SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-210
District Docket No. XIV-09-107E

IN THE MATTER OF	
JEFFREY D. LAVENHAR	
AN ATTORNEY AT LAW	

Decision

Argued: November 19, 2009

Decided: December 16, 2009

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear for oral argument, despite proper service.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us on a motion for reciprocal discipline, filed by the Office of Attorney Ethics ("OAE"),

following respondent's disbarment[1] by the Supreme Court of Colorado for what that court described as his knowing misappropriation of client funds, as well as funds belonging to his law firm's landlord, Enron Corporation. For the reasons expressed below, we determine to recommend respondent's disbarment.

Respondent was admitted to the New Jersey bar in 1976 and to the Colorado bar in 1982. At the relevant times, he maintained an office for the practice of law in Englewood, Colorado. Presently, he resides in Colorado and does not maintain an office in New Jersey.

Prior to the institution of the Colorado disciplinary proceedings that led to respondent's disbarment, he had been admonished in that state on two occasions. He has no disciplinary history in New Jersey.

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[1] In Colorado, disbarment is defined as the revocation of an attorney's license to practice law in that state. C.R.C.P. 251.6(a). A Colorado disbarment is not permanent. The revocation of the license is "at least" eight years, with re-admission requiring, among other things, that the disbarred attorney take and pass the Colorado bar examination. C.R.C.P. 251.29(a).

From October 20, 1988 to March 19, 1998, respondent was on the Supreme Court of New Jersey's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

The Colorado discipline in this matter arose out of respondent's various acts of misconduct that were the subject of two disciplinary actions. The first action involved one client matter, in addition to a personal litigation matter involving respondent and his wife. The second action involved three client matters, in addition to a matter involving respondent's law firm and its landlord.

I. The First Disciplinary Action (Colorado Docket No. 95SA261)

Although respondent was represented by court-appointed counsel before a hearing board of the Supreme Court of Colorado in this action, he did not attend the hearing because he was very ill.

A. The Clarke Matter

Count I of the Colorado ethics complaint charged respondent with having violated Colorado DR 1-102(A)(1) (violating a disciplinary rule) (comparable to New Jersey RPC 8.4(a)); DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) (comparable to RPC 8.4(c)); DR 2-106(A) (charging or collecting an illegal or clearly excessive fee) (comparable to RPC 1.5(a)); and C.R.C.P. 241.6.[2]

In 1984, Mitchell Clarke ("Clarke") and his brother Daniel were partners in a business called Coat of Arms Painting and Decorating. In June 1987, they executed an agreement terminating their business relationship.

On March 3, 1989, Clarke retained respondent's firm to file a lawsuit against Daniel. At the time, Clarke was a member of

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[2] On January 1, 1993, Colorado adopted the Rules of Professional Conduct. "C.R.C.P." refers to the Colorado Rules of Civil Procedure. After the charges were brought against respondent in this case, C.R.C.P. 241.1 through 241.26 were repealed and replaced by Rule 251.1 through 251.16. In all likelihood, the current applicable rule is Rule 251.5(a), which renders as grounds for discipline "[a]ny act or omission which violates the provisions of the Code of Professional Responsibility or the Colorado Rules of Professional Conduct."

the Montgomery Ward legal service plan ("plan"). Respondent was a plan attorney, offering reduced fees to the plan's members. Clarke paid respondent a $500 retainer and further agreed to pay $50 per hour for his services.

On September 22, 1989, respondent filed a complaint on Clarke's behalf, asserting breach of contract and tort claims against Daniel. Daniel counterclaimed. Trial was scheduled for May 15, 1990.

In April 1990, respondent advised Clarke that he was concerned about Clarke's outstanding balance for legal fees. He warned Clarke that he would not be able to "carry such a large balance." As of May 1, 1990, Clarke owed respondent $8,021.44. By that date, Clarke had paid respondent $7,661.95.

On May 14, 1990, the day before the scheduled trial, respondent injured his back. Consequently, the trial was re-scheduled for January 15, 1991.

