People v. Walker. 10PDJ022. April 14, 2011. Attorney Regulation. Following a sanctions hearing, a Hearing Board suspended Scott Neil Walker (Attorney Registration Number 32859) for three years, effective May 15, 2011. Walker converted over $22,000.00 from twelve clients by failing to return their retainers after he neglected to perform agreed-upon work. His neglect of most of those matters was so pronounced as to amount to abandonment. Respondent's major depressive disorder, however, was principally responsible for his misconduct, and the Hearing Board determined that, in light of this mitigating factor, the sanction for Respondent's misconduct was appropriately lowered from the presumptive sanction of disbarment to a three-year suspension. His misconduct constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.3, 1.4(a), 1.5(b), 1.15(a), 1.15(b), 1.16(a)(1), 1.16(d), and 8.4(c).

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:** SCOTT NEIL WALKER	Case Number: **10PDJ022 (consolidated with 10PDJ111)**
DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)	

On February 15 and 16, 2011, a Hearing Board composed of Gail C. Harriss and Dean S. Neuwirth, members of the bar, and William R. Lucero, the Presiding Disciplinary Judge ("the PDJ"), held a two-day hearing pursuant to C.R.C.P. 251.18. Adam J. Espinosa appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Scott Neil Walker ("Respondent") appeared pro se. The Hearing Board now issues the following "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."

I. SUMMARY

Respondent converted over $22,000.00 from twelve clients by failing to return their retainers after he neglected to perform agreed-upon work. His neglect of most of those matters was so pronounced as to amount to abandonment. Respondent's major depressive disorder, however, was principally responsible for his misconduct. In light of Respondent's demonstrated mental disability and other mitigating factors, the Hearing Board determines that a three-year suspension is warranted in this matter.

II. PROCEDURAL HISTORY

On February 24, 2010, the People filed a complaint in case number 10PDJ022, alleging that Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(b), 1.16(a)(1), 1.16(d), and 8.4(c) with respect to six client matters. Respondent filed an answer on September 9, 2010.

On December 28, 2010, the People filed a complaint in case number 10PDJ111, alleging that Respondent violated Colo. RPC 1.3, 1.4(a), 1.5(b), 1.15(a), 1.16(a)(1), and 8.4(c) in matters involving eight additional clients.[1] On January 18, 2011, the PDJ consolidated case number 10PDJ111 into case number 10PDJ022. Respondent filed an answer responding to the allegations in the complaint in case number 10PDJ111 on January 21, 2011.

On February 2, 2011, Respondent filed a motion for summary judgment, in which he admitted to the rule violations alleged in both of the People's complaints. At a status conference on February 3, 2011, in which Respondent appeared pro se, the PDJ determined that Respondent had knowingly and intelligently waived his right to a hearing on the merits in this matter. The next day, the PDJ granted Respondent's motion, entered summary judgment on all claims alleged by the People in the consolidated matters, and converted the previously scheduled trial into a sanctions hearing.

During the sanctions hearing on February 15 and 16, 2011, the Hearing Board heard testimony and considered the stipulated facts, the People's stipulated exhibits 1-7, and Respondent's exhibit A.[2]

III. FINDINGS OF FACT AND RULE VIOLATIONS

The Hearing Board finds the following facts and rule violations have been established by clear and convincing evidence.

Jurisdiction

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on June 4, 2001. He is registered upon the official records under attorney registration number 32859 and is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in these disciplinary proceedings.[3] Respondent's address is 1001A East Harmony Road, #116, Fort Collins, CO 80525.

Established Rule Violations

This case involves extensive misconduct with respect to fourteen client matters. Because Respondent has stipulated to this misconduct, the facts of each matter are presented here in an abbreviated form. Further details are

[1] This complaint was originally filed under case number 10PDJ141. On January 12, 2011, the PDJ transferred case number 10PDJ141 to case number 10PDJ111 and closed case number 10PDJ141. The complaint filed on December 28, 2011, is referred to here under case number 10PDJ111.

[2] The reverse side of the bank records in exhibits 1 and 2 were mistakenly omitted from the original exhibits as filed. They were admitted by stipulation as supplements to be included in exhibits 1 and 2.

[3] *See* C.R.C.P. 251.1(b).

available in the People's two complaints in this proceeding, which have been admitted as stipulated facts.

Shannon Boerger Matter – Shannon Boerger ("Boerger") hired Respondent in November 2008 to represent her in a contempt action against her ex-husband. She paid Respondent a $3,000.00 retainer. Respondent neglected her case by taking nearly three months to file the contempt motion. He failed to prepare and timely submit exhibits prior to the contempt hearing and then failed to appear for the hearing, resulting in the postponement of Boerger's trial. Boerger was subsequently unable to reach Respondent. Respondent abandoned Boerger and failed to return either her file or any portion of her retainer, thereby converting unearned legal fees. Through these actions, Respondent violated Colo. RPC 1.3 (requiring lawyers to act with reasonable diligence and promptness), 1.4(a) (requiring lawyers to communicate with clients about their matters), 1.16(a) (requiring lawyers to withdraw from representation if continued representation will result in violations of the Rules of Professional Conduct), and 8.4(c) (requiring lawyers to refrain from conduct involving dishonesty).

