

People v. David Eugene Bath. 19PDJ034. January 27, 2020.

Following a sanctions hearing, the Presiding Disciplinary Judge disbarred David Eugene Bath (attorney registration number 05679). The disbarment took effect March 2, 2020.

Bath represented a client in a personal injury claim arising from an automobile accident against an at-fault driver. As part of the representation, Bath requested from the client's treating provider a lien agreement on behalf of his client, whereby the client's medical bills would be paid on a lien basis. The treating provider agreed, and Bath executed the lien agreement. When the client's case later settled, Bath withheld the full lien amount from her settlement funds disbursement in accordance with the lien agreement. But Bath never notified the treating provider that the case had settled, nor did he provide the lien funds to the treating provider. Rather, he kept the lien amount himself, along with his attorney's fees. To date, Bath has not paid the lien.

Through this conduct, Bath violated Colo. RPC 1.2(a) (a lawyer must abide by the client's decisions concerning the objectives of a case and consult with the client regarding the means to achieve the objectives); Colo. RPC 1.15A(c) (a lawyer shall keep separate any property in which two or more persons claim an interest until there is a resolution of the claims); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The case file is public per C.R.C.P. 251.31. Please see the full opinion below.

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| SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203 | |
| Complainant: THE PEOPLE OF THE STATE OF COLORADO | Case Number: 19PDJ034 |
| Respondent: DAVID EUGENE BATH, #05679 | |
| OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(b) | |

David Eugene Bath (“Respondent”) was hired to represent a client in a personal injury action. He executed a lien agreement with the client’s treating provider, which required the lien to be repaid from the proceeds of the client’s claim. Respondent then withheld the full lien amount from the client’s portion of the settlement disbursement in accordance with the lien agreement. Despite withholding the full lien amount, Respondent never tendered those funds to the provider, knowingly converting the funds for his own use. Respondent thereby violated Colo. RPC 1.2(a), 1.15A(c), and 8.4(c). His misconduct warrants disbarment.

I. PROCEDURAL HISTORY

Alan C. Obye, Office of Attorney Regulation Counsel (“the People”), filed a complaint with Presiding Disciplinary Judge William R. Lucero (“the PDJ”) on May 10, 2019, alleging that Respondent violated Colo. RPC 1.2(a), 1.15A(c), and 8.4(c). After receiving two extensions of time, Respondent answered the complaint on August 9, 2019. The PDJ set a one-day disciplinary hearing for December 2019. On November 12, 2019, the PDJ granted the People’s motion for summary judgment on all three claims and converted the disciplinary hearing to a hearing on the sanctions.

On December 4, 2019, a Hearing Board comprising the PDJ and lawyers Margaret C. Cordova and Lorraine E. Parker held a hearing on the sanctions under C.R.C.P. 251.18. Obye represented the People; Respondent did not appear.¹ The Hearing Board heard the

¹ The hearing was set for 10:00 a.m. (instead of the usual 9:00 a.m.), at the request of Respondent’s sister, to give Respondent additional time to travel to Denver from Fort Collins. Neither the PDJ’s administrator nor the People received any communication from Respondent about his failure to appear. The Hearing Board waited an additional 15 minutes before beginning the hearing and then proceeded without Respondent present.

testimony of Jamie Juergens, the complaining witness, and considered Respondent's disciplinary history.

II. FACTS AND RULE VIOLATIONS

Respondent was admitted to practice law in Colorado on October 16, 1974, under attorney registration number 05679. He is thus subject to this Court's jurisdiction in this disciplinary proceeding.²

Facts Established on Summary Judgment³

As pertinent here, Respondent was the owner and sole lawyer at the Law Firm of David Bath, Esq. On February 4, 2013, Elizabeth Giglio was injured in an automobile accident. Giglio retained Respondent to represent her in a claim against the at-fault driver.