At some point, respondent and Clarke agreed that Clarke would work off part of his bill by painting and making repairs to respondent's home. On July 27, 1990, Clarke provided respondent with a list of materials required to make those repairs. Clarke agreed to provide the labor, while respondent agreed to pay for the necessary materials.

While Clarke was painting the house, respondent went to a nearby store to obtain the materials. There, respondent charged $107.13 to JHL Enterprises ("JHL"), a general contractor to whom Clarke's wife, Kathryn Christopher, had subcontracted commercial wall-covering services. Neither Clarke nor Christopher had granted respondent permission or authorization to make such a charge. In fact, Christopher was not authorized to charge expenses to JHL's account.

On the store's invoice, respondent listed the customer as JHL and signed "Mitchell Clarke" as the authorized signature. When respondent gave the invoice to Clarke, he was very upset about the unauthorized charges to JHL's account. Respondent refused Clarke's request for immediate reimbursement, choosing instead to issue him a credit for the amount.

Clarke immediately advised Christopher of respondent's use of JHL's account. Christopher then contacted the store and JHL to advise them of respondent's unauthorized use of the account. On the following business day, Christopher reimbursed JHL for the charge.

On August 1, 1990, respondent wrote to Clarke and indicated that, after crediting $3858 to Clarke's account and taking into consideration an expected payment of $1000 on August 3, 1990,

Clarke owed him a balance of $5,675.75. Respondent then advised Clarke that, "if this continues, you leave me no alternative other than to withdraw from representation."

Respondent proposed a payment plan of $1000 per month to reduce the balance. Clarke responded that he was financially capable of paying, and offered to pay, only $500 per month. Respondent rejected this counter-proposal.

On August 22, 1990, respondent filed a motion to withdraw as counsel, claiming, among other things, that Clarke was in default on his fee obligation and that he recently had accused respondent of misconduct in the handling of his case and in connection with an outside business relationship between them. The court denied respondent's motion, as well as a subsequent motion for reconsideration. Respondent was unsuccessful in his attempt to have these determinations overturned by the Colorado Supreme Court.

In a letter dated October 23, 1990, respondent repeated his earlier complaints to Clarke about the status of his account. He claimed that, irrespective of the trial court's denial of his motion to withdraw as counsel, "the attorney-client relationship no longer exists between us. I cannot and do not represent you

any longer. You should have already retained substitute counsel, and if you have not, I urge you to do so immediately."

On November 7, 1990, Clarke sent a copy of respondent's October 23, 1990 letter to the court that had denied the motion to withdraw. In response, the court issued an order requiring respondent to "prepare for and present his client's case on January 15, 1991 as scheduled and to prepare for and attend a status conference on November 13, 1990 at 1:30 p.m." The court further indicated that respondent was "mistaken" in advising Clarke that "the attorney client relationship no longer exist[ed] irrespective of the Court's denial of Counsel's Motion to Withdraw."

On November 3, 1990, respondent injured his back again. Due to his physical condition, he participated in the November 13, 1990 status conference by telephone and advised Clarke of the outcome in a letter written that same day. In that letter, respondent reiterated that Clarke needed to make payments toward costs and attorney's fees.

On December 13, 1990, respondent reported to the court that he was involved in a serious automobile accident.

On January 7, 1991, respondent filed a motion for reconsideration of an order denying his late submission of an

expert report in the Clarke matter. In the alternative, respondent requested the court to continue the January 15, 1991 trial. Respondent alleged that he was experiencing "severe and at times debilitating pain" and that "his ability to work on legal matters of his clients ha[d] been severely curtailed" because of his injuries.

Daniel's lawyer filed an objection to the motion. He also filed his own motion to dismiss the complaint "for failure to prosecute and failure to comply with the Court Order." The court denied respondent's motion.

By letter dated January 10, 1991, Mark Whiting, respondent's paralegal, advised Clarke of the court's order denying the request to continue the trial. Whiting further advised Clarke that respondent was "physically unable to appear at trial" on January 15, 1991. Whiting also provided Clarke with ideas and suggestions for handling his case pro se.