Madeline Scull Matter – Madeline Scull ("Scull") hired Respondent in August 2009 to prepare a will and trust for her. She paid Respondent a $350.00 retainer, which he deposited into his office account. Respondent never performed the agreed-upon work and Scull was unable to reach him. By abandoning Scull's case, failing to return either her file or retainer upon her request when she terminated him, and converting her funds, Respondent violated Colo. RPC 1.15(b) (requiring lawyers to deliver to a client any funds the client is entitled to receive), 1.16(d) (requiring lawyers to surrender client papers and unearned retainers upon termination of representation), and 8.4(c).

Paul Green Matter – Paul Green ("Green") hired Respondent in August 2009 to represent him in a dissolution of marriage action. Green paid Respondent a $2,500.00 retainer. Respondent never completed any of the requested work, and Green received no communication from Respondent regarding the case. As a result, Green proceeded pro se in his case. By abandoning Green, failing to return his file or unearned attorney fees, and knowingly converting client funds, Respondent violated Colo. RPC 1.3, 1.4(a), 1.16(d), and 8.4(c).

Jason Keleher Matter – Jason Keleher ("Keleher") hired Respondent in March 2009 to represent him in a post-decree child support matter. Keleher paid Respondent $1,960.00 as a retainer. Although Respondent prepared a response and financial affidavit on Keleher's behalf, he otherwise neglected the matter and failed to appear at Keleher's hearing. Consequently, the court granted motions filed by Keleher's ex-wife to compel discovery and for sanctions. In addition, Respondent failed to respond to Keleher's requests for information. Respondent abandoned Keleher and converted the unearned

portions of Keleher's retainer. In so doing, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(b), 1.16(d), and 8.4(c).

Shawn Brooks Matter – Shawn Brooks ("Brooks") hired Respondent in July 2009 to file an expedited motion to modify parenting time. Brooks paid Respondent a $750.00 retainer. Respondent filed Brooks's motion in early August 2009 but did not timely attach a certificate of mailing to the motion. When Brooks learned that Respondent had been hospitalized, he hired another attorney to complete the work on his matter. Respondent never responded to that attorney's attempts to contact him. By failing to respond to requests for information and failing to maintain minimum communications with Brooks, Respondent violated Colo. RPC 1.4(a).

Shaun Bagnell Matter – Shaun Bagnell ("Bagnell") and Cameron Phillip ("Phillip") hired Respondent and paid him a $3,000.00 retainer in April 2009 to represent Phillip in a child custody matter. Respondent told Bagnell that he had filed a motion in the matter on April 22, 2009, but he subsequently admitted he had not filed the motion. After continued delays by Respondent, his services were terminated. Respondent only provided an accounting and a refund after a four-month delay. By failing to timely perform work and provide an accounting, Respondent violated Colo. RPC 1.3 and 1.15(b).

Rod Fortin Matter – Rod Fortin ("Fortin") hired Respondent in September 2008 to file a motion to modify maintenance. Fortin paid Respondent $400.00 upon hiring him and paid him an additional $1,500.00 in March 2009. Respondent never provided Fortin with a written fee agreement, even though Respondent had not previously represented him. Respondent never completed any work on Fortin's matter and failed to respond to Fortin's messages. Fortin hired another attorney, who requested that Respondent return Fortin's retainer, but Respondent failed to do so. Rather, Respondent removed Fortin's funds from his COLTAF account and used them for his own purposes. Through this conduct, Respondent violated Colo. RPC 1.3, 1.4(a), 1.5(b) (requiring lawyers to provide a written fee agreement to a new client), 1.15(a) (requiring lawyers to hold client property separate from the lawyer's own property), 1.16(a)(1), and 8.4(c).

Judy Sansom Matter – Judy Sansom ("Sansom") hired Respondent in July 2009 to file a petition for dissolution of marriage. Sansom paid Respondent a retainer of $3,000.00. Respondent filed a petition on Sansom's behalf later that month, but he failed to serve Sansom's husband. Respondent also failed to appear at a scheduled hearing and neglected to respond to Sansom's efforts to contact him. Ultimately, Sansom proceeded pro se in her case. Respondent did not return unearned portions of Sansom's retainer and instead paid those funds to himself out of his COLTAF account. Through this conduct, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(a), and 8.4(c).

Rodney Masters Matter – Rodney Masters ("Masters") hired Respondent in April 2009 to represent him in a guardianship matter. Masters paid Respondent a $1,500.00 retainer. But Respondent never performed any work in this matter, he failed to communicate with Masters, he removed the funds paid by Masters from his COLTAF account, and never returned Masters' retainer. Respondent's conduct in this matter violated Colo. RPC 1.3, 1.4(a), 1.15(a), and 8.4(c).

