit when he did not possess the legal knowledge necessary to handle the matter. Respondent executed a notary without witnessing the signatures, recorded the deeds in question, filed an application for a land use permit and then recorded deeds transferring title back to the original owners. When questions arose about transferring title back to the original owners before the land use permit was approved, respondent's client withdrew his application. In the second matter, respondent sought to have a judgment lien against his client's home vacated. Respondent then appeared before the court without providing adequate notice of his intention to appear. In turn, the court vacated the lien and his client refinanced his home. The court later reinstated the lien retroactively. The misconduct was committed between April 1995 and February 1996. In aggravation, respondent committed multiple acts of misconduct. In mitigation, respondent cooperated with the State Bar and had no prior record of discipline. See Exhibit 1.

**Multiple Acts of Wrongdoing (Std. 1.5(b)):** Respondent committed multiple acts of misconduct by representing adverse parties Tom and Paul, and charging an illegal fee to Sperry, and engaging in an act of moral turpitude.

**MITIGATING CIRCUMSTANCES.**

**Prefiling Stipulation:** By entering into this stipulation, respondent has acknowledged his misconduct and is entitled to mitigation for recognition of wrongdoing and saving the State Bar significant resources and time. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation as to facts and culpability]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [where the attorney's stipulation to facts and culpability was held to be a mitigating circumstance].)

**AUTHORITIES SUPPORTING DISCIPLINE.**

The Standards for Attorney Sanctions for Professional Misconduct "set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances." (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, Std. 1.1. All further references to Standards are to this source.) The Standards help fulfill the primary purposes of discipline, which include: protection of the public, the courts and the legal profession; maintenance of the highest professional standards; and preservation of public confidence in the legal profession. (See Std. 1.1; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Although not binding, the Standards are entitled to "great weight" and should be followed "whenever possible" in determining level of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 92, quoting *In re Brown* (1995) 12 Cal.4th 205, 220 and *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Adherence to the Standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 190.) If a recommendation is at the high end or low end of a Standard, an explanation must be given as to how the recommendation was reached. (Std. 1.1.) "Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure." (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

In this matter, respondent was found culpable of professional misconduct in the other jurisdiction, and to determine the appropriate sanction in this proceeding, it is necessary to consider the equivalent rule or statutory violation under California law. Specifically, respondent's misconduct in the other jurisdiction demonstrates violations of Business and Professions Code section 6106 [Moral Turpitude-Dishonesty] and Rules of Professional Conduct 3-310(C)(2) [Representing Multiple Clients-Actual Conflict], and 4-200(A) [Illegal Fee].

Respondent represented clients with conflicting interests by representing QPRT in the involuntary bankruptcy proceeding. Respondent's representation of QPRT was materially adverse to former client Tom Brenneke, who was QPRT's trustee at the time of filing and resigned as trustee days after filing. Respondent collected an illegal fee by instructing Sperry to make a payment of $75,000 to Durkheimer and later requiring Durkheimer to direct $25,000 to respondent's creditor, the Stoel Rives law firm. Respondent committed an act of moral turpitude by knowingly causing Sperry to make the $75,000 payment to Durkheimer without authorization by Tom or the Sperry partners, and later knowingly instructing Durkheimer to direct $25,000 to the Stoel Rives law firm for respondent's benefit without authorization by Tom or the Sperry partners.

Respondent was found culpable of committing three acts of professional misconduct. Standard 1.7(a) requires that where a respondent "commits two or more acts of misconduct and the Standards specify different sanctions for each act, the most severe sanction must be imposed."

The most severe sanction applicable to respondent's misconduct is found in standard 2.11, which applies to respondent's violation of Business and Professions Code section 6106. Standard 2.11 states, "Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law."

In aggravation, Respondent has one prior record of discipline. Standard 1.8(a) states that when a respondent has a single prior record of discipline, the sanction for the current misconduct must be greater than the previously-imposed discipline. The prior discipline involved two failures to perform competently in 1995 and 1996. The previous discipline was an actual suspension of 60 days. Therefore, the discipline in the current case must be greater than a 60-day actual suspension.

Additionally, in aggravation, respondent committed multiple acts of misconduct wholly related to his practice of law. Respondent also committed an act of moral turpitude by, knowingly and without authorization by Tom or the Sperry partners, causing Sperry to make the $75,000 payment to Durkheimer, and thereafter, knowingly and without authorization by Tom or the Sperry partners, instructing Durkheimer to direct $25,000 to respondent's creditor, the Stoel Rives law firm. Respondent is entitled to mitigation for acknowledging his misconduct and entering into a prefiling stipulation, thereby saving State Bar time and resources. Considering the fact that respondent also has a prior record of discipline which imposed a 60-day actual suspension, the aggravation in this matter outweighs the mitigation.

In light of the foregoing, discipline consisting of two years' stayed suspension, two years' probation with conditions including a six month actual suspension is appropriate to protect the public, the courts, and the legal profession; to maintain professional standards by attorneys; and to preserve public confidence in the legal profession.

This outcome is consistent with case law. In *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, the attorney was disciplined for violating Business and Professions Code section 6106. The attorney made a misrepresentation in a pleading filed with a court under penalty of perjury. When the opposing party brought the misrepresentation to light, the attorney filed a subsequent pleading less than a month later stating that no misrepresentation had been made. The misconduct was mitigated by good character and a four month actual suspension. The Review Department found that the attorney's misconduct had been limited in nature, and the attorney received a five month actual suspension.

Like the attorney in *Downey*, respondent engaged in an act of moral turpitude and has a prior record of discipline. While the attorney in *Downey* made misrepresentations to a court, respondent here collected a substantial illegal fee, among other acts of misconduct. Respondent's misconduct is serious because it involved multiple acts of misconduct and an act of moral turpitude. The similarities between the instant case and *Downey* show that a six month actual suspension is appropriate in this matter.

**COSTS OF DISCIPLINARY PROCEEDINGS.**

Respondent acknowledges that the Office of Chief Trial Counsel has informed respondent that as of August 18, 2017, the discipline costs in this matter are $2,518. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

**EXCLUSION FROM MINIMUM CONTINUING LEGAL EDUCATION ("MCLE") CREDIT**

Respondent may not receive MCLE credit for completion of State Bar Ethics School or the six (6) hours of live, in-person, or live online-webinar Minimum Continuing Legal Education ("MCLE") approved courses in legal ethics offered through a certified MCLE provider in California and/or any other educational course(s) to be ordered as a condition of discipline. (Rules Proc. of State Bar, rule 3201.)

(Do not write above this line.)

| In the Matter of: | Case number(s): |
|---|---|
| Robert Samuel Simon | 16-J-17455-CV |

## SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Fact, Conclusions of Law and Disposition.

| | | |
|---|---|---|
| 9/11/17 | | Robert Simon |
| Date | Respondent's Signature | Print Name |
| 9/21/17 | | Stacia L. Johns |
| Date | Deputy Trial Counsel's Signature | Print Name |

| In the Matter of:<br>**Robert Samuel Simon** | Case Number(s):<br>**16-J-17455-CV** |
|---|---|

## ACTUAL SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

☐ The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.

☒ The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.

☐ All Hearing dates are vacated.

1. On page 1 of the stipulation, an "X" is inserted in the box indicating "Previous Stipulation Rejected";

2. On page 12 of the stipulation, in the fifth full paragraph, "The misconduct was mitigated by good character and a four month actual suspension" is deleted, and in its place is inserted "The misconduct was mitigated by good character and the attorney's cooperation with the State Bar";

3. The instant stipulation includes a certified copy of respondent's prior discipline as Attachment One. On page 8 of Attachment One, there is a reference to two exhibits that were purportedly attached to the prior stipulation in respondent's prior discipline. This court notes, however, that neither of the two referenced exhibits are included in the certified copy of respondent's prior discipline, nor are the two referenced exhibits attached to the prior stipulation in the official court file relating to respondent's prior discipline.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 5.58(E) & (F), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

Oct. 3, 2017
Date

Cynthia Valenzuela
CYNTHIA VALENZUELA
Judge of the State Bar Court

EXHIBIT 1

(State Bar Court Case No. 00-J-10122)

S088325

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

SUPREME COURT
FILED
JUL 20 2000
Frederick K. Ohlrich Clerk
DEPUTY

IN RE ROBERT SAMUEL SIMON ON DISCIPLINE

It is ordered that **ROBERT SAMUEL SIMON, State Bar No. 187823**, be actually suspended from the practice of law for 60 days. Respondent is also ordered to comply with the other terms of the stipulation recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation executed on March 17, 2000. Costs are awarded to the State Bar pursuant to Business & Professions Code section 6086.10 and payable in accordance with Business & Professions Code section 6140.7.

Chief Justice

I, Frederick K. Ohlrich, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this

____ day of JUL 20 2000 20___

Clerk

By: Deputy

ORIGINAL

State Bar Court of the State Bar of California
Hearing Department ☒ Los Angeles ☐ San Francisco

| Counsel for the State Bar | Case number(s) | (for Court's use) |
|---|---|---|
| THE STATE BAR OF CALIFORNIA<br>OFFICE OF THE CHIEF TRIAL COUNSEL<br>ENFORCEMENT<br>DAVID C. CARR, No. 124510<br>JANET S. HUNT, No. 97635<br>ERIN McKEOWN JOYCE, No. 149946<br>1149 South Hill Street<br>Los Angeles, California 90015-2299<br>Telephone: (213) 765-1000 | 00-J-10122<br><br>PUBLIC MATTER | FILED<br>MAR 09 2000<br>STATE BAR COURT<br>CLERK'S OFFICE<br>LOS ANGELES |
| Counsel for Respondent<br><br>Robert Samuel Simon<br>P. O. Box 6059<br>Portland, OR 97228-6059<br>(503) 274-6208 | | |
| In the Matter of<br><br>ROBERT SAMUEL SIMON<br><br>Bar #<br>#187823<br>A Member of the State Bar of California<br>(Respondent) | Submitted to ☒ assigned judge ☐ settlement judge<br><br>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING<br><br>**ACTUAL SUSPENSION**<br><br>☐ PREVIOUS STIPULATION REJECTED | |

**A. Parties' Acknowledgments:**

(1) Respondent is a member of the State Bar of California, admitted April 15, 1997 (date).

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.

(3) All investigations or proceedings listed by case number in the caption of this stipulation, are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation and order consist of 9 pages.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law."

(6) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(7) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):

☒ until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 284, Rules of Procedure.

☐ costs to be paid in equal amounts prior to February 1 for the following membership years:

_____
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)

☐ costs waived in part as set forth under "Partial Waiver of Costs"

☐ costs entirely waived

**Note: All information required by this form and any additional information which cannot be provided in the space provided, shall be set forth in the text component of this stipulation under specific headings, i.e. "Facts," "Dismissals," "Conclusions of Law."**

B. **Aggravating Circumstances (for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b).) Facts supporting aggravating circumstances are required.**

(1) ☐ **Prior record of discipline** (see standard 1.2(f))

(a) ☐ State Bar Court case # of prior case _____

(b) ☐ date prior discipline effective _____

(c) ☐ Rules of Professional Conduct/ State Bar Act violations: _____

_____

_____

(d) ☐ degree of prior discipline _____

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below or under "Prior Discipline".

(2) ☐ **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

(3) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(4) ☐ **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.

(5) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

(6) ☐ **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.

(7) ☒ **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

(8) ☐ **No aggravating circumstances** are involved.

**Additional aggravating circumstances:**

C. Mitigating Circumstances (see standard 1.2(e).) Facts supporting mitigating circumstances are required.

(1) ☒ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.

(2) ☐ **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.

(3) ☒ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation to the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.

(4) ☐ **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

(5) ☐ **Restitution:** Respondent paid $ _____ on _____ in restitution to _____ without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ **Good Faith:** Respondent acted in good faith.

(8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.

(9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.

(11) ☐ **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

**Additional mitigating circumstances:**

**D. Discipline**

1. Stayed Suspension.

   A. Respondent shall be suspended from the practice of law for a period of _____

   ☐ i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct

   ☐ ii. and until Respondent pays restitution to _____ (payee(s)) (or the Client Security Fund, if appropriate), in the amount of _____, plus 10% per annum accruing from _____, and provides proof thereof to the Probation Unit, Office of the Chief Trial Counsel

   ☐ iii. and until Respondent does the following: _____.

   B. The above-referenced suspension shall be stayed.

2. Probation.

   Respondent shall be placed on probation for a period of _____, which shall commence upon the effective date of the Supreme Court order herein. (See rule 953, California Rules of Court.)

3. Actual Suspension.

   A. Respondent shall be actually suspended from the practice of law in the State of California for a period of Sixty (60) Days

   ☐ i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct

   ☐ ii. and until Respondent pays restitution to _____ (payee(s)) (or the Client Security Fund, if appropriate), in the amount of _____, plus 10% per annum accruing from _____, and provides proof thereof to the Probation Unit, Office of the Chief Trial Counsel

   ☐ iii. and until Respondent does the following: _____.

**E. Additional Conditions of Probation:**

(1) ☐ If Respondent is actually suspended for two years or more, he/she shall remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

(2) ☐ During the probation period, Respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct.

(3) ☐ Respondent shall promptly report, and in no event in more than 10 days, to the Membership Records Office of the State Bar and to the Probation Unit, Office of the Chief Trial Counsel, Los Angeles, all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code.

(4) ☐ Respondent shall submit written quarterly reports to the Probation Unit of the Office of the Chief Trial Counsel on each January 10, April 10, July 10, and October 10 of the period of probation, except as set forth in the second paragraph of this condition. Under penalty of perjury each report shall state that Respondent has complied with all provisions of the State Bar Act and the Rules of Professional Conduct during the preceding calendar quarter or period described in the second paragraph of this condition.

If the first report would cover less than 30 days, then the first report shall be submitted on the next quarter date and cover the extended period. The final report is due no earlier than 20 days before the last day of the period of probation and no later than the last day of probation.

(5) ☒ Subject to assertion of applicable privileges, Respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit of the Office of the Chief Trial Counsel and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.

(6) ☐ Within one year of the effective date of the discipline herein, Respondent shall attend the State Bar Ethics School, and shall pass the test given at the end of such session.

☒ No Ethics School recommended. Respondent has been suspended for sixty (60) days by the Oregon Supreme Court. This is the reciprocal disciplinary action.

(7) ☐ The following conditions are attached hereto and incorporated:

☐ Substance Abuse Conditions ☐ Law Office Management Conditions

☐ Medical Conditions ☐ Financial Conditions

(8) ☐ Respondent shall be assigned a probation monitor. Respondent shall promptly review the terms and conditions of his/her probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent shall furnish such reports as may be requested by the probation monitor to the probation monitor in addition to quarterly reports required to be submitted to the Probation Unit of the Office of the Chief Trial Counsel. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties.

(9) ☐ Other conditions negotiated by the parties:

☐ **Multistate Professional Responsibility Examination:** Respondent shall provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Probation Unit of the Office of the Chief Trial Counsel during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) & (c), Rules of Procedure.**

☒ No MPRE recommended. Respondent has been suspended for sixty (60) days by the Oregon Supreme Court. This is the reciprocal disciplinary action.

☐ **Rule 955, California Rules of Court:** Respondent shall comply with the provisions of subdivisions (a) and (c) of rule 955, California Rules of Court, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein.

☐ **Conditional Rule 955, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she shall comply with the provisions of subdivisions (a) and (c) of rule 955, California Rules of Court, within 120 and 130 days, respectively, from the effective date of the Supreme Court order herein.

☐ **Credit for Interim Suspension (conviction referral cases only):** Respondent shall be credited for the period of his/her interim suspension toward the stipulated period of actual suspension.

## ATTACHMENT TO

## STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: Robert S. Simon

CASE NUMBER: 00-J-10122

**FACTS AND CONCLUSIONS OF LAW.**

### ARMSTRONG MATTER

On or about June 22, 1995, Respondent undertook to represent Dan Armstrong to obtain a land use permit for Yamhill County real property that was owned by Mr. Armstrong's wife, Patricia Armstrong, and his mother, Milly Armstrong.

After discussions with Yamhill County land use planning personnel, Respondent determined that the above-described real property would be eligible for a land use permit if Milly and Patricia Armstrong transferred title to the property to a previous owner before an application for a land use permit was filed. Accordingly, Respondent prepared deeds by which Patricia and Milly Armstrong transferred title to the real property to Clifford Hacker, a previous owner of the property. Because the Armstrongs intended that the property revert to them after the application was filed, Respondent also prepared deeds by which Mr. Hacker transferred title back to Patricia and Milly Armstrong.

The deeds described in paragraph 6 herein were executed on or about January 8, 1996, outside Respondent's presence and delivered to Respondent. Respondent executed the notarial jurat on the deeds after speaking to Mr. Hacker, Patricia Armstrong and Milly Armstrong on the telephone and without witnessing their signatures. Respondent noted on the notarial jurat that the notary was performed telephonically.

At all relevant times, Respondent was a notary public for the State of Oregon. At all relevant times, ORS 194.515(1) required Respondent, as a notarial officer taking an acknowledgment, to determine, either from personal knowledge or from satisfactory evidence, that persons making acknowledgments before him were the persons whose true signatures were on the instruments they acknowledged. Respondent was familiar with the requirements of ORS 194.515(1).

On February 14, 1996, Respondent recorded the deeds by which Patricia and Milly Armstrong had transferred title to the real property to Clifford Hacker. Immediately thereafter, on behalf of Dan Armstrong and Clifford Hacker, Respondent filed an application for a land use permit for the property. Immediately after he filed the land use permit application, Respondent recorded the deeds by which Clifford Hacker transferred title to the real property back to Patricia and Milly Armstrong.

The County ultimately gave initial approval to Dan Armstrong's land use permit application. However, interested citizens questioned whether the permit was properly granted in light of the ffact that Mr. Hacker had transferred title back to the Armstrongs before the County had approved the application for the permit. The County subsequently decided to review the basis for Mr. Armstrong's application for a land use permit, and Mr. Armstrong withdrew it.

Throughout the transaction described above, Respondent did not possess or acquire the legal knowledge, thoroughness or preparation reasonably necessary to assist the Armstrongs in obtaining a land use permit.

**Violation**

Respondent admits that, by engaging in the conduct described above, he violated Rule of Professional Conduct 3-110(A).