On January 14, 1991, the court conducted a "forthwith hearing." Respondent did not appear. Clarke appeared with a different attorney, who agreed to enter a special appearance on his behalf. Daniel appeared with his lawyer. At the conclusion of that hearing, the court entered an order dismissing the case

without prejudice, and further ordered respondent and Clarke to pay Daniel's attorney fees.

On February 11, 1991, respondent filed another motion to withdraw. A month later, the court issued an order allowing respondent to withdraw upon the resolution of a hearing on attorneys' fees. Apparently, the court never conducted the hearing.

Respondent billed Clarke $20,509.40 in attorneys' fees and $4,686.36 in costs. Of this amount, he admitted that approximately $6800 was related to his attempts to withdraw from the representation and to collect his unpaid fees. According to respondent's records, Clarke paid him a total of $12,121.95. Clarke also provided respondent with approximately $3858 in services.

Based on these facts, the Colorado hearing board concluded that respondent had violated all of the rules with which he had been charged. The board stated:

> More specifically, respondent represented himself as Mitchell Clarke and signed Mitchell Clarke's name to an account without express authorization. He thereby engaged in conduct involving dishonesty, fraud, deceit and misrepresentation. Respondent further charged and attempted to collect approximately $6,800 in attorney fees, which he admitted were directly generated by his

> attempts to collect his fee and by his multiple attempts to withdraw from representation of Mr. Clarke. Under the circumstances of this case, including respondent's disregard of the District Court's orders denying his request to withdraw, respondent attempted to collect an illegal and clearly excessive fee.
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> [OAEaEx.A15¶63.][3]

A hearing panel of the Colorado Supreme Court approved the hearing board's findings of fact. The Supreme Court agreed that respondent's conduct violated DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) (comparable to New Jersey RPC 8.4(c)) and DR 2-106(A) (charging or collecting an illegal or clearly excessive fee) (comparable to RPC 1.5(a)). The Court did not mention DR 1-102(A)(1) (violating a disciplinary rule) (RPC 8.4(a)) in its decision.

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[3] "OAEa" refers to the appendix to the OAE's brief in support of its motion for reciprocal discipline. Exhibit A is the findings of fact and recommendation of the hearing board of the Supreme Court of Colorado, which was filed with that court on August 15, 1995.

B. **The Rocky Mountain Matter**

Count II of the Colorado ethics complaint charged respondent with having violated Colorado DR 1-102(A)(1) (violating a disciplinary rule) (comparable to New Jersey RPC 8.4(a)); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice) (comparable to RPC 8.4(d)); DR 3-101(B) (practicing law in a jurisdiction in violation of the regulations of the profession in that jurisdiction) (comparable to RPC 5.5(a)(1)); and C.R.C.P. 241.6.

As stated previously, respondent was injured in an automobile accident on December 13, 1990. He sustained a brain lesion and suffered from depression. Six months later, respondent fell from a roof and sustained a concussion. On October 24, 1991, the Colorado Supreme Court transferred him to disability inactive status.

On April 16, 1992, attorney Barry Meinster filed a complaint in the Denver County Court on behalf of Rocky Mountain Recovery Services/Rose Health Care Systems, Inc. ("Rocky Mountain"), seeking to recover $3,213.41 in medical bills owed by respondent and his wife.

On April 27, 1992, respondent sent Meinster courtesy copies of a "combined answer, notice of counterclaim in excess of

jurisdictional limit of county court, and compulsory transfer of action to Denver District Court." In addition, he sent Meinster a courtesy copy of a complaint, naming respondent and his wife as plaintiffs and Rocky Mountain as defendant. The cover letter for these documents was on the letterhead of Lavenhar, Fried & Associates, listing "David Fried" and "Jeffrey D. Lavenhar (1982-1991)." Respondent had been transferred to disability inactive status six months earlier. In that letter, respondent advised Meinster that he would file the complaint, unless he received notice, by April 30, 1992, that Rocky Mountain's lawsuit would be dismissed with prejudice.