Robert and Barbara Frikken Matter – Robert and Barbara Frikken ("the Frikkens") hired Respondent in November 2008 to assist them in adopting their granddaughter, at which time they gave Respondent a $2,000.00 retainer. Respondent billed $645.20 for work he completed in the case in January 2009. In July 2009, Respondent and the Frikkens met to sign the petition for adoption, but Respondent never filed the petition. The Frikkens were unable to reach Respondent, who did not inform them he had stopped practicing law. Respondent never returned any portion of their retainer, but rather used the retainer for his own benefit. Respondent's conduct violated Colo. RPC 1.3, 1.4(a), 1.15(a), and 8.4(c).

Shawn Johnson Matter – Shawn Johnson ("Johnson") hired Respondent in May 2009 to file a petition for dissolution of marriage. Johnson paid Respondent a $3,000.00 retainer and requested that Respondent complete the dissolution matter under a power of attorney while Johnson was deployed overseas. Respondent failed to serve Johnson's wife with the petition for dissolution and failed to file a court-ordered proof of service. As a result, Johnson's case was dismissed. Johnson was unable to reach Respondent to discuss the status of his case. By failing to return Johnson's retainer, failing to communicate with him, and neglecting his case, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(a), and 8.4(c).

Jennifer Martin Matter – Jennifer Martin ("Martin") hired Respondent in October 2008 to represent her in a child support enforcement case. Martin paid Respondent a $2,000.00 retainer. Although Respondent had not previously represented Martin, he did not give her a written fee agreement. Respondent abandoned Martin, failed to communicate with her, and failed to return any unearned portions of her retainer. Accordingly, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(a), 1.5(b), and 8.4(c).

Angela Bock Matter – Angela Bock ("Bock") hired Respondent in April 2009 to represent her in a dissolution of marriage case. She paid Respondent a $1,500.00 retainer. Respondent accepted service on Bock's behalf and filed a one-paragraph response to her husband's petition for dissolution, but he failed to notify her of a scheduled hearing and failed to appear at that hearing. At the hearing, the court ruled in favor of Bock's husband on several disputed issues because Bock and Respondent were not present. By abandoning his duties to

Bock, failing to keep her informed about the matter, and failing to return her retainer, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(a), and 8.4(c).

Nina and Greg Jackson Matter – Nina and Greg Jackson ("the Jacksons") hired Respondent in April 2009 to represent them in an adoption matter and paid Respondent a $2,168.00 retainer. Respondent did not submit the Jacksons' fingerprints to the authorities as part of a required background check, and he failed to complete the work he had promised to perform. He did not inform the Jacksons that he had not completed this work. He also failed to return the Jackson's retainer, instead using the funds for his own benefit. Nina Jackson testified that Respondent's delay might have led a judge to reject their adoption because their financial circumstances had worsened during the period of his delay. Through this conduct, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(a), and 8.4(c).

The Colorado Attorneys' Fund for Client Protection paid a total of $22,707.00 to Respondent's clients to reimburse them for Respondent's conversions.[4]

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law govern the selection and imposition of sanctions for lawyer misconduct. ABA *Standard* 3.0 mandates that, in selecting the appropriate sanction, the Hearing Board consider the duty breached, the injury or potential injury caused, Respondent's mental state, and the aggravating and mitigating evidence.

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

Duty: Respondent violated the duties he owed to fourteen clients. He failed to uphold some of the most fundamental obligations of a lawyer, including the obligations to act with loyalty and honesty towards clients. By failing to properly terminate his representation of clients, he also violated duties he owed as a professional.

Injury: Respondent caused serious injury or potential injury to his clients. His abandonment of his clients' cases caused delay in those matters and jeopardized the clients' interests. In some instances, Respondent's failure to attend hearings on his clients' behalf appears to have led to adverse judicial rulings. Moreover, Respondent converted over $22,000.00 in client funds, in some cases depriving clients of money they needed to hire another lawyer. By failing to appear at scheduled hearings, Respondent also caused harm to the

[4] Ex. 3.

court system by wasting judicial resources. Finally, Respondent's misconduct negatively influenced the public's perception of the legal profession.

Mental State: Respondent stipulated to the mental state required to support each rule violation alleged by the People in this matter. In doing so, Respondent admitted that the gravamen of his misconduct—his abandonment of clients and his conversion of client funds—was knowing.

ABA *Standard* 3.0 – Aggravating Factors

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. The Hearing Board considers evidence of the following aggravating circumstances in deciding the appropriate sanction.

Dishonest or Selfish Motive – 9.22(b) – By converting funds from clients, Respondent benefitted at his clients' expense. Respondent's conversion permitted him to continue to pay his own bills while in some cases depriving his clients of the opportunity to hire an attorney to pursue or defend their interests.