**ROSAS MATTER**

On or about April 4, 1996, Respondent undertook to represent George Rosas to remove a lien on Mr. Rosas' home that had resulted from a 1984 judgment of approximately $18,000 against Mr. Rosas in favor of his former wife, Debra Munday. In 1989, Mr. Rosas discharged the judgment debt in bankruptcy, but when Mr. Rosas attempted to refinance his home, the lien showed as an encumbrance on his property.

On April 5, 1995, Respondent spoke to a lawyer who appeared in Mr. Rosas' bankruptcy schedules as a lawyer for Debra Munday. On April 6, 1995, without having first acquired the legal knowledge, skill, thoroughness and preparation reasonably necessary to represent Mr. Rosas, Respondent appeared in the Circuit Court, Clackamas County, and presented to the court a Motion and Order to Vacate Debra Munday's judgment lien. Respondent filed this motion without adequate legal research into whether it was well-taken, and appeared before the court to present it without first giving Ms. Munday adequate notice of his intent to appear before the court.

In response to Respondent's motion, the court signed an order which vacated Ms. Munday's judgment lien. The effect of the court's order was to extinguish Ms. Munday's right to foreclose her lien as a means to collect some or all of the judgment debt that Mr. Rosas had discharged in bankruptcy.

After the court vacated Ms. Munday's lien, Mr. Rosas refinanced his home and secured the resulting loan with a mortgage or trust deed. The court later reinstated Ms. Munday's judgment lien retroactively. However, the instrument that secured Mr. Rosas' refinancing may have taken priority over the reinstated lien.

**Violation**

Respondent admits that, by engaging in the conduct described above, he violated Rule of Professional Conduct 3-110(A).

**PENDING PROCEEDINGS.**

The disclosure date referred to, on page one, paragraph A.(6), was February 23, 2000.

**AGREEMENTS AND WAIVERS PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6049.1.**

1. Respondent's culpability determined in the disciplinary proceeding in the State of Oregon would warrant the imposition of discipline in the State of California under the laws or rules in effect in this State at the time the misconduct was committed; and

2. The proceeding in the above jurisdiction provided Respondent with fundamental constitutional protection.

**AUTHORITIES SUPPORTING DISCIPLINE.**

Respondent has engaged in conduct in the Armstrong and Rosas matters which violated Rule of Professional Conduct rule 3-110(A), which warrants the imposition of discipline.

Respondent has already been disciplined for this conduct by the Oregon Supreme Court, which imposed a sixty (60) day suspension, as evidenced by the order and stipulation attached hereto as Exhibits 1 and 2.

**RESTRICTIONS WHILE ON ACTUAL SUSPENSION.**

1. During the period of actual suspension, respondent shall not:

   a. Render legal consultation or advice to a client;

   b. Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

   c. Appear as a representative of a client at a deposition or other discovery matter;

   d. Negotiate or transact any matter for or on behalf of a client with third parties;

   e. Receive, disburse, or otherwise handle a client's funds; or

   f. Engage in activities which constitute the practice of law.

3/5/00
Date

Respondent's signature

Robert S. Simon
print name

3-8-00
Date

Respondent's Counsel's signature

print name

3-8-00
Date

Deputy Trial Counsel's signature

Erin McKeown Joyce
print name

## ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

☒ The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.

☐ The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 135(b), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 953(a), California Rules of Court.)**

3/17/00
Date

Judge of the State Bar Court

# CERTIFICATE OF SERVICE

**[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]**

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on March 17, 2000, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING filed March 09, 2000**

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**ROBERT S SIMON ESQ**
**P O BOX 6059**
**PORTLAND OR 97228-6059**

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**Erin M. Joyce, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **March 17, 2000.**

Julieta E. Gonzales

**Julieta E. Gonzales**
Case Administrator
State Bar Court


The document to which this certificate is affixed is a full, true and correct copy of the original on file and of record in the State Bar Court.

ATTEST July 20, 2017
State Bar Court, State Bar of California,
Los Angeles

By _____
Clerk

EXHIBIT 2

Source: **Find a Source > OR - Oregon Local, State & Federal Court Rules**
TOC: Oregon Court Rules > OREGON STATE BAR RULES > OREGON RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP > **Rule 1.9. Duties to Former Clients**

*ORPC 1.9*

OREGON COURT RULES



OREGON STATE BAR RULES
OREGON RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

ORPC 1.9 (2016)

Review Court Orders which may amend this Rule.

Rule 1.9. Duties to Former Clients

**(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.**

**(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:**

**(1) whose interests are materially adverse to that person; and**

**(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.**

**(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:**

**(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or**

**(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.**

**(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with**

**the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.**

**History:**

*Adopted 01/01/05*

*Amended 12/01/06*:

*Paragraph (d) added.*

*Defined Terms (see Rule 1.0)*:

*"Confirmed in writing"*

*"Informed consent"*

*"Firm"*

*"Knowingly"*

*"Known"*

*"Matter"*

*"Reasonable"*

*"Substantial"*

*Comparison to Oregon Code*

This rule replaces DR 5-105(C), (D) and (H). Like Rule 1.7, this rule is a significant departure from the language and structure of the Oregon Code provisions on conflicts. Paragraph (a) replaces the sometimes confusing reference to "actual or likely conflict" between current and former client with the simpler "interests [that are] materially adverse." The prohibition applies to matters that are the same or "substantially related," which is virtually identical to the Oregon Code standard of "significantly related."

Paragraph (b) replaces the limitation of DR 5-105(H), but is an arguably clearer expression of the prohibition. The new language makes it clear that a lawyer who moves to a new firm is prohibited from being adverse to a client of the lawyer's former firm only if the lawyer has acquired confidential information material to the matter while at the former firm.

Paragraph (c) makes clear that the duty not to use confidential information to the client's disadvantage continues after the conclusion of the representation, except where the information "has become generally known."

Paragraph (d) defines "substantially related." The definition is taken in part from former DR 5-105(D) and in part from Comment [3] to ABA Model Rule 1.9.

*Comparison to ABA Model Rule*

ABA Model Rule 1.9(a) and (b) require consent only of the former client. The Model Rule also has no definition of "substantially related;" this definition was derived in part from the Comment to MR 1.9.

TOC: Oregon Court Rules > OREGON STATE BAR RULES > OREGON RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP > **Rule 1.9. Duties to Former Clients**
View: Full
Date/Time: Wednesday, November 16, 2016 - 2:39 PM EST

Source: **Find a Source > OR - Oregon Local, State & Federal Court Rules**
TOC: Oregon Court Rules > OREGON STATE BAR RULES > OREGON RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP > **Rule 1.5. Fees**

*ORPC 1.5*

OREGON COURT RULES



OREGON STATE BAR RULES
OREGON RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

ORPC 1.5 (2016)

Review Court Orders which may amend this Rule.

Rule 1.5. Fees

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

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

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

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

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

**(4) the amount involved and the results obtained;**

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

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

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

**(8) whether the fee is fixed or contingent.**

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

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

**(2) a contingent fee for representing a defendant in a criminal case; or**

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

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

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

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

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

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

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

**History:**

*Adopted 01/01/05*

*Amended 12/01/10:*

*Paragraph(c)(3) added.*

*Defined Terms (see Rule 1.0):*

*"Firm"*
*"Informed Consent"*
*"Matter"*
*"Reasonable"*

*Comparison to Oregon Code*

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a "clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive." Paragraph (e) is essentially identical to DR 2-107(B).

*Comparison to ABA Model Rule*

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, "preferably in writing." Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Paragraph (c)(3) has no counterpart in the Model Rule. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

Source: **Find a Source > OR - Oregon Local, State & Federal Court Rules**
TOC: Oregon Court Rules > OREGON STATE BAR RULES > OREGON RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP > **Rule 1.5. Fees**
View: Full
Date/Time: Wednesday, November 16, 2016 - 2:40 PM EST

*ORPC 8.4*

OREGON COURT RULES



OREGON STATE BAR RULES
OREGON RULES OF PROFESSIONAL CONDUCT
MAINTAINING THE INTEGRITY OF THE PROFESSION

ORPC 8.4 (2016)

Review Court Orders which may amend this Rule.

Rule 8.4. Misconduct

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

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

**(2) commit a criminal act that reflects adversely onthe lawyer's honesty, trustworthiness or fitness asa lawyer in other respects;**

**(3) engage in conduct involving dishonesty, fraud,deceit or misrepresentation that reflects adverselyon the lawyer's fitness to practice law;**

**(4) engage in conduct that is prejudicial to theadministration of justice; or**

**(5) state or imply an ability to influence improperlya government agency or official or to achieveresults by mans that violate these Rules or otherlaw, or**

**(6) knowingly assist a judge or judicial officer inconduct that is a violation of applicable rules ofjudicial conduct or other law.**

**(7) in the course of representing a client, knowinglyintimidate or harass a person because of thatperson's race, color, national origin, religion, age,sex, gender identity, gender expression, sexualorientation, marital status, or disability.**

**(b) Notwithstanding paragraphs (a)(1), (3) and (4) andRule 3.3(a)(1), it shall not be professional misconductfor a lawyer to advise clients or others about or tosupervise lawful covert activity in the investigation ofviolations of civil or criminal law or constitutional rights,provided the lawyer's conduct is otherwise incompliance with these Rules of Professional Conduct."Covert activity," as used in this rule, means an effort toobtain information on unlawful activity through the useof misrepresentations or other subterfuge. "Covertactivity" may be commenced by a**

**lawyer or involve alawyer as an advisor or supervisor only when the lawyerin good faith believes there is a reasonable possibilitythat unlawful activity has taken place, is taking place orwill take place in the foreseeable future.**

**(c) Notwithstanding paragraph (a)(7), a lawyer shall notbe prohibited from engaging in legitimate advocacywith respect to the bases set forth therein.**

**History:**

*Adopted 01/01/05*

*Amended 12/01/06*:

*Paragraph (a)(5) added.*

*Amended 02/19/15*:

*Paragraphs (a)(7) and (c) added.*

*Defined Terms (see Rule 1.0)*:

*"Believes"*
*"Fraud"*
*"Knowingly"*
*"Reasonable"*

*Comparison to Oregon Code*

This rule is essentially the same as DR 1-102(A).

Paragraph (b) retains DR 1-102(D).

*Comparison to ABA Model Rule*

Paragraphs (a)(1) through (6) are the same as Model Rule 8.4(a) through (f), except that MR 8.4(a) also prohibits attempts to violate the rules. Paragraph (a)(7) reflects language in Comment [3] of the Model Rule.

Paragraphs (b) and (d) have no counterpart in the Model Rule.

EXHIBIT 3

I certify that this document is a true copy of the original and the whole thereof.

IN THE SUPREME COURT
OF THE STATE OF OREGON

| | |
|---|---|
| In re: | |
| Complaint as to the Conduct of | Case No. 13-58 |
| ROBERT S. SIMON, | Trial Panel Opinion |
| Respondent. | |

Bar Counsel: Ms. Amber Bevacqua-Lynott

Mr. Richard Weill

Counsel for the Accused: Mr. Brian Williams

Mr. Greg Lockwood

Trial Panel: Mr. Bryan D. Beel, Trial Panel Chair;

Mr. Dylan M. Cernitz, panel member;

Mr. Charles A. Martin, public member

Disposition: 185-day suspension

## I. INTRODUCTION AND DECISION

In this disciplinary action, No. 13-58, the Oregon State Bar (Bar) alleges that respondent Robert Simon (Simon) violated numerous provisions of the Oregon Rules of Professional Conduct (ORPC) while he represented individuals and entities related to Paul and Tom Brenneke (Paul and Tom, respectively). The Disciplinary Trial Panel (Panel) held a trial on April 19, 20, and 22, 2016, and heard closing arguments on April 28, 2016.

The Panel finds that the Bar established, by clear and convincing evidence, that Simon committed three of the acts of misconduct alleged in the Bar's Second Amended Complaint. The Panel finds that the Bar established, by clear and convincing evidence, that Simon violated ORPC 1.9(a) (former-client conflict of interest), as alleged in the Bar's first cause of complaint, and ORPC 1.5(a) (charging an illegal or excessive fee) and ORPC 8.4(a)(3) (misconduct), as alleged in the Bar's second cause of complaint. The Panel recommends a sanction of a 185-day suspension.

## II. NATURE AND STATUS OF THE CASE

### A. Factual Background

At all times material to the allegations in the Bar's Second Amended Formal Complaint, [1] Simon was a member of the Oregon State Bar, having been admitted in 1990. Ex. 226 (Transcript of the 8/26/2015 Deposition of Robert Simon) (Simon 8/26 Tr.) at 6:9; Compl. ¶ 2; Simon's Answer to Second Amended Complaint ("Ans.") ¶ 2. Simon was admitted to practice law in the State of Washington in April 1991, and the State of California in April 1997. Ex. 226 at 6:16-17. Simon is now a voluntarily inactive member of the Bar. Ans. ¶ 2.

At the time of the events described here, Simon focused on business workouts and restructurings. In the mid-1990s, Simon began representing Paul and/or entities which Paul owned or controlled. Trial Tr. (4/19/2016) at 50:14–17; Ex. 40 (Transcript of the 8/12/2009 Deposition of Robert Simon) (Simon 8/12 Tr.) at 76:3; Ex. 166 (Transcript of the 6/1/2011 Deposition of Robert Simon) (Simon 6/1 Tr.) at 17:7; Ex. 194 (2/3/2012 Letter from Tellam to Cooper) (Tellam 2012) at 2; Ex. 226 at 13:4. Simon had an engagement letter for his initial engagement with Paul in 1996, but has not entered into one since, for any new matter. Trial Tr. at 51:11–16; Ex. 166 at 17:7; Ex. 226 at 19:4. In 1998, Paul hired Simon to work for him in a more or less permanent capacity. Ex. 40 at 24:21; Ex. 194 at 2. Paul was essentially Simon's sole client through 2008 or 2009. Trial Tr. 54:21–23; Ex. 40 at 8:9).

Beginning in about 1998, Paul gave Simon an office, cell phone, healthcare reimbursements, travel expenses, and a $12,000 per month "flat fee earned upon receipt pursuant to [a] written agreement...." Ex. 40 at 51:8. After 1998, almost all the clients that Simon represented were individuals or companies involved in deals with Paul or his companies.

In November 2004, Paul formed the Zoe Brenneke & Ava Brenneke Irrevocable Trust (Z&A Trust), whose corpus included several limited liability company interests that Paul held in his own name. Ex. 194. Paul Brenneke's daughters (Zoe and Ava) were the beneficiaries of the Z&A Trust. Simon worked as an attorney for Paul Brenneke's limited liability companies through their managers.

Also in November 2004, Paul established the Paul Brenneke Qualified Personal Residence Trust (QPRT), which would eventually hold title to Paul's house (the Summerville residence) for his family. Ex. 2. Paul chose his brother, Tom, to be the trustee for the QPRT when it was formed. Ex. 2. Tom was the trustee for the QPRT from 2004 until he resigned on March 21, 2011.

Simon represented the QPRT in a number of transactions while Tom was the QPRT's trustee. For example, when the QPRT received the Summerville residence, the QPRT's only asset, in August 2005, there were two classes of encumbrances on its title: (1) a first mortgage held by

[1] For purposes of this opinion, the Panel will refer to the operative complaint, the Second Amended Formal Complaint, filed March 16, 2016, as the "Complaint," unless the identity of the source of a given allegation is important. Similarly, the Panel will refer to the operative answer, Mr. Simon's Answer to the Bar's Second Amended Formal Complaint, filed March 23, 2016, as the "Answer," unless the identity of the source of a given response is important.

Bank of America, and (2) second and third mortgages and a judgment lien ("the junior encumbrances"). Ex. 7. Simon represented the QPRT in dealing with these encumbrances and other challenges to the title of the QPRT.

In March and April 2008, Simon represented the QPRT and the Z&A Trust in obtaining a $1 million loan from Frontier Bank, which was secured by the Summerville residence. The Frontier loan was intended to pay off the encumbrances on the Summerville residence other than the Bank of America first mortgage. Ex. 11A. To facilitate issuance of the Frontier Bank loan, Simon located a lender, negotiated the terms, coordinated the document flow, and prepared the closing instructions.

Frontier had two conditions for issuing the Frontier loan: (1) Frontier required that Tom sign a personal guaranty; and (2) Frontier required that the junior encumbrances be removed from the title of the Summerville residence, leaving the Frontier loan in second position after the Bank of America mortgage. Ex. 11A. Tom agreed to guarantee the loan only after Paul, the Z&A Trust, and the QPRT agreed to indemnify and hold him harmless from all costs, expenses, judgments, losses, etc. relating to the loan. Ex. 11A. Ron Shellan, Tom's personal attorney, represented Tom when he entered into the guarantee and indemnification agreement. Exs. 14, 18.

In late summer 2008, Tom and Paul each contributed $600,000 to buy (through Tom's entity, Guardian Real Estate Services LLC, or GRES) a 50% partnership with Mr. Rand Sperry and Mr. Mark Van Ness, who owned Sperry Van Ness, a national real estate brokerage firm that sold franchises. Exs. 22, 24. Together, the parties formed a new entity: Sperry Van Ness Real Estate Services ("Sperry") to operate corporate offices in California and Arizona. Given the distressed state of the economy at that time, by November 2008, Sperry was losing significant amounts of money and Tom made a cash call to all of the Sperry partners. Tom raised $500,000 by January 2009 to keep the company going. By that time, however, the Sperry partners were having significant conflicts. Thus, on January 29, 2009, the partners signed a settlement agreement, agreeing that GRES (Tom's entity) would take over and remain obligated on Sperry's leases. Ex. 32.

In April 2009, one of Paul's creditors, Western Pacific Building Materials ("Western"), brought a foreclosure action against the QPRT. Ex. 36. Simon appeared as counsel of record in the *Western Pacific* litigation on behalf of Tom, in his capacity as trustee for the QPRT.

In July 2009, another of Paul's creditors, Travelers Casualty and Surety Company of America, filed a petition to void the August 2005 transfer of the Summerville residence into the QPRT. Ex. 39B. The action named as defendants both Paul, individually, and Tom, as trustee of the QPRT. Travelers alleged that the transfer of the Summerville residence into the QPRT was fraudulent because it was intended to avoid an outstanding liability that Paul owed to Travelers. Simon represented Tom, in his capacity as trustee of the QPRT, in the *Travelers* litigation. Mr. Simon remained counsel of record for Tom, as trustee of the QPRT, in the *Travelers* litigation through March 11, 2011.

