People v. Jensen. 10PDJ035. January 7, 2011. Attorney Regulation. Following a Sanctions Hearing, a Hearing Board suspended Marie S. Jensen (Attorney Registration No. 24616) from the practice of law, effective February 7, 2011. Respondent was convicted of felony possession of a controlled substance, which constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5. Her misconduct violated Colo. RPC 8.4(b) and C.R.C.P. 251.5(b).

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** MARIE S. JENSEN	Case Number: **10PDJ035**

AMENDED DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)

On November 15, 2010, a Hearing Board composed of Ralph G. Torres and Andrew A. Saliman, members of the Bar, and William R. Lucero, the Presiding Disciplinary Judge ("the PDJ"), held a Sanctions Hearing pursuant to C.R.C.P. 251.18. Margaret B. Funk appeared on behalf of the Office of Attorney Regulation Counsel ("the People") and Marie S. Jensen ("Respondent") appeared with her attorney, Erick Knaus. The Hearing Board now issues the following "Amended Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."[1]

I. SUMMARY

Respondent received a deferred sentence of two years for felony possession of a controlled substance. The PDJ previously granted the People's motion for summary judgment, determining as a matter of law that Respondent's criminal conduct violated Colo. RPC 8.4(b) and C.R.C.P. 251.5(b). The Hearing Board's task here is to determine what sanction is warranted. After considering the nature of Respondent's misconduct and multiple factors that mitigate her misconduct, the Hearing Board finds the appropriate sanction is suspension for six months.

[1] This order replaces the existing "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)." Page 8 of that order provided an incorrect attorney registration number for Respondent. This nunc pro tunc order is dated February 3, 2011.

II. PROCEDURAL HISTORY

On February 19, 2009, a criminal complaint was filed against Respondent in Routt County District Court.[2] The complaint charged Respondent with five felonies: (1) a class three felony involving possession of more than one gram of psilocybin, a schedule I controlled substance; (2) a class four felony involving cultivation of marijuana; (3) a class four felony involving possession with intent to manufacture or distribute marijuana; (4) a class five felony involving possession of eight ounces or more of marijuana; and (5) a class six felony involving possession of one gram or less of cocaine, a schedule II controlled substance.

On December 10, 2009, Respondent entered an *Alford* plea to the first count, possession of more than one gram of psilocybin.[3] The other four counts against Respondent were dismissed. She received a deferred sentence of two years, conditioned upon thirty days in jail or successful completion of a thirty-day inpatient treatment program, 150 hours of public service, and the standard terms and conditions of probation.

The People filed a petition for immediate suspension against Respondent on March 26, 2010. Respondent filed an answer on April 9, 2010. Mr. Knaus then entered his appearance in this matter. On April 15, 2010, the People and Respondent entered into a stipulation for immediate suspension. On the same day, the PDJ filed a report recommending that the Colorado Supreme Court immediately suspend Respondent. The Colorado Supreme Court approved that recommendation on April 22, 2010.

On May 3, 2010, the People filed a complaint against Respondent, alleging she had violated Colo. RPC 8.4(b) and C.R.C.P. 251.5(b). Respondent filed her answer on May 27, 2010. The PDJ then conducted an at-issue conference on June 14, 2010.

On September 14, 2010, the People filed a motion for summary judgment, to which Respondent responded on September 29, 2010. The PDJ granted the People's motion for summary judgment on October 8, 2010.

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[2] An amended criminal complaint was filed on April 16, 2009.

[3] In an *Alford* plea, a criminal defendant pleads guilty while maintaining innocence. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970) ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

III. ESTABLISHED FACTS AND RULE VIOLATIONS

Respondent took and subscribed to the Oath of Admission and gained admission to the Bar of the Colorado Supreme Court on October 14, 1994. She is registered upon the official records, Attorney Registration No. 24616, and is therefore subject to the jurisdiction of the Hearing Board pursuant to C.R.C.P. 251.1.

As noted above, the PDJ granted summary judgment on the People's claim that Respondent violated Colo. RPC 8.4(b) and C.R.C.P. 251.5(b).[4] That order was premised upon C.R.C.P. 251.20(a), which provides that a certified copy of a judgment of criminal conviction shall conclusively establish the existence of such conviction for purposes of disciplinary proceedings. The Colorado Supreme Court has previously deemed an *Alford* plea sufficient to find for purposes of a disciplinary proceeding that a lawyer "actually committed the acts necessary to constitute [the crime]."[5] In his order granting summary judgment, the PDJ found as a matter of law that felony possession of a controlled substance evidences a lawyer's lack of fitness to practice law.