Pattern of Misconduct – 9.22(c) – Respondent engaged in the same rule violations with respect to numerous clients.

Multiple Offenses – 9.22(d) – In the client matters underlying this proceeding, Respondent violated multiple rules of conduct.

ABA *Standard* 3.0 – Mitigating Factors

Mitigating factors are any considerations or factors that may justify a reduction in the degree of discipline imposed. The Hearing Board considers evidence of the following mitigating circumstances in deciding the appropriate sanction.

Absence of a Prior Disciplinary Record – 9.32(a) – Respondent has not previously been subject to discipline for violations of the Rules of Professional Conduct.

Personal and Emotional Problems – 9.32(c) – Respondent testified that prior to his misconduct he suffered from a variety of personal and emotional problems, such as his divorce, the death of a pet dog, and significant medical issues, including surgeries.

Timely Good Faith Effort to Make Restitution – 9.32(d) – As of the date of the sanctions hearing, Respondent had paid a total of $60.00 in restitution,

made in six installments.[5] This sum may represent a significant effort on Respondent's part in light of his now minimal income. But given the large amount of funds Respondent converted, the Hearing Board finds that this mitigating factor merits minimal weight.

Full and Free Disclosure to Disciplinary Board or Cooperative Attitude toward Proceedings – 9.32(e) – Although Respondent initially did not respond to letters from the People, Respondent became more cooperative as his mental and emotional status improved. The Hearing Board gives considerable weight to Respondent's decision to facilitate the resolution of this matter by admitting to the rule violations alleged by the People.

Remorse – 9.32(l) – Respondent testified that he regrets his misconduct. His psychotherapist also testified that Respondent has demonstrated remorse and has assumed responsibility for his actions. Accordingly, the Hearing Board finds Respondent to be genuinely remorseful for his misconduct.

Mental Disability – 9.32(i) – ABA *Standard* 9.3(i) provides that a mental disability or chemical dependency is a mitigating factor when:

> (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
> (2) the chemical dependency or mental disability caused the misconduct;
> (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
> (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

The comment to ABA *Standard* 9.3 provides:

> Issues of physical and mental disability or chemical depencency [sic] offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantially contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight.

[5] Ex. 3.

The Hearing Board heard extensive testimony from three mental health experts, a friend of Respondent, and Respondent himself regarding Respondent's mental condition. The testimony shows that Respondent entered a state of depression starting in 2008, which significantly worsened during the spring and summer of 2009. During the summer and fall of 2009, he attempted to commit suicide twice and was committed to a mental hospital on three occasions. During a portion of this period, Respondent remained largely confined to his bed, he could not provide basic self-care, such as attending to his hygiene, and he developed paranoia. Respondent continued to suffer from significant depression through the beginning of 2010, during the period when Respondent lived temporarily with his brother in Texas. Through therapy and the use of medications, Respondent's condition improved, and he returned to Colorado later that year.

Hal Wortzel, M.D., a forensic neuropsychiatrist, prepared a report based upon an examination of Respondent on July 17, 2010, and also testified at the sanctions hearing.[6] Dr. Wortzel found that, in 2009, Respondent suffered from a major depressive disorder under the criteria set forth in the DSM-IV-TR.[7] Dr. Wortzel further determined that Respondent has experienced long-standing difficulties with dysthymia, a chronic, low-level depression. Dr. Wortzel testified that dysthymia and major depressive disorder typically would not cause someone to lose the ability to discern right from wrong, and neither condition would cause someone to engage in dishonest or illegal activity. In Dr. Wortzel's view, Respondent's misconduct cannot be attributed solely to his mental disability. However, Dr. Wortzel testified that the major depression is "a very important factor" in explaining Respondent's misconduct. He further opined that "the role of [Respondent's] depression was very substantial, such that [his] transgressions would have been extremely unlikely but for the contribution of mental illness."[8] Dr. Wortzel also testified that, with continued therapy and monitoring, a recurrence of the misconduct would be "very unlikely."

Howard Lindemann, L.C.S.W., a psychotherapist who treated Respondent beginning in January 2010 while Respondent lived in Texas, testified by telephone at the sanctions hearing.[9] Mr. Lindemann opined that Respondent suffered from severe major depressive disorder and from post-traumatic stress disorder. In Mr. Lindemann's view, Respondent's misconduct would not have occurred but for his serious mental disorders. Mr. Lindemann

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[6] Dr. Wortzel's report was introduced into evidence as exhibit 5.

[7] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION TEXT REVISION (2000). Dr. Wortzel's diagnostic impression under the DSM-IV-TR criteria was that Respondent suffered from major depressive disorder; major depressive episode, resolving; and dysthymia. Ex. 5.

[8] Ex. 4 (Letter from Hal Wortzel, M.D., to Adam J. Espinosa, Office of Attorney Regulation Counsel (Dec. 25, 2010)).

