

Summary of Opinion. People v. Cleland, No. GC98B118, 9/17/99. Attorney Regulation
The Presiding Disciplinary Judge and the Hearing Board suspended the Respondent, James A. Cleland, for a period of two years, for breaching a fiduciary duty he assumed when he disbursed funds held in trust, pending resolution of settlement discussions to his client, and for failing to disclose that disbursement to the parties engaged in the settlement negotiations, in violation of Colo. RPC 1.15(b), Colo. RPC 1.15(c), Colo. RPC 8.4(a) and Colo. RPC 8

SUPREME COURT, STATE OF COLORADO
CASE NO GC98B118
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE
THE PRESIDING DISCIPLINARY JUDGE

OPINION AND ORDER IMPOSING SANCTIONS

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

JAMES A. CLELAND,

Respondent.

Opinion by Presiding Disciplinary Judge Roger L. Keithley, Hearing Board members Corrine Martinez-Casias and Daniel C. Kogovsek.

SANCTION IMPOSED: ATTORNEY SUSPENDED FOR TWO YEARS

This matter was heard on July 13, 1999 before the Presiding Disciplinary Judge (“PDJ”) and two hearing board members, both members of the bar. Gregory G. Sapakoff, Assistant Attorney Regulation Counsel, represented the People of the State of Colorado (the “People”). James A. Cleland did not appear either in person or through counsel.

I. CHARGES

On November 3, 1998, the People filed a Complaint in this matter alleging violations of the Colorado Rules of Professional Conduct (“Colo. RPC”) 1.15(b)(failure to deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, render a full accounting regarding such property); Colo. RPC 1.15(c)(failing to keep separate funds in which the lawyer and another person claim interests until there is an accounting and severance of their interests); Colo. RPC 4.1(a)(knowingly making a false or misleading statement of fact or law to a third person in the course of representing a client); Colo. RPC 8.4(a)(violating a rule of professional conduct); and Colo. RPC 8.4(h)(engaging in any other conduct that adversely reflects on the lawyer’s fitness to practice law).

Service of the Complaint and Citation were effected by certified mail on November 4, 1998 pursuant to C.R.C.P. 251.32(b). Although Cleland accepted service of the Complaint and Citation by signing the certified mail return receipt on November 9, 1999, he failed to answer the allegations advanced in the Complaint. The People moved for default on February 4, 1999, and Cleland filed a Response thereto on February 17, 1999. The Response did not directly address the matters raised in the People’s Motion for Default. By Order dated March 2, 1999, the PDJ ordered Cleland to set the Motion for Default for a hearing within fifteen days, advising Cleland that if he failed to do so, the PDJ would grant the People’s Motion for Default. Cleland failed to set the Motion for Default for hearing, and on April 16, 1999,

default entered against Cleland, deeming the facts alleged in the Complaint admitted. See *In the Matter of Michael F. Scott*, 979 P.2d 572, 573 (Colo. 1999); *People v. Pierson*, 917 P.2d 275, 275 (Colo. 1996).

Notice of the hearing on sanctions was mailed to Cleland on May 4, 1999, sixty days in advance of the scheduled hearing. Cleland failed to appear. The People's Exhibit 1, the Report of Investigation, was admitted into evidence pursuant to C.R.C.P. 251.15(b). The People offered no additional evidence.

The PDJ and Hearing Board members reviewed the factual allegations deemed admitted from the Complaint and the contents of Exhibit 1, heard argument of counsel, and made the following findings of fact which were established by clear and convincing evidence:

II. FINDINGS OF FACT

Cleland has taken and subscribed the oath of admission, was admitted to the bar of the Supreme Court of Colorado on September 8, 1989, and is registered upon the official records of the Supreme Court, attorney registration number 18635. Cleland is subject to the jurisdiction of this court pursuant to C.R.C.P. 251.1(a).

In 1996 Cleland represented Gem Valley Homes, Inc. ("Gem"), a home building contractor. Joseph and Dawn Ferris hired Gem to construct a new home. Gem, in turn, retained Stacey Baker ("Baker") as a subcontractor and to provide construction management services. By November 1996, construction had been completed and the Ferrises owed Gem a final payment

of approximately \$8,600 under the contract. Gem, however, had failed to pay some of its subcontractors on the project and had failed to obtain lien releases from them. Baker was among the subcontractors who had not been paid; he had recorded a statement of lien in July 1996, claiming that he was owed \$29,285 for work and materials.