On May 8, 1992, respondent sent a two-page letter, on the same letterhead, to Meinster's associate, Brenna Francy, proposing an offer of settlement and raising several legal issues.[4]

On May 19, 1992, respondent filed the "Combined Answer, Notice of Counterclaim in Excess of Jurisdictional Limit of County Court, and Compulsory Transfer of Action to Denver

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[4] The numbered paragraphs of the hearing board's findings skipped from thirty-six to forty-two.

District Court." The pleading began "COME NOW defendants" and was signed by respondent "pro se." Respondent's wife did not sign that pleading. The county court matter was scheduled for trial on August 3, 1992.

Although respondent filed a pleading to transfer the case to the Denver District Court, he did not take any further action to effect the transfer. More specifically, he did not pay the required filing fee, did not attach a complaint to any pleading in the county court, and did not file any complaint in the district court.

Respondent and his wife failed to appear for trial in the Denver County Court on August 3, 1992. Accordingly, the court entered a default judgment against them for the claimed amount. On that same day, respondent embarked on a multi-court effort to set aside the default judgment and to seek redress for professional negligence against Rocky Mountain, as well as unfair collection practices and malicious prosecution against its attorneys.

Ultimately, respondent failed to overturn the default judgment against him and his wife. His action against Rocky Mountain and its attorneys proceeded in the Denver District Court.

In November 1992, attorney Douglas Best entered his appearance on behalf of Rocky Mountain. On January 20, 1993, Best mailed a notice of deposition to respondent and to his wife, both of whom failed to appear. Neither respondent nor his wife provided Best with prior notice of their inability to attend the depositions.

On February 24, 1993, respondent faxed a letter to Best and Meinster, claiming that his and his wife's failure to appear was due to his wife, who "took seriously ill." He apologized for "any inconvenience."

On April 9, 1993, the Denver District Court granted a motion for sanctions against respondent for his failure to appear at the deposition and ordered respondent and his wife to pay $40 in costs and $325 in attorney fees. Shortly before the scheduled trial date, the parties settled the matter by respondent's payment of $1000 to Rocky Mountain.

The hearing board found that respondent had violated DR 3-101(B) by using firm letterhead after he had been placed on disability inactive status. The board also found that respondent's failure to appear at his February 1993 scheduled deposition, without prior notice to counsel, constituted conduct prejudicial to the administration of justice (DR 1-102(A)(5)).

The hearing board did not find, however, that respondent engaged in conduct prejudicial to the administration of justice by his multiple filings in multiple courts and procedural deficiencies. The board noted that no court had found his conduct to be "willful, in bad faith or without justification or that they failed to comply with the rules of civil procedure."

In determining the appropriate measure of discipline for respondent's misconduct in the Clarke and Rocky Mountain matters, the hearing board identified the following aggravating factors: (1) respondent's dishonest or selfish motive; (2) his pattern of misconduct; (3) the multiple offenses; and (4) his substantial experience in the practice of law.

With respect to the Clarke matter, in particular, the board noted that, on the one hand, Clarke was a "vulnerable victim," who had relied on respondent to provide him with legal representation, while, on the other hand, respondent had "repeatedly threatened and attempted to withdraw, charged fees for these attempts, and then virtually left Mr. Clarke unrepresented on the eve of trial." The hearing board also pointed to respondent's disciplinary history, consisting of two prior admonitions.

In mitigation, the board considered respondent's "personal and emotional problems" and his physical disability. Specifically, the board referred to the opinion of a Dr. Dahlberg, who testified that respondent "suffered from organic brain syndrome, resulting from his multiple head injuries, and mixed personality disorder, and thus exhibited problems with brain functioning and judgment." Further, the doctor "indicated that this impairment played a role in respondent's conduct."

Notwithstanding the doctor's opinion, the hearing board did not find that respondent's mental disability was responsible for his conduct or that he had recovered from the disability. Moreover, the board noted, respondent met with his doctor infrequently and refused certain courses of treatment recommended by the doctor.

After weighing the aggravating and mitigating factors, the hearing board recommended that respondent be suspended for a year and a day for his misconduct in both matters. Moreover, as a condition of reinstatement, the board recommended that respondent be required to "demonstrate by competent psychiatric and medical evidence that his physical and mental condition does not interfere with his ability to practice law."