On February 22, 2010, the Sperry partners entered an Amendment to the January 2009 Agreement that terminated the venture, stating: "it is the intention of [Sperry] to shut down all offices and terminate all leases except West LA and Phoenix." Ex. 47. Sperry partners funded

an escrow account with $500,000 to be used to negotiate settlements with Sperry's creditors, primarily the leaseholders of Sperry's office space. These settlements protected the Sperry partners from the personal guarantees they made for some of the leases.

According to escrow instructions effective March 2, 2010, the Sperry partners directed that the $500,000 be applied first to resolve the lease claims, with any remaining funds used to pay Sperry's "non-leasehold creditors" (including attorneys). Ex. 48. Under the escrow instructions, the Guardian parties (including Tom, personally) could be liable if there was a dispute or misuse of the escrow funds, *i.e.*, if the funds were not utilized in accordance with the Amendment and Escrow Instructions. Tom entrusted Simon with the task of negotiating the settlements and administering the disbursements from escrow.

Shortly after the escrow agreement went into force, Mr. Durkheimer's name appeared on a list of accounts payable, dated March 9, 2010. Ex. 50. Simon directed an escrow payment to John Durkheimer, after directing Mr. Durkheimer to send an invoice for $75,000. Mr. Durkheimer's invoice was dated March 31, 2010, Ex. 52, and the escrow instructions to Williams & Jensen for Mr. Durkheimer's payment issued on May 12, 2010. Exs. 51, 55. Simon and Mr. Durkheimer had a history because Mr. Durkheimer was Paul's "go to" bankruptcy attorney, and had worked on an earlier failed Brenneke venture, called "Broken Top."

Shortly after Mr. Durkheimer received his payment, he received a call from Simon, who requested that Mr. Durkheimer reduce his fee. Mr. Simon directed Mr. Durkheimer to send $25,000 of the $75,000 payment to the Stoel Rives law firm. Ex. 167 at 49:6–50:19. The $25,000 payment was for Simon's benefit, and Mr. Durkheimer made the payment on May 14, 2010.

On July 1, 2010, Tom asked in an email: "For what services are we paying Durkheimer?" Ex. 62B. Mr. Simon responded that the payment was for a bankruptcy plan prepared for Sperry, should it have become necessary in 2008. Ex. 62B. Mr. Simon acknowledged that there was no written fee agreement with Mr. Durkheimer, but asserted that Tom knew of the Durkheimer payment long before, and, at a meeting on May 19, 2010, approved crediting the payment of $25,000 to the sums owed by Sperry to Simon. Written corroboration of the May 19, 2010 meeting is allegedly provided by a memo from Simon to Tom dated May 24, 2010, about which there is some dispute regarding authenticity. Ex. 56.

By mid-2010, Paul and Tom began to have a falling out over a series of disputes, business and personal, which escalated over time into significant hostility. During this time, Simon tried to withdraw from representing either brother, in any capacity, including telling them that he was ready to withdraw from the Travelers litigation as soon as the brothers found replacement counsel. Exs. 65, 68, 89. Neither brother found an attorney to replace Simon.

Also in 2010, the Z&A Trust fell increasingly behind on the mortgage payments on the Summerville residence until, in late 2010, Bank of America began the foreclosure process. In November 2010, Bank of America scheduled a trustee's sale of the Summerville residence for March 17, 2011. Ex. 93. On November 22, 2010, Tom forwarded to Simon a copy of the Bank of America Notice of Trustee's Sale and requested that Simon provide an analysis of options for the QPRT. Ex. 93.

In the face of the trustee's sale of the Summerville residence, it became clear that Paul wanted to save his house. In addition, the QPRT had only the residence as an asset. Tom, however, in his capacity as trustee, wanted to surrender the house and collect whatever equity remained. Tom argued that completing a sale would maximize any equity from the QPRT or mitigate its further losses. In view of this divergence of opinions, Paul, the settlor of the trust, and Jimmy Drakos, trustee of the Z&A Trust, sought to remove Tom as QPRT trustee. Tom resisted these attempts.

Around this same time, near the end of 2010, a fee dispute developed between Tom and Simon. The central issues were Simon's alleged entitlement to unpaid fees for his work with Sperry, and the propriety of the escrow payment to John Durkheimer. Exs. 88, 89, 91, 119, 123, 125, 126.

In December 2010 and January 2011, Simon sued Sperry and Tom, personally, for attorney fees in Multnomah County Circuit Court. Mr. Simon claimed that Tom owed past-due attorney fees of more than $130,000, Ex. 81, and that Sperry owed more than $42,000.

In late January 2011, Simon learned that the *Travelers* case was nearing settlement. To resolve the case, Simon discussed the possibility of representing both Tom, as trustee of the QPRT, and Paul, asking them to waive any conflicts of interest, and noting that he would have to resign if the others could not agree to waive potential conflicts. Tom responded "ok." Ex. 126A, 127, 131. Mr. Simon then sought a more formal conflict waiver related to the *Travelers* litigation, which Jimmy and Paul, but not Tom, signed. Eventually, after providing Tom with more information and telling Tom to consult with his attorney, Simon received new terms from Tom related to the representation. Mr. Simon agreed to those terms. Ex. 140. Mr. Simon successfully settled the Travelers case and withdrew on March 11, 2011, the same day that Paul and Tom, as trustee of the QPRT, were dismissed from the case. Exs. 145-146.

During this period, Tom asked Paul how he planned to pay the past-due mortgage payments on the Summerville residence and avoid Bank of America's foreclosure. Ex. 93. Importantly, Tom had recently learned that the junior encumbrances remained on the title to the Summerville residence, despite the intent that they be satisfied by the Frontier loan. Ex. 142. The possibility that the Frontier loan would be unsatisfied in the case of a foreclosure sale exposed Tom to significant financial risk because he personally guaranteed the Frontier loan. Tom requested that Paul have Simon ensure that the junior encumbrances were removed from the title. Tom suggested that the best solution to the situation was to sell the Summerville residence and use the proceeds to pay off the existing mortgage and satisfy the Frontier loan. Ex. 142.

In their urgency to stop Bank of America's March 17, 2011 foreclosure sale, Paul and Simon demanded that Tom file bankruptcy on the QPRT's behalf. Paul and Simon asserted that Tom had a conflict of interest and was not fulfilling his fiduciary duties as trustee for the QPRT. When Tom declined to file bankruptcy, Paul demanded he resign as the QPRT's trustee, but Tom refused. Mr. Simon still represented Tom in his capacity as trustee of the QPRT.

On March 11, 2011, Simon withdrew as counsel of record from the only two matters in which he represented Tom, as trustee for the QPRT: the *Western Pacific* litigation and the *Travelers* litigation. Exs. 148, 149.

On March 14, 2011, Simon filed a petition for involuntary bankruptcy against the QPRT, on behalf of three named creditors, including the Z&A Trust, which halted the foreclosure sale scheduled for just three days later. Ex. 147. The debtor identified in this filing was the "Paul Brenneke Personal Residence Trust aka Thomas B. Brenneke, Trustee of Paul Brenneke Personal Trust." Ex. 147.

Tom resigned as QPRT trustee on March 21, 2011. Ex. 84. Tom stated that he would possibly become a creditor of the QPRT because of the QPRT's agreement to indemnify Tom for claims arising from his personal guaranty of the Frontier loan. In other words, if Frontier foreclosed on its loan, then Tom would be personally liable for amounts owed, due to his guaranty, and would, in turn, look to the QPRT for indemnification, per their earlier agreement. Tom thus had a potential conflict of interest in continuing to act as the QPRT's trustee.

Mr. Simon's fee litigation proceeded to trial in October 2012. At trial, Bonnie Richardson used metadata[2] from a .pdf copy of the May 24, 2010 memo to suggest that Simon created the memo on December 8, 2010, and not in May. The metadata from the .pdf shows that it was created in December 2010. Ex. 57. At his fee litigation trial, and in a later deposition, Simon testified that he scanned a hard copy of the memo, which he kept in a workbook, on December 8, 2010. Mr. Simon testified at this trial that he misspoke previously, and that he had, in fact, acquired the .pdf document from Paul in December 2010. Mr. Simon testified that recently learned of his error when investigating the issue before the disciplinary trial, and talking with Jimmy Drakos.

## B. Procedural Posture

The Bar filed its Formal Complaint against Mr. Simon on August 16, 2013, and an Amended Formal Complaint on January 22, 2015. Mr. Simon challenged the sufficiency of the Bar's Amended Formal Complaint by motion dated November 19, 2015, which the chair of the Panel granted on March 10, 2016. The Bar thereafter filed a Second Amended Formal Complaint on March 16, 2016, and Simon served his Answer to Second Amended Formal Complaint on March 28, 2016. The Bar's Second Amended Formal Complaint alleged four causes of complaint and six violations of the ORPCs, each of which Simon disputes.

The Panel held a trial at the Oregon State Bar Center on April 19, 20, and 22, with closing arguments heard at the same location on April 28, 2016.

The Bar called the following witnesses:

- Mr. Robert Simon, the respondent;
- Ms. Bonnie Richardson;
- Mr. Thomas Brenneke;
- Mr. Thomas Howe, expert witness on document creation; and

[2] A document's metadata is information about the document itself, as contrasted with the content of the document. The metadata may show the document's creation date, dates that it was edited and saved, the identity of the creator, and so on. Trial Tr. (Howe) 395:3–396:8.

- Mr. Will Wilson.

At the close of the Bar's case-in-chief, Mr. Simon moved orally for a directed verdict against the Bar's causes of complaint. Trial Tr. 465:5–472:25. The Panel denied the motion, not least because the Panel was uncertain whether the Bar Rules allow or contemplate such a motion for these proceedings. Trial Tr. 473:6–16.

Mr. Simon called the following witnesses:

- Ms. Sam Ruckwardt;
- Mr. Thomas Brenneke, by videotape;
- Mr. Brent Summers (Ex. 246);
- Mr. Paul Brenneke; and
- Mr. Jimmy Drakos.

At the close of the evidence, the parties submitted 228 exhibits into the record, including 10 demonstrative exhibits, which highlighted those portions of the transcript exhibits that the parties thought most relevant.

The trial transcript, as submitted, encompassed 780 pages of testimony and argument.

## III. ISSUES OF FACT

### A. Credibility of Witnesses

The Panel found Mr. Drakos to be a credible witness. His testimony appeared honest and forthright. He seemed self-assured in his demeanor and answers, and spoke energetically and with little hesitation when discussing the events described here. He did not appear to struggle with his recollections, and spoke with confidence about the various transactions in which he has been involved. He did not shy away from addressing the Panel or counsel, as necessary, when making his points.

The Panel found Paul Brenneke to be a credible witness. Paul Brenneke's often emotional responses to questioning gave the distinct impression that he was invested in his testimony, and that discussing the events was sometimes truly painful. The Panel would not have expected to see such emotional turmoil in a witness who was being dishonest. At times, Paul was reduced to tears discussing the disputes described above. Paul was not halting in his testimony, and appeared to have a good recall of the facts and circumstances of the various business and legal situations he experienced.

The panel found Tom Brenneke to be less credible than other witnesses. Although Mr. Brenneke typically gave straightforward responses to questions, he seemed unemotional to the point of being cold. In addition, Mr. Brenneke rarely, if ever addressed the Panel or acknowledged its presence, speaking almost exclusively toward the counsel tables. Mr. Brenneke also did not

display any obvious emotion, as might be expected, when addressing situations that left his brother, Paul Brenneke, either close to or in tears. Mr. Brenneke's lack of outward expressions of regret or misgivings was notable when he discussed what was essentially the destruction of his relationship with his brother, and the creation of an apparently irreconcilable rift between Mr. Brenneke and his father, on one side, and Paul Brenneke, on the other.

The Panel found Mr. Howe to be a credible witness. The Bar qualified Mr. Howe as an expert in electronic-document forensics, and the Panel accepts him as such. Mr. Howe gave his testimony in a straightforward manner, and he was both understandable and knowledgeable on technical issues. As well, when pressed, Mr. Howe readily disclosed possible shortcomings in his analysis, described things that he might have done with other resources, and gave testimony that was, in the Panel's view, unbiased toward either party.

The Panel found Ms. Richardson to be a credible witness. Her demeanor was calm and reassured, and she gave her testimony in a matter-of-fact manner. Nothing about Ms. Richardson's mannerisms or body language suggested that she was being deceitful or anything less than truthful in her responses and explanations.

The Panel found Ms. Ruckwardt to be a credible witness. Like Ms. Richardson, Ms. Ruckwardt's demeanor suggested that she was simply relaying the facts, rather than shading the truth. Ms. Ruckwardt was friendly and animated and often directly addressed the Panel with her testimony. She did not appear uneasy or halting in anything she said, and appeared to do her best to answer all the questions she received.

The Panel found Mr. Simon to be a credible witness. Mr. Simon did not typically appear uneasy with his testimony, and did not portray any of the behaviors that one would typically expect of a witness shading the truth, such as fidgeting, avoidance of eye contact, or visible unease. To his credit, Mr. Simon did appear uneasy when describing actions for which he clearly has misgivings, such as convincing Mr. Durkheimer to give back $25,000 of his attorney fee. Mr. Simon described that action as the "most reprehensible professional thing" he has done. Mr. Simon's candid admissions of his errors and personal faults make him believable. In addition, Mr. Simon was often engaged and energetic in his testimony, and appeared comfortable enough with his testimony to offer occasional moments of humor. Mr. Simon did display some moments of what might be called annoyance or exasperation with the situation, but the appearance of these reactions served to suggest that his testimony was honest rather than rehearsed or opaque.

The Panel found Mr. Summers to be a credible witness. Mr. Summers was often very animated and energetic in his testimony, and gave his answers with no hesitation. Mr. Summers was never halting or uncomfortable in making his statements, and often addressed the Panel or the questioning attorney directly.

The Panel found Mr. Wilson to be a credible witness. Mr. Wilson appeared relaxed during his testimony and answered questions in an unhesitating manner. He gave the Panel no reason to think that he was being anything but open and honest.

## B. First Cause of Complaint: QPRT (Qualified Personal Residence Trust) Matter

The Bar alleges in its First Cause of Complaint that Mr. Simon violated ORPC 1.7(a) (current-client conflict of interest) and ORPC 1.9(a) (former-client conflict of interest).

Under ORPC 1.7, Conflict of Interest: Current Clients:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

ORPC 1.7(a) (2015).

Under ORPC 1.9, Duties to Former Clients:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

ORPC 1.9(a) (2015).

In support of these charges, the Bar alleges that Paul created the QPRT in 2004, and named Tom as trustee; Paul then transferred title to the Summerville residence, encumbered by the Bank of America mortgage and the junior encumbrances, into the QPRT. The Bar alleges that Paul also created the Z&A Trust, into which he transferred his interests in several limited liability corporations, whose income was intended to pay the mortgage debt on the Summerville residence.

The Bar alleges that in 2005, the Z&A Trust bought the junior encumbrances, represented by Simon. The Bar alleges that in early 2008, Simon negotiated a loan from Frontier Bank on behalf of the QPRT and the Z&A Trust; in return, Frontier Bank required security in the form of a lien against the Summerville residence, and satisfaction of the junior encumbrances. The Bar alleges that Frontier Bank also required a personal guarantee by Tom Brenneke. The Bar alleges

that as a result of his representation of QPRT and the Z&A Trust, Simon knew that Tom guaranteed the Frontier loan, and that Z&A Trust was to use a portion of the loan proceeds to extinguish the indebtedness secured by the junior encumbrances.

The Bar further alleges that, upon receiving the loan proceeds from Frontier Bank, satisfactions of the junior encumbrances were signed, and Simon submitted the satisfactions to the title insurance company for recording. The Bar alleges that the satisfactions were never recorded, leaving the junior encumbrances on the title to the Summerville residence ahead of the Frontier lien. The Bar alleges that Simon took no steps to determine or verify whether the satisfactions were ever recorded.

The Bar alleges that in 2009, Travelers Insurance Company filed a petition to void the transfer of the Summerville residence from Paul to the QPRT, naming both Paul and Tom, as trustee of the QPRT, as defendants. The Bar alleges that Simon represented both Paul and Tom in the *Travelers* litigation, and that Simon represented Tom, as trustee of the QPRT, from 2008 through March 2011, when Simon withdrew as attorney of record in the *Travelers* litigation.

The Bar further alleges that in late 2010, the relationship between Simon and Tom was strained because Simon sued Tom personally for fees due in another matter, and Simon remained close to Paul, who blamed Tom for losing Z&A Trust's investment in Sperry. The Bar alleges that Simon accused Tom of malfeasance related to the Frontier loan proceeds and demanded that he return money to the Z&A Trust, all while Simon represented Tom as trustee of the QPRT and individually in the *Travelers* litigation.

The Bar concludes that Simon violated ORPC 1.7(a) because the *Travelers* litigation sought to void the transfer of the Summerville property from Paul to the QPRT, and Simon accused one client, Tom, on behalf of another client, Paul, of engaging in malfeasance regarding his use of the Frontier loan proceeds secured by the Summerville property, and owned by the QPRT. The Bar argues that these actions show that Paul and Tom Brenneke's interests were directly adverse and that Simon's continuing to represent each one of them was materially limited by responsibilities he owed to the other. The Bar argues that Simon did so in the absence of required informed consent, confirmed in writing, from both Tom and Paul Brenneke.

The Bar alleges that in early 2011, Simon urged Tom to file for bankruptcy on behalf of the QPRT to avoid a foreclosure sale scheduled for March 17, 2011; Tom refused both that request and a request that he resign as QPRT trustee. The Bar further alleges that on March 14, 2011, the *Travelers* court granted Simon's motion to withdraw as Tom Brenneke's attorney in the *Travelers* litigation, and Simon filed an involuntary bankruptcy petition against the QPRT. The Bar alleges that Tom resigned as QPRT trustee on March 21, 2011, and that Simon continued the bankruptcy against the QPRT, arguing that Tom committed theft and malfeasance.