[9] Mr. Lindemann's report was introduced into evidence as exhibit 6.

believes Respondent has made significant strides in treating his depression and a relapse is unlikely as long as Respondent continues to "take care of himself."

The Hearing Board also heard testimony from Charles Larsen, Ed.D., a counselor and therapist in Colorado who treated Respondent in the fall of 2009 and who resumed treating Respondent in July 2010 after his return from Texas.[10] Dr. Larsen believes Respondent's misconduct was the result of overwhelming depression and disconnectedness and that Respondent probably would have been able to act in conformity with his values if not for the depression. Dr. Larsen opined that Respondent is unlikely to engage in further misconduct if he continues to "learn" and to "grow."

The expert testimony that Respondent's misconduct would have been unlikely but for his severe depression demonstrates that Respondent suffered from a mental disability and that a direct causal connection exists between that disability and Respondent's misconduct.[11] In addition, the expert testimony shows that Respondent has largely been rehabilitated through weekly therapy sessions since January 2010 and that recurrence of misconduct is unlikely. Even as of the summer of 2010, Dr. Wortzel found that the disabling aspects of Respondent's depressive episode no longer persisted and that he appeared to be "restored in terms of functional abilities." Accordingly, the criteria in ABA *Standard* 9.32(i) have been established here.

Having found ABA *Standard* 9.32(i) to be applicable, the Hearing Board next must determine what weight to accord this factor. Dr. Wortzel testified that Respondent's disability was a "very important factor" in explaining the misconduct, that the disability was a "major, if not leading, contributing factor" to the misconduct, and that Respondent's transgressions would have been "extremely unlikely" but for his disability. Mr. Lindemann believes Respondent "probably" would not have engaged in the misconduct but for his disability, while Mr. Larsen similarly stated that Respondent "most probably" would have behaved in a more appropriate manner were it not for his depression. These opinions are not expressed in the precise formulations used in the comment to ABA *Standard* 9.3, but the Hearing Board believes the experts' comments indicate that Respondent's disability was "principally responsible for the offense," such that it should be given "very great weight" in mitigation.

Sanctions Analysis under ABA *Standards* and Case Law

Under the ABA *Standards*, the presumptive sanction for Respondent's misconduct is disbarment. ABA *Standard* 4.11 provides that disbarment is typically warranted when a lawyer knowingly converts client property and

[10] Mr. Larson's report was introduced into evidence as exhibit 7.

[11] We reject the People's argument that ABA *Standard* 9.3(i) cannot apply unless a mental disability is the *sole* cause of misconduct. The comments to that standard clearly indicate that a disability may be considered in mitigation if it is a contributing cause of misconduct.

thereby causes injury or potential injury.[12] Similarly, ABA *Standard* 4.41 provides that disbarment is generally appropriate when a lawyer causes serious or potentially serious injury to a client by knowingly failing to perform services for a client, engaging in a pattern of neglect with respect to client matters, or abandoning the practice.

The Colorado Supreme Court likewise has held that, except where significant mitigating factors apply, disbarment is the appropriate sanction for knowing conversion of client funds in violation of Colo. RPC 8.4(c).[13] Where a lawyer's conversion of client funds is coupled with abandonment of the client, it is all the more clear that disbarment is the presumptive sanction.[14] The Colorado Supreme Court, however, has cautioned that mitigating factors merit close examination and may in some cases warrant a departure from the presumption of disbarment.[15]

Here, Respondent's misconduct occurred during the time period when Respondent was suffering from a mental disability, and his most serious misconduct—conversion of client funds and abandonment of clients—occurred while Respondent was experiencing a severe mental disability.[16] As a result, we find that Colorado Supreme Court case law supports Respondent's argument that his mental disability justifies a sanction less severe than disbarment under these circumstances. We draw in particular upon the court's decisions in *People v. Lujan*,[17] *People v. Boyer*,[18] and *People v. Shidler*.[19]

The Colorado Supreme Court held in *People v. Lujan* that a lawyer whose mental disability caused her to steal from her law firm did "not deserve to be

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[12] Although Appendix 1 of the ABA *Standards* indicates that the standards applicable to violations of Colo. RPC 8.4(c) are ABA *Standards* 4.6 and 5.1, the Court determines that ABA *Standard* 4.1, "Failure to Preserve the Client's Property," is more relevant to this type of violation of Colo. RPC 8.4(c).

[13] *See In re Haines*, 177 P.3d 1239, 1250 (Colo. 2008); *In re Cleland*, 2 P.3d 700, 703 (Colo. 2000); *see also People v. Varallo,* 913 P.2d 1, 10-11 (Colo. 1996) (holding that the presumed sanction for knowing conversion of client funds is disbarment, regardless of whether the lawyer intended to permanently deprive the client of those funds).

[14] *See In re Stevenson*, 979 P.2d 1043, 1044-45 (Colo. 1999) (disbarring an attorney who abandoned a client and converted her funds); *People v. Roybal*, 949 P.2d 993, 998 (Colo. 1997) (stating that disbarment is "appropriate when a lawyer effectively abandons his clients and thereby misappropriates unearned attorney fees").