On September 28, 2015, Respondent sent a letter titled "Lien Request" to Marrick Medical Finance, LLC ("Marrick"), the medical billing company for one of Giglio's treating providers, requesting that Marrick pay two of Giglio's accounts on a lien basis. On November 5, 2015, Marrick received a "Medical Bill Pay Agreement" signed by both Respondent and Giglio. Per that agreement, Marrick would pay Giglio's medical bills on a lien basis, with repayment from the proceeds of Giglio's claim against the at-fault driver. Section two of that agreement stated:

When Patient/RP is represented by an attorney who has agreed to comply with this Agreement. If Patient/RP is represented by an attorney when Claim Proceeds are paid, Patient/RP hereby directs and authorizes the attorney to withhold from Patient/RP and pay directly to Marrick the amount of Claim Proceeds necessary to satisfy Patient/RP's indebtedness to Marrick under this agreement, subject to any valid attorney's lien⁴

On November 9, 2015, Marrick filed a UCC financing statement with the Colorado Secretary of State to perfect the lien. Nine days later, Marrick sent Respondent a "Notice of Personal Injury Lien" by certified mail. The balance of the lien was \$2,189.00. Between March and October 2016, Marrick contacted Respondent or his office on six occasions inquiring about the status of the lien. Respondent's staff responded to some of these inquiries, stating that the claim was still in litigation.

On October 25, 2016, Giglio's personal injury claim settled. Ten days later a settlement check was issued to Giglio and Respondent for \$150,000.00. Both Respondent and Giglio endorsed the check, which was deposited into Respondent's trust account on November 10,

² See C.R.C.P. 251.1(b).

³ These findings are drawn from the PDJ's "Order Granting Complainant's Motion for Summary Judgment," issued November 12, 2019.

⁴ Order Granting Mot. for Summ. J. at 2-3.

2016. Respondent issued a “Final Settlement Statement” to Giglio seven days later. Per the settlement statement, the \$150,000.00 was to be distributed as follows:

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| Attorney fees: | \$50,000 |
| Service of Process: | \$250 |
| Filing Fees: | \$244 |
| Marrick Lien: | \$2,189 |
| Total Costs: | \$52,683 |
| Total due client: | \$97,317 ⁵ |

On November 16, 2016, a check was issued from Respondent’s trust account to Giglio in the amount of \$97,317.00. Respondent signed the check. Also on that day, a second check was issued from Respondent’s trust account in the amount of \$52,683.00. That check was issued to Respondent, and he signed and endorsed it. Respondent never informed Marrick about the settlement.

On November 28, 2016, Marrick emailed Respondent and his staff, inquiring about the status of Giglio’s claim and requesting information about whether the claim had been settled. No one responded. Marrick again attempted to confirm the status of Giglio’s claim on December 14, 2016, as well as on January 20, March 6, March 30, April 20, and May 17, 2017.

On May 18, 2017, Marrick learned from the at-fault driver’s insurer that Giglio’s case had settled. That same day, Marrick wrote to Respondent, stating that it was aware of Giglio’s settlement and requesting an immediate response. On June 23, 2017, Giglio contacted Marrick directly to discuss the lien. That same day, Giglio emailed Marrick a copy of Respondent’s disbursement statement.

Respondent then attempted to negotiate a reduction of the lien. Marrick refused to reduce the lien because Respondent’s disbursement statement showed that he had withheld the full lien amount from the settlement disbursement, and there was no indication that he would pass along the reduction to Giglio.

Marrick attempted several more times in August and September 2017 to contact Respondent’s office about the lien payment. Respondent replied to some of these communications but never paid Marrick.

Rule Violations

In granting the People’s motion for summary judgment, the PDJ determined that Respondent violated Colo. RPC 1.2(a), which requires a lawyer to abide by a client’s decision concerning the objectives of the representation and to consult with the client about the

⁵ Order Granting Mot. for Summ. J. at 3.

means by which they are to be pursued. The PDJ concluded that Respondent violated this rule because he knew about Marrick's lien for \$2,189.00 and Giglio's decision to repay that lien from her settlement proceeds, yet he failed to satisfy the lien, an objective of the representation.

By withdrawing the lien amount from his trust account and failing to disburse the funds to Marrick, Respondent violated Colo. RPC 1.15A(c), which mandates that when a lawyer takes possession of property in which multiple parties claim an interest the lawyer must keep that property separate until there is a resolution of the claims.