At the sanctions hearing, Respondent explained the events underlying the criminal proceedings. Respondent and her husband were traveling on February 7, 2009, and had left their seventeen-year-old daughter home alone. A party involving other teenagers took place at Respondent's home that evening, and the police were called to investigate. While at Respondent's home, the police discovered a number of marijuana plants, as well as sixteen grams of psilocybin mushrooms.

Respondent has held a license to cultivate medical marijuana in Colorado since approximately 2002. She testified that she uses marijuana to treat her anxiety, depression, herniated neck, and irritable bowel syndrome. Although Colorado law generally permits licensed individuals to have no more than six marijuana plants at any time,[6] Respondent testified that she had at least forty plants on February 7, 2009.[7] However, she claims she had no intent

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[4] Colo. RPC 8.4(b) provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's fitness as a lawyer. C.R.C.P. 251.5(b) provides that any act in violation of criminal laws is grounds for discipline.

[5] *People v. Gritchen*, 908 P.2d 70, 71 n.1 (Colo. 1995) (citing *People v. Martin*, 897 P.2d 802, 803 (Colo. 1995)).

[6] Colo. Const. Art. 18, § 14.

[7] Respondent's testimony was somewhat unclear about the number of marijuana plants in her home, partly due to ambiguity about whether dead plants and cuttings are considered to be plants. She testified that she had twenty plants in her room for flowering plants as well as twenty plants in her room for non-flowering plants.

to distribute any marijuana, and she vehemently denies any knowledge of the psilocybin mushrooms found in her home.[8]

Respondent explained that she decided to enter her *Alford* plea to the psilocybin charge because she could not risk going to prison and leaving her daughter without a home. At the sanctions hearing, she asked that the Hearing Board impose a sanction for her misconduct in growing an excessive number of marijuana plants but not for her alleged conduct regarding psilocybin mushrooms.[9]

IV. SANCTIONS

The ABA Standards for Imposing Lawyer Sanctions ("ABA *Standards*") and Colorado Supreme Court case law are the guiding authorities for selecting and imposing sanctions for lawyer misconduct.[10] In determining the appropriate sanction after a finding of lawyer misconduct, the Hearing Board must consider the duty violated; the lawyer's mental state; the actual or potential injury caused by the lawyer's misconduct; and the existence of aggravating and mitigating evidence pursuant to ABA *Standard* 3.0.

ABA *Standard* 3.0 – Duty, Mental State, and Injury

Duty: By engaging in criminal conduct, Respondent violated her duty to the public to uphold the laws of the State of Colorado.

Mental State: Respondent should have known she was growing more marijuana than allowed by her medical marijuana license. She admits she had a "cavalier attitude" towards the medical marijuana law.

Injury: Respondent's illegal conduct caused some injury to the reputation of the legal profession. Respondent does not maintain an active law practice, however, so her conduct caused no injury or risk of injury to clients.

ABA *Standard* 3.0 – Aggravating & Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of discipline to be imposed.[11] Mitigating circumstances include any considerations or factors that may justify a

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[8] At the sanctions hearing, Respondent took responsibility for having lost control of the "boundaries" of her home and for the presence of the mushrooms.

[9] Because of the similarity of the psilocybin and marijuana charges and because of the applicable disciplinary standards and case law, our analysis regarding the appropriate sanction is not strongly influenced by whether we focus on the psilocybin charge or the marijuana-related misconduct.

[10] *See In re Roose,* 69 P.3d 43, 46-47 (Colo. 2003).

[11] *See* ABA *Standard* 9.21.

reduction in the degree of discipline to be imposed.[12] The Hearing Board considered evidence of the following aggravating and mitigating circumstances in deciding the appropriate sanction.

Illegal Conduct – 9.22(k): Respondent violated the laws of the State of Colorado through the conduct underlying this matter.

Absence of Prior Disciplinary Record – 9.32(a): Respondent has not previously been subject to discipline.

Personal or Emotional Problems – 9.32(c): Respondent testified that she was struggling with depression and anxiety at the time of the misconduct.

