

People v. Mulvihill. 09PDJ043. April 16, 2010. Attorney Regulation. Following a Sanctions Hearing, a Hearing Board disbarred Henry N. Mulvihill (Attorney Registration No. 04811) from the practice of law, effective May 17, 2010. Respondent knowingly converted \$50,000.00 belonging to his client when he deceived his client into believing that the money would be used to fund and capitalize a start-up business. Instead, Respondent spent the \$50,000.00 on personal expenses. Respondent also solicited a \$100,000.00 personal loan from the same client. Respondent misrepresented his ability and intent to repay the personal loan to his client and deceptively documented the personal loan after the fact as a loan to the start-up business. His misconduct constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.8(a) and 8.4(c). The Hearing Board's decision was affirmed by the Colorado Supreme Court on January 21, 2011.

22, 2009. Upon the entry of default, the Court deems all facts set forth in the complaint admitted and all rule violations established by clear and convincing evidence.²

III. ESTABLISHED FACTS AND RULE VIOLATIONS

The Court hereby adopts and incorporates by reference the factual background of this case fully detailed in the admitted complaint.³ Respondent took and subscribed the Oath of Admission and gained admission to the Bar of the Colorado Supreme Court on March 25, 1959. He is registered upon the official records, Attorney Registration No. 04811, and is therefore subject to the jurisdiction of the Court pursuant to C.R.C.P. 251.1.⁴

In March 2004, Richard Scott Pearson retained Respondent to represent him in an employment dispute and paid him a \$1,000.00 retainer fee. Mr. Pearson paid Respondent an additional \$1,325.00 for legal work in April 2004.

In May 2004, Respondent solicited Mr. Pearson to invest in a start-up business known as “Mediation Experts, Inc.” (“Mediation Experts”). Mr. Pearson invested \$15,000.00 in Mediation Experts in June 2004, \$10,000.00 in November 2004, and \$25,000.00 in February 2005. Mr. Pearson therefore invested a total of \$50,000.00 in Mediation Experts through checks payable to Henry Mulvihill or, in one case, Henry N. Mulvihill, P.C.

Respondent never deposited the checks into a bank account belonging to Mediation Experts. Instead, he controlled the funds at all times, spent Mr. Pearson’s investment on personal expenses unrelated to Mediation Experts, and deceived Mr. Pearson into believing that the \$50,000.00 investment would be used to fund and capitalize the start-up business.

In addition to the \$50,000.00 Mr. Pearson invested in Mediation Experts, Respondent solicited from Mr. Pearson a personal loan in the amount of \$100,000.00 in March 2005. However, Respondent never advised Mr. Pearson he had filed Chapter 7 bankruptcy in December 2002, or he lacked security for the personal loan. Rather, Respondent inaccurately and deceptively documented the personal loan after the fact as a loan to Mediation Experts when, in fact, the loan had been intended as a personal loan from Mr. Pearson to Respondent. Respondent never repaid any of the money Mr. Pearson invested in Mediation Experts or loaned to Respondent.⁵

² See *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987).

³ See the People’s complaint in 09PDJ043 for additional detailed findings of fact.

⁴ The Court takes judicial notice of the fact that the Colorado Supreme Court immediately suspended Respondent from the practice of law pursuant to C.R.C.P. 251.8 on June 17, 2009.

⁵ Mr. Pearson testified during the Sanctions Hearing he received \$75,000.00 from Respondent in a civil lawsuit settlement related to the matters discussed herein, thus reducing the total amount of restitution sought by the People from \$150,000.00 to \$75,000.00.

Based on these admitted facts, the PDJ finds Respondent violated Colo. RPC 8.4(c) when he: (1) knowingly exercised unauthorized dominion and control over the \$50,000.00 Mr. Pearson paid to Mediation Experts; (2) misrepresented his ability and intent to repay the \$100,000.00 personal loan to Mr. Pearson; and (3) deceptively documented the \$100,000.00 personal loan after the fact as a loan to Mediation Experts.

The PDJ also finds Respondent violated Colo. RPC 1.8(a) when he solicited an investment in Mediation Experts and when he solicited and accepted a personal loan from Mr. Pearson: (1) under unfair terms to the client; (2) without full disclosure in writing in a manner which could be reasonably understood by the client; (3) without informing the client that the use of independent counsel may be advisable; (4) without giving the client a reasonable opportunity to seek the advice of such independent counsel in the transaction; and (5) without obtaining the client's consent in writing to the transactions.