The Bar concludes that Simon violated ORPC 1.9(a) because his representation of the QPRT's creditors in the involuntary bankruptcy proceeding was substantially related to his prior representation of Tom because that was the matter on which Simon advised Tom at the time when the alleged malfeasance occurred. The Bar further argues that Simon's representation of the QPRT's creditors in the involuntary bankruptcy proceeding was materially adverse to Tom Brenneke's interests because it attacked Tom Brenneke's actions and sought to hold him

financially responsible for conduct undertaken as trustee at the time when Simon represented him in that capacity. Finally, the Bar argues that Simon undertook these actions in the absence of informed consent from Tom and the QPRT creditors, confirmed in writing, to Simon's representing the creditors in the involuntary bankruptcy proceeding.

Mr. Simon disputes many aspects of the Bar's allegations, including the following:

Mr. Simon denies that Frontier Bank required satisfaction of the junior encumbrances as a condition of its loan, and that, as a result of his representing the QPRT and the Z&A Trust, he knew of Tom Brenneke's personal guarantee of the Frontier loan and a requirement that the Z&A Trust was supposed to extinguish the junior encumbrances with a portion of the loan proceeds.

Mr. Simon further denies that he was responsible for recording the satisfactions of the junior encumbrances, or for representing Tom in the *Travelers* litigation.

Mr. Simon denies that he represented Tom as QPRT trustee at the time Simon sued Sperry and Tom, personally, for legal fees. Mr. Simon also denies that he aligned himself with Paul or accused Tom of malfeasance regarding use of the Frontier loan proceeds.

Mr. Simon therefore denies that he violated ORPC 1.7(a) because informed consent was never required; there was no conflict of interest between Paul, settlor of the QPRT, and Tom, its trustee, in the challenges to the QPRT; and there were no allegations regarding the capacity in which Simon might have been Paul Brenneke's attorney.

Mr. Simon also denies that, in early 2011, he and Paul urged Tom to file for bankruptcy protection on the QPRT's behalf. Mr. Simon also denies that his motion to withdraw from the *Travelers* litigation was granted as late as March 14, 2011.

Mr. Simon denies that he represented Tom as trustee for any matter other than in cases of public record, and that he represented Tom in any matters involving theft or malfeasance.

Mr. Simon therefore denies either that he violated ORPC 1.9(a) or that he needed informed consent under the circumstances alleged.

### C. Second Cause of Complaint: Sperry Matter

The Bar alleges in its Second Cause of Complaint that Simon violated ORPC 1.5(a) (charging an illegal or excessive fee) and ORPC 8.4(a)(3) (dishonest conduct).

Under ORPC 1.5, Fees:

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

ORPC 1.5(a) (2015).

Under ORPC 8.4, Misconduct:

> (a) It is professional misconduct for a lawyer to: [...] (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]

ORPC 8.4(a)(3) (2015).

The Bar alleges that in August 2008, Tom and Paul, through their legal entities, entered into a partnership with two others to operate Sperry in California and Arizona. The Bar further alleges that the partners in Sperry made capital contributions and named Tom the managing partner. The Bar also alleges that Simon began representing Sperry beginning in 2008.

The Bar alleges that by early 2010, the Sperry partners decided to dissolve Sperry, and that on March 2, 2010, they created and funded the Sperry escrow account to negotiate settlements with Sperry's leasehold creditors and, if possible, Sperry's remaining creditors. The Bar alleges that Tom entrusted Simon with negotiating the settlements and disbursing the escrow funds, and that Simon believed that Sperry owed him attorney fees for work performed on Sperry's behalf.

The Bar further alleges that on March 31, 2010, Mr. Durkheimer sent Sperry an invoice, at Simon's direction, for $75,000 for legal services allegedly performed on Sperry's behalf, but Sperry did not owe Mr. Durkheimer the money, and Simon knew it when he instructed Mr. Durkheimer to issue the invoice. The Bar alleges that Sperry did not retain Mr. Durkheimer and Tom was unaware that Mr. Durkheimer rendered legal services on Sperry's behalf.

The Bar alleges that on May 12, 2010, Simon caused $75,000 to be wired from the Sperry escrow account to Mr. Durkheimer. The Bar further alleges that on May 13, 2010, Simon instructed Mr. Durkheimer to send $25,000 of the $75,000 to a law firm to which Simon owed money, and that Mr. Durkheimer did so on May 14, 2010.[3]

Finally, the Bar alleges that when Simon directed Mr. Durkheimer to send the $75,000 Sperry invoice, Simon knew that Sperry had not retained Mr. Durkheimer and that Mr. Durkheimer did not render services to Sperry worth $75,000. The Bar also alleges that when Simon directed Mr. Durkheimer to send the $25,000 to Simon's creditor, Simon knew that he was not entitled to use those funds to his benefit.

The Bar concludes that the described conduct constitutes charging or collecting a clearly excessive fee, and is dishonest in violation of ORPC 1.5(a) and ORPC 8.4(a)(3).

Mr. Simon denies that the Sperry partners decided, by early 2010, to dissolve Sperry. Mr. Simon also denies that Tom entrusted Simon with negotiating the necessary settlements and disbursing the escrow funds. Mr. Simon further denies that Sperry owed Simon money for attorney fees when the funds were deposited into the trust account.

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[3] The Second Amended Formal Complaint recites "March 14, 2010," Compl. ¶ 25, but the Panel believes this is in error.

Mr. Simon also denies that Sperry did not owe Mr. Durkheimer $75,000, that Simon knew it when he instructed Mr. Durkheimer to issue an invoice, that Sperry had not retained Mr. Durkheimer, and that Tom was unaware that Mr. Durkheimer had rendered legal services on Sperry's behalf.

Mr. Simon denies that, when he directed Mr. Durkheimer to send Sperry an invoice for $75,000, Simon knew that Sperry had not retained Mr. Durkheimer and that Mr. Durkheimer had not rendered services to Sperry worth $75,000. Mr. Simon further denies that when he directed Mr. Durkheimer to send $25,000 to Simon's creditor, Simon knew that he was not entitled to use those funds for his benefit.

Mr. Simon therefore denies that the conduct described constitutes charging or collecting a clearly excessive fee, and is dishonest in violation of ORPC 1.5(a) and ORPC 8.4(a)(3).

**D. Third Cause of Complaint: Simon v. Brenneke Fee Litigation**

The Bar alleges in its Third Cause of Complaint that Simon violated ORPC 1.7(a) (self-interest conflict of interest).

Under ORPC 1.7, Conflict of Interest: Current Clients:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

ORPC 1.7(a) (2015).

The Bar alleges that at the end of 2010, Simon sued Sperry and Tom, personally, for attorney fees. The Bar alleges that Simon claimed Sperry and Tom owed Simon for legal services he performed for Sperry.

The Bar additionally alleges that, at the time Simon sued Tom, an act that could make Tom personally liable for fees found to be owed by Sperry, Tom was Simon's client in other matters. The Bar alleges, specifically, that, at the time, Simon was defending Tom in the *Travelers* litigation and representing Tom as the QPRT trustee.

The Bar alleges that there was a significant risk that Simon's representation of Tom in those matters would be materially limited by Simon's personal animosity toward Tom, as well as Simon's personal interest in prevailing in the lawsuit he brought against Tom to collect attorney fees. Finally, the Bar alleges that Simon failed to obtain informed consent from Tom after full disclosure.

The Bar concludes that the described conduct constituted a self-interest conflict by Simon, in violation of ORPC 1.7(a).

Mr. Simon denies the vagueness in the Bar's allegations that the fee litigation occurred at "the end of 2010." Mr. Simon also denies that, at the time he sued Tom for attorney fees, Simon represented Tom in other matters.

Mr. Simon denies that his suit for unpaid legal fees created a significant risk that Simon's representation of Tom in QPRT matters (to the extent the allegation can be understood in that manner) would be materially limited. Mr. Simon asserts that his work on the QPRT was a completely different matter than the Sperry matter and was provided at no charge. Mr. Simon therefore states that because he never expected payment on the QPRT matter, there could be no "significant risk" that Tom's failure to pay Simon's attorney fees would impact Simon's free work.

Mr. Simon admits that he did not obtain informed consent, confirmed in writing, but denies that informed consent was required.

Mr. Simon therefore denies that he engaged in a self-interest conflict of interest, in violation of ORPC 1.7(a).

### E. Fourth Cause of Complaint: Creating a Fraudulent Document

The Bar alleges in its Fourth Cause of Complaint that Simon violated ORPC 8.4(a)(3) (dishonest conduct).

Under ORPC 8.4, Misconduct:

> (a) It is professional misconduct for a lawyer to: [...] (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]

ORPC 8.4(a)(3) (2015).

The Bar alleges that during his attorney fee litigation against Tom and Sperry Van Ness Real Estate, Simon asserted that Tom approved Simon retaining and paying Mr. Durkheimer. The Bar alleges that this representation is a knowingly false statement by Simon.

The Bar further alleges that Simon produced a memo in support of his claim that Tom approved the payment to Mr. Durkheimer, which Simon claimed he wrote and sent to Tom around May 24, 2010. According to the Bar, the contents of the memo purportedly confirm that Simon disclosed to Tom that Simon asked Mr. Durkheimer to refund $25,000 of the $75,000 he

received, and that Tom authorized Simon to apply the refunded amount against the attorney fees that Sperry owed Simon. The Bar alleges that the May 2010 memo was fraudulently created after the fact, Simon knew that it was fraudulently created, and that Simon offered it as false evidence in his dispute with Tom intending that the court and the parties rely upon it.

Mr. Simon denies that he made a false representation when he asserted that Tom approved Simon retaining and paying Mr. Durkheimer. Mr. Simon also denies that the May 2010 memo was fraudulently created, either originally or as reproduced in PDF form, and that the contents of the memo speak for themselves in confirming that Tom authorized Simon's actions regarding the $75,000 and $25,000 payments.

## IV. FINDINGS AS TO GUILT

In a disciplinary proceeding, the respondent is "entitled to a presumption that [he is] innocent of the charges" alleged. *In re Brandt*, 331 Or 113, 149–50 (2000) (citing *In re Jordan*, 295 Or 142, 156 (1983)). To overcome that presumption and establish a violation alleged in a cause of complaint, the Bar must prove every element of the alleged violation by clear and convincing evidence, which means that the truth of the necessary facts is "highly probable." Oregon State Bar Rules of Procedure (BR) 5.2 (Burden of Proof); *In re Conduct of Ellis*, 356 Or 691, 693 (2015) (citing *In re Phinney*, 354 Or 329, 330 (2013)). In determining whether the Bar carried its burden, the Panel "may admit and give effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs." BR5.1(a). Thus, while much evidence is admissible, the Panel should disregard "[i]ncompetent, irrelevant, immaterial, and unduly repetitious evidence." *Id.*

### A. Evidentiary Issues and Rulings

With his pre-trial memorandum, Simon made several motions *in limine* and sought several rulings regarding the nature of the proceedings.

#### 1. Motions *in limine*[4]

##### a. Sequester nonparty lay witnesses from the hearing room.

Mr. Simon moved to "exclude[e] all nonparty lay witnesses from the hearing room during the trial until closing argument, unless it is shown that the witness is essential to presenting a claim or defense." Simon Trial Memo at 41–42. Mr. Simon argued that such a ruling was necessary to "prevent witnesses from tailoring or being influenced by the testimony of others who testify before them." *Id.* at 42–43 (citing *State v. Cooper*, 319 Or 162, 166 and n.1 (1994)). The Bar did not object to this motion. Bar's Response to Motions *in limine* (Bar's Response) at 2. The Panel therefore held that nonparty lay witnesses should be excluded from the hearing room until closing argument. Trial Tr. 5:19–20.

[4] The Panel considered Mr. Simon's motions *in limine* in light of its understanding that disciplinary proceedings are *sui generis* and have unique requirements of evidence and procedure. BR 1.3; BR 5.1; *see also In re Thorp*, 296 Or 666, 668 (1984).

**b. Exclude references to the "golden rule."**

Mr. Simon moved to "exclude[e] any arguments asking the Panel to apply the 'Golden Rule,' or otherwise place themselves in the position of the complainant." Simon Trial Memo at 43 (citing *Hovis v. City of Burns*, 243 Or 607, 614 (1966)). Mr. Simon contended that such arguments should not be permitted because they ask the finder of fact to ignore his or her duty of neutrality and decide the case on the basis of sympathy and bias, not the evidence. The Bar had no objection to limiting argument that "places the trial panel 'in the shoes' of the complainant." Bar's Response at 3. The Bar asserted, however, that it must be allowed to make arguments regarding Tom Brenneke's view of the attorney-client relationship. *Id.* The Panel agreed to allow this line of argument, but disallowed references to the Golden Rule. Trial Tr. 6:7–9.

**c. Exclude testimony providing that Simon represented Tom Brenneke, always and for everything.**

Mr. Simon moved to bar any suggestions by Tom that Simon was Tom's attorney on a general counsel basis, *i.e.*, that Simon represented Tom on almost all matters. Simon Trial Memo at 43. Apparently because various attorney-client relationships are so central to the conflicts analysis in this case, Simon considered such suggestions more prejudicial than probative. The Bar agreed not to refer to Simon as Tom Brenneke's general counsel but asserted that witnesses should be allowed to testify as to "when they understood that Simon was acting on behalf of Tom Brenneke[.]" Bar's Response at 4. The Panel adopted the parties' agreement. Trial Tr. at 6:10–16.

**d. Exclude personal opinions of counsel.**

Mr. Simon moved to exclude any attorney from "express[ing] his or her opinion regarding the facts of the case, or give what amounts to unsworn testimony regarding any aspect of the case[.]" Simon Trial Memo at 43–44 (citing *Jefferis v. Marzano*, 298 Or 782, 795 n.5 (1985)). Mr. Simon was of the opinion that statements of this type tainted the outcome in other cases in which he was involved. *Id.* at 44. The Bar agreed that counsel's personal opinions should be excluded, but that argument must be allowed. Bar's Response at 4. Trial Tr. at 6:22–7:17.

**e. Disclose expert files in advance of testimony.**

Mr. Simon moved to require disclosure for review of "any testifying expert's entire file concerning this case, including any notes, memoranda, correspondence, or other factual documentation provided to them." Simon Trial Memo at 44 (citing OEC 705). The Bar argues that the exchange of expert files should not be required because the Oregon Rules of Evidence do not apply to this proceeding. Bar's Response at 4–5 (citing *In re Barber,* 322 Or 194, 206 (1995)). The Panel held that the parties must exchange expert files. Trial Tr. at 7:24–8:1.

**f. Exclude evidence of conduct not pled in the complaint.**

Mr. Simon moved to preclude the Bar from offering any new causes of complaint or new bases for a cause of complaint at trial. Simon Trial Memo at 44–45. Mr. Simon argued that fundamental concerns of due process required that he not face new charges and theories of violations during the course of his trial. *Id.* at 44 (citing *In re Magar,* 296 Or 799, 806 n.3

(1984); *In re Chambers,* 292 Or 670, 676 (1982); *In re Ainsworth,* 289 Or 479, 487 (1980)). Mr. Simon further argued that the Bar should not be allowed to amend its complaint at trial to conform to the evidence, as might be allowed under ORCP 23B. *Id.* (citing *In re Ellis,* 356 Or 691, 739 (2015)). The Bar agreed that it cannot add new charges during the proceeding, but asserted a right to prove conduct, in the course of making its case, that is not specifically charged as an ethics violation. Bar's Response at 5. Consistent with Simon's motion and the Bar's agreement, the Panel ruled that the Bar was limited to establishing theories of violation set forth in the pleadings of record. Trial Tr. at 8:8–10.

**g. Exclude the metadata.**

Mr. Simon moved to exclude the metadata regarding the May 24, 2010 memo, or make it subject to an adverse inference based on spoliation of the evidence and at least Oregon Evidence Code § 311(1)(c). Simon Trial Memo at 45–47. Mr. Simon objected that the metadata should be excluded because it is more prejudicial than probative. *Id.* at 45 (citing OEC 403; *Ostrander v. Alliance Corp.*, 181 Or App 283, 293 (2002)). Mr. Simon also objected that the metadata should be excluded as hearsay; *i.e.*, an out of court statement made by the computer that created the metadata. *Id.* at 46 (citing OEC 801; *State v. Causey*, 265 Or App 151, 154 (2014)). Further, Simon objected because the metadata is appended to the document and is not data from the original document, in addition to being a disallowed duplicate of the underlying document. *Id.* at 46 (citing OEC 1001(2); OEC 1003(2)). The Bar disagreed, and argued that each of Simon's evidentiary theories was in error. Bar's Response at 6–7. The Bar argued, for example, that the rules of spoliation should not apply because they apply to the bad acts of a party to the proceeding, but Simon did not allege bad acts by the Bar. *Id.* at 6 (citing, *e.g.*, *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 958 (9th Cir. 2006)). The Panel was persuaded by the Bar's comments, and allowed the document metadata to be presented as evidence. Trial Tr. at 9:3–5.

**h. Exclude evidence of the outcome of the underlying fee litigation.**

Finally, Simon moved to prevent Bar counsel "from introducing evidence of the outcome of the underlying fee litigation." Simon Trial Memo at 47–48. Initially, Simon was concerned that the offered materials do not bear on the elements of the violations alleged in this case. *Id.* Mr. Simon also argued that the use of conclusions from the fee litigation (where the burden of proof is a preponderance of the evidence) would be reversible error in this proceeding (where the burden of proof is clear and convincing evidence). *Id.* (citing *Cook v. Michael*, 214 Or 513, 525 (1958)). Finally, Simon argued that the evidence of the judgment in the fee litigation would create confusion and prejudice the Panel against Simon, despite the earlier outcome not having any preclusive effect. *Id.* at 48 (citing *Shuler v. Distribution Trucking Co.*, 164 Or App 615, 625 (1999)). The Bar argued that evidence from the underlying fee litigation was relevant and should be admitted. Bar's Response at 7. The Bar asserted that even if the findings in the underlying trial should not be given precedential effect, they should at least be taken into consideration and given the appropriate weight once heard. *Id.* The Panel found the Bar's arguments persuasive and allowed evidence of the outcome of the fee litigation, to be given the necessary weight when presented. Trial Tr. at 9:11–14.