[15] *In re Fischer,* 89 P.3d 817, 822 (Colo. 2004).

[16] While the financial records admitted into evidence suggest that Respondent *may* have mishandled or misused client funds in early 2009, the People have neither alleged nor demonstrated by clear and convincing evidence that Respondent converted client funds before August 2009, when the undisputed evidence indicates that Respondent was experiencing a major depressive disorder.

[17] 890 P.2d 109 (Colo. 1995).

[18] 934 P.2d 1361 (Colo. 1997).

[19] 901 P.2d 477 (Colo. 1995).

disbarred."[20] In that case, the lawyer suffered a head injury requiring surgery when she was involved in a serious automobile collision in Egypt.[21] Although she initially had no memory of the accident, she later recalled that she had been sexually assaulted on the side of the road just after the accident.[22] Upon returning to the practice of law, she began to submit falsified charges to her law firm, using the money she obtained through the fraudulent charges to purchase clothes costing in excess of two thousand dollars a month.[23] She was diagnosed with major depression and obsessive compulsive disorder, which she subsequently controlled through the use of medication.[24] The hearing board determined, after considering expert medical testimony, that "the respondent's obsessive compulsive disorder caused the misconduct" and that this mitigating factor should be accorded the greatest weight because the lawyer's misconduct was solely attributable to her disability.[25] The Colorado Supreme Court upheld the imposition of a year-long suspension.[26]

In *People v. Boyer*, the court approved a conditional admission of misconduct and imposed a 180-day suspension upon an attorney who engaged in sexual relationships with two clients, drove while drunk, lied to a police officer, and used cocaine.[27] The court found that such misconduct typically would warrant a longer suspension, but the respondent's lack of prior discipline, his full and free disclosure to disciplinary counsel, his remorse, and a bipolar personality disorder, which was exacerbated by alcohol and chemical dependency and which substantially contributed to the misconduct, justified a reduced sanction.[28] The Colorado Supreme Court employed similar reasoning in *People v. Shidler*, where a presumptive sanction of suspension for commingling personal and client funds and technically converting client funds was reduced to a public censure because the respondent had no prior discipline, he cooperated with the investigation, he lacked a dishonest or selfish motive, he expressed remorse, and his attention deficit hyperactivity disorder was established to have been a major cause of the misconduct.[29]

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[20] 890 P.2d at 110.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 110-11.
[24] *Id.* at 111.
[25] *Id.* at 112.
[26] *Id.* at 113.
[27] 934 P.2d at 1362-63.
[28] *Id.* at 1364.
[29] 901 P.2d at 479-80. The Hearing Board finds several other Colorado Supreme Court cases cited by the People to be inapposite. In these cases, the court declined to apply ABA *Standard* 9.32(i) because evidence did not establish a causal relationship between the disability and the misconduct or because the lawyer had not recovered from the disability. *See In re Cleland*, 2 P.3d at 703, 705; *People v. Torpy*, 966 P.2d 1040, 1046 (Colo. 1998); *People v. Brady*, 923 P.2d 887, 890 (Colo. 1996); *People v. Goldstein*, 887 P.2d 634, 641-42 (Colo. 1994); *see also People v. Reynolds*, 933 P.2d 1295, 1304 (Colo. 1997). Here, in contrast, the four criteria in ABA *Standard* 9.32(i) have been established to the Hearing Board's satisfaction.

The Hearing Board also draws guidance from other jurisdictions' decisions, including those cited in the comment to ABA *Standard* 9.3(i). In several of those decisions, courts have determined that the severity of a lawyer's misconduct was not sufficiently mitigated by a mental disability to overcome a presumption of disbarment, or that disbarment was appropriate because the attorney had the capacity to refrain from misconduct.[30] But our review of disciplinary case law identified far more examples of cases in which a demonstrated mental disability or chemical dependence warranted a departure from the presumptive sanction, including in cases involving such egregious misconduct as the conversion of client funds.[31]

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[30] *See, e.g., Attorney Grievance Comm'n of Md. v. Zakroff*, 876 A.2d 664, 690-91 (Md. 2005) (disbarring attorney who suffered from significant depression, a mood disorder, and a personality disorder and whose disorders were the "root cause" of his intentional dishonesty and misappropriation since he was not utterly incapable of conforming his conduct to the rules of professional conduct); *Matter of Rowe*, 174 A.D.2d 159, 160-61 (N.Y. App. Div. 1992) (finding that mitigating factors, including mental disease, were not sufficient to overcome presumption of disbarment for lawyer who bludgeoned to death his wife and his three children); *State ex rel. Okla. Bar Ass'n v. Colston*, 777 P.2d 920, 925-26 (Okla. 1989) (disbarring attorney who forged signatures on legal documents, deceived clients, and neglected client matters over five-year period, despite consideration of attorney's emotional and mental state of mind in mitigation, because of the "enormity and severity of the harmful misconduct"); *Matter of Rich*, 559 A.2d 1251, 1255-58 (Del. 1989) (disbarring attorney who engaged in extensive misconduct, including conversion of client funds, notwithstanding mitigating evidence that he suffered from passive-aggressive personality disorder and dysthymic disorder). Notably, none of the cases cited in this footnote explicitly interpret ABA *Standard* 9.3(i).