IV. SANCTIONS

The ABA Standards for Imposing Lawyer Sanctions (“ABA *Standards*”) and Colorado Supreme Court case law are the guiding authorities for selecting and imposing sanctions for lawyer misconduct.⁶ In imposing a sanction after a finding of lawyer misconduct, the Court must first consider: the duty violated; the lawyer's mental state; the actual or potential injury caused by the lawyer's misconduct; and the existence of aggravating and mitigating evidence pursuant to ABA *Standard* 3.0.

Respondent's failure to participate in these proceedings leaves the Court with no alternative but to consider only the established facts and rule violations set forth in the complaint as well as testimony offered by the People from Mr. Pearson during the Sanctions Hearing. Mr. Pearson testified he believed Respondent had essentially operated a “Ponzi Scheme” and played him for a “sucker” after he placed his trust in Respondent.

The Court finds Respondent violated duties owed to his client.⁷ Respondent specifically failed to preserve the property of his client for its rightful purpose and failed to act honestly. He also failed to avoid a conflict of interest. The entry of default established that Respondent *knowingly* engaged in this conduct and caused actual financial and emotional harm to his client. Although he recovered \$75,000.00 as a result of a civil lawsuit settlement, Mr. Pearson still suffered a loss of \$75,000.00. He also suffered years of distress, including strain on his marriage, as a result of Respondent's misconduct.

⁶ See *In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

⁷ See ABA *Standard* 4.0.

The Court finds several aggravating factors in this case including a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law.⁸ Due in part to the absence of any contradictory evidence, the Court finds clear and convincing evidence to support each aggravating factor. Respondent failed to participate in these proceedings and therefore presented no evidence in mitigation. However, the People conceded that Respondent has no prior disciplinary record consistent with ABA *Standard* 9.32(a).

The ABA *Standards* suggest that disbarment is the presumptive sanction for the gravamen of the misconduct demonstrated by the admitted facts and rule violations. Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.⁹

Colorado Supreme Court case law applying the ABA *Standards* also holds that disbarment is the presumptive sanction for conversion of client or third-party funds.¹⁰ Knowing conversion or misappropriation of client money “consists simply of a lawyer taking a client’s money entrusted to him, knowing that it is the client’s money and knowing that the client has not authorized the taking.”¹¹ Neither the lawyer’s motive in taking the money, nor the lawyer’s intent regarding whether the deprivation is temporary or permanent, are relevant for disciplinary purposes.¹² Significant mitigating factors may overcome the presumption of disbarment, however, Respondent failed to present any in this case and those otherwise acknowledged by the People are insufficient to vary from the presumed sanction.¹³

V. CONCLUSION

One of the primary goals of our disciplinary system is to protect the public from lawyers who pose a danger to them. The facts established in the complaint, without explanation or substantial mitigation, reveal the harm Respondent has caused his client. He knowingly converted funds belonging to his client, engaged in conduct involving dishonesty and misrepresentation, and failed to comply with the conflict of interest rule when he entered into business

⁸ See ABA *Standards* 9.22(b), (c), (d) and (i).

⁹ See ABA *Standard* 4.11. The People relied on this standard in seeking the disbarment of Respondent. However, Respondent’s conduct also implicates ABA *Standard* 4.3 for failing to comply with the conflict of interest rule and ABA *Standard* 4.6 for deceiving his client.

¹⁰ See *e.g.* *People v. Dice*, 947 P.2d 339 (Colo. 1997) (attorney took funds in five separate estate, trust, and conservative matters while acting as a fiduciary); and *People v. Robnett*, 859 P.2d 872 (Colo. 1993) (attorney disbarred for converting monies belonging to a trust for which he was the trustee and engaging in deception of his client).

¹¹ See *People v. Varallo*, 913 P.2d 1, 11 (Colo. 1996).

¹² *Id.* at 10-11.

¹³ See *In re Fischer*, 89 P.3d 817 (Colo. 2004) (finding significant facts in mitigation).

transactions with his client. Upon consideration of the nature of Respondent's misconduct, his mental state, the actual and potential harm he caused, the aggravating factors, and the absence of mitigating factors, the Court concludes that the ABA *Standards* and Colorado Supreme Court case law both support disbarment in this case.

VI. ORDER

The Court therefore **ORDERS**:

1. Henry N. Mulvihill, Attorney Registration No. 04811, is hereby **DISBARRED** from the practice of law and his name shall be stricken from the list of attorneys licensed to practice law in the State of Colorado. The disbarment **SHALL** become effective thirty-one (31) days from the date of this order upon the issuance of an "Order and Notice of Disbarment" by the Court and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).
2. Respondent **SHALL** pay restitution in the amount of \$75,000.00 to Richard Scott Pearson and/or the Attorneys' Fund for Client Protection for any amounts paid as a result of this case.
3. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days of the date of this order. Respondent shall have ten (10) days within which to respond.

DATED THIS 16TH DAY OF APRIL, 2010.

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

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