

**People v. Alan D. Carlson. 16PDJ051. December 20, 2016.**

Following a sanctions hearing, the Presiding Disciplinary Judge disbarred Alan D. Carlson (attorney registration number 11205) from the practice of law. Carlson's disbarment took effect on January 24, 2017.

Carlson committed misconduct in four separate client representations. He neglected two cases, leading to their dismissal, and then lied to his clients, leading them to believe that their cases were still active. Further, he grossly mishandled funds by failing to keep clients' property separate from his own, neglecting to pay medical costs he was obligated to pay, and—most serious—dishonestly converting funds belonging to others. Last, he disregarded multiple requests for information from the disciplinary authority.

In the course of these client representations and the ensuing disciplinary investigation, Carlson violated Colo. RPC 1.1 (a lawyer shall competently represent a client); Colo. RPC 1.3 (a lawyer shall act with reasonable diligence and promptness when representing a client); Colo. RPC 1.4(a)(2) (a lawyer shall reasonably consult with a client about the means by which the client's objectives are to be accomplished); Colo. RPC 1.4(a)(3) (a lawyer shall keep a client reasonably informed about the status of the matter); Colo. RPC 1.15A(a) (a lawyer shall hold client property separate from the lawyer's own property); Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Colo. RPC 8.1(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); and Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Please see the full opinion below.

<p>SUPREME COURT, STATE OF COLORADO</p> <p>ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE</p> <p>1300 BROADWAY, SUITE 250 DENVER, CO 80203</p>	
<p><b>Complainant:</b> THE PEOPLE OF THE STATE OF COLORADO</p> <p><b>Respondent:</b> ALAN D. CARLSON</p>	<p>Case Number: <b>16PDJ051</b></p>
<p><b>OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(c)</b></p>	

Alan D. Carlson (“Respondent”) committed misconduct in four separate client representations. He neglected two cases, leading to their dismissal, and then lied to his clients, leading them to believe that their cases were still active. Further, he grossly mishandled funds by failing to keep clients’ property separate from his own, neglecting to pay medical costs he was obligated to pay, and—most serious—dishonestly converting funds belonging to others. Last, he disregarded multiple requests for information from the disciplinary authority. This conduct warrants disbarment.

**I. PROCEDURAL HISTORY**

On June 17, 2016, Geanne R. Moroye, Office of Attorney Regulation Counsel (“the People”), filed a complaint with Presiding Disciplinary Judge William R. Lucero (the “Court”) and sent copies via certified mail the same day to Respondent at his registered home and business addresses.<sup>1</sup> After Respondent failed to answer, the Court entered default on August 15, 2016, thus deeming the facts alleged in the complaint admitted and all rule violations established by clear and convincing evidence.<sup>2</sup> At the sanctions hearing on November 3, 2016, Moroye represented the People but Respondent did not appear. Robert J. Rebman testified and the People submitted Exhibits 1-3.

On November 16, 2016, the People filed a statement of costs. This statement includes both expenses incurred as part of the disciplinary case and two requested awards of restitution. Respondent filed no response.

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<sup>1</sup> Respondent was previously suspended from the practice of law for three years, effective October 9, 2015, in case number 15PDJ078.

<sup>2</sup> See C.R.C.P. 251.15(b); *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987).

## II. ESTABLISHED FACTS AND RULE VIOLATIONS

The Court adopts and incorporates by reference the averments in the admitted complaint, presented here in condensed form. Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 15, 1981, under attorney registration number 11205. He is thus subject to the Court's jurisdiction in this disciplinary proceeding.

### **Lavelle Matter**

David Lavelle was injured in a motor vehicle accident on September 2, 2010. On October 5, 2010, he signed a contingent fee agreement with Respondent for representation regarding the accident. Respondent filed a complaint on Lavelle's behalf in Larimer County District Court on September 1, 2013—the day before the statute of limitations expired. Respondent failed to file a return of service, however. The court issued several orders warning him that it would dismiss the case if he did not serve the defendant. On March 17, 2014, the court dismissed Lavelle's case.

In July 2014, Lavelle requested that Respondent provide an update about the case. Respondent replied later that month, stating that there was “no big news but I need to push on so I have some news.”<sup>3</sup> In October 2014, Lavelle emailed Respondent, expressing concern about lack of progress on the case. When Respondent did not reply, Lavelle followed up the next month. Respondent did reply this time, promising to check on the claim. Lavelle again requested a status update in January 2015.

In June 2015, after Lavelle threatened to contact the People, Respondent agreed to meet with Lavelle in person. At that meeting in July 2015, Respondent did not disclose that Lavelle's case had been dismissed.

The People contacted Respondent multiple times about their investigation of this matter and the other three client representations summarized below, but he never responded.