Cooperative Attitude toward Proceedings – 9.32(e): Respondent stipulated to an immediate suspension. As the People note, her cooperation in this regard removed the need for a hearing on that matter.

Character or Reputation – 9.32(g): Respondent testified that she has supported her community through a significant amount of volunteering, including service to the Colorado Court Appointed Special Advocates, the Routt County planning commission, an arts council, an acting group, and youth programs.

Imposition of Other Penalties or Sanctions – 9.32(k): Respondent served time in jail, completed 150 hours of public service, and remains on probation for the criminal conduct in this case.

Remorse – 9.32(l): Although Respondent denies knowledge of the psilocybin mushrooms found in her home, the Hearing Board finds Respondent to be genuinely remorseful about her failure to heed restrictions on the cultivation of medical marijuana.

Analysis under ABA *Standards* and Colorado Case Law

ABA *Standard* 5.12 provides: "[s]uspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice." Because Respondent's conduct was criminal but does not contain the elements listed in *Standard* 5.11, *Standard* 5.12 is applicable here.[13]

[12] *See* ABA *Standard* 9.31.

[13] Public censure is an appropriate sanction under ABA *Standard* 5.13 only for non-criminal conduct.

The Colorado Supreme Court has held on numerous occasions that suspension is the appropriate sanction for lawyers who have violated laws restricting the possession of controlled substances. Our review of these cases indicates that a six-month suspension here would be most consistent with prior case law.[14] The facts underlying Respondent's matter are particularly similar to the facts in *People v. Abelman*, in which a lawyer received a six-month suspension.[15] In that case, the lawyer pled guilty to a state felony charge for cocaine use and received a deferred judgment in the criminal proceeding.[16] The court noted the presence of several mitigating factors, including that the lawyer's illegal conduct had not compromised his clients' interests and that he had no history of prior discipline.[17]

Another case with close parallels to Respondent's is *People v. Moore*, in which a licensed attorney with a limited law practice received a six-month suspension.[18] There, the attorney pled guilty to a state felony charge of making and altering a false and forged prescription for Phentermine, a schedule IV controlled substance, and to criminal attempt to obtain a controlled substance by forgery and alteration.[19] She received a deferred judgment and sentence in the criminal proceeding.[20] A number of factors mitigated her conduct, though on the other side of the ledger she engaged in deceitful conduct as well as the illegal possession of controlled substances.[21]

Our determination is bolstered by two Colorado Supreme Court cases imposing suspensions lasting for a year and a day upon a deputy district attorney and a judge for possession of cocaine. In *People v. Robinson*, the court emphasized that the deputy district attorney "undertook an even higher responsibility to the public . . . by virtue of his public office as an attorney engaged in law enforcement."[22] Were it not for the lawyer's position, the court

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[14] We note there are several cases that are outliers with respect to the level of discipline imposed for illegal drug use. In *People v. Simon*, 698 P.2d 228, 228-29 (Colo. 1985), the Colorado Supreme Court imposed only a public censure on an attorney who pled guilty to unlawful use of cocaine and to criminal possession of a third-degree forged instrument; the attorney had obtained a fictitious liquor license for a client after neglecting to obtain a license through proper channels. In *People v. McPhee*, 728 P.2d 1292, 1293-95 (Colo. 1986), by contrast, the court suspended for three years an attorney who pled guilty to the cultivation of marijuana and the possession of psilocybin. We assign theses cases relatively little weight because they are comparatively old. More recent cases have imposed three-year suspensions under circumstances significantly more egregious than those presented here. *See, e.g., People v. Rhodes*, 829 P.2d 850, 850-51 (Colo. 1992) (suspending an attorney for three years for having distributed cocaine on five separate occasions).

[15] 744 P.2d 486 (Colo. 1987).

[16] *Id.* at 487.

[17] *Id.*

[18] 849 P.2d 40 (Colo. 1993).

[19] *Id.* at 42.

[20] *Id.*

[21] *Id.* at 43.

[22] 839 P.2d 4, 6 (Colo. 1992).

suggested it would have imposed a six-month suspension.[23] Similarly, in *People v. Stevens*, the court emphasized that the respondent committed a "serious betrayal of duty to the judicial system" because he was a judicial officer at the time of the offense.[24] On those grounds, the court distinguished *Abelman*, in which the respondent received a six-month suspension.[25]

In finding that a six-month suspension is appropriate here, we emphasize several factors.[26] First, Respondent did not engage in multiple instances of misconduct or break laws governing controlled substances after a prior warning or conviction.[27] Second, as Respondent was not a practicing attorney, her conduct did not place any clients at risk. Third, Respondent received a deferred judgment from the district court, as in *Abelman* and *Moore*.[28] Finally, the significant number of mitigating factors favors a relatively lenient sanction.