The PDJ further determined that Respondent violated Colo. RPC 8.4(c), which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The PDJ found that Respondent agreed to pay Marrick's \$2,189.00 lien directly from Giglio's settlement, that he received payment for that lien from the settlement proceeds, and that he withheld those funds from Giglio's disbursement. But he did not pay Marrick the funds it was owed, as Giglio believed he would. Rather, he wrote a check to himself for those funds, knowingly converting the funds.

The PDJ entered judgment as a matter of law by granting the People's summary judgment motion on all three claims alleged in the complaint, thereby establishing that Respondent violated Colo. RPC 1.2(a), 1.15A(c), and 8.4(c).

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA Standards")⁶ and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.⁷ When imposing a sanction after a finding of lawyer misconduct, a hearing board must consider the duty violated, the lawyer's mental state, and the actual or potential injury caused by the lawyer's misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

Moreover, where multiple charges of misconduct are proved, the ABA *Standards* counsel that "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations."⁸ In all disciplinary proceedings, the Court's utmost concern is protecting the public from errant lawyer conduct.⁹

⁶ Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2d ed. 2019).

⁷ See *In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

⁸ ABA *Standards* at xx.

⁹ See *People v. Richardson*, 820 P.2d 1120, 1121 (Colo. 1991).

ABA Standard 3.0 – Duty, Mental State, and Injury

Duty: Respondent violated the duties he owed to his client, Giglio, to abide by her wishes regarding settlement funds and to preserve her property, and he violated his duty as a professional to pay Marrick’s lien, as he had agreed to do.

Mental State: Respondent acted knowingly when he converted Marrick’s funds to his own use, as he knew that he was obligated to disburse those funds to Marrick.

Injury: Respondent caused Marrick actual financial injury, as the company was deprived of its funds when it relied on Respondent’s agreement to pay its lien. He caused Giglio potential injury by exposing her to the risk that Marrick would bring legal action against her to recover the full lien amount. Although Marrick is entitled legally to pursue collection actions for the lien against Giglio personally, Marrick has not done so only because the disbursement statement shows that Respondent withheld the full lien amount from the settlement funds he disbursed to Giglio.¹⁰

ABA Standards 4.0-7.0 – Presumptive Sanction

ABA Standard 4.11 is the applicable standard for Respondent’s violations of Colo. RPC 1.15A(c) and 8.4(c), which calls for disbarment when a lawyer knowingly converts another’s property and thereby causes that person injury or potential injury. Suspension is the presumptive sanction when a lawyer knowingly fails to perform services for a client and causes injury or potential injury under ABA Standard 4.42(a). This standard applies to Respondent’s violation of Colo. RPC 1.2(a).

When there is more than one violation, the sanction “generally should be greater than the sanction for the most serious misconduct.”¹¹ Thus, we begin here with the presumptive sanction of disbarment.

ABA Standard 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations that may justify an increase in the degree of the sanction to be imposed, while mitigating factors may warrant a reduction in the severity of the sanction.¹² As explained below, the Hearing Board applies five factors in aggravation, two of which carry substantial weight. No mitigating factors apply.¹³

¹⁰ Juergens testified that Giglio was worried that she would have to pay the lien herself, even though the lien amount was withheld from her settlement proceeds. Juergens also noted that Giglio was cooperative with Marrick during this process.

¹¹ ABA Standards at xx.

¹² See ABA Standards 9.21 & 9.31.

¹³ Because Respondent did not appear at the hearing, the Hearing Board is not aware of any applicable mitigating factors.

Aggravating Factors

Prior Disciplinary Offenses – 9.22(a): Respondent was suspended from the practice of law in 2015, 2011, and 2010. The Hearing Board weighs heavily this aggravating factor of recent—and numerous—disciplinary offenses.

Respondent's 2015 discipline was premised on violations of Colo. RPC 1.3, 1.4(a)(3), 3.4(c), 8.4(c), and 8.4(d), resulting in his eight-month suspension, with four months served and four months stayed upon his successful completion of a two-year period of probation (including practice monitoring). The parties stipulated that Respondent's misconduct occurred in a single client matter (representing a husband and wife in a medical malpractice claim) in which he failed to comply with court orders and sufficiently communicate with his clients about actions he took in their case. The illness and death of Respondent's wife during the representation was a strong mitigating factor.