In the Lavelle matter, Respondent violated several Rules of Professional Conduct:

- Respondent provided incompetent representation in violation of Colo. RPC 1.1 by failing to effect service on the defendant.
- By failing to take action and thus allowing Lavelle's case to be dismissed, Respondent violated Colo. RPC 1.3, which requires a lawyer to act with reasonable diligence and promptness in representing a client.
- When Respondent neglected to inform Lavelle that he had not served the defendant, that the court had dismissed the case, and that the statute of

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<sup>3</sup> Compl. ¶ 16.

limitations had expired, he violated Colo. RPC 1.4(a)(3), which requires a lawyer to keep a client reasonably informed about the status of a matter.

- By knowingly failing to respond to the People's lawful demands for information, Respondent violated Colo. RPC 8.1(b).
- Respondent contravened Colo. RPC 8.4(c) when he dishonestly led Lavelle to believe that his case was still active and viable when in fact it had been dismissed and the statute of limitations had expired.

### **Swackhammer Matter**

On September 10, 2013, Angela Swackhammer suffered significant injuries in a motor vehicle accident. Seven days later, she and her husband, Edward Swackhammer, retained Respondent to represent them on a contingency fee basis in a personal injury action. Mr. Swackhammer instituted a claim for loss of consortium related to his wife's accident.

On October 10, 2014, a mediated settlement was reached, in which Mrs. Swackhammer was awarded \$200,000.00 and Mr. Swackhammer was awarded \$25,000.00. Before depositing any settlement funds in his trust account, Respondent distributed fees to his law firm from the trust account, noting "Swackhammer" in the memo line of each check. Later, after he received the settlement funds, Respondent paid the Swackhammers, or payees on their behalf, a total of \$81,790.89. After these distributions, \$143,209.11 remained. Respondent's legal fee would have totaled \$75,000.00, leaving \$68,209.11 to be held in trust for the Medicare set aside. Although Respondent told Mrs. Swackhammer that he would retain the \$68,209.11 to reimburse Medicare or pay other outstanding medical costs, Mrs. Swackhammer reported to the People that no medical costs were paid, she received no further funds from Respondent, and about \$65,000.00 remained outstanding in her medical costs. As of July 31, 2015, Respondent's trust account contained just over \$2,000.00, while his operating account held about \$100.00. He paid no further checks on the Swackhammers' behalf.

In his representation of the Swackhammers, Respondent violated the following rules:

- By failing to pay medical costs for Mrs. Swackhammer, instead retaining the funds set aside to pay these costs, Respondent violated Colo. RPC 1.3.
- When he failed to consult with or inform Mrs. Swackhammer about his failure to pay the medical costs and his lack of intent to do so, he transgressed Colo. RPC 1.4(a)(2). This rule states that a lawyer must reasonably consult with a client about the means by which the client's objectives are to be accomplished.<sup>4</sup>
- By neglecting to tell Mrs. Swackhammer that he had not paid her medical costs, Respondent violated Colo. RPC 1.4(a)(3).

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<sup>4</sup> Colo. RPC 1.4(a)(2).

- Respondent violated Colo. RPC 1.15(A), which requires a lawyer to hold property of clients or third persons separate from the lawyer's own property, when he failed to maintain all of the Swackhammer funds in trust.
- By knowingly failing to respond to the People's demands for information, Respondent violated Colo. RPC 8.1(b).
- By converting the Swackhammer funds to his own use, Respondent violated Colo. RPC 8.4(c). He also violated this rule when, prior to receiving any funds on the Swackhammers' behalf, he issued checks to himself from his trust account for his work on this case.

### **Rebman Matter**

Robert Rebman was injured in a motor vehicle accident on June 20, 2013. On March 11, 2014, he retained Respondent in his personal injury matter. The case settled in August 2014. On August 22, 2014, Respondent deposited a check from Allstate Insurance in the amount of \$240,000.00 into his trust account. On July 31, 2015, after Respondent wrote various checks from the trust account, including checks payable to his own law firm, the account balance was approximately \$2,000.00.

Respondent was suspended from the practice of law for three years on October 9, 2015. On October 22, 2015, Rebman contacted Respondent to ask about payment of medical bills, among other things, but Respondent did not respond. Rebman then contacted Anthem Blue Cross and Blue Shield and discovered that a bill in the amount of \$2,422.44 had never been paid. Rebman reported to the People that Medicare is still owed approximately \$21,000.00 related to this case.

On November 30, 2015, Rebman terminated Respondent and requested the return of \$40,000.00 held in Respondent's trust account. Respondent did not reply.

In the Rebman matter, Respondent violated the following rules:

- By failing to pay Rebman's medical costs from the settlement proceeds, Respondent violated Colo. RPC 1.3.
- When he disregarded Rebman's requests for information about his case, Respondent violated Colo. RPC 1.4(a)(3).
- By failing to maintain the Rebman funds in trust, he violated Colo. RPC 1.15(A).
- Respondent committed dishonest conduct in contravention of Colo. RPC 8.4(c) when he did not respond to Rebman's request for information, disregarded Rebman's request to turn over \$40,000.00, paid himself over \$10,000.00 from the Rebman funds, and did not maintain the Rebman funds in trust.