By letter dated November 4, 1996 Cleland, acting as counsel for Gem, sent a letter to the Ferris' attorney concerning the final payment under the construction contract, stating that Gem understood that some or all of the remaining \$8,600 being withheld by the Ferrises should be paid to the subcontractors. The letter indicated that Gem had authorized Cleland to receive the funds, hold the funds in trust, and interplead the funds with the court if suit was filed regarding payments or liens. The letter stated, in part:

Gem Valley Homes, Inc. is prepared to tender a release of lien in exchange for the final payment due under the contract and to hold the final payment in trust (or interplead it) pending resolution of the issues with the subcontractors.

Cleland sent a copy of the letter to the attorney for Baker. As a result of Cleland's representations in the November 4, 1996 letter, the Ferris' attorney hand-delivered a check to Cleland in the amount of \$8,600, representing the balance owed under the Gem construction contract.

In January 1997, Baker filed suit in La Plata County District Court, Case No. 97CV7, against Gem. Shortly thereafter, Cleland and Baker's attorney began to discuss settlement. By March 1997, the parties had reached an agreement, whereby Gem confessed judgment in favor of Baker and agreed to

make payments on the judgment commencing in May 1997. Gem failed to make the initial May payment.

In June 1997, the attorney for Baker conducted a C.R.C.P. 69 examination to determine the location of Gem's assets. Cleland appeared at the C.R.C.P. 69 examination without any representative of his client. Cleland informed Baker's attorney at that time that he no longer had the Ferris funds. Cleland had disbursed the Ferris funds to Gem before the settlement was reached. To date, Baker has received no payments toward satisfaction of the judgment he obtained against Gem.

III. CONCLUSIONS OF LAW

The Complaint in this disciplinary proceeding alleges that Cleland's conduct involves dishonesty, fraud, deceit or misrepresentation and constitutes violations of Colo. RPC 1.15(b) (failing to promptly deliver funds in which a client and a third party claim an interest); Colo. RPC 1.15(c)(failing to keep property separate in which the lawyer and another person claim an interest, until there is an accounting and severance of the various interests in the property); Colo. RPC 4.1(a)(making a false or misleading statement of fact to a third person in the course of representing a client); Colo. RPC 8.4(h)(engaging in other conduct that adversely reflects on the lawyer's fitness to practice law), and Colo. RPC 8.4(a)(violating a rule of professional conduct).

Cleland represented to both Baker and the Ferrises in his November 4, 1996 letter that he would take possession of the disputed \$8,600 amount due

under the Gem contract and hold it in trust until the dispute was resolved.¹ In reliance upon that representation, the Ferris' attorney delivered the \$8,600 to Cleland to be held in trust pending resolution of the dispute. The facts establish that Cleland knew he was in possession of funds to which his client and others made claim. Notwithstanding that knowledge and the clear proscription of Colo. RPC 1.15 (b) and (c), Cleland paid the disputed funds to his client, continued in negotiations knowing those with whom he was negotiating were relying upon the availability of the \$8,600 in formulating their positions, consummated a settlement agreement which, in part, was premised upon Cleland's earlier representations which were no longer accurate, and delayed disclosing to Baker or his attorney the true state of facts until it became apparent that Cleland's client was not going to honor the settlement agreement.

At a minimum, Cleland's conduct and his November 4, 1996 letter induced reliance by Baker that Cleland would hold the \$8,600 until Baker's dispute with Gem was resolved. *See Conyers v. Lee*, 511 P.2d 506, 509 (Colo. App. 1973)(holding that a patient's attorney was liable to physician for any damage the physician suffered as a result of a breach of contract resulting from the attorney's agreement and subsequent failure to withhold sums from settlement in which the physician claimed an interest).

¹ Although the quoted language from the November 4, 1996 letter set forth in the Findings of Fact states that "Gem . . . is prepared . . . to hold the final payment in trust", other language which was summarized in the Complaint incorporates Cleland's representation that the funds will be held by him in his trust account.