[31] *See, e.g., Toledo Bar Ass'n v. Baker,* 907 N.E.2d 1172, 1177-79 (Ohio 2009) (imposing indefinite suspension upon attorney who misappropriated client funds, among extensive other misconduct, in light of demonstrated causal connection between the lawyer's depression and post-traumatic stress disorder and the lawyer's misconduct); *In re Belz*, 258 S.W.3d 38, 44-47 (Mo. 2008) (imposing indefinite suspension without leave to apply for reinstatement for three years upon attorney who misappropriated client funds, where attorney's bipolar disorder caused the misconduct and where the attorney had self-reported his misconduct and made restitution, among other mitigating factors); *Cincinnati Bar Ass'n v. Komarek*, 702 N.E.2d 62, 67 (Ohio 1998) (indefinitely suspending attorney who misappropriated client funds and neglected client matters because the attorney suffered from bipolar disorder at the time of his misconduct); *Attorney Grievance Comm'n of Md. v. Christopher*, 861 A.2d 692, 698, 704, 706 (Md. App. 2004) (imposing indefinite suspension with right to apply for reinstatement upon attorney who misappropriated funds from an estate and commingled funds, where a doctor opined that attorney's alcohol dependence and major depression were the root causes of at least some of the misconduct and affected his ability to function in normal activities); *In re Rivkind,* 791 P.2d 1037, 1041, 1043, 1045 (Ariz. 1990) (imposing two-year retroactive suspension and two-year probation upon attorney who was convicted of attempted possession of cocaine, where attorney had been addicted to drugs, there was strong evidence of rehabilitation, and the attorney's drug usage did not affect his clients); *In re Howle*, 363 S.E.2d 693, 694-95 (S.C. 1988) (in light of respondent's manic depressive illness, imposing retroactive two-year suspension upon attorney who misappropriated client funds); *In re Johnson*, 322 N.W.2d 616, 617-18 (Minn. 1982) (imposing stayed suspension upon lawyer who misappropriated client funds as a result of alcoholism); *In re Barry*, 447 A.2d 923, 924-26 (N.J. 1982) (imposing three-month suspension upon young, inadequately supervised attorney who acted with dishonesty and gross negligence in nineteen client matters, where lawyer had

The Hearing Board, however, cannot go so far as to adopt Respondent's recommendation that we simply impose probation and require him to make restitution. Respondent argues that the imposition of any sanction for his misconduct would equate to a punishment for getting "sick." Although the purpose of disciplinary proceedings is the protection of the public, not punishment,[32] a finding of a mental disability does not shield a respondent from sanctions.[33] Rather, a disability may temper the measure of discipline to be imposed. The remedy proposed by Respondent would conflict with Colorado Supreme Court precedent in this regard. Given that the *Lujan* decision suspended an attorney whose mental disability was solely responsible for her theft, it would be inconsistent here for the Hearing Board to decline to sanction a lawyer whose more extensive misconduct was not entirely attributable to his mental disability.[34] Further, imposition of a sanction in this case will help to protect the public by alerting other Colorado attorneys that a mental disability will not fully excuse misconduct, thereby encouraging attorneys to seek early and comprehensive treatment for incipient mental conditions.

In light of the foregoing analysis, the Hearing Board finds that a three-year suspension is the proper sanction here. As explained above, disbarment would not appropriately recognize the significant role Respondent's mental disability played in his misconduct or the numerous other mitigating factors present in this matter. But a lesser sanction would be unreasonably lenient given the extensive and dishonest nature of Respondent's misconduct. The *Lujan*, *Shidler*, and *Boyer* decisions suggest that a demonstrated mental disability may lower a sanction from disbarment to suspension, or from suspension to public censure. A more pronounced departure from the presumptive level of discipline, at least under the circumstances presented here, would be out of step with governing precedent.

Finally, even though Respondent did not previously raise this issue and we are not compelled to consider it,[35] we briefly address Respondent's argument in his written supplement to oral closing argument that "[s]anctions applied after a period of disability for conduct occurring during that period of

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submitted to psychiatric therapy and had rehabilitated his "psychic conflicts"); *Tenner v. State Bar of Calif.*, 617 P.2d 486, 487-89 (Cal. 1980) (imposing stayed suspension upon attorney who misappropriated client funds and committed forgeries, where offenses occurred during lawyer's acute alcoholism, and where he had since been rehabilitated).

[32] *Lujan*, 890 P.2d at 110.