## Dice Matter

On June 12, 2015, Respondent filed a complaint on behalf of his clients Joseph and Nicole Dice. Dice had suffered injuries in a motor vehicle accident, and his wife had a loss of consortium claim. In August 2015, the court dismissed one of the defendants because the defendant had not been served. The court also ordered Respondent to file a motion for default judgment against the other defendant or to otherwise inform the court why such a motion would be inappropriate. When Respondent did not do so, the court dismissed the case for failure to prosecute in September 2015.

In January 2016, several months after Respondent's law license had been suspended, Mr. Dice emailed Respondent, inquiring about the status of his case. Respondent replied, saying he would follow up with the adjuster and report back to him later that week. Respondent did not inform Mr. Dice that he had been suspended and thus was barred from working on the case. Respondent also omitted any mention of the case's dismissal.

In the course of representing the Dices, Respondent transgressed multiple rules:

- By failing to prosecute the case, Respondent violated Colo. RPC 1.1.
- By failing to effect service of process on a defendant and allowing the case to be dismissed, Respondent violated Colo. RPC 1.3.
- When he elected not to inform Mr. Dice that his case had been dismissed, Respondent violated Colo. RPC 1.4(a)(3).
- When he failed to respond to the court's order and thus allowed the case to be dismissed, Respondent violated Colo. RPC 3.4(c), which prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.
- By knowingly failing to respond to the People's demands for information, Respondent violated Colo. RPC 8.1(b).
- Respondent contravened Colo. RPC 8.4(c) in his January 2016 communications with Mr. Dice because he led Mr. Dice to believe the case was still active and that he could lawfully work on the matter.

### III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA Standards") and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.<sup>5</sup> When imposing a sanction after a finding of lawyer misconduct, the Court must consider the duty violated, the lawyer's mental state, and the

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<sup>5</sup> See *In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

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.

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

*Duty:* By neglecting cases, failing to communicate with clients, misrepresenting facts, and failing to safeguard client funds, Respondent violated his duties to his clients. The Court deems Respondent's failure to safeguard funds owed to third-party medical providers as a dereliction of his duties to the public. Respondent also violated his duty to the legal system when he violated a court order in the Dice case. And last, by disregarding the People's requests for information, he transgressed his duties as a professional.

*Mental State:* The order of default establishes that Respondent knowingly violated Colo. RPC 3.4(c) and 8.1(b). The Court concludes that Respondent knowingly committed the remaining rule violations here but that his deceit of his clients, in particular, was intentional.

*Injury:* Respondent has occasioned widespread harm. He seriously injured Lavelle and the Dices by causing their cases to be dismissed. He harmed all of his clients by providing inadequate representation and not communicating with them. He deprived third parties of significant amounts of funds to which they were entitled. And he injured the legal profession by impeding the People's investigation and undermining public confidence in the bar.

Rebman provided additional testimony at the sanctions hearing about how Respondent's conduct affected him. Rebman said that he has spent hours trying to address his outstanding Medicare bills with no resolution yet. He found Respondent's conduct to be upsetting and it shook his faith in the legal profession.

### **ABA Standards 4.0-7.0 – Presumptive Sanction**

Several ABA Standards apply here. ABA Standard 5.11(b) indicates that disbarment is generally warranted when a lawyer engages intentional conduct involving dishonesty and when that conduct seriously adversely reflects on the lawyer's fitness to practice. Disbarment is also the presumptive sanction under ABA Standard 4.41(b), which applies when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to the client. In addition, as described below, Respondent has already been suspended for similar misconduct. The Court therefore applies ABA Standard 8.1, which calls for disbarment when a lawyer has been suspended for similar misconduct and knowingly engages in further acts of misconduct that harm the client, the public, the legal system, or the profession.

## **ABA Standard 9.0 – Aggravating and Mitigating Factors**

Aggravating circumstances include any considerations that may warrant an increase in the degree of discipline to be imposed, while mitigating circumstances may justify a reduction in the severity of the sanction.<sup>6</sup>

In this case, the Court is not aware of any applicable mitigating factors but finds that six aggravating factors are present. First, Respondent has a history of discipline.<sup>7</sup> In case number 11PDJ018, he was suspended for one year and one day, all stayed upon the successful completion of a two-year period of probation, effective September 13, 2011. Respondent failed to properly safeguard funds belonging to others and engaged in conduct that was dishonest toward his law partners. He thereby violated Colo. RPC 1.15(a), 1.15(c), and 8.4(c).