Moreover, when Cleland accepted the \$8,600, he voluntarily assumed fiduciary responsibilities of a trustee with respect to those funds, even though Baker was not his client. Cleland breached those responsibilities both by disbursing the funds to his client, and by failing in his obligation to inform Baker that he had disbursed the funds immediately upon his election to violate the conditions of his trusteeship. *People v. Nulan*, 820 P.2d 1117, 1119 (Colo. 1991).

Cleland was obligated by the terms of his November 4, 1996 letter to maintain the funds in his trust account until the entitlement to the funds was resolved.² See CBA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, Formal Op. 94 (1993)(discussing the ethical duties relating to a client's property held by a lawyer in which a third party has an interest). See *In the Matter of Royce Edward Tolley*, 975 P.2d 1115, 1120 (Colo. 1999)(holding that disbarment was warranted pursuant to conditional admission of the parties where attorney, among other rule violations, made representations to interested parties that the funds entrusted to him were being held in his trust account when funds had actually been misappropriated to attorney's own use); *People v. Rodriguez*, 889 P.2d 681, 682 (Colo. 1995)(suspending attorney for, in part, misrepresenting that funds were in trust account). Cleland's failure to do so violated Colo. RPC 1.15(b) and (c). The violation of these rules also established a violation of Colo. RPC 8.4(a)(violation of a rule of professional conduct).

² Alternatively, Cleland could have instituted an interpleader action and transferred possession of the funds to the

Regarding the alleged violation of Colo. RPC 4.1(a)(making a false or misleading statement of fact to a third person in the course of representing a client), the People argued that Cleland violated this rule by making the false statement in his November 4, 1996 letter that he would hold the disputed funds until the pending issues were resolved. For the PDJ and Hearing Board to conclude that a violation of Colo. RPC 4.1(a) occurred, the People must prove that the statement they contend to be false or misleading was false or misleading when made. See *Board of County Com'rs of Summit County v. DeLozier*, 917 P.2d 714, 716 (Colo. 1996)(holding that in an equitable estoppel claim for negligent misrepresentation of facts, the misrepresentation must be of material fact that presently exists or has existed in the past) citing *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, 892 P.2d 230, 237 (Colo.1995); *Ballow v. PHICO Ins. Co.*, 875 P.2d 1354, 1361 (Colo. 1993)(holding that in order to prove fraud, a plaintiff must establish: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) that the representation was made with the intention that it be acted upon; and (5) damage caused by the representation).

The Complaint is silent regarding Cleland's intent, and the People offered no evidence to establish his intent on or about November 4, 1996, when the letter was written. Although the People argued that it was a fair

court pending resolution of the dispute.

inference from Cleland's conduct during the next two months that his intent on November 4 was contrary to the statement contained in the letter, it is an equally fair inference that the statement in the letter was in fact his intent on that day, but subsequent events altered his intent. Consequently, the PDJ and Hearing Board cannot find that the People have established by clear and convincing evidence that the statement contained in Cleland's November 4, 1996 letter was a false or misleading statement of fact when made, and therefore that Colo. RPC 4.1(a) was violated.

The charged violation of Colo. RPC 8.4(h)(other conduct adversely reflecting on a lawyer's fitness to practice law) requires proof that the lawyer engaged in conduct, the totality of which reflects that he or she lacked the personal or professional moral and/or ethical qualifications required of those authorized to practice law. Conduct involving violence, lack of honesty, violation of trust, serious interference with the administration of justice, criminal endeavors, or comparable misconduct is required to establish a violation of Colo. RPC 8.4(h). *See People v Sheffer*, GC98A112 (Colo. P.D.J. 1999) 28 COLO. LAW. 142, 145 (Sept. 1999); *People v. Egbune*, No. GC98A13 (Colo. P.D.J. 1999) 28 Colo. Law 132, 134 (Sept. 1999)(holding that the attorney's conduct must be viewed in light of the totality of the circumstances to determine whether that conduct constitutes a violation of Colo. RPC 8.4(h)); *People v. Theodore*, 926 P.2d 1237, 1242-43 (Colo. 1996)(holding that attorney's engaging in conduct involving dishonesty amounts to conduct that adversely reflects on his fitness to practice law); *People v. Good*, 893 P.2d 101,

104 (Colo. 1995)(decided under prior rule DR 1-102(A)(6)); *People v. Bergner*, 873 P.2d 726, 727 (Colo. 1994) (decided under prior rule DR 1-102(A)(6)).

Viewing the totality of Cleland's misconduct as a serious violation of trust, the P.D.J. and Hearing Board found that the People established a violation of Colo. RPC 8.4(h). *See Egbune, supra*, and *Sheffer, supra*. Indeed, Cleland's failure to satisfy his obligation to immediately inform Baker that the \$8,600 had been disbursed to Gem, standing alone, rises to the level of misrepresentation. *See Egbune, supra* (holding an attorney's receipt and disbursement of settlement funds while on notice of another attorney's claimed interest, coupled with the respondent's failure to disclose information to the other attorney is professional misconduct). After the disbursement of the \$8,600 to Gem, Cleland knowingly continued to negotiate and consummate a resolution of entitlement to the \$8,600 knowing that Baker's attorney was proceeding under the false presumption that the funds were still in Cleland's trust account. Such intentional misconduct, taken in its totality, is the type of conduct Colo. RPC 8.4(h) was intended to prohibit.

The People argued that the facts admitted in the Complaint also establish a violation of Colo. RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation). The People acknowledged that the Complaint does not specifically charge a violation of Colo. RPC 8.4(c) but requested the PDJ and Hearing Board to find a violation of that rule notwithstanding the

People's failure to charge it in the Complaint. At the conclusion of their case in chief, the People moved to amend the Complaint.³

C.R.C.P. 251.14, the disciplinary rule which governs the content of all disciplinary complaints, provides in part:

(a) Contents of Complaint . . . (2) . . . The complaint shall set forth clearly and with particularity the grounds for discipline with which the respondent is charged and the conduct of the respondent which gave rise to those charges.

The rule requires that the charging document in a disciplinary case set forth both a factual basis for the charges and the legal basis upon which the People seek discipline. *See In the Matter of Andrew L. Quiat*, 979 P.2d 1029, 1037 (Colo. 1999)(*en banc*)(*citing People v. Emeson*, 638 P.2d 293, 294 (Colo. 1981) and holding that under a due process rationale the charges contained in the formal complaint circumscribe the scope of the disciplinary proceedings). *See also, In re Chandler*, 641 N.E. 2d 473, 478 (1994)(stating, "Generally, an attorney may not be disciplined for instances of uncharged misconduct; to do so would violate the respondent's right to procedural due process and our own notions of candor and fairness."); *People v. Chastain*, No. GC98A53, slip op. at 5-6 (Colo. P.D.J. August 11, 1999). The Complaint in this case does not specifically refer to Colo. RPC 8.4(c). Although the Complaint does refer to C.R.C.P. 241.6 as providing a basis for discipline, C.R.C.P. 241.6 merely recites that a violation of any rule of professional conduct constitutes grounds for discipline and does not give notice of the

³ The court denied the People's Motion to Amend to include a violation of Colo. RPC 8.4(c) by separate Order.

specific rule applicable to the misconduct alleged. Consequently, even though the Complaint refers generally to conduct involving dishonesty, fraud, deceit or misrepresentation, it does not meet the “with particularity” pleading requirement of C.R.C.P. 251.14(a)(2).⁴ See *In the Matter of John Ruffalo, Jr.*, 390 US 544, 550 (1968); but see *The Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). The charges in this action do not include a charged violation of Colo. RPC 8.4(c) and the PDJ and Hearing Board cannot find such a violation.⁵

IV. SANCTION/IMPOSITION OF DISCIPLINE

Members of the public, both clients and non-clients, frequently rely upon lawyers to hold their funds in the lawyer’s trust account pending the outcome of uncertain events. A lawyer’s failure to uphold this trust is a serious breach of the lawyer’s responsibilities to the client or non-client and brings distrust upon the profession.

The ABA *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) (“ABA *Standards*”) are the guiding authority for selecting the appropriate sanction to impose for lawyer misconduct.

ABA *Standard* 5.11 provides:

Disbarment is generally appropriate when:
(a) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or

⁴ Conduct involving dishonesty, fraud, deceit or misrepresentation may be prohibited by several of the rules of professional conduct. See Colo. RPC 3.3; Colo. RPC 3.4; Colo. RPC 4.1; Colo. RPC 7.1; Colo. RPC 8.1; Colo. RPC 8.2; and Colo. RPC 8.4.

⁵ Moreover, the conduct upon which the People rely to support the uncharged violation of Colo. RPC 8.4(c) is the same conduct relied upon to establish the Colo. RPC 8.4(h) violation which is established by the evidence. The same conduct cannot establish both a violation of Colo. RPC 8.4(c) and Colo. RPC 8.4(h). *People v. Righter*, No. GC98A120 (Colo. P.D.J. 1999), 28 Colo. Law. 140, 141 (Sept. 1999).

misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Under the ABA *Standards*, Cleland's misconduct presumes disbarment to be the appropriate discipline. Colorado law, however, suggests a lesser sanction. Both in *People v. McDowell*, 942 P.2d 486 (Colo. 1997) and *People v. Sims*, 913 P.2d 526 (Colo. 1996) the Colorado Supreme Court disbarred the lawyers for violating their fiduciary responsibilities by disbursing funds deposited in their trust accounts. In both of these cases, however, the decision to disbar arose, in part, from the fact that at least a portion of the funds disbursed ultimately was expended to benefit the lawyer. In *Nulan*, 820 P.2d at 1119, an attorney disbursed funds from his trust account contrary to his fiduciary responsibilities, but the disbursement did not result in personal gain for the lawyer. The Supreme Court noted that disbarment was the presumed sanction, identified substantial mitigating factors, and imposed a sixty day suspension. *Nulan* provides helpful guidance in determining the appropriate sanction, and suggests that personal gain by the lawyer is a significant consideration in determining the appropriate discipline. No evidence of benefit to Cleland was offered in this case.

The PDJ and Hearing Board considered certain factors in aggravation pursuant to ABA *Standards* 9.22. The People advised the PDJ and Hearing Board that Cleland had received one letter of admonition in 1994 for neglect of a legal matter. Under ABA *Standards* 9.22(a) prior discipline is an aggravating factor. The People also argued additional aggravation because

there was no indication of remorse or restitution under ABA *Standards* 9.22(g) and (j) respectively. A lack of evidence showing remorse or restitution does not establish, by clear and convincing evidence, the lack of remorse or restitution. Rather, it reflects a lack of proof. That lack of proof, however, may be attributable to Cleland's complete lack of cooperation and involvement in these proceedings. Apart from Cleland's single Response to the People's Motion for Default, which did not address the issues presented in the Motion for Default, Cleland failed to Answer the Complaint, failed to comply with the Orders issued in this proceeding, and failed to be present and participate in the trial of the disciplinary charges. Those failures constitute a bad faith obstruction of the disciplinary proceeding and is further aggravation pursuant to ABA *Standards* 9.22(e).

No factors in mitigation pursuant to ABA *Standards* 9.32 were presented.

The PDJ and Hearing Board conclude, based on the analysis set forth above, that Cleland's misconduct constituted a violation of Colo. RPC 1.15(b), Colo. RPC 1.15(c), and Colo. RPC 8.4(h). The PDJ and Hearing Board do not find by a clear and convincing standard that the People established a violation of Colo. RPC 4.1(a) and that charge is, therefore, not proven and is dismissed. The PDJ and Hearing Board accordingly find that a suspension from the practice of law for a period of two (2) years is the appropriate sanction.

V. ORDER

It is therefore ORDERED:

1. James A. Cleland is SUSPENDED from the practice of law in the State of Colorado for a period of TWO (2) years effective October 18, 1999;
2. James A. Cleland shall pay the costs of these proceedings within sixty (60) days of the date of this Order;
3. The People shall submit a Statement of Costs within ten (10) days of the date of this Order. Respondent shall have five (5) days thereafter to submit a response

Copies to:

Gregory G. Sapakoff Via Hand Delivery

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