### 2. Pretrial rulings

In addition to the motions *in limine* described above, the Panel was presented with other evidentiary issues at the start of trial. From an evidentiary perspective, the significant issue was Simon's query whether the trial evidence would consist of entire transcripts of depositions or hearings, as offered at the opening of trial, or whether the evidence would only consist of designations and counter-designations of testimony. The Bar preferred to submit each entire transcript into the record for the sake of completeness and context on review. Trial Tr. at 9:19–12:17. The Panel ruled that the entire offered transcripts would remain of record as exhibits, with the parties instructed to highlight the most relevant portions during the course of trial or at the close of evidence. *Id.* at 12:19–24, 14:7–14.

Based on the Panel's decisions on the motions *in limine* and relevant precedent, the four causes of complaint described above, and the issues alleged therein, are the violations and transactions the Panel considered in this trial. *In re Magar,* 296 Or 799, 806 n.3 (1984) ("[A]n accused lawyer must be put on notice not only of the disciplinary rule that he is charged with violating but of the conduct constituting the violation."); *In re Chambers,* 292 Or 670, 676 (1982); *In re Ainsworth,* 289 Or 479, 487 (1980). The Panel did not consider violations or conduct not pled in the Second Amended Formal Complaint.

## B. First Cause of Complaint: QPRT (Qualified Personal Residence Trust) Matter

### 1. Alleged Violation of ORPC 1.7(a) (Current-Client Conflict of Interest)

The Panel is of the opinion that the Bar failed to establish, by clear and convincing evidence, that Simon engaged in a current-client conflict of interest, in violation of ORPC 1.7(a), under its First Cause of Complaint.

ORPC 1.7(a), in relevant part, recites:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; [or]
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer[.]

As described above, the Bar's conclusion is that Simon violated ORPC 1.7(a) because the *Travelers* litigation sought to void the transfer of the Summerville property from Paul to the QPRT, and Simon accused one client, Tom, on behalf of another client, Paul, of engaging in malfeasance regarding his use of the Frontier loan proceeds secured by the Summerville property, owned by the QPRT. The Bar's accusations are not a model of clarity, however, and it is unclear exactly when the wrongdoing occurred, and whether it relates to Simon's alleged

representation of Tom, individually, or Tom, as trustee of the QPRT. These roles must be considered distinctly because, for conflicts purposes, representation of a trustee is, in actuality, representation of the underlying entity, and not the individual. *See In re Conduct of Campbell*, 345 Or 670, 681 (2009) ("When a lawyer represents a corporation, the lawyer represents, for the purpose of conflict of interest analysis, the entity, not the person who manages the entity. *See In re Banks,* 283 Or 459, 469 (1978) ("[t]he corporation usually is considered an entity[,] and the attorney's duty of loyalty is to the corporation and not to its officers, directors or any particular group of stockholders").")

It is not clear whether the Bar intends to refer to Tom, individually, or Tom, as trustee of the QPRT. But regardless of the reference, the Bar has not established a violation by clear and convincing evidence.

**a. The Bar's theory fails if it requires Mr. Simon's representing Tom Brenneke, the individual.**

The Bar's theory of violation is premised on the notion that Tom was accused of committing "malfeasance" with the proceeds of the Frontier loan. Compl. ¶ 12. Under the circumstances, malfeasance in handling funds for investment is something that could only have been done by Tom as an individual, and not as trustee of the QPRT, because handling of investment funds was not among Tom Brenneke's duties as trustee. *See* Ex. 2 at 7 (trustee empowered to orderly administer the QPRT); *id.* at 2–3 (administering the QPRT involved such tasks as holding and maintaining the Summerville residence as a personal residence, paying expenses related to the residence, and distributing income to the Transferor of the trust). Therefore, the only possible malfeasance had to be the result of Tom Brenneke's actions as an individual.

Consistent with this theory, the Bar's allegations state that Simon "represented [Tom Brenneke] individually in the Travelers litigation." Compl. ¶ 11. The Bar's allegations also state, "Simon's accusations [of malfeasance] against *his client, Thomas Brenneke*" demonstrate direct adversity. Compl. ¶ 12 (emphasis added). Under this reading of the Bar's theory, then, both Paul and Tom, individually, had to be clients of Simon at the same time for an ethical violation to occur. *See* ORPC 1.7(a)(1) ("the representation of *one client* will be directly adverse to *another client*") (emphasis added).

But this premise is directly contrary to the documentary and testimonial evidence. First, Tom testified that Simon was not his personal lawyer. *See* Trial Tr. (Tom Brenneke) at 353:20–24 (Q. You've never really thought of [Simon] as your lawyer with the exception of when he has very specifically represented you in your capacity as trustee of the QPRT? A. *He's not my personal lawyer.*") (emphasis added); *see also* Ex. 245 at 33:7–16. Second, correspondence between Simon and Tom makes clear that they both understood Simon to represent Tom only as the trustee for the QPRT. *See* Ex. 94 at 1 (Tom email to Simon, dated 11/22/2010: "*As attorney for the Paul Brenneke QPRT*, I request that you please provide an analysis of options for the Trust[.]" (emphasis added); Simon email to Tom, dated 11/22/2010: "*I am the counsel for you, the Trustee, in the Travelers v QPRT case.*" (emphasis added)).

As noted above, a violation of ORPC 1.7(a) requires the representation of two current clients, and that the representation of one be "directly adverse to another" (ORPC 1.7(a)(1)) or be

"materially limited by" responsibilities to another (ORPC 1.7(a)(2)). Here, however, there is no clear and convincing evidence that Tom, individually, was ever one of the two necessary clients. Thus, if the Bar's theory of violation relies on Simon's representing Tom, individually, to establish a conflict between current clients, the Bar's theory fails.

**b. The Bar's theory fails if it relies on Mr. Simon's representing Tom Brenneke, the trustee.**

Alternatively, the Bar's theory of violation could be analyzed under a scenario where the malfeasance was committed by Tom, the trustee. In this case, the QPRT would be the relevant client for purposes of a conflicts analysis, however unlikely that may be. But even supposing this to be true, the Bar fails to prove a theory of violation by clear and convincing evidence.

If Simon's client for purposes of the current-client conflicts analysis is deemed to be the QPRT, through Tom, the trustee, then the Bar's theory of violation fails for lack of the necessary adversity before the involuntary bankruptcy petition was filed.

The Bar argues that Paul Brenneke's allegations of malfeasance against Tom, the trustee, show that Paul and Tom Brenneke's interests were directly adverse and that Simon's continuing to represent each one of them was materially limited by responsibilities he owed to the other. The Bar argues that Simon represented both Paul and the QPRT, through Tom, in the *Travelers* litigation, and that he did so in the absence of required informed consent, confirmed in writing, from both Tom and Paul Brenneke.

The Bar's case fails on three grounds. First, the Bar failed to establish that Paul and the QPRT's interests were adverse during the simultaneous representation in the *Travelers* litigation. Second, the Bar failed to establish that Simon's representation of either Paul or Tom was materially limited by Simon's responsibilities to another or by a personal interest. Third, the Bar failed to establish that Paul and Tom, as trustee of the QPRT, did not give informed consent, confirmed in writing.

Regarding the required adversity, the Bar's evidence regarding the *Travelers* litigation does not establish that Paul and the QPRT's interests were directly adverse. Whether an actual conflict exists depends on the clients' objective interests. *In re Cohen*, 316 Or. 657, 662 (1993). The Bar did not establish that Tom, the trustee's, objective interest in the *Travelers* litigation was contrary to Paul's. In fact, it makes more sense to conclude that Paul and Tom had aligned interests in *Travelers*: from beginning to end of the case, they were both on the side of defending the most significant asset of the QPRT, the Summerville residence.

Next, the Bar did not establish that Simon's representation of Paul or Tom was, or would be, materially limited by a responsibility to another or to an interest of Simon. In fact, the evidence shows just the opposite. As described above, Paul and Tom, the latter as trustee of the QPRT, both had an interest in keeping the Summerville residence in the QPRT, against an attempt by Travelers to pull the residence out. Keeping the residence in the QPRT would reinforce the QPRT's possession of its most significant asset and, importantly, maintain the residence's availability as a home for Paul and his family. And if there is anything to which Simon was more dedicated than the safety and comfort of Paul Brenneke's minor children, the Panel did not

see it. Mr. Simon's primary focus appeared always to be preserving the Summerville residence for Paul Brenneke's family, and there is no evidence that any circumstance caused him, or could have caused him, to waver in this goal. The evidence shows that Simon was continually staunch in his efforts to resolve the *Travelers* litigation, even in the midst of epic disputes between the brothers Brenneke, and between Simon and Tom over the former's entitlement to attorney fees from the Sperry matter.

Third, the Bar failed to establish that Paul and Tom, as trustee of the QPRT, did not give informed consent, confirmed in writing. The evidence shows that Simon educated Paul, Jimmy Drakos (trustee of the Z&A Trust), and Tom (trustee of the QPRT) about the benefits of, and potential conflicts involved in, his representing all three of them in the *Travelers* litigation. On January 6, 2011, during the course of the litigation, Simon asked Paul, Jimmy, and Tom if they would "all agree to sign a consent to allow [him] to continue to represent the QPRT in the Travelers case." Ex. 127 at 1. Tom immediately replied "OK," signaling his assent to the arrangement. While Paul and Jimmy eventually signed formal consent documents, Tom did not. The Panel does not think, however, that this fact negates the assent by the QPRT's trustee, Tom, that Simon continue his representation. The Bar failed to prove otherwise by clear and convincing evidence.

### 2. Alleged Violation of ORPC 1.9(a) (Former-Client Conflict of Interest)

The Panel is of the opinion that the Bar established, by clear and convincing evidence, that Simon engaged in a former-client conflict of interest, in violation of ORPC 1.9(a), under its First Cause of Complaint.

Under ORPC 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing."

The Bar argues that Simon violated ORPC 1.9(a) by representing the QPRT's creditors in the 2011 involuntary bankruptcy proceeding because that proceeding was substantially related to Simon's prior representation of Tom, during which time Tom allegedly committed malfeasance relating to the QPRT's assets. The Bar further argues that Simon's representation of the QPRT's creditors in the involuntary bankruptcy proceeding was materially adverse to Tom Brenneke's interests because it attacked his actions and sought to hold him responsible for conduct undertaken as trustee of the QPRT, when Simon represented the QPRT.

#### a. The Bar's theory fails if it requires Mr. Simon's representing Tom Brenneke, the individual.

As discussed above, if the Bar's theory of violation is premised on the notion that Tom was, individually, a former client of Simon, it fails.

Consistent with this theory, the Bar's allegations state that "[i]n March 2011, Simon moved to withdraw as Thomas Brenneke's lawyer in the Travelers matter." Compl. ¶ 15. The Bar's allegations also state, "Simon filed an involuntary bankruptcy petition against QPRT accusing Thomas (*i.e.*, now his former client)." *Id.* Further, the Bar alleges that "Simon's representation

of the QPRT's creditors in the involuntary bankruptcy proceeding was substantially related to his prior representation of Thomas Brenneke[.]" *Id.* ¶ 18.

But as noted above, this premise is contrary to the documentary and testimonial evidence, which establishes that neither Simon nor Tom considered Simon to be Tom's personal lawyer. *See* Trial Tr. (Tom Brenneke) at 353:20–24; Ex. 94 at 1.

As noted above, analysis of a violation of ORPC 1.9(a) begins with establishing that the representation of one client occurs "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Here, however, there is no clear and convincing evidence that Tom, individually, was "the former client." Thus, if the Bar's theory of violation relies on Simon's representing Tom, individually, to establish a conflict between a current and a former client, the Bar's theory fails.

**b. The Bar's theory succeeds if it relies on Mr. Simon's representing Tom Brenneke, the trustee of the QPRT.**

Alternatively, the Bar's theory of violation could be analyzed under a scenario where the former client is the QPRT, as represented by Tom, the trustee. In this case, the Bar established a violation of ORPC 1.9(a) by clear and convincing evidence.

Mr. Simon represented the QPRT, through Tom, its trustee, in the *Travelers* litigation. It is well understood that a representation of an entity, such as a trust, occurs through its manager (such as the trustee), as noted above. *See In re Conduct of Campbell*, 345 Or at 681 ("When a lawyer represents a corporation, the lawyer represents, for the purpose of conflict of interest analysis, the entity, not the person who manages the entity; *In re Banks,* 283 Or at 469 ("[t]he corporation usually is considered an entity[,] and the attorney's duty of loyalty is to the corporation and not to its officers, directors or any particular group of stockholders").") In this situation, the lawyer must treat the trustee as the lawyer's client, and take direction from him or her. *In re Conduct of Campbell*, 345 Or at 681 ("in representing [an] entity, the lawyer generally must follow [the representative's] directives") (citing RPC 1.13(a)).

Under ORPC 1.9(a), a "lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing." Here, the Bar established, by clear and convincing evidence, each of the necessary elements for a former client conflict of interest.

For there to be a conflict between an attorney and a former client, "the former client's interests [must] pertain to the matter in which the lawyer previously represented the former client." *In re Hostetter*, 348 Or 574, 584 (2010). The root issue is whether the former client's interest in relation to the earlier representation is adverse to the current client's interest in the new representation. *In re Ellis*, 356 Or 691, 753 (2015). Here, a former-client conflict existed, as made clear by an examination of the terms of ORPC 1.9(a).

First, Simon formerly represented the QPRT, through its trustee, in the *Travelers* litigation. Mr. Simon then represented a number of creditors in the involuntary bankruptcy petition filed against the QPRT. Further, the *Travelers* litigation and the involuntary bankruptcy litigation (which

prevented Bank of America from foreclosing on, and Tom, the trustee, from selling, the Summerville residence) were "substantially related" because they both involved a dispute over whether title to the Summerville residence would stay in the QPRT, or it would be taken out and foreclosed upon. Further, the interests of the bankruptcy creditors were materially adverse to the interests of the debtor QPRT because the former wanted to force resolution of their debts against the latter, even if the hidden motive of the creditors was to prevent Bank of America's foreclosure. In the face of these facts, there is no evidence that the QPRT and the bankruptcy creditors gave informed consent, confirmed in writing to Simon's representing the creditors in the bankruptcy. Indeed, there is strong evidence that the QPRT, through Tom, would never have given that consent because he wanted to sell the Summerville residence. Ex. 142.

Mr. Simon argues that there was no adversity and thus no conflict. Simon argues that when he represented Tom as the QPRT trustee in the *Travelers* litigation, Tom Brenneke's interest was the preservation of the QPRT's assets, including the Summerville residence. Similarly, the involuntary bankruptcy was intended to, and did, head off the Bank of America foreclosure against the Summerville residence. Mr. Simon therefore urged the Panel to find that these interests are not adverse, and are actually aligned. Simon's Proposed Findings of Fact and Conclusions of Law at 11–12 (citing *In re Hostetter*, 348 Or 574, 584 (2010); *In re Ellis,* 356 Or 691, 753 (2015). The Panel did not, however, find this argument persuasive because it did not consider the hidden motive of the bankruptcy creditors to be the relevant interest for the conflict test.

### C. Second Cause of Complaint: Sperry Matter – Alleged Violation of ORPC 1.5(a) (Charging an Illegal or Excessive Fee)

The Panel is of the opinion that the Bar established, by clear and convincing evidence, that Simon charged an illegal or excessive fee, in violation of ORPC 1.5(a), and dishonest conduct, in violation of ORPC 8.4(a)(3), under its Second Cause of Complaint.

The Bar alleges that Simon violated ORPC 1.5(a) because he charged or collected a clearly excessive fee, which is also dishonest conduct in violation of ORPC 8.4(a)(3). Under ORPC 1.5(a), "[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses." Under ORPC 8.4(a)(3), "[i]t is professional misconduct for a lawyer to: [...] engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]"

To establish that Simon charged Sperry an illegal or excessive fee, the Bar must show that "it is *highly likely* that [Sperry] did not agree to pay" the fee. *See In re Campbell*, 345 Or. 670, 685 (2009) (emphasis added).

The Panel is unaware of any documentary evidence establishing the amount of the fee that Sperry agreed to pay Mr. Durkheimer or Simon before they began working for that entity, or the rate at which the fee would be earned.[5] Mr. Simon argues that numerous documents establish his

[5] Mr. Simon asserts that he cannot be found to have committed a violation when the Bar declined to charge Mr. Durkheimer for receiving his fee. But the Panel has no information regarding the

authority to disburse funds to Mr. Durkheimer and himself, but none of those documents establish that Sperry, through Tom,[6] agreed to pay the fee. Each of the documents cited by Simon in his Written Closing Argument in support of his authority to disburse the money suffers from a shortcoming:

- Ex. 50: A ledger, dated March 9, 2010, with an entry for $75,000 owed to John Durkheimer. But the ledger pre-dates Mr. Durkheimer's invoice by more than three weeks (*see* Ex. 52, dated March 31, 2010).

- Ex. 56: Memo from Simon asserting that Tom authorized payment.

- Ex. 61: Mr. Simon asserting that he is in charge of resolving the liquidation of Sperry, but not addressing the Durkheimer payment.

- Ex. 62: 7/1/2010 email from Simon to Tom, attaching spreadsheet showing deployment of settlement funds.

- Ex. 62B: 7/1/2010 email from Tom, questioning why Mr. Durkheimer was paid, and 7/2/2010 response from Simon, asserting that Mr. Durkheimer gave bankruptcy advice.

- Ex. 70: 7/27/2010 email from Simon to Paul and Tom, stating that Simon paid Mr. Durkheimer for bankruptcy work. This email states that the work was done "at [Simon's] request for Sperry Van Ness."

- Ex. 74: 8/10/2010 and 8/11/2010 emails between Tom and Simon, in which Tom expressed a desire to review Mr. Durkheimer's payment, and Simon stated that the issue was discussed in 2008, 2009, and a recent memo.

- Ex. 105: 12/8/2010 emails between Simon and Tom, in which Tom relays a discussion he had with Mr. Durkheimer, who allegedly described his payment as excessive, and Simon responds that the arrangement with Mr. Durkheimer was approved in a December 2008 meeting between Simon, and Paul and Tom Brenneke. Mr. Simon's email states that he, not Tom, "settled on a fee with [Mr. Durkheimer] accordingly."

- Ex. 113: 12/9/2010 email from Jimmy Drakos to Mr. Durkheimer, asserting that Tom was "fired from all positions with SVN RES Inc.," and that the payments to Mr. Durkheimer and Simon were approved.

- Ex. 117: 12/23/2010 email from Tom to Simon, asserting that Tom never authorized the payment to Mr. Durkheimer. Mr. Simon expresses his disagreement.

