People v. Head. 09PDJ042 (consolidated with 09PDJ092). May 18, 2010. Attorney Regulation. The Hearing Board publicly censured John Frederic Head (Attorney Registration Number 03077). Respondent failed to reduce a flat-fee agreement to writing and deposited his client's advance fee into an operating account, refunding the sum eight months after his client requested return of her money. In an unrelated matter, Respondent collected money from clients to pay their third-party vendor costs for service of process but failed to timely remit those funds to the third-party vendor. Respondent's misconduct constitutes grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.5(b), 1.15(a), 1.15(b), 1.15(c) and 1.16(d).

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:** JOHN FREDERIC HEAD	Case Number: **09PDJ042 (consolidated with 09PDJ092)**
DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)	

On May 18, 2010, a Hearing Board composed of F. Stephen Collins and Terry F. Rogers, members of the Bar, and William R. Lucero, the Presiding Disciplinary Judge ("PDJ"), held a half-day hearing pursuant to C.R.C.P. 251.18. Charles E. Mortimer, Jr., appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and John Frederic Head ("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. ISSUE AND SUMMARY

A lawyer must hold property of others with the care required of a professional fiduciary. In one matter, Respondent admits he failed to reduce a flat-fee agreement to writing and deposited the fee into an operating account, refunding the sum eight months after his client requested the return of her money. In an unrelated matter, Respondent acknowledges he collected money from clients to pay their costs related to service of process but failed to timely remit those funds to the third-party vendor. What Rules of Professional Conduct have been violated, and what is the appropriate sanction?

As regards the first matter, the Hearing Board finds clear and convincing evidence that Respondent violated Colo. RPC 1.5(b), 1.15(a), 1.15(c) and 1.16(d), but that he did not violate Colo. RPC 1.4(a)(3). In the second matter, the Hearing Board concludes Respondent violated Colo. 1.15(a) and 1.15(b), but we cannot conclude he violated Colo. RPC 8.4(c). In light of the substantial mitigating factors presented, the Hearing Board determines a public censure is warranted in this instance.

II. PROCEDURAL HISTORY

On May 20, 2009, the People filed a Complaint in case 09PDJ042, alleging Respondent had violated Colorado Rules of Professional Conduct 1.5(b), 1.15(a), 1.15(c), 1.16(d) and 1.4(a)(3). Respondent filed an Answer on July 8, 2009. On October 20, 2009, the People filed a Complaint in case 09PDJ092, alleging Respondent had violated Colorado Rules of Professional Conduct 1.15(a), 1.15(b) and 8.4(c). Respondent filed an Answer on November 30, 2009. The PDJ consolidated the two cases on January 11, 2010. On March 9, 2010, the parties filed a stipulation, setting forth certain facts and law. During the May 18, 2010, hearing, the Hearing Board heard testimony and considered the People's exhibits 1-5, to which Respondent stipulated.

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 September 27, 1972. He is registered upon the official records, Attorney Registration No. 03077, and is thus subject to the jurisdiction of the Hearing Board in these disciplinary proceedings. Respondent's registered business address is 1860 Blake Street, Suite 300, Denver, CO 80202.

Representation of Barbara Fox

In September 2007, Barbara Fox ("Fox"), acting *pro se*, filed a lawsuit for $12,000.00 in damages in Arapahoe County Court against Mortgage Planning and Lending Specialists ("Mortgage Specialists"), a mortgage brokerage company, arising from false representations it had allegedly made when granting Fox a loan. Fox also filed suit against two of the company's principals, Leo Shifrin ("Shifrin") and Mathew Green ("Green"). Fox had personally served a summons and complaint on Green, but she was having difficulty prosecuting her case and did not have the funds available to hire a lawyer on an hourly basis.

On January 11, 2008, Fox met with Respondent, a solo practitioner, who was litigating similar claims against Mortgage Specialists, Shifrin and Green, and who had completed substantial amounts of discovery that would be germane to Fox's case. Because Respondent recognized another lawyer would likely not assist Fox, given that the damages she sought were limited, and because Respondent had work product available and relevant to Fox's claims, Respondent agreed to represent Fox.