In 2011, Respondent was sanctioned for violating Colo. RPC 1.15(a), 1.15(b), 1.15(i)(2), 1.15(i)(3), 1.15(i)(5), 1.15(j)(1), 1.15(j)(2), 1.15(j)(7), and 5.3(a), resulting in a thirty-day suspension, all stayed upon the successful completion of a two-year period of probation (including a financial audit). In that case, the parties stipulated that Respondent had failed to appropriately manage his trust account, both paying personal expenses directly from the trust account and allowing earned fees to remain in the trust account. Respondent's probation was revoked in December 2014 after he failed to comply with a mandatory condition of probation: that he not engage in any further violation of the Colorado Rules of Professional Conduct. This probation was revoked because he was convicted of driving while ability impaired in July 2014, violating Colo. RPC 8.4(b). His failure to report his conviction violated Colo. RPC 3.4(c) and 8.4(d).

Respondent's 2010 discipline was based on his violation of Colo. RPC 1.7(b), 1.8(a), and 1.9(a), which resulted in a seventy-five day served suspension. The parties stipulated that Respondent failed to advise his partners in a real estate investment that they may want to seek outside counsel. He also represented multiple parties with conflicting interests, and represented a party with interests materially adverse to his former clients in litigation when the real estate matter was later litigated.

Dishonest or Selfish Motive – 9.22(b): Respondent withheld the full lien amount from Giglio's disbursement portion of the settlement funds but never provided those funds to Marrick. The full lien amount remains in Respondent's possession to date; Respondent personally benefited from keeping the funds. The Hearing Board considers this conduct to be both dishonest and selfish.

Pattern of Misconduct – 9.22(c): Respondent's failure here to disburse funds to a lien holder after settlement is nearly identical to the conduct underlying his suspension in January 2018. Respondent was suspended for two years in January 2018 for failing to timely pay a client's medical lien after he received the client's settlement funds, thereby violating Colo. RPC 1.8(e), 1.15A(c), and 8.4(c). Because the misconduct in this matter occurred *before*

the entry of discipline in January 2018, the prior misconduct aggravator does not apply to Respondent's January 2018 discipline.¹⁴ The conduct, however, does fit a pattern of misconduct, and we weigh this aggravating factor heavily.

Substantial Experience in the Practice of Law – 9.22(i): Respondent has practiced law for more than four decades. His lengthy practice is also an aggravating factor here.

Indifference to Making Restitution – 9.22(j): To date, Respondent still has not paid Marrick the outstanding lien balance of \$2,189.00.

Analysis Under ABA Standards and Case Law

The People assert that Respondent's misconduct warrants disbarment. Because he did not file a hearing brief or appear at the hearing, Respondent presented no argument in support of a different result. The People also request restitution in the amount of \$2,189.00, to be paid to Marrick to satisfy the outstanding lien.

As the Colorado Supreme Court's *In re Attorney F.* decision explains, hearing boards must follow a "two-step framework" for analysis: first, a presumptive sanction is identified based on the applicable duty, injury, and mental state, and second, that presumptive sanction may be adjusted based on consideration of aggravating and mitigating factors.¹⁵ This analysis may be informed by Colorado Supreme Court cases, particularly those decided after the adoption of our current disciplinary system in 1999.¹⁶ Hearing boards are called upon to exercise discretion in imposing a sanction in recognition that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."¹⁷ Accordingly, the appropriate sanction for a lawyer's misconduct must be determined on a case-by-case basis.

The PDJ's entry of summary judgment established that Respondent knowingly converted property in violation of Colo. RPC 1.2(a), 1.15A(c), and 8.4(c). Respondent violated his duty to Giglio to abide by her wishes and to protect her property. He also violated his duty to Marrick to follow the terms of the lien agreement, which he voluntarily signed after specifically requesting that Marrick agree to a lien for Giglio's medical expenses. Respondent injured Marrick when he did not satisfy the lien amount from the settlement proceeds. Respondent caused Giglio potential injury by exposing her to additional liability for the lien

¹⁴ See *People v. Honaker*, 863 P.2d 337, 340 (Colo. 1993) (misconduct that occurred contemporaneously with the misconduct from an earlier disciplinary proceeding—and before an entry of discipline—is treated as a pattern of misconduct, as opposed to evidence of prior discipline).