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grounds on which the Bar finally resolved its investigation of Mr. Durkheimer, and therefore cannot reach this conclusion.

[6] Mr. Simon asserts that the fee could be authorized by Tom, Paul Brenneke, or Jimmy Drakos, but the Sperry partnership documents do not support this assertion; only Sperry's General Partner, which was controlled by Tom Brenneke, could make such decisions. Ex. 24; *see also* Ex. 245 at 117:12–15.

- Ex. 139: 1/22/2011 email from Paul to Tom, asserting that Tom was aware of all payments from escrow and agreed to them, having given Paul and Simon authority to wrap up Sperry matters.

Mr. Simon's Written Closing Argument at 23. Contrary to this evidence, Tom testified that he did not authorize payment to Mr. Durkheimer or Simon. Trial Tr. at 352:12–19; *see also* Trial Tr. at 379:19-380:4;[7] Trial Tr. 378:1-3;[8] Ex. 245 at 43:5–13.[9] Mr. Simon asserts that Tom testified that Simon was authorized to make payments by either Tom or Paul, *see* Trial Tr. at 380:19–381:2,[10] but the Panel thinks the testimony is less than clear on this point. Although it could be understood in this manner, it could also be understood to confirm that Simon controlled the logistics of the transfers, rather than the amounts and recipients. Ex. 245 at 73:3–11 (describing authority over logistics). On the other hand, Simon testified, consistent with the email exhibits cited above, that Mr. Durkheimer's fee was preapproved in November 2008. Ex. 226 (Simon 8/26/2015 Depo Tr.) at 80:12-81:11. According to Mr. Durkheimer, Simon told him that the fee was approved by Jimmy Drakos and "at least one of the Brennekes," though he did not say which. Ex. 223 at 4.

Given the available evidence, the Panel concludes that the Bar established by clear and convincing evidence that it is highly likely that Sperry, through Tom, did not agree to pay the $75,000 fee. *In re Campbell*, 345 Or at 685. In none of the correspondence and testimony described above is there even a suggestion from Tom, in Tom's words, that Sperry agreed to pay this fee to Mr. Durkheimer. Instead, the correspondence revolves around Tom questioning the fee, beginning shortly after it was paid, and Simon and others arguing that it had already been discussed and approved. There is no direct evidence that Sperry agreed to pay, or authorized, the fee. Simon asserts, alternatively, that under ORPC 1.5(a), the fee was not "clearly excessive" because it was reasonable under the circumstances. Mr. Simon's Proposed Findings of Fact and Conclusions of Law at 13 (citing *In re Gastineau*, 317 Or 545, 550-51 (1993)). But the first step in making this argument is to establish that a fee was approved. There is no testimonial or documentary evidence from Tom, who was ultimately in charge of Sperry, that he approved Mr. Durkheimer's fee at all, regardless of whether the amount is otherwise appropriate.

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[7] Question by Ms. Bevaqua-Lynott; answer by Tom Brenneke: "Q. The $75,000 to Durkheimer, before it was paid, did you ever have any discussions with Mr. Drakos or Mr. Brenneke, Paul Brenneke, about -- that you agreed that that money should be paid to Mr. -- A. Never had any discussions."

[8] Question by the Panel; answer by Tom Brenneke: "MR. MARTIN: So [Mr. Simon] had the authority to disburse but he was supposed to check with you first? THE WITNESS: Absolutely."

[9] As noted, the Panel did not find Tom's demeanor as impressive as those of other witnesses, but the Panel's hesitance was not sufficient to disturb its conclusion regarding this violation, in view of other evidence.

[10] Questions by Mr. Williams; answers by Tom Brenneke: "Q. Okay. [Mr. Simon] had the authority to give instructions to Williams & Jensen, where the funds were at, to tell them how to disburse money by wire transfer. That was one of the things he was charged to do? A. Yes. He had that relationship with them. Q. Okay. And in terms of how he got approval to make those transfers, he talked to you and/or Paul? A. Correct."

In light of the finding that the payment to Mr. Durkheimer was not authorized, and was therefore excessive, the Panel further concludes that Simon's payment to Mr. Durkheimer was dishonest.[11] First, Simon, by his admission, took back $25,000 of the payment to Mr. Durkheimer and applied it to his account at Stoel Rives, but did so long before he submitted a bill for the work he did at this time. *See* Ex. 223 at 3 (describing May 2010 transfer to Stoel); Ex. 81 (9/2/2010 invoice). This strikes the Panel as a sort of self-help that cannot be condoned. Second, Simon argues that misrepresentation misconduct only occurs when an attorney makes a misrepresentation, directly or by omission, that is "knowing, false, and material." Written Closing Argument at 13 (quoting *In re Gatti*, 356 Or 32, 52 (2014)). Mr. Simon argues that under the circumstances, his actions were simply a mistake based on Paul Brenneke's apparent authority, and were therefore not "knowing." *Id.* at 13-14. The Panel does not agree. The Sperry partnership documents clearly lay out that Tom was the head of the general partner in charge of the partnership's operations, *see* Ex. 24, and Simon testified that he knew Tom was ultimately legally in charge, even if Paul might have been running things day-to-day. Trial Tr. at 155:8–24.

### D. Third Cause of Complaint: Alleged Violation of ORPC 1.7(a) (self-interest conflict of interest) for *Simon v. Brenneke* Fee Litigation

The Panel is of the opinion that the Bar failed to establish, by clear and convincing evidence, that Simon engaged in a self-client conflict of interest, in violation of ORPC 1.7(a), under its Third Cause of Complaint.

Under ORPC 1.7(a)(2), "a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if: ... (2) there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer[.]"

The Bar alleges that Simon had a self-interest conflict of interest, in violation of ORPC 1.7(a)(2), when he continued to represent Tom, as trustee for the QPRT, after recognizing that he would need to litigate his fee dispute with Sperry, and Tom, personally, and filed litigation against them for that purpose.

A typical self-interest conflict arises when an attorney puts his or her financial interest ahead of the client's. An exemplary case is one involving a contingent fee or a real estate commission. *See In re Gatti*, 356 Or at 53; *In re Wittemyer*, 328 Or 448 (1999); *In re Gildea*, 325 Or 281 (1997). But even in the exemplary case, the possibility of a conflict does not pose a "significant risk" that the lawyer will actually give priority to his or her financial interest. *See* ABA Model Rules, Rule 1.7, cmt. [8] (explaining that "[t]he mere possibility of subsequent harm" does not constitute a significant risk; there must be a "likelihood that a difference in interests will eventuate").

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[11] Although the Bar does not allege it as a violation, the Panel notes that it was also arguably dishonest conduct for Simon to pay Mr. Durkheimer the $75,000 fee with the intent to take back $25,000 for Simon's benefit, as a way to hide the latter payment from Jim Mercer, the attorney for Mr. Sperry and Mr. Van Ness. Ex. 56 at 1; Ex. 226 (Simon 8/26/2015 Tr.) at 81:21–82:18.

Here, the evidence shows that, in fact, Simon repeatedly ignored his financial interests in favor of representing his clients, often working for free. Indeed, to the extent one can use hindsight to determine whether a risk of conflict existed, the results from the *Travelers* litigation, in which the QPRT was dismissed through Simon's actions, *see* Ex. 38B at 6, suggests that there was no conflict.

Further, the Bar's Formal Ethics Opinions suggest that a fee dispute during litigation is not inherently a conflict of interest, because an attorney may not withdraw simply because fees are not being paid. *See* Oregon State Bar Formal Ethics Opinion No. 2005-1. In this situation, an unpaid fee, standing alone, is not sufficient to create a conflict of interest, and an attorney must continue to diligently represent his or her client. *Id.* Given these guidelines and the actual facts of Simon's representation of the QPRT, the Panel cannot conclude that there was a significant risk that Simon's representation of the QPRT would be materially limited by his fee litigation against Tom Brenneke.

### E. Fourth Cause of Complaint: Alleged Violation of ORPC 8.4(a)(3) (dishonest conduct) for Creating a Fraudulent Document

The Panel is of the opinion that the Bar failed to establish, by clear and convincing evidence, that Simon engaged in a misrepresentation and dishonest conduct, in violation of ORPC 8.4(a)(3), under its Fourth Cause of Complaint.

As noted above, under ORPC 8.4(a)(3), "[i]t is professional misconduct for a lawyer to: [...] engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]"

The Bar alleges that Simon is guilty of misrepresentation and dishonesty because he knowingly and falsely testified that Tom approved Simon's paying Mr. Durkheimer, and "produced a memo that he claimed to have written and sent to Thomas Brenneke on or about May 24, 2010," corroborating this fact, which was fraudulently created to serve as false evidence. Compl. ¶ 34.

Resolution of this dispute centers on whether the Bar supported its allegation that Simon fraudulently created the May 2010 memo (Ex. 56) to support the legitimacy of his payments to Mr. Durkheimer and himself.

To support its theory that the May 2010 memo was fraudulently created, the Bar relied primarily on the trial testimony of Mr. Howe. As noted above, the Panel found Mr. Howe credible. Mr. Howe testified that the PDF version of the May 2010 memo, used as evidence in this litigation, was created by direct conversion from Microsoft Word. Trial Tr. (Howe) 405:11–12. Mr. Howe arrived at this conclusion by reviewing various physical characteristics of the memo, and analyzing the metadata that accompanies the PDF file. Trial Tr. (Howe) 396:9–400:24, 401:23–403:12; *see generally* Ex. 244.

On cross-examination, however, Mr. Howe forthrightly stated that the metadata for the PDF produced as evidence in this case, and in Simon's earlier fee litigation, does not say anything about when Simon created the underlying Microsoft Word version of the memorandum. Trial Tr. (Howe) 407:16–18 (Q: Does your analysis tell you anything about when the underlying Word document was created? A: No.).

The Bar also supports its theory with testimonial evidence from Tom regarding the existence of the memorandum. Tom testified that he never saw the May 24 memo in May 2010. Ex. 221 (Tom Brenneke 9/14/2012 Tr.) at 131:1–7. On the other hand, Simon testified that the memo was created in May 2010, on or about May 24. Ex. 226 (Simon 8/26/2015 Tr.) at 91:2–8. Mr. Simon also testified that he did not hand the memo to Tom, and may have simply placed it on his chair, or left Tom to find it in intra-office mail. *Id.* at 93:2–18. These conflicting accounts are not clear and convincing evidence that the May 24, 2010 memo was created sometime other than on or near that date. The evidence is just as consistent with Simon creating a memo on or about May 24, 2010, that never reached its intended recipient.

Thus, the Bar offered no clear and convincing evidence of when the document of interest was actually written. The evidence from the Bar merely established the date when the Microsoft Word document was converted into a .pdf document: December 8, 2010. The Bar needed to establish, however, that the underlying Word document was created on a date other than (and likely later than) May 24, 2010. This, the Bar did not do.

The Panel concludes that the available evidence is not clear and convincing proof that Simon created the May 24, 2010 memo sometime later in 2010 to support his story regarding the payments to Mr. Durkheimer and himself. Although the Bar's evidence is intriguing in some parts, it fails by a significant margin to establish a case of dishonest conduct.[12] The Panel therefore does not find a violation of ORPC 8.4(a)(3) under the Fourth Cause of Complaint.

### F. Affirmative Defenses

Mr. Simon asserted a number of affirmative defenses to the Bar's allegations of wrongdoing, as set forth below. The Panel does not find the affirmative defenses persuasive, and therefore does not alter its findings of violations.

#### 1. To the First Cause of Complaint: Exigent Circumstances – QPRT - Bankruptcy Petition

Mr. Simon asserts, in defense of the First Cause of Complaint, that his actions were defensible on the grounds of exigent circumstances; that is to say, Simon was required to act promptly in filing an involuntary bankruptcy against the QPRT, or risk losing the Summerville residence to foreclosure. Ans. ¶ 35. The Panel is not aware of any case that has applied this defense to a disciplinary action, and therefore declines to accept it.

#### 2. To the First and Third Causes of Complaint: Impossibility – Conflicts of Interest – QPRT and Attorney Fee Litigation

Mr. Simon asserts a defense of impossibility to the First and Third Causes of Complaint, stating that "[a]t no point during the time period of January 3, 2011 onward did Tom Brenneke alert Simon to any interests of Tom Brenneke's, either personal or in his capacity as Trustee, from which Simon could perform an ethical analysis consistent to that alleged by the Bar." Ans. ¶ 36.

[12] The Panel recognizes that Simon had more than one "creation story" regarding the .pdf version of the May 24, 2010 memo, but the Panel did not consider that clear and convincing evidence of misconduct regarding the underlying Word version.

### 3. To the Second Cause of Complaint: Impossibility – Excessive Fee – QPRT & Fee Litigation

Mr. Simon asserts that he could not have paid an "excessive" fee under the Second Cause of Complaint because the Bar investigated Mr. Durkheimer under the same disciplinary rule, and "exonerated him" for "receipt" of the "excessive fee." Ans. ¶ 37. The Panel cannot accept this defense because the Panel has not received the details of any alleged exoneration, as noted previously.

### 4. To the Second and Fourth Causes of Complaint: Spoliation – Sperry and Fabrication Matters

Mr. Simon asserts a defense of spoliation, because Tom, the initial complainant in this disciplinary action, had exclusive custody and control of the documents and materials on which Simon bases, or would base, his defense. Ans. ¶¶ 38-41. Thus, according to Simon, because Tom has not turned over all relevant materials in his possession to Simon, or may have destroyed them, the Bar should be prevented from pursuing any claim where the absence of the spoiled evidence prevents an adequate defense. *Id.* The Panel is unaware of a case where the Court entertained such a defense, and therefore declines to accept it here.

### 5. To the Second Cause of Complaint: Applicable Law – Sperry Matter

Mr. Simon asserts that California law applies to the Second Cause of Complaint, and the Bar should therefore not be allowed to prosecute that claim because it did not cite the appropriate law. Ans. ¶ 42; Simon Trial Memorandum at 19-20. The Panel believes that it is proper to apply Oregon disciplinary rules. BR 1.4(b)(2)(B).

### 6. To the First, Second, and Third Causes of Complaint: Failure to State a Claim

Mr. Simon argues that the First, Second, and Third Causes of Complaint fail to state a claim upon which relief can be granted because they inadequately recite various elements of the rules allegedly violated. Ans. ¶¶ 43-46. The Panel disagreed, and found the Bar's causes of complaint sufficient.

### 7. To the First, Second, and Third Causes of Complaint: Failure to State a Claim as a Denial of Due Process

Mr. Simon argues that the First, Second, and Third Causes of Complaint fail to state a claim upon which relief can be granted, to such an extent that they are a violation of due process. Ans. ¶¶ 47-48. The Panel disagreed, and found the Bar's causes of complaint constitutionally adequate.

### 8. To the Second Cause of Complaint: Estoppel

Mr. Simon asserts that the Bar is estopped from arguing that Simon charged an illegal or excessive fee, as alleged in the Second Cause of Complaint. According to Simon, the Bar is estopped from this argument because it investigated Mr. Durkheimer "on exactly this issue and

exonerated him for 'receipt' of the 'excessive fee.'" Ans. ¶ 37. According to Simon, it would therefore be impossible for him to have paid an excessive fee. *Id.* The Panel does not find Simon's argument persuasive. As discussed above, the Panel concludes that Simon charged an excessive fee, consistent with the language of ORPC 1.5(a). The Panel is not informed of the details of how the Bar resolved its investigation of Mr. Durkheimer. There is thus no obvious inconsistency between concluding that Simon acted wrongfully in the way that he procured the $75,000 that went to Mr. Durkheimer, and finding that Mr. Durkheimer was not wrong to receive the money.

### G. Conclusion

Based on the foregoing discussion, the Panel holds that the Bar carried its burden of proving, by clear and convincing evidence, that Simon violated ORPC 1.9(a), as alleged in the First Cause of Complaint, and ORPC 1.5(a) and ORPC 8.4(a)(3), as alleged in the Second Cause of Complaint.

## V. SANCTION

In determining the appropriate sanction, we are to follow the American Bar Association's Standards for Imposing Lawyer Sanctions (Standards). *In re Kimmell*, 332 Or 480, 487 (2001) (citing *In re Jaffee*, 331 Or 398, 408 (2000)). Under the Standards, we consider the following factors: a) the duty violated, b) the lawyer's mental state, c) the potential or actual injury caused by the lawyer's misconduct, and d) the existence of aggravating or mitigating factors. Standards 3.0. Analysis of the first three factors establishes a "presumptive sanction," which is then adjusted by "the presence of aggravating or mitigating circumstances." *Jaffee*, 331 Or at 409 (citing Standard 3.0 and Standards 5–6). As a final step, "we consider whether that adjusted sanction is consistent with Oregon case law." *Id.* (citing *In re Huffman*, 328 Or 567, 587–88 (1999)).

### A. Nature of the Duty Violated

In this case, based on the panel's conclusions described above, Simon is guilty of violating duties owed to his former client to avoid conflicts of interest, and charging a client an illegal or excessive fee. These violations fall under ABA Standard 4.3: Failure to Avoid Conflicts of Interest, and ABA Standard 7.0: Violations of Other Duties Owed As A Profession.

### B. Mental State

The ABA Standards explain that an act is done with "intent" if it is done with a "conscious objective or purpose to accomplish a particular result." ABA Standards 8. The ABA Standards explain that an act is done with "knowledge" when it is done with a "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Id.* The ABA Standards explain that an act is done with "negligence" when a lawyer fails to "heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*

In this case, the Panel does not find that the accused acted intentionally; that is, the Panel does not believe that Simon acted with the conscious objective or purpose to either engage in a former

client conflict, or charge an illegal or excessive fee. The Panel believes, instead, that Simon acted either negligently or with knowledge with respect to all the charges. In particular, the Panel finds that the circumstances described above establish that Simon knew of the conflict of interest. Further, the Panel finds that the circumstances described above establish that Simon acted negligently or with knowledge regarding his authority to make payments to Mr. Durkheimer and himself.

### C. Injury

According to the ABA Standards, the "purpose of lawyer discipline proceedings is to protect the public and the administration of justice[.]" ABA Standards 1.1.