In case number 15PDJ078, Respondent was suspended for three years, effective October 9, 2015, based on misconduct in two separate personal injury representations. In one matter, Respondent failed to answer written discovery, despite a court order directing him to do so. The court dismissed the case without prejudice, and the statute of limitations soon expired. Respondent did not inform his client of the dismissal. Instead, he created a “distribution schedule” showing that his client was entitled to fictitious settlement proceeds. Respondent then misrepresented the status of the case to a medical provider. In the second matter, Respondent filed suit on behalf of his client but failed to take any action, and the court dismissed the case. Respondent did not inform his client of the dismissal. For a year and a half, he repeatedly avoided the client’s inquiries and then misled her about the status of her case. In these cases, Respondent violated Colo. RPC 1.1, 1.3, 1.4(a)(3), 8.4(c), and Colo. RPC 8.4(d) (a lawyer shall not engage in conduct prejudicial to the administration of justice).

As a second aggravating factor, the established rule violations make clear that Respondent acted dishonestly and selfishly.<sup>8</sup> Third, Respondent engaged in a pattern of misconduct by neglecting multiple clients, failing to safeguard funds, and acting dishonestly.<sup>9</sup> Next, Respondent engaged in multiple distinct types of misconduct.<sup>10</sup> Fifth, Respondent had substantial experience as a lawyer at the time of his misconduct.<sup>11</sup> And sixth, Respondent has not made restitution to the aggrieved parties in this case.<sup>12</sup>

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<sup>6</sup> See ABA Standards 9.21 & 9.31.

<sup>7</sup> ABA Standard 9.22(a); see Ex. 3.

<sup>8</sup> ABA Standard 9.22(b).

<sup>9</sup> ABA Standard 9.22(c).

<sup>10</sup> ABA Standard 9.22(d).

<sup>11</sup> ABA Standard 9.22(i).

<sup>12</sup> ABA Standard 9.22(j).

## **Analysis Under ABA Standards and Colorado Case Law**

The Court is mindful of the Colorado Supreme Court's directive to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,<sup>13</sup> recognizing that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."<sup>14</sup>

The Colorado Supreme Court has held that knowing or intentional misappropriation of funds from clients or other parties warrants disbarment, except where substantial mitigating factors are present.<sup>15</sup> This settled case law, coupled with the presumptive sanction and the preponderance of aggravating factors, clearly supports imposition of disbarment here. Respondent's failure to participate in these proceedings and his failure to make restitution demonstrate that he no longer wishes to practice law and has no intention of making amends for his misconduct.

### **IV. CONCLUSION**

In the client representations underlying this disciplinary case, Respondent entirely abdicated his duties to his clients, the legal system, the public, and the legal profession. He not only knowingly converted funds but also intentionally deceived his clients, caused cases to be dismissed through inaction, and consistently disregarded requests for information from disciplinary authorities. The Court thus disbars Respondent.

### **V. ORDER**

The Court therefore **ORDERS**:

1. **ALAN D. CARLSON**, attorney registration number **11205**, is **DISBARRED** from the practice of law in the State of Colorado. The **DISBARMENT SHALL** take effect only upon issuance of an "Order and Notice of Disbarment."<sup>16</sup>
2. To the extent applicable, Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c).
3. Within fourteen days after the effective date of the disbarment, Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the Court setting forth pending matters and attesting, *inter alia*, to notification of clients and of other jurisdictions where the attorney is licensed.

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<sup>13</sup> See *In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *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).

<sup>14</sup> *In re Attorney F.*, 285 P.3d at 327 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

<sup>15</sup> See, e.g., *People v. Varallo*, 913 P.2d 1, 10-11 (Colo. 1996); *People v. Lavenhar*, 934 P.2d 1355, 1358-59 (Colo. 1997).

<sup>16</sup> 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) or (c). 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.

4. Any application for stay pending appeal **MUST** be filed with the Court **on or before January 10, 2017**. Any response thereto **MUST** be filed within seven days.
5. Respondent **SHALL** pay the costs of these proceedings. The People have already submitted a statement of costs.<sup>17</sup> Any response thereto **MUST** be filed **on or before December 27, 2016**.
6. Respondent shall pay **RESTITUTION** as follows:
  - a. **On or before January 17, 2017**, Respondent **SHALL** pay \$40,000.00 to the Colorado Attorneys' Fund for Client Protection in compensation for the amount the Fund paid to Robert Rebman; and
  - b. **On or before January 17, 2017**, Respondent **SHALL** pay \$61,009.11 to Angela and Edward Swackhammer.

DATED THIS 20<sup>th</sup> DAY OF DECEMBER, 2016.

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WILLIAM R. LUCERO  
PRESIDING DISCIPLINARY JUDGE

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<sup>17</sup> The Court grants the People's requests for restitution in this disciplinary opinion as noted below, but the Court reserves ruling on the remainder of the People's statement of costs.