At the sanctions hearing, Respondent suggested her suspension should be retroactive to the date of her immediate suspension. Three factors govern whether a retroactive sanction is appropriate: "whether the conduct is part of a continuing pattern or whether there is only a single instance of misconduct; whether there is a significantly attenuated relationship between the misconduct and the practice of law; and whether the passage of time mitigates the severity of the discipline required."[29] We decline to impose a retroactive

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[23] *Id.*

[24] 866 P.2d 1378, 1378 (Colo. 1994).

[25] *Id.* at 1379. Other cases in which the Colorado Supreme Court has imposed suspensions lasting for a year and a day for drug possession also have involved more serious misconduct than that presented here. *See, e.g., People v. Holt*, 832 P.2d 948, 949 (Colo. 1992) (suspending attorney for a year and a day for having used cocaine for an eight-year period and used marijuana for a fifteen-year period, in addition to having failed to file personal state and federal income tax returns for eight years and failed to pay withholding taxes).

[26] We do not find a lesser sanction appropriate here because Respondent is still subject to the two-year deferred sentence imposed by the district court. Respondent's matter is therefore distinguishable from *People v. Gould*, where the Colorado Supreme Court imposed a public censure upon an attorney who had already completed the terms of a deferred prosecution for possession of cocaine. 912 P.2d 556, 557-58 (Colo. 1996).

[27] In *People v. Abelman*, 804 P.2d 859, 863 (Colo. 1991) (*Abelman II*), the court noted that the attorney did not cease his use of cocaine after his arrest on state drug charges and only sought treatment for his addiction after his second arrest on federal drug charges. In imposing a two-year suspension, the court found a number of mitigating factors but also found that the lawyer had engaged in a pattern of misconduct, had committed multiple offenses, and had substantial experience in the practice of law. *Id.* at 862.

[28] 744 P.2d at 487; 849 P.2d at 42. In *Abelman II*, by contrast, the Colorado Supreme Court's imposition of a two-year suspension followed the trial court's imposition of a two-year prison sentence. 804 P.2d at 861.

[29] *In re Corbin*, 973 P.2d 1273, 1276 (Colo. 1999) (citing *Abelman*, 804 P.2d at 862) (quotation omitted).

suspension here, because there has not been a significant delay between the effective date of the immediate suspension and the issuance of this order.[30]

V. CONCLUSION

Respondent exercised poor judgment by violating laws governing the possession of controlled substances. Her criminal conduct reflects adversely upon the legal profession. However, Respondent's misconduct is mitigated by numerous factors, including her good character as demonstrated in her community work as a volunteer, the absence of a prior disciplinary record, and personal and emotional issues. In accordance with the ABA *Standards* and Colorado Supreme Court case law, the Hearing Board imposes a six-month suspension upon Respondent.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. Marie S. Jensen, Attorney Registration No. 24616, is hereby **SUSPENDED FOR SIX MONTHS**. The suspension **SHALL** become effective thirty-one days from the date of this order upon the issuance of an "Order and Notice of Suspension" by the PDJ and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).

2. Respondent **SHALL** file any post-hearing motion or application for stay pending appeal with the PDJ **on or before January 27, 2011**. No extension of time will be granted.

3. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days of the date of this order. Respondent shall have ten (10) days within which to respond.

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[30] *See In re Thompson*, 991 P.2d 820, 824 (Colo. 1999) (noting that the Colorado Supreme Court has "rarely approved an effective date that was retroactive to the date of a lawyer's immediate suspension" and that the "one exception is when there is a significant period of time between the date of the immediate suspension and [the court's] order"); *People v. Gonzalez*, 967 P.2d 156, 158 (Colo. 1998) (declining to impose retroactive disbarment for respondent who was immediately suspended less than twelve months before date of opinion); *People v. Ebbert*, 925 P.2d 274, 279-80 (Colo. 1996) (declining to impose retroactive disbarment for respondent who was immediately suspended twelve months before date of opinion).