Here, Simon knowingly entered into an engagement that resulted in a conflict of interest, harming his former client, and dealt negligently with the funds used for the Sperry windup, disbursing money without clear authority to do so. Mr. Simon was also previously disciplined for violations of the Bar's Rules of Professional Conduct. Mr. Simon's prior discipline was not, however, for violations involving conflicts of interest or charging an illegal or excessive fee.

For these violations, and before considering aggravating and mitigating factors, the ABA Standards provide:

"4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

"7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."

Thus, before considering any aggravating and mitigating factors, the ABA Standards suggest that either suspension or reprimand would be an appropriate sanction in this case.

### D. Aggravating and Mitigating Circumstances

#### 1. Aggravating Factors

The aggravating factors present in this case are:

a) prior disciplinary offenses;

b) a pattern of misconduct;

c) multiple offenses; and

d) substantial experience in the practice of law (the accused was admitted to practice in 1990).

ABA Standards 9.22(a), (c), (d), and (i).

Although not listed in the ABA Standards, the Panel also considered it an aggravating factor that Mr. Simon advertised on his letterhead his status as a "Former Member, Oregon State Bar Ethics Committee." *See, e.g.*, Ex. 18.

### 2. Mitigating Factors

The mitigating factors present in this case are:

a) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;[13]

b) remorse;[14] and

c) remoteness of prior offenses.

ABA Standards 9.32(e), (l), and (m).

The Panel views the aggravating factors as outweighing the mitigating ones, and therefore, before reviewing the case law, concludes that a suspension would be the more appropriate sanction for the established violations.

## E. Oregon Case Law

It is understood that "case-matching in the context of disciplinary proceedings 'is an inexact science,'" especially when the analysis involves multiple violations in multiple factual scenarios. *In re Hostetter,* 348 Or at 602 (quoting *In re Stauffer,* 327 Or 44, 70 (1998)). The Supreme Court's case law can still, however, "provide some guidance" and help "demonstrate the appropriateness of the suspension in this case." *Id.*

In *Hostetter*, for example, the Court affirmed a 150-day suspension where an attorney violated the rule against former-client conflicts of interest (ORPC 1.5(a)) and committed misrepresentations in violation of ORPC 8.4(a)(3). *Id.* at 598-604. The Court found as aggravating factors the attorney's multiple offenses, substantial experience, and prior disciplinary offenses. *Id.* at 601-602. Considering the aggravating factors, the Court found that the attorney had a cooperative attitude toward the disciplinary process and had an excellent reputation in the community. *Id.* at 602. Here, Simon committed similar types of violations, displayed the cooperativeness that might be expected, but there was only minimal commentary on his reputation.

Similarly, in *In re Conduct of Campbell*, 345 Or 670 (2009), the Court imposed a 60-day suspension for engaging in a former-client conflict of interest and charging an excessive fee.

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[13] The Panel did not expect Mr. Simon's cooperativeness to be boundless, given his right to fully contest these proceedings.

[14] Unprompted, and even before issuance of the Panel's opinion in this case, Mr. Simon called his actions surrounding his clawback of a portion of the Durkheimer fee, the "most reprehensible thing" he has done in his professional life. Trial Tr. at 220:13. The Panel considers this to be evidence of Simon's self-reflection and remorse.

The attorney's violation was aggravated by having committed multiple violations, being subject to prior discipline, and having a selfish motive. *Id.* at 688-89. The violation was mitigated by the attorney's cooperative attitude and there being no evidence of actual harm to the client. *Id.* at 689. Here, Simon engaged in similar wrongdoing, and also committed multiple violations and was subject to prior discipline. On the other hand, Simon's actions caused Sperry to suffer an actual harm in the form of paying tens of thousands of dollars' worth of attorney fees, which it only mitigated through later litigation. In addition, Simon's acting on a former-client conflict arguably caused Tom to resign as trustee of the QPRT, when he might not have done so otherwise.

Finally, in *In re Obert*, the Court imposed a sanction of a six-month suspension where the attorney violated several ethical rules, including charging an excessive fee. 352 Or 231, 263-64 (2012). There, the Court found that the attorney caused actual injury to his clients, the Bar, the legal system, and the legal profession. In mitigation, the Court noted that, in one matter, the attorney "fully and freely disclosed all relevant information to the disciplinary board and fully cooperated with [the] investigation." *Id.* at 261. The attorney also "presented evidence of his good reputation in the community." *Id.* at 262. The aggravating factors, which the Court held outweighed those cited in mitigation, included: a history of prior disciplinary offenses; a pattern of misconduct; committing multiple offenses; and substantial experience in the practice of law. *Id.* at 261. Here, the aggravating factors are similar, and there are similar mitigating factors. On the other hand, Simon caused actual injury of much greater financial extent (tens of thousands of dollars versus $1,200 in *In re Obert*).

Taking into account the factors above, the trial panel concludes that a suspension is the appropriate sanction in this case, and that it should extend 185 days.

## VI. CONCLUSION AND DISPOSITION

The Panel concludes that Mr. Simon violated the prohibition against engagements that result in a former-client conflict of interest, and charging an illegal or excessive fee. Considering the facts of these violations and the factors used to determine the appropriate sanction, the Panel believes that Mr. Simon should be suspended for 185 days.

IT IS SO ORDERED.

Dated: July 22, 2016.

Bryan D. Beel, Esq., Trial Panel Chair

Dylan M. Cernitz, Esq., Panel Member

Charles A. Martin, Public Member

I certify that this document is a true copy of the original and the whole thereof.

IN THE SUPREME COURT

OF THE STATE OF OREGON

| | |
|---|---|
| In re: Complaint as to the Conduct of ROBERT S. SIMON, Accused. | Case No. 13-58<br>SECOND AMENDED FORMAL COMPLAINT |

For its FIRST CAUSE OF COMPLAINT against the Accused, Robert S. Simon ("Simon") the Oregon State Bar ("Bar") alleges:

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

Simon, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon.

**QPRT Matter**

3.

In 2004, Paul Brenneke created the Paul Brenneke Qualified Personal Residence Trust ("QPRT") and named his brother, Thomas Brenneke, as trustee. Paul Brenneke transferred ownership of his residence ("Summerville residence") into the QPRT. At the time, the Summerville residence was encumbered by a first mortgage held by Bank of America, and



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junior encumbrances consisting of two mortgages and a judgment lien ("junior encumbrances").

4.

At the same time, Paul Brenneke created the Z&A Trust into which he transferred his interests in several limited liability corporations. The Z&A Trust was to use income from the limited liability corporations to pay the mortgage debt on the Summerville residence. Paul Brenneke named James Drakos ("Drakos") as Z&A trustee.

5.

In 2005, Simon, representing the Z&A Trust, bought the junior encumbrances.

6.

In March and April 2008, Simon, representing the QPRT and the Z&A Trust, negotiated a loan from Frontier Bank. As a condition of the loan, Frontier Bank required security in the form of a lien against the Summerville residence and satisfaction of the junior encumbrances. Frontier Bank also required a personal guarantee by Thomas Brenneke. As a result of his representation of QPRT and the Z&A Trust, Simon knew that Thomas Brenneke had guaranteed that loan, and that Z&A Trust was supposed to extinguish the indebtedness secured by the junior encumbrances with a portion of the loan proceeds.

7.

Upon receiving the loan proceeds from Frontier Bank, Drakos signed satisfactions of the junior encumbrances. Simon submitted the satisfactions to the title insurance company for recording. However, the satisfactions were never actually recorded and (unbeknownst to Thomas Brenneke and contrary to his interests) the junior encumbrances remained on the title to the Summerville residence in second position—ahead of the Frontier lien. Simon took no steps to determine or verify whether the satisfactions were ever recorded.



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8.

Drakos used most of the proceeds from the Frontier Bank loan to invest in real estate projects managed by Thomas Brenneke.

9.

In 2009, Travelers Insurance Company filed a petition to void the transfer of the Summerville residence from Paul Brenneke to the QPRT, naming both Paul Brenneke and Thomas Brenneke, as trustee of the QPRT, as defendants. Simon represented both Paul Brenneke and Thomas Brenneke in the litigation ("Travelers litigation"). Simon also represented Thomas Brenneke, as trustee of the QPRT from 2008 until in or around mid-March 2011, when Simon withdrew as attorney of record in the Travelers litigation.

10.

By 2010, the Z&A Trust was unable to service the debts secured by the Summerville residence and Bank of America began foreclosing on the Summerville residence.

11.

By late 2010, Simon's relationship with Thomas Brenneke had become very strained because (1) Simon was suing Thomas Brenneke personally for fees in another matter (the Sperry matter) even while he continued to represent him as trustee of the QPRT and defend him in the Travelers litigation, and (2) Simon aligned himself with Paul Brenneke, who blamed Thomas Brenneke for losing Z&A Trust's investment (in the Sperry project). In November 2010, when Paul Brenneke became frantic that the Summerville residence was about to be foreclosed, Simon, on behalf of Paul Brenneke, accused Thomas Brenneke, as trustee of the QPRT and manager of real estate projects who had utilized the proceeds from the Frontier Bank loan, of malfeasance and demanded that he return to the Z&A Trust the proceeds from the Frontier Bank loan that the Z&A Trust had invested. At the time, Simon still represented



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Thomas Brenneke as the trustee of the QPRT and represented him individually in the Travelers litigation.

12.

Considering that the Travelers litigation sought to void the transfer of the Summerville property from Paul Brenneke to QPRT, Simon's accusations against his client, Thomas Brenneke, made on behalf of his other client, Paul Brenneke, that Thomas Brenneke had engaged in malfeasance with regard to his usage of loan proceeds secured by the Summerville property, owned by QPRT, demonstrate that Paul Brenneke's interests and Thomas Brenneke's interests were directly adverse and that Simon's continued representation of each of them was materially limited by responsibilities owed to the other. Insofar as informed consent from both clients might have permitted Simon to continue to represent both Thomas Brenneke and Paul Brenneke, Simon failed to obtain such informed consent, confirmed in writing, from Thomas Brenneke and Paul Brenneke.

13.

As part of Bank of America's foreclosure, a trustee's sale of the Summerville residence was scheduled for March 17, 2011.

14.

In early 2011, Paul Brenneke and Simon urged Thomas Brenneke, as QPRT's trustee, to file for bankruptcy protection on its behalf. Thomas Brenneke refused and also refused their demand that he resign as the QPRT trustee.

15.

In March 2011, Simon moved to withdraw as Thomas Brenneke's lawyer in the Travelers matter. That motion was granted on March 14, 2011. On that same day, on behalf of three purported QPRT creditors, Simon filed an involuntary bankruptcy petition against QPRT accusing Thomas Brenneke (*i.e.,* now his former client) of malfeasance in connection with his



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handling of the QPRT (*i.e.*, the very matter on which Simon had advised Thomas Brenneke at the time when the alleged malfeasance occurred).

16.

On March 21, 2011, Thomas Brenneke resigned as the QPRT trustee.

17.

Simon continued to represent the QPRT creditors in the involuntary bankruptcy proceeding against QPRT, repeatedly alleging that Thomas Brenneke, while acting QPRT's trustee and during the same time period as he was represented in that capacity by Simon, had committed theft and malfeasance.

18.

Simon's representation of the QPRT's creditors in the involuntary bankruptcy proceeding was substantially related to his prior representation of Thomas Brenneke in that it was the very matter on which Simon had advised Thomas Brenneke at the time when the alleged malfeasance occurred. Simon's representation of the QPRT's creditors in the involuntary bankruptcy proceeding was also materially adverse to Thomas Brenneke's interests, in that it attacked Thomas Brenneke's actions and sought to hold him financially responsible for conduct undertaken as trustee at the time when Simon represented him in that capacity.

19.

Simon failed to obtain informed consent, confirmed in writing, from Thomas Brenneke and the QPRT creditors to his representation of the creditors in the involuntary bankruptcy proceeding.



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20.

By the aforesaid conduct, Simon engaged first in a current client conflict of interest, and then in a former client conflict of interest, in violation of the following standards of professional conduct established by law and by the Bar:

A. RPC 1.7(a); and

B. RPC 1.9(a) of the Oregon Rules of Professional Conduct.

**Sperry Matter**

And, for its SECOND CAUSE OF COMPLAINT against Simon, the Bar alleges:

21.

Realleges and incorporates by reference the allegations of its First Cause of Complaint as if fully set forth herein.

22.

In August 2008, Thomas Brenneke and Paul Brenneke, through their legal entities, entered into a partnership with two others to operate real estate brokerage offices in California and Arizona ("Sperry"). The four partners made capital contributions and named Thomas Brenneke the managing partner. Starting in 2008, Simon began representing Sperry in a number of matters.

23.

By early 2010, the Sperry partners decided to dissolve Sperry. On March 2, 2010, they created and funded an escrow account ("Sperry escrow account") to be used to negotiate settlements, first with Sperry's leasehold creditors, and then, if any funds remained, with Sperry's remaining creditors. Thomas Brenneke entrusted Simon with negotiating the settlements and disbursing the escrow funds. At the time, Simon believed that Sperry owed Simon for attorney fees for work he had performed on Sperry's behalf.



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24.

On March 31, 2010, at Simon's direction, lawyer John Durkheimer ("Durkheimer") sent Sperry an invoice for $75,000 for legal services Durkheimer had allegedly performed on Sperry's behalf. Sperry did not owe Durkheimer $75,000 and Simon knew that Sperry did not owe Durkheimer $75,000 when he instructed Durkheimer to issue an invoice to him in that amount. Sperry had not retained Durkheimer and Thomas Brenneke was unaware that Durkheimer had rendered legal services on Sperry's behalf.

25.

On May 12, 2010, Simon caused $75,000 to be wired from the Sperry escrow account to Durkheimer. On May 13, 2010, Simon instructed Durkheimer to send $25,000 of the $75,000 to a law firm to which Simon owed money for services rendered in an unrelated matter. Durkheimer sent the $25,000 to the law firm on March 14, 2010.

26.

When Simon directed Durkheimer to send Sperry and invoice for $75,000, Simon knew that Sperry had not retained Durkheimer and that Durkheimer had not rendered $75,000 worth of services to Sperry. When Simon directed Durkheimer to send $25,000 to Simon's creditor, Simon knew that he was not entitled to those utilize those funds to his benefit.

27.

The aforesaid conduct of Simon constitutes charging or collecting a clearly excessive fee; and dishonesty, in violation of the following standards of professional conduct established by law and by the Bar:

A. RPC 1.5(a); and

B. RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.



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And, for its THIRD CAUSE OF COMPLAINT against Simon, the Bar alleges:

28.

Realleges and incorporates by reference the allegations of its First Cause of Complaint, and its Second Cause of Complaint, as if fully set forth herein.

29.

At the end of 2010, Simon sued Sperry and Thomas Brenneke personally for attorney fees. Simon claimed Sperry and Thomas Brenneke owed to him for legal services Simon had performed for Sperry.

30.

At the time he sued Thomas Brenneke—an act adverse to Thomas Brenneke's personal interests insofar as Thomas Brenneke could be held personally liable for fees found to be owed by Sperry—Thomas Brenneke was also Simon's client in other matters. Specifically, Simon was defending Thomas Brenneke in the Travelers litigation and was representing Thomas Brenneke as the QPRT trustee. There was a significant risk that Simon's representation of Thomas Brenneke in those matters would be materially limited by Simon's personal animosity toward Thomas Brenneke, as well as his personal interest in prevailing in the lawsuit he had brought against Thomas Brenneke to collect attorney fees from Thomas Brenneke. Insofar as informed consent was available, Simon failed to obtain that consent, after full disclosure, from Thomas Brenneke.

31.

The aforesaid conduct of Simon constituted a self-interest conflict, in violation of the following standard of professional conduct established by law and by the Bar:

A. RPC 1.7(a) of the Oregon Rules of Professional Conduct.



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And, for its FOURTH CAUSE OF COMPLAINT against Simon, the Bar alleges:

32.

Realleges and incorporates by reference the allegations of its First Cause of Complaint, its Second Cause of Complaint, and its Third Cause of Complaint, as if fully set forth herein.

33.

In connection with the lawsuits referenced in paragraph 29, Simon represented and testified that Thomas Brenneke had approved his retaining and paying Durkheimer. This representation was false and Simon knew that it was false when he made it.

34.

In support of his claim that Thomas Brenneke had approved payment to Durkheimer, Simon produced a memo that he claimed to have written and sent to Thomas Brenneke on or about May 24, 2010, purporting to confirm that Simon had disclosed to Thomas Brenneke that he (Simon) had asked Durkheimer to refund $25,000 of the $75,000 Sperry had paid Durkheimer, and that Thomas Brenneke had authorized Simon to apply the refunded amount against the attorney fees that Sperry owed Simon. This memo was fraudulently created after the fact, Simon knew that it was fraudulently created, and Simon offered it as false evidence in his dispute with Thomas Brenneke intending that the court and the parties rely upon it.

35.

The aforesaid conduct of Simon constitutes misrepresentation and dishonesty, in violation of the following standard of professional conduct established by law and by the Bar:

A. RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

WHEREFORE, the Bar demands that Simon make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully,



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properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 16th day of March, 2016.

OREGON STATE BAR

By _____
Amber Bevacqua-Lynott, OSB No. 990280
Chief Assistant Disciplinary Counsel



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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I filed the foregoing SECOND AMENDED FORMAL COMPLAINT on the 16th day of March, 2016, by delivering the original thereof to:

Disciplinary Board Clerk
Oregon State Bar
16037 SW Upper Boones Ferry Road
Post Office Box 231935
Tigard, OR 97281-1935

I hereby certify I served the foregoing SECOND AMENDED FORMAL COMPLAINT on the 16th day of March, 2016, by email and by mailing a true copy by first class mail, with postage prepaid, through the United States Postal Service to:

Brian B. Williams
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Portland, OR 97209
bbeel@perkinscoie.com

Dated this 16th day of March, 2016.

Amber Bevacqua-Lynott, OSB No. 990280



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Oregon State Bar

# *True Copy Certificate*

I certify that the attached documents consisting of 13 pages, are true and correct copies from the Oregon State Bar membership file or files of:

**Robert S. Simon,**

Bar No. **901209**.