A hearing panel of the Colorado Supreme Court approved the hearing board's findings of fact. The Supreme Court expressly found that respondent's conduct violated DR 3-101(B) (practicing law in a jurisdiction in violation of the regulations of the profession in that jurisdiction) (RPC 5.5(a)(1)) and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice). The Court did not mention DR 1-102(A)(1) (violating a disciplinary rule) (RPC 8.4(a)) in its decision.

II. The Second Disciplinary Action (Colorado Docket No. 96SA106)

Respondent was represented by counsel before the hearing board in this matter, but attended only one of the three-day hearings. On the final day of the proceedings, respondent sought to admit in evidence a written statement that he had provided to his own lawyer at the last minute. The hearing board denied the application on the ground that, since respondent had chosen not to appear and testify at the hearing, "it would be inappropriate to permit him to testify in absentia," as he had not made himself available for cross-examination. The hearing board denied a similar application made after the hearing.

The McKee Matter

In Count I of the Complaint, respondent was charged with having violated Colorado DR 1-102(A)(1) (violating a disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR 6-101(A)(3) (neglecting a legal matter entrusted to him) (similar to RPC 1.3 (lack of diligence));[5] DR 7-101(A)(1) (intentionally failing to seek the lawful objectives of his client through reasonable available means permitted by law and the Disciplinary Rules) (similar to RPC 1.2(a), which authorizes a lawyer to take such action on behalf of the client, "as is impliedly authorized, to carry out the representation")); DR 7-101 (A)(2) (intentionally failing to carry out a contract of employment entered into with a client for professional services) (analogous to RPC 1.3 (lack

[5] Colorado DR 6-101(A)(3) prohibited an attorney from neglecting a legal matter entrusted to him. When Colorado adopted the RPCs, its version of RPC 1.3 differed markedly from that of New Jersey and of the Model Rules of Professional Conduct. New Jersey RPC 1.3 is a single sentence rule, requiring a lawyer to "act with reasonable diligence and promptness in representing a client." Colorado RPC 1.3 is a lengthy, three-part rule. Nevertheless, the comment to Colorado RPC 1.3 expressly states that RPC 1.3 restated DR 6-101(A)(3). Thus, we assume that the Colorado rule is comparable to New Jersey RPC 1.3.

of diligence)); and DR 7-101(A)(3) (intentionally prejudicing or damaging his client during the course of the professional relationship) (no comparable RPC).

In January 1988, Robert R. McKee ("McKee") retained respondent to recover from the estate of his deceased aunt, Blanche Berkowitz, monies for services that he and his wife had rendered to Berkowitz during her last illness and for services that he had rendered on behalf of the estate following her death. The parties' agreement provided that respondent would (1) petition the probate court to open formal probate and require the personal representative for the estate to provide an accounting of asset investment, losses, gains, and distribution; (2) conduct preliminary research; and (3) prepare a claim against the estate for the care of the deceased, during her last illness.

On April 4, 1988, McKee called respondent's office and left a message that the estate had been closed with inaccurate figures. On October 3, 1988, the day before the statute of limitations was to expire, respondent filed a motion to enlarge the time within which to institute a proceeding against the personal representative of the Berkowitz estate and for an extension of all applicable statutes of limitation. After the

exchange of pleadings, on January 6, 1989, the probate court denied the motion and stated that the court was without authorization to expand the period for the statute of limitations. The court ordered McKee to pay the attorney fees incurred by the personal representative. He complied.

Respondent represented McKee for approximately nine months before the statute of limitations for filing objections to the closing of the estate expired. According to the hearing board, respondent, "without justification or excuse, failed to file a timely petition . . . during that entire period."

The hearing board found that respondent had violated all of the rules with which he had been charged. A hearing panel of the Colorado Supreme Court agreed. The court itself did not make its own determination on which rules were violated. Instead, the court merely recited the hearing board's conclusions with respect to all rules, except DR 1-102(A)(1).