[33] *See State ex rel. Okla. Bar Ass'n v. Colston*, 777 P.2d 920, 925 (Okla. 1989).

[34] The Hearing Board is bound to follow Colorado Supreme Court precedent and lacks the authority to chart a new course in the discipline of attorneys with mental disabilities, as Respondent asks of us. *See In re Roose*, 69 P.3d 43, 48 (Colo. 2003).

[35] *See People v. Goldstein*, 887 P.2d 634, 638 n.2 (Colo. 1994) (declining to address the ADA's applicability to a disciplinary proceeding when the respondent had not raised the issue in his briefs to the court).

disability may be illegal under the terms of the Americans with Disabilities Act" ("ADA").[36] The Colorado Supreme Court previously held that the ADA did not preclude it from suspending a lawyer who suffered from depression while chronically neglecting client matters and misusing client funds.[37] The court followed decisions from the Florida and Oklahoma supreme courts holding that, even if a mental disability is a cause of attorney misconduct, attorneys who commit serious misconduct are not qualified to serve as members of the bar, and no "reasonable modifications" can be made for such individuals.[38] In other words, otherwise qualified attorneys with mental disabilities that prevent them from meeting the essential requirements of their work are not entitled to protections under the ADA.[39] Accordingly, we reject Respondent's argument that the ADA bars the imposition of disciplinary sanctions in this matter.

V. CONCLUSION

Respondent's conversion of funds from twelve clients and his wholesale abandonment of client matters is an example of the most serious misconduct in which an attorney can engage. Such extensive misconduct not only has harmed Respondent's clients but also has brought disrepute upon the legal profession. Yet sanctions for attorney misconduct may be tempered where, as here, the evidence establishes that a professionally-diagnosed mental disability was principally responsible for the attorney's misconduct and where the evidence also shows that treatment and monitoring will allow the attorney to successfully resume his professional duties. Under the particular facts of this case, the Hearing Board finds that the sanction for Respondent's misconduct is appropriately lowered from the presumptive sanction of disbarment to a three-year suspension.

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[36] The ADA offers protections to a "qualified individual with a disability," meaning "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

[37] *People v. Reynolds*, 933 P.2d 1295, 1305 (Colo. 1997). In *Reynolds*, the respondent's depression did not qualify as a mitigating factor under ABA *Standard* 9.32(i) because he had not been fully rehabilitated. *Id.* at 1304.

[38] *See Fl. Bar v. Clement*, 662 So.2d 690, 699-700 (Fla. 1995); *State ex rel. Okla. Bar Ass'n v. Busch,* 919 P.2d 1114, 1119-1120 (Okla. 1996); *see also In re Marshall*, 762 A.2d 530, 539-40 (D.C. 2000) (holding that an attorney's disbarment did not constitute discrimination based upon his disability and observing that the ADA does not require authorities to accommodate a disabled individual by overlooking violations of the law); *Cincinnati Bar Ass'n v. Komarek*, 702 N.E.2d 62, 67 (Ohio 1998) ("The ADA does not prevent disciplinary authorities from disbarring an attorney with a bipolar disorder who had misappropriated client funds.").

[39] *See Busch,* 919 P.2d at 1118-19.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **SCOTT NEIL WALKER**, attorney registration number 32859, is hereby **SUSPENDED FOR THREE YEARS**. The **SUSPENSION SHALL** become public and 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. As a condition precedent to any petition for reinstatement pursuant to C.R.C.P. 251.29(c), Respondent **SHALL** submit to an Independent Medical Examination ("IME") by a qualified forensic psychiatrist agreeable to the People. Respondent, not the People, shall be responsible for the cost of the IME. Once a qualified expert is chosen, it is Respondent's duty to advise the PDJ so that an appropriate order may be drafted and presented to the psychiatrist as to what issues to address in a report to the PDJ. The psychiatrist shall have access to all records in the People's possession, as well as this opinion, before meeting with Respondent for the scheduled IME.

3. Respondent **SHALL** pay restitution to the Colorado Attorneys' Fund for Client Protection to reimburse the fund for all of the disbursements it made to the clients named in this matter.

4. In light of the expert recommendations presented in this matter, the Hearing Board strongly encourages Respondent to continue to engage in therapy. A record of continued therapeutic treatment likely will help Respondent to demonstrate in a reinstatement proceeding that he has been rehabilitated and is fit to practice law, as required by C.R.C.P. 251.29(b). Given Respondent's testimony that he wished to make amends to his former clients, we also encourage Respondent to extend apologies to those clients for his misconduct.

5. Respondent **SHALL** file any post-hearing motion or application for stay pending appeal with the PDJ **on or before May 4, 2011**. No extensions of time will be granted.

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

DATED THIS 14th DAY OF APRIL, 2011.

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

_____
GAIL C. HARRISS
HEARING BOARD MEMBER

_____
DEAN S. NEUWIRTH
HEARING BOARD MEMBER

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