Regulatory Services

By Sergio Hernandez
Public Records Coordinator
Oregon State Bar

Date July 26, 2017

IN THE SUPREME COURT

OF THE STATE OF OREGON

| | |
|---|---|
| In re: | Case No. 13-58 |
| Complaint as to the Conduct of | |
| ROBERT S. SIMON, | ANSWER TO AMENDED FORMAL COMPLAINT |
| Accused. | |

Robert S. Simon admits, denies and alleges the following Answer to the Amended Formal Complaint. For ease of reference, the allegations from the Amended Formal Complaint are restated in regular text with the answer by Simon in **Bold type**. Except as expressly admitted, the bar's allegations are denied.

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys. **Admit.**

2.

Simon, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon. **Admit. Simon is also licensed and practices law in California.**

QPRT Matter

3.

In 2004, Paul Brenneke created the Paul Brenneke Qualified Personal Residence Trust ("QPRT") and named his brother, Thomas Brenneke, as trustee. Paul Brenneke transferred



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ownership of his residence ("Summerville residence") into the QPRT. **The preceding allegation is admitted.** At the time, the Summerville residence was encumbered by a first mortgage held by Bank of America, and junior encumbrances consisting of two mortgages and a judgment lien ("junior encumbrances"). **The final conjunctive phrase of the sentence of this paragraph is denied.**

4.

At the same time, **(the allegation as to timing is denied)** Paul Brenneke created the Z&A Trust into which he transferred his interests in several limited liability corporations. **Admit.** The Z&A Trust was to use income from the limited liability corporations to pay the mortgage debt on the Summerville residence. **Deny.** Paul Brenneke named James Drakos ("Drakos") as Z&A trustee. **Admit.**

5.

In 2005, Simon, representing the Z&A Trust, bought the junior encumbrances. **Simon denies that he bought the junior encumbrances; he admits that he arranged the purchase.**

6.

In March and April 2008, Simon, representing the QPRT and the Z&A Trust, negotiated a loan from Frontier Bank. As a condition of the loan, Frontier Bank required security in the form of a lien against the Summerville residence and satisfaction of the junior encumbrances. Frontier Bank also required a personal guarantee by Thomas Brenneke. **This paragraph is admitted with the exception of the statement that Frontier Bank required satisfaction of the junior encumbrances, which is denied.**

7.

Upon receiving the loan proceeds from Frontier Bank, Drakos signed satisfactions of the junior encumbrances. Simon submitted the satisfactions to the title insurance company for recording. However, the satisfactions were never actually recorded. **Admit.**



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8.

Drakos used most of the proceeds from the Frontier Bank loan to invest in real estate projects managed by Thomas Brenneke. **Admit that Drakos entrusted most of the proceeds to Thomas Brenneke for investment.**

9.

In 2009, Travelers Insurance Company filed a petition to void the transfer of the Summerville residence from Paul Brenneke to the QPRT, naming both Paul and Thomas Brenneke as defendants. Simon undertook to defend both Paul and Thomas Brenneke in the litigation ("Travelers litigation"). **Admit that Travelers sued the QPRT and a number of other entities and that Simon was involved in that litigation for a time. Except as admitted, denied.**

10.

By 2010, the Z&A Trust was unable to service the debts secured by the Summerville residence **(the allegation is denied to this point)** and Bank of America began foreclosing on the Summerville residence. **Admit that B. of A. began foreclosing on Summerville.**

11.

In November 2010, Simon, on behalf of Paul Brenneke, accused Thomas Brenneke of malfeasance and demanded that he return to the Z&A trust the proceeds from the Frontier Bank loan that the Z&A Trust had invested as described in paragraph 8. **Admit that Simon disagreed with some of what Tom did as trustee and told him as much. Except as admitted, denied.**

12.

No later than the events described in paragraph 11 herein, there was a significant risk that Simon's representation of Thomas Brenneke, as QPRT Trustee and as a defendant in the Traveler's litigation, would be materially limited by Simon's responsibilities to Paul Brenneke in the same matters. Insofar as informed consent was available to permit Simon to represent both



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Thomas and Paul Brenneke, Simon failed to obtain such informed consent. **Deny. Simon admits that he did not obtain informed consent, confirmed in writing, but denies the inference or allegation that it was required.**

13.

As part of Bank of America's foreclosure, a trustee's sale of the Summerville residence was scheduled for March 17, 2011. **Admit.**

14.

In early 2011, Paul Brenneke and Simon urged Thomas Brenneke, as QPRT's trustee, to file for bankruptcy protection on its behalf. Thomas Brenneke refused and also refused their demand that he resign as the QPRT trustee. **Deny.**

15.

In March 2011, Simon moved to withdraw as Thomas Brenneke's lawyer in the Travelers matter. That motion was granted on March 14, 2011. On that same day, on behalf of three purported QPRT creditors, Simon filed an involuntary bankruptcy petition against QPRT accusing Thomas Brenneke of malfeasance in connection with his handling of the QPRT. **Deny. Simon admits that Traveler's litigation in Multnomah County was dismissed and that he withdrew as attorney for all defendants in said litigation. The allegations in the bankruptcy pleadings speak for themselves and are the best evidence of the contents of the allegations that were made.**

16.

On March 21, 2011, Thomas Brenneke resigned as the QPRT trustee. **Admit.**

17.

Simon continued to represent the QPRT creditors in the involuntary bankruptcy proceeding, repeatedly alleging that Thomas Brenneke, while acting QPRT's trustee and during the same time period as he was represented in that capacity by Simon, had committed theft and



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malfeasance. **Simon denies any allegation or inference that he represented Thomas Brenneke as Trustee related to Thomas Brenneke's theft or malfeasance. Simon admits that he represented the QPRT creditors in the bankruptcy proceeding against the QPRT, which benefited the QPRT and kept Summerville out of foreclosure. The pleadings in the bankruptcy matter are the best evidence of what was alleged in the bankruptcy. Except as admitted, denied.**

18.

Simon's representation of the QPRT's creditors in the involuntary bankruptcy proceeding was substantially related to his prior representation of Thomas Brenneke and was materially adverse to Thomas Brenneke's interests. **Denied.**

19.

Simon failed to obtain informed consent, confirmed in writing, from Thomas Brenneke and the QPRT creditors to his representation of the creditors in the involuntary bankruptcy proceeding. **Simon admits that he did not obtain informed consent, confirmed in writing, but denies the inference or allegation that it was required.**

20.

By the aforesaid conduct, Simon engaged first in a current client conflict of interest, and then in a former client conflict of interest, in violation of the following standards of professional conduct established by law and by the Bar:

A. RPC 1.7(a); and

B. RPC 1.9(a) of the Oregon Rules of Professional Conduct.

**The allegations of paragraph 20 are denied.**

///

///



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**Sperry Matter**

And, for its SECOND CAUSE OF COMPLAINT against Simon, the Bar alleges:

21.

Realleges and incorporates by reference the allegations of paragraphs 1 and 2 of its First Cause of Complaint as if fully set forth herein. **And Simon incorporates his prior responses thereto.**

22.

In August 2008, Thomas and Paul Brenneke, through their legal entities, entered into a partnership with two others to operate real estate brokerage offices in California and Arizona ("Sperry"). The four partners made capital contributions and named Thomas Brenneke the managing partner. Starting in 2008, Simon began representing Sperry in a number of matters. **Many of the details of this paragraph are wrong, so the allegations are denied. Simon admits that he represented Sperry in a number of matters, that Tom controlled the General Partner of the Sperry ownership structure and that Tom and Z&A Trust were owners of Sperry through entities they owned, controlled and/or were affiliated with.**

23.

By early 2010, the Sperry partners decided to dissolve Sperry. On March 2, 2010, they created and funded an escrow account ("Sperry escrow account") to be used to negotiate settlements, first with Sperry's leasehold creditors, and then, if any funds remained, with Sperry's remaining creditors. Thomas Brenneke entrusted Simon with negotiating the settlements and disbursing the escrow funds. At the time, Sperry owed Simon for attorney fees for work he had performed on Sperry's behalf. **Again, many of the details of this paragraph are wrong, so the allegations are denied. Simon admits that Sperry failed and its obligations wound up, that Simon handled much of that legal work, and that an escrow account was used to fund settlements, all of which were obtained through Simon efforts**



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**performed in California and under California law. Simon admits that Sperry owed Simon for attorney fees for work he performed on Sperry's behalf.**

24.

On March 31, 2010, at Simon's direction, lawyer John Durkheimer ("Durkheimer") sent Sperry an invoice for $75,000 for legal services Durkheimer had allegedly performed on Sperry's behalf. Sperry had not retained Durkheimer and Thomas Brenneke was unaware that Durkheimer had rendered legal services on Sperry's behalf. **Simon admits that Durkheimer sent an invoice to Sperry at Simon's suggestion and that Simon arranged to have $75,000 from the escrow account sent to Durkheimer. The remainder of the allegations are denied, including the assertions that the transfer was wrongful, that Durkheimer hadn't done any work, that Durkheimer accepted funds he had not earned, and that Tom was unaware of the transfer of funds or Durkheimer's involvement in the work to windup Sperry.**

25.

On May 12, 2010, Simon caused $75,000 to be wired from the Sperry escrow account to Durkheimer. On May 13, 2010, Simon instructed Durkheimer to send $25,000 of the $75,000 to a law firm to which Simon owed money for services rendered in an unrelated matter. Durkheimer sent the $25,000 to the law firm on March 14, 2010. **See the response to the preceding paragraph 24. For a further response, Simon admits that he asked, and Durkheimer agreed, to send $25,000 of the $75,000 to a law firm where Simon had an outstanding balance for unrelated services.**

26.

When Simon directed Durkheimer to send Sperry and invoice for $75,000, Simon knew that Sperry had not retained Durkheimer and that Durkheimer had not rendered $75,000 worth of services to Sperry. When Simon directed Durkheimer to send $25,000 to Simon's creditor, Simon knew that he was not entitled to those funds. **Denied. The $25,000 payment for**



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**Simon's benefit was the method chosen by Tom Brenneke, Paul Brenneke, and Jimmy Drakos as a way of paying down a portion of the substantial unpaid legal fees Simon had earned working on the Sperry windup.**

27.

The aforesaid conduct of Simon constitutes charging or collecting a clearly excessive fee; and dishonesty, in violation of the following standards of professional conduct established by law and by the Bar:

A. RPC 1.5(a); and

B. RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

**Denied.**

And, for its THIRD CAUSE OF COMPLAINT against Simon, the Bar alleges:

28.

Realleges and incorporates by reference the allegations of paragraphs 1 through 15 of its First Cause of Complaint, and paragraphs 22 through 26 of its Second Cause of Complaint, as if fully set forth herein. **And Simon incorporates his prior responses thereto.**

29.

At the end of 2010, Simon sued Sperry and Thomas Brenneke personally for attorney fees. Simon claimed Sperry and Thomas Brenneke owed to him for legal services Simon had performed for Sperry. **Simon admits that he sued Sperry and Tom personally for his unpaid attorney's fees for work performed related to Sperry. Except as admitted, denied including the imprecise allegation of "the end of 2010."**

30.

At the time, Simon was defending Thomas Brenneke in the Travelers litigation and was representing Thomas Brenneke as the QPRT trustee. There was a significant risk that Simon's representation of Thomas Brenneke in those matters would be materially limited by Simon's



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personal interest in collecting attorney fees from Thomas Brenneke. Insofar as informed consent was available, Simon failed to obtain that consent, after full disclosure, from Thomas Brenneke. **Denied. Simon admits that he did not obtain informed consent, confirmed in writing, but denies the inference or allegation that it was required.**

31.

The aforesaid conduct of Simon constituted a self-interest conflict, in violation of the following standard of professional conduct established by law and by the Bar:

A. RPC 1.7(a) of the Oregon Rules of Professional Conduct.

**Denied.**

And, for its FOURTH CAUSE OF COMPLAINT against Simon, the Bar alleges:

32.

Realleges and incorporates by reference the allegations of paragraphs 1 and 2 of its First Cause of Complaint, its Second Cause of Complaint, and paragraph 29 of its Third Cause of Complaint, as if fully set forth herein. **And Simon incorporates his responses thereto.**

33.

In connection with the lawsuits referenced in paragraph 29, Simon represented and testified that Thomas Brenneke had approved his retaining and paying Durkheimer. **Admit.** This representation was false and Simon knew that it was false when he made it. **Denied. Tom did approve of retaining and paying Durkheimer.**

34.

In support of his claim that Thomas Brenneke had approved payment to Durkheimer, Simon produced a memo that he claimed to have written and sent to Thomas Brenneke on or about May 24, 2010, purporting to confirm that Simon had disclosed to Thomas Brenneke that he (Simon) had asked Durkheimer to refund $25,000 of the $75,000 Sperry had paid Durkheimer, and that Thomas Brenneke had authorized Simon to apply the refunded amount



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against the attorney's fees that Sperry owed Simon. This memo was fraudulently created after the fact, Simon knew that it was fraudulently created, and Simon offered it as false evidence in his dispute with Thomas Brenneke intending that the court and the parties rely upon it. **Simon admits that the memo, dated after the transfer to Durkheimer or the $25,000 payment out of the $75,000, confirmed Tom's approval. Tom did approve all of that. Except as admitted, denied. Simon specifically denies the spurious allegation that the memo was fraudulently created.**

35.

The aforesaid conduct of Simon constitutes misrepresentation and dishonesty, in violation of the following standard of professional conduct established by law and by the Bar:

A. RPC 8.4(a)(3) of the Oregon Rules of Professional Conduct.

**Denied.**

**First Affirmative Defense**

**(Exigent Circumstances)**

36.

**The Foreclosure of Summerville was a threat to substantially all of the corpus of the QPRT. The home was going to be foreclosed upon and lost to the bank. The bankruptcy filing was a creative effort to avoid losing Summerville, which was ultimately successful. Given the time restrictions, the people and personalities involved, the complexities of the situation, and the potential risk associated with taking a position that was not well supported legally, it was impossible for the QPRT to avoid losing Summerville unless Simon did what he did when he did it. It was in the best interest of his clients, the QPRT, and its beneficiaries.**

///



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**Second Affirmative Defense**

**(Impossibility and Necessity)**

37.

**When Simon began representing the QPRT, and then Tom as its trustee, and then defended Tom in his capacity as the trustee of the QPRT in litigation related to the primary asset of the QPRT, there was no conflict of interest. Without admitting that a conflict subsequently developed, if one developed, it was impossible for Simon to withdraw without prejudicing the interests of his clients, the QPRT and the beneficiaries. The conflict of interest rules cannot be read in isolation. Other equally important ethics rules, such as the duty of loyalty and zealous representation, and the duty to advise not just on the law but to consider moral and economic factors, especially with respect to vulnerable clients, authorized the course of action taken. Simon did not have any confidences or secretes of Tom through his limited representation of Tom as trustee.**

**Third Affirmative Defense**

**(Spoliation)**

38.

**Tom Brenneke is a highly successful businessman with tremendous resources who has hired numerous lawyers and frequently employs lawyers full time. He has full time I.T. people that work at his companies. Tom failed to preserve, and destroyed, the computer servers of Sperry and otherwise failed to make documents available to Simon to establish the authenticity of the memo the bar erroneously alleges that Simon fabricated. The same is true for the email pertaining to the allegations related to Sperry. Tom was aware, given the pending fee claims, of the need to save and secure the contents of the Sperry servers and spoiled all of that evidence.**



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**Under RPC 8.5(b), applicable California rules govern some of the conduct at issue, not the Oregon DRs.**

DATED: May 22, 2015.

HITT HILLER MONFILS WILLIAMS LLP

By _____
Brian B. Williams, OSB No. 964594
Attorney for Robert S. Simon

Trial Attorney: Brian B. Williams

---

I, Robert S. Simon, being first duly sworn on oath deposes and says:

I am the accused in the above-captioned matter. I have read the Answer to Formal Amended Complaint and the responses are true and correct to the best of my knowledge and belief.

DATED: May _____, 2015.

_____
Robert S. Simon



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PORTLAND, OREGON 97204
(503) 228-8870

## CERTIFICATE OF FILING

I hereby certify that I filed the foregoing **ANSWER TO AMENDED FORMAL COMPLAINT** on May 22, 2015, by deliverying the original to:

Disciplinary Board Clerk
Oregon State Bar
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

## CERTIFICATE OF SERVICE

I hereby certify I served the foregoing **ANSWER TO AMENDED FORMAL COMPLAINT** on May 22, 2015, by mailing a true copy by first class mail, with postage prepaid, through the United States Postal service to:

Amber Bevacqua-Lynott
Assistant Disciplinary Counsel
Oregon State Bar
16037 SW Upper Boones Ferry Road
PO Box 231935
Tigard, OR 97281-1935

Richard A. Weill
Troutdale Law Firm
102 W Hist Col River Hwy
Troutdale, OR 97060

DATED this 22nd day of May, 2015.

HITT HILLER MONFILS WILLIAMS LLP

By _____
Brian B. Williams, OSB No. 964594
Attorney for Robert S. Simon



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EXHIBIT 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

ROBERT S SIMON P.C., an Oregon Professional corporation,

Plaintiff(s),

v.

SPERRY VAN NESS REAL ESTATE SERVICES, INC.,

Defendant(s).

**Case No. 1101-00008**

**SATISFACTION OF JUDGMENT**

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ROBERT S SIMON P.C., an Oregon Professional corporation,

Plaintiff(s),

v.

THOMAS B. BRENNEKE,

Defendant(s).

**Case No. 1101-00009**

Bonnie Richardson, attorney for defendants, Sperry Van Ness Real Estate Services, Inc. and Thomas B. Brenneke, hereby acknowledges full and complete satisfaction of the general judgment and money award entered against Robert S. Simon P.C. in this matter and hereby directs the clerk of said court to enter this satisfaction of record.



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(503) 228-8870

DATED this 14th day of ~~October~~ November, 2012.

Bonnie Richardson

STATE OF OREGON )
) ss
County of Multnomah )

This instrument was acknowledged before me on November 14, 2012.

OFFICIAL SEAL
RANELLE I BRADY
NOTARY PUBLIC-OREGON
COMMISSION NO. 441682
MY COMMISSION EXPIRES SEPTEMBER 21, 2013

Notary Public of Oregon
My Commission Expires: Sept. 21, 2013



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## CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on October 3, 2017, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

ROBERT S. SIMON
ROBERT S SIMON P.C.
PO BOX 3706
SANTA MONICA, CA 90408 - 3706

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Stacia L. Johns, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on October 3, 2017.

Stephen Peters
Case Administrator
State Bar Court