B. The Shorts Matter

Count II of the complaint charged respondent with having violated C.R.C.P. 241.6 and Colorado DR 1-102(a)(1) (violating a disciplinary rule); DR 1-102(A)(4) (engaging in conduct

involving dishonesty, fraud, deceit or misrepresentation); and DR 6-101(A)(3) (neglecting a legal matter entrusted to him).

In April of 1988, Sue Ann Shorts ("Shorts") retained respondent to represent her in a divorce action that other counsel had filed on her behalf. On August 19, 1988, the date set for final hearing, the parties resolved their differences by stipulation and agreement. Under the terms of the agreement, the parties were to have joint custody of their children and, by implication, Shorts was to be their residential custodian. The agreement provided that, if Shorts were to move out of the Denver area, her husband would be entitled to increased visitation, during their vacations from school.

On August 22, 1988, Shorts advised respondent's paralegal that she was going to accept a job offer in the State of Washington. The paralegal advised her not to inform her husband that she was leaving until after the court had signed the decree.

On August 31, 1988, the decree was signed. Shortly thereafter, Shorts left for Washington with the children, leaving a forwarding address with respondent's office and having requested the clerk of the court to mail her a copy of the signed decree.

Shorts testified (presumably before the hearing board) that she had informed her ex-husband that she was leaving the state with the children, but apparently did not tell him their new address. The ex-husband later obtained an address from the children.

The court clerk mailed copies of the decree to respondent, but not to Shorts. On several occasions after moving to Washington, Shorts requested copies of the decree and separation agreement from respondent and members of his staff, to no avail.

On December 5, 1988, Shorts' ex-husband filed a motion for a change of custody. A copy was served on respondent. On December 13, 1988, respondent's paralegal called Shorts and advised her that contempt of court proceedings had been filed against her, on the grounds that she had removed the children from the state and disappeared with them. Respondent's paralegal informed Shorts that she could be arrested in the State of Washington and that, unless she express-mailed $480 to respondent, on account of the unpaid balance of her bill, respondent would withdraw from the case.

On December 15, 1988, Shorts received a bill from respondent's office, again informing her that contempt of court proceedings were pending. The representations that contempt

proceedings had been filed were "entirely false," but there was no evidence that respondent had either participated in or had any knowledge of the misrepresentations. In the hearing board's view, however, the evidence was clear that respondent had failed to comply with Shorts' repeated request for copies of the decree and separation agreement, failed to answer her questions concerning the pending proceedings, and failed to communicate with her at all for an extended period of time.

Based on these facts, the hearing board concluded that respondent's conduct violated DR 6-101(A)(3) (neglecting a legal matter entrusted to him) and DR 1-102(A)(1) (violating a disciplinary rule. According to the board, however, the evidence failed to show that respondent had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, as prohibited by DR 1-102(A)(4).

A Colorado Supreme Court hearing panel approved the hearing board's findings of fact. The court, however, ruled only that respondent had violated DR 6-101(A)(3) (neglecting a legal matter entrusted to him). The court based this ruling on respondent's failure to comply with Shorts' "repeated requests for copies of the decree and separation agreement," as well as

his failure to communicate with her "at all for an extended period of time."

C. **The Enron Matter**

Count III charged respondent with having violated C.R.C.P. 241.6(1) and (3) and DR 1-102(A)(1) (violating a disciplinary rule); DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and DR 1-102(A)(6) (engaging in conduct that adversely reflects on fitness to practice law).[6]

On July 21, 1988, respondent and his partner, Herman J. Ledbetter, entered into a sublease of office space from Enron Corporation. Disputes arose as to which party was to bear the expense of certain improvements to the premises. On December 21, 1988, Enron mistakenly sent to respondent and Ledbetter a check for $28,333.60, "which was intended for a contractor working on the project." The amount greatly exceeded any claim

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[6] New Jersey RPC 8.4(b) is similar to Florida DR 1-1202(A)(6), except that RPC 8.4(b) requires that the conduct be criminal.

or possible claim that respondent and Ledbetter might have had against Enron.

Enron was unaware of the mistake. Instead of inquiring as to why the check had been