¹⁵ *In re Attorney F.*, 2012 CO 57, ¶ 19.

¹⁶ *Id.* at ¶ 20.

¹⁷ *Id.* (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)); *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

payment.¹⁸ With these considerations in mind, we find that disbarment is the presumptive sanction here, as Respondent knowingly converted another's property and thereby caused injury or potential injury.¹⁹

Case law also supports a sanction of disbarment. The Colorado Supreme Court recently affirmed that knowing conversion under Colo. RPC 8.4(c) occurs “when a lawyer takes money that has been entrusted to him or her by a client or third party, knowing that it is the client or third party's money and that the client or third party has not authorized the taking.”²⁰ A lawyer's knowing misappropriation of funds is serious misconduct and, under longstanding case law, warrants disbarment absent extraordinary mitigating factors.²¹

Here, no mitigating factors apply—much less extraordinary mitigation—that would justify the application of a lesser sanction. Rather, the aggravators here present significant cause for concern, because Respondent has repeatedly engaged in misconduct despite his substantial experience as a lawyer. We find that his continued failure to pay the outstanding lien, or even acknowledge that the lien amount is still owed, is especially troubling. Given the number and severity of aggravating factors, the absence of any mitigation, and the supporting body of case law, we find no basis for deviating from the presumed sanction of disbarment.

IV. CONCLUSION

The PDJ's entry of summary judgment established that Respondent knowingly converted Marrick's funds for his own benefit, violating duties he owed to his client and to Marrick. To date, Respondent still has not paid the lien, causing Marrick actual injury and causing Giglio potential harm. With a presumptive sanction of disbarment, coupled with five factors in aggravation and none in mitigation as well as a robust body of supportive case law, we conclude that Respondent's misconduct warrants disbarment.

¹⁸ We also note that both Marrick and Giglio spent significant time and effort attempting, without success, to resolve this issue with Respondent.

¹⁹ See ABA Standard 4.11.

²⁰ *Matter of Kleinsmith*, 2017 CO 101, ¶ 14.

²¹ See *People v. Wolfe*, 748 P.2d 789, 792 (Colo. 1988) (misappropriation of client funds for personal use was very serious misconduct that outweighed all mitigating factors, including evidence that the misconduct was an aberrant act that would not be repeated, and warranted disbarment rather than suspension).

V. ORDER

The Hearing Board therefore **ORDERS**:

1. **DAVID EUGENE BATH**, attorney registration number **05679**, will be **DISBARRED**. The disbarment will take effect upon issuance of an “Order and Notice of Disbarment.”²²
2. Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c), concerning winding up of affairs, notice to parties in pending matters, and notice to parties in litigation.
3. Within fourteen days of issuance of the “Order and Notice of Disbarment,” Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the PDJ setting forth pending matters and attesting, *inter alia*, to notification of clients and other state and federal jurisdictions where he is licensed.
4. The parties **MUST** file any posthearing motion **on or before Monday, February 10, 2020**. Any response thereto **MUST** be filed within seven days.
5. The parties **MUST** file any application for stay pending appeal **on or before Monday, February 17, 2020**. Any response thereto **MUST** be filed within seven days.
6. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** submit a statement of costs **on or before Monday, February 10, 2020**. Any response thereto **MUST** be filed within seven days.
7. Respondent **SHALL** make restitution of \$2,189.00 to Marrick **on or before Monday, February 24, 2020**.

²² In general, an order and notice of sanction will issue thirty-five days after a decision is entered under C.R.C.P. 251.19(b). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

DATED THIS 27th DAY OF JANUARY, 2020.

[Original signature on file]

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

[Original signature on file]

MARGARET C. CORDOVA
HEARING BOARD MEMBER

[Original signature on file]

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