Respondent proposed the following arrangement: Respondent would charge Fox a flat fee of $5,000.00. An hourly rate of $425.00 per hour would be quoted in the fee agreement, but that rate would only be used in an application for statutory attorney's fees if Fox prevailed. Respondent would be entitled to any attorney's fees awarded, and he would be reimbursed for all costs he advanced during the litigation. Fox agreed with this arrangement and gave Respondent a check for $5,000.00, which Respondent deposited into his operating account. Due to a looming trial date in federal court, however, Respondent neglected to memorialize this understanding in a written fee agreement. Respondent stipulated to a violation of Colo. RPC 1.5(b) for failing to reduce his fee agreement with Fox to writing.

Following the engagement, Respondent incurred costs and performed some work in Fox's case; he amended her complaint, re-filed it in district court, and arranged for service of process on the named defendants. Through no fault of Respondent, however, service could not be effected quickly, and Fox grew tired of delays. In early August 2008, Fox directed Respondent to halt the litigation and requested return of her $5,000.00 fee. After negotiations with Fox, Respondent agreed to refund the entire amount, but due to a "cash crunch," he delayed in doing so until April 2009 – eight months after Fox sought return of her money.

The Hearing Board concludes Respondent violated Colo. RPC 1.15(a), which mandates an attorney hold property of clients apart from the lawyer's own property by depositing the client's property in a separate trust account.[1] Respondent contends these funds were earned on receipt to compensate him for the bank of knowledge, experience and work product he amassed in litigating prior cases. But all fees deemed "earned on receipt" must be fully documented in writing, including a detailed description of the benefit being conferred on the client.[2] Because there was no such writing here, the Hearing Board views Respondent's arrangement with Fox as a flat-fee agreement and concludes the $5,000.00 advanced to Respondent was Fox's property. As such, Respondent was required to hold these funds in a separate trust account until he performed legal services on Fox's behalf.

We likewise find Respondent violated Colo. RPC 1.15(c). This rule provides that client property held by a lawyer must be kept separate in a trust account until there is an accounting of funds earned, and that the lawyer must provide a periodic accounting regarding portions of the fee that are consumed. Contrary to the rule, Respondent deposited the $5,000.00 in his operating account, and he testified he never sent Fox a bill accounting for the work he performed or the fees associated with that work prior to the time she

[1] *In re Sather*, 3 P.3d 403, 412 (Colo. 2000).
[2] *Id.*

terminated the representation. Respondent's failure to keep these funds separate and provide a periodic accounting is a violation of Colo. RPC 1.15(c).

Further, we conclude Respondent violated Colo. RPC 1.16(d), which makes clear a lawyer is required to timely return to his client any advance payment of fees or expenses that has not been earned or incurred. On September 9, 2008, Respondent agreed to refund all of Fox's money, but Respondent also concedes he did not do so until April 2009 because he did not have the funds available. Since the Colorado Supreme Court has found comparable delays violated Colo. RPC 1.16(d),[3] the Hearing Board must likewise find Respondent violated the rule when he waited more than eight months to refund Fox's $5,000.00.

The Hearing Board does not find, however, that the People presented clear and convincing evidence of a violation of Colo. RPC 1.4(a)(3), which requires a lawyer to keep his client reasonably informed about the status of his or her matter. Although Respondent testified he did not provide Fox a bill summarizing his work and related fees, he also stated he could not recall whether he discussed these issues with Fox more informally. The People adduced no other evidence concerning this claim. The Hearing Board finds and concludes this vague and indefinite testimony, unsupported by any other evidence, is not sufficient to meet the People's burden of proof.

Hibernia Investigating Matters

In matters unrelated to Fox's case, Respondent ran up a bill with Hibernia Investigating ("Hibernia") totaling $2,114.78, including late fees, incurred for service of process in civil cases between 2008 and May 2009. In four of these cases,[4] Respondent admits he engaged the services of Hibernia and submitted an invoice to the respective client for the cost of those services. These invoices were distributed between April and October of 2008. Each client paid Respondent's invoice, but Respondent did not promptly repay Hibernia, nor did he deposit the funds in his trust account. Instead, Respondent consumed the funds. Despite several telephonic discussions with Hibernia representatives regarding this unpaid bill, Respondent delayed in

[3] *See, e.g., id.* at 415 (finding violation when attorney submitted partial repayment three months after discharge and full repayment two months thereafter); *People v. Sigley*, 917 P.2d 1253, 1254 (Colo. 1996) (finding violation when attorney delayed in returning advance fees for seven months after termination).

[4] These four cases involved Respondent's representation of three clients: representation of Tony Head, representation of Security National Mortgage Company, for which Respondent handled two separate matters, and representation of Mr. and Mrs. Manion. All told, the bills for these four matters added to $932.00.

making the repayment until July 2009, when Hibernia filed a Request for Investigation with the People.[5]

Respondent testified that even though he had received payment for Hibernia's services from each client, he failed to reimburse Hibernia for two reasons. First, Respondent stated he lacked operating funds during this time and could not make ends meet. Second, Respondent explained the Hibernia bill included costs associated with both contingent and hourly-fee matters, and he acknowledged that he was *negligent* in differentiating between the four matters billed on an hourly basis, for which his clients paid costs, and the majority of his caseload, which was conducted on a contingent fee basis where Respondent advanced all costs.

Respondent provided this statement by way of explanation, and not excuse, and he testified he was "chagrined" by his conduct in the matter. To that end, Respondent stipulated he had violated Colo. RPC 1.15(a), for exercise of unauthorized dominion and control over client funds forwarded to him for the purpose of paying Hibernia's bill, and Colo. RPC 1.15(b), for failing to promptly pay Hibernia's bill.

The People also seek a finding that Respondent violated Colo. RPC 8.4(c), which proscribes conduct involving dishonesty, fraud, deceit or misrepresentation.[6] However, the Hearing Board finds the People presented a skeletal case regarding Respondent's state of mind, relying only on Respondent's testimony itself, combined with layers of inference, to establish a knowing misappropriation of client funds. While the Hearing Board finds Respondent knowingly violated his duties to his clients by improperly handling money rightfully belonging to them, we cannot find, based upon the evidence presented, that he acted with the purpose of deceiving or misleading them.

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[5] One member of the Hearing Board is concerned that some vendors embroiled in collections disputes with members of the bar may perceive that their most expeditious route to recovery runs through the Office of Attorney Regulation Counsel, and not the civil courts. Stated simply, the Hearing Board member fears the complaining witnesses may have used the Office of Attorney Regulation Counsel as a collection agency in a simple debt collection case. The other members of the Hearing Board agree the Office of Attorney Regulation Counsel should not be used as a collection agency for debt claims. However, in this case, they find that Hibernia and Fox brought their claims to the Office of Attorney Regulation Counsel after attempting numerous times to recoup money rightfully theirs. Moreover, Respondent agrees he violated the disciplinary rules by improperly handling the funds in question and not promptly returning them.

[6] Colo. RPC 1.0 (d) states: "Fraud' or 'fraudulent' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *and has a purpose to deceive*." (Emphasis added). BLACK'S LAW DICTIONARY 465 (9th ed. 2009) defines deceit as "[t]he act of intentionally giving a false impression." *See also In re Attorney* D, 57 P.3d 395, 402 (Colo. 2002) (noting the term "fraud" has a generic meaning that includes virtually any kind of deception or unfair way of inducing another to surrender rights or property).

Accordingly, we find that the People did not establish dishonesty, fraud, deceit or misrepresentation, elements required in Colo. RPC 8.4(c).

As discussed more fully below, Respondent's irresponsible, careless and ultimately reckless behavior in these matters does not rise to the level of culpability necessary to find a violation of Colo. RPC 8.4(c).[7] Rather, we find Respondent recklessly handled his client billing, his review of the Hibernia invoices and his application of funds received from clients in payment of billed costs. Respondent admits he failed to properly monitor his incoming and outgoing bills, and he recognizes that, in essence, he spent monies that were owed to Hibernia.

But we cannot in good conscience brand Respondent as dishonest or deceitful. While his conduct gives rise to various ethical violations, the evidence falls short of showing by clear and convincing evidence that Respondent attempted to defraud or deceive his clients or Hibernia. Respondent *should have known* he consumed funds his clients had forwarded to him to cover Hibernia's costs. His recklessness in this matter is amply addressed in the other ethical violations we have found. But in light of the dearth of clear and convincing evidence, we cannot conclude Respondent knowingly engaged in dishonest, fraudulent or deceitful conduct, nor can we find he knowingly misrepresented any material facts.[8]

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law

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[7] As a general rule, a mental state of recklessness may warrant a finding that an attorney engaged in conduct violative of Colo. RPC 8.4(c) under certain circumstances. *See People v. Radar*, 822 P.2d 950, 953 (Colo. 1992) (finding the element of scienter, which is necessary for a violation of the precursor to Colo. RPC 8.4(c), was established when attorney deliberately closed his eyes to facts he had a duty to see). *See also* Colo. RPC 1.0(f), cmt [7A] (clarifying when recklessness may be equated with knowing); Marcy G. Glenn & Michael H. Berger, *The New Colorado Rules of Professional Conduct: A Survey of the Most Important Changes*, 36 Colo. Law. 71, 72 (2007) (discussing comment). Cases involving a violation of Colo. RPC 8.4(c) that specifically deal with misappropriation of another's property, however, require a finding of *knowing* conduct; the finding of a reckless state of mind will not properly sustain a finding of "knowing" in such cases. *See People v. Small*, 962 P.2d 258, 260 (Colo. 1998) ("With one important exception [involving knowing misappropriation of property], we have considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for disciplinary purposes."); *People v. Zimmermann*, 922 P.2d 325, 329 (Colo. 1996) (concluding the "single most important factor" in cases addressing misappropriation of clients funds is whether the conduct was knowing, or whether it was reckless or merely negligent).

[8] *See In re Haines*, 177 P.3d 1239, 1245 (Colo. 2008) (noting a determination that an attorney has intentionally misappropriated funds belonging to a client must be supported by clear and convincing evidence); *People v. Dickinson*, 903 P.2d 1132, 1138 (Colo. 1995) (finding that a knowing misappropriation of client funds must be established by clear and convincing evidence).

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: The Hearing Board finds Respondent violated his duties to his clients in both the Fox and the Hibernia matters, since a lawyer must preserve the property of his client with the care required of a professional fiduciary. The Hearing Board also finds Respondent breached the duties he owes as a professional when he failed to adhere to ethical standards of conduct, including the obligation to reduce fee agreements to writing and to timely refund advanced fees not yet earned.

Injury: Respondent's conduct caused some injury to his client, Fox, and to Hibernia, a third-party vendor. Fox was deprived use of her $5,000.00 for well over nine months, and Hibernia's bills were paid, in some instances, over a year late.

Mental State: While the People and Respondent stipulated to many of the underlying facts in this case, they differ as to characterization of Respondent's mental state. The People argue that in each case, Respondent's mental state was knowing. In the Fox matter, the People contend Respondent knew he had not reduced the fee agreement to writing, knew he deposited Fox's fees into his operating account, and knew he did not account to Fox as he consumed those fees. In the Hibernia matter, the People claim Respondent knew he owed Hibernia for their services, knew he billed his clients for those services, knew he collected fees to compensate Hibernia and knew he spent those funds rather than forwarding them to Hibernia. Respondent, in contrast, argues his conduct in both matters was the result of negligence occasioned by the press of matters going to trial and distraction caused by the financial stress he was experiencing at the time.[9]

As regards the Fox matter, the Hearing Board concludes Respondent was negligent in his failure to memorialize in writing his fee agreement with Fox, per Colo. RPC 1.5(b). Respondent testified it was his usual practice to draft such agreements, and he impressed the Hearing Board as genuinely surprised that he had not done so in this case. In contrast, we find that Respondent's conduct in depositing Fox's fee in his operating account, his failure to account for consumed portions of that fee and, above all, his delay in returning to Fox

[9] As a solo practitioner, Respondent practiced law as a plaintiff's lawyer in a difficult field of practice and, at the same time, handled all the administrative matters in his office.

her $5,000.00[10] – due entirely to Respondent's "cash crunch" – constitutes knowing conduct as defined in the ABA *Standards*.[11]

With respect to Hibernia, the Hearing Board finds that Respondent's conduct was reckless, but we cannot find by clear and convincing evidence that Respondent knowingly converted client property. For purposes of disciplinary proceedings, knowing conversion requires proof that the lawyer took property entrusted to him, even though the lawyer knew the property belonged to another and the taking was not authorized.[12]

The Hearing Board credits Respondent's testimony that initially he "flat overlooked" the fact he had already received funds from his clients to pay Hibernia's costs. But during the spring and summer of 2008, Respondent reviewed the bills in each of the four matters at issue and was in regular communication with Hibernia. At that time, Respondent certainly knew his account with Hibernia was in arrears, and he eventually should have become aware that while *his* bills for services rendered by Hibernia had been paid by his clients, he had failed to forward those monies to Hibernia. Nevertheless, while there is ample evidence Respondent ultimately *should have known* he improperly consumed client funds rightfully due to Hibernia, there is little to suggest Respondent *actually knew* that he was not authorized or entitled to those funds at the time he improperly accessed them. Accordingly, we find Respondent acted recklessly with respect to the Hibernia matters.

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.

Multiple Offenses – 9.22(d): The Hearing Board finds six separate violations of the Colorado Rules of Professional Conduct under the rubric of two distinct set of offenses – one related to Fox, and one related to Hibernia. Although the Hearing Board considers this factor in aggravation, it accords it minimal weight because some of those six claims speak to the same operative facts.

[10] Claims under Colo. RPC 1.15(a), 1.15(c) and 1.16(d).
[11] "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ABA *Standards*, Section IV, Definitions.
[12] *See People v. Varallo*, 913 P.2d 1, 11 (Colo. 1996).

Substantial Experience in the Practice of Law – 9.22(i): Respondent has been a member of the Colorado bar for almost thirty-eight years, and his conduct is ill-befitting such a longstanding practitioner.

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 Prior Disciplinary Record – 9.32(a): Respondent was admitted to the bar in 1972. During his decades of practice, Respondent has enjoyed an exemplary career with no prior disciplinary record. The People have stipulated that the absence of any such record should be considered as a mitigating circumstance in this case, and we grant this factor significant weight in our sanctions decision.

Absence of a Dishonest or Selfish Motive – 9.32(b): Respondent testified that in neither the Fox nor the Hibernia matter was he motivated by a dishonest or selfish motive. In fact, Respondent claimed he undertook representation of Fox in order to assist her when no other lawyer would or could have economically served her interests, and he stated that he simply failed to closely tend to his administrative responsibilities given the pressure of his trial schedule. Because we assess Respondent to be a credible and trustworthy witness, we regard Respondent's testimony as reliable and therefore find this factor justifies a reduction in the degree of discipline imposed.

Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct – 9.32(d): The Hearing Board acknowledges that Respondent eventually refunded Fox the $5,000.00 she advanced, and he also paid the balance of the Hibernia bill, albeit up to a year late. The People maintain that in each case Respondent failed to disburse these funds until Requests for Investigation were filed with the People, and therefore his repayment cannot be considered in mitigation.[13] But we observe the Colorado Supreme Court has recently ruled it the "better policy to allow a good faith effort to make restitution to be considered in mitigation in order both to encourage lawyers to reduce the injuries they have caused and help insure recognition of the wrongfulness of their conduct."[14] As such, we consider Respondent's repayment of these funds as a mitigating factor but accord it minimal weight.[15]

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[13] The People cite *People v. Brady,* 923 P.2d 887, 890 (Colo. 1996); *People v. Guyerson*, 898 P.2d 1063, 1064 (Colo. 1995); and *People v. Robbins*, 869 P.2d 518, 519 (Colo. 1994).
[14] *In re Fischer*, 89 P.3d 817, 821 (Colo. 2004).
[15] *Id. See also* ABA *Standard* 9.32 cmt.

Cooperative Attitude Toward Proceedings – 9.32(e): The People acknowledge Respondent has been cooperative throughout these proceedings, which should be considered in mitigation.

Character or Reputation – 9.32(g): Respondent presented unrebutted testimony that he has rightfully earned a "high profile" in the Colorado legal community during his lengthy career. He has served on boards of bar committees and civic organizations, lectured for CLE events, founded a non-profit advocacy organization and performed pro bono work.

Remorse – 9.32(l): The Hearing Board finds Respondent is sincerely remorseful for his conduct in the Fox and Hibernia matters. Respondent testified he realizes the Rules of Professional Conduct apply to him and he is not exempt from their application, and he expressed great regret – and embarrassment – that he "got himself into this predicament." Because we believe Respondent to be a credible and truthful witness, we also consider this factor in mitigation.

Sanctions Analysis Under ABA Standards and Case Law – The Fox Matter

ABA *Standard* 4.1 governs violations of Colo. RPC 1.15, and ABA *Standard* 7.0 addresses violations of Colo. RPC 1.5 and 1.16. ABA *Standard* 4.12 provides that suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury as a result. Likewise, ABA *Standard* 7.2 establishes suspension as the appropriate result when a lawyer knowingly engages in conduct that is a violation of a professional duty and causes injury or potential injury to a client, the public or the legal system. ABA *Standard* 7.4, which allows for admonition, is appropriate when a lawyer engages in an isolated instance of negligence and causes little or no actual or potential injury to a client, the public or the legal system.

The Hearing Board has concluded that in his dealings with Fox, Respondent acted knowingly when he failed to place Fox's funds into a trust account, failed to account for those funds and failed to timely return them to Fox upon termination of their attorney-client relationship. This conduct violated Colo. RPC 1.15 and 1.16; therefore, *ABA* Standards 4.12 and 7.2, which call for a period of suspension, apply here. Respondent's failure to reduce his fee agreement with Fox to writing, on the other hand, appears to the Hearing Board an isolated instance of negligence worthy only of admonition. Indeed, it could hardly be said that this violation of Colo. RPC 1.5(b) redounded to Fox's detriment; Respondent's failure to put the agreement in writing forced him to refund to Fox his entire $5,000.00 fee, notwithstanding that he had incurred costs and performed valuable legal services on her behalf.

Yet after considering the various mitigating and aggravating factors limned above, the Hearing Board concludes a public censure, rather than suspension, is warranted for Respondent's conduct in the Fox matter. Respondent's excellent reputation as a longstanding member of the bar, his service in the legal community, his willingness to address the People's concerns forthrightly and in a spirit of cooperation and his belated efforts to return to Fox her funds all "demonstrate precisely the recognition and acceptance of personal responsibility that diminish the need for further protection of the public."[16]

Sanctions Analysis Under ABA Standards and Case Law – The Hibernia Matters

The Hearing Board has found Respondent acted recklessly in failing to transfer client monies to Hibernia for services it had rendered on his clients' behalf. In essence, we conclude Respondent committed a "technical conversion," which generally warrants a suspension under Colorado authorities.[17] But because of the many mitigators in this case, we find, as we did above, that suspension is not required in this instance. Respondent eventually paid the overdue Hibernia bills, and he expressed significant remorse for his failure to do so in a timely manner. Moreover, Respondent has adjusted his bookkeeping and vendor communication practices to prevent similar problems from arising in the future. Indeed, because the Hearing Board has every confidence that Respondent will henceforth be particularly vigilant in monitoring client bills and vendor invoices, anything more than imposition of a public censure in this instance would be draconian, serving no role in protecting the public.[18]

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[16] *In re Fischer*, 80 P.3d at 821 (cautioning against unreasonably harsh sanctions and acknowledging that cases do not always present the same need for sanctions when aggravating and mitigating factors are properly balanced). *See also In re Wimmershoff*, 3 P.3d 417 (Colo. 2000) (requiring public censure and restitution when attorney charged unreasonable fee, failed to adequately convey to client the basis and rate of his fee and entered into a fee agreement that did not comply with the rules).

[17] *See In re Haines*, 177 P.3d 1239, 1250 ("[W]hen a lawyer recklessly or negligently misappropriates funds, a period of suspension is typically adequate sanction."); *People v. Schaefer*, 938 P.2d 147, 149 (Colo. 1997) ("The single most important factor in determining the appropriate level of discipline . . . is whether the respondent's misappropriation of client funds was knowing, in which case disbarment is the presumed sanction, or whether it was reckless, or merely negligent, suggesting that a period of suspension is adequate.") (internal citations omitted); *Zimmermann*, 922 P.2d at 329 (same). We likewise look to ABA *Standard* 4.12, which provides that suspension is appropriate when a lawyer *should know* he is dealing improperly with client property and causes injury or potential injury as a result.

[18] *Compare People v. Pooley*, 817 P.2d 712, 713-14 (Colo. 1996) (deeming public censure appropriate where lawyer failed to communicate with client, failed to separate client and lawyer funds and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by drafting 17 insufficient funds checks to third-party payees, but where mitigating factors were present) *with Zimmermann*, 922 P.2d at 330 (ruling reckless misappropriation of client funds,

V. CONCLUSION

Respondent attributes the conduct at issue here solely to the stress of imminent trial and a severe "cash crunch" due to the uncertain nature of his practice. While this may be so, poor financial management and inferior monitoring practices cannot excuse Respondent's professional misconduct in his dealings with Fox and Hibernia, nor can it exonerate Respondent's misapplication of monies remitted by his clients to pay their costs. Although the Hearing Board finds Respondent's conduct to be reckless and at times knowing, as discussed above, we also find substantial mitigation, namely his excellent reputation and longstanding record of achievement in the legal community, warrants a public censure, rather than a suspension.[19]

VII. ORDER

The Hearing Board therefore **ORDERS**:

1. **JOHN FREDERIC HEAD**, Attorney Registration No. 03077, is hereby **PUBLICLY CENSURED.** The censure **SHALL** become public and effective thirty-one days from the date of this order upon the issuance of an "Order and Notice of Public Censure" by the PDJ and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).

2. 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.

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compounded by respondent's claim of ignorance regarding his fiduciary duties with regard to client funds, warranted one year and one day suspension) *and People v. Davis*, 893 P.2d 775, 776 (Colo. 1995) (suspending lawyer for 180 days under conditional admission for commingling client and lawyer funds and for writing 45 insufficient funds checks, where admission contained no explicit allegations of misappropriation of client funds).

[19] Respondent argued that imposition of any sanction beyond a private admonition would interfere with his ability to represent, and thus would harm, his existing clients. The Hearing Board does not believe we can consider this as a relevant factor, and we feel it necessary to underscore that our decision does not contemplate and is not based upon any alleged harm to Respondent's current clients resulting from imposition of these sanctions.

DATED THIS 20th DAY OF JULY, 2010.

_____
WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

(*Original Signature on File*)
F. STEPHEN COLLINS
HEARING BOARD MEMBER

(*Original Signature on File*)
TERRY F. ROGERS
HEARING BOARD MEMBER

Copies to:

Charles E. Mortimer, Jr. Office of Attorney Regulation Counsel	Via Hand Delivery
John Frederic Head Respondent	Via First Class Mail
F. Stephen Collins	Via First Class Mail
Terry F. Rogers Hearing Board Members	Via First Class Mail
Susan Festag Colorado Supreme Court	Via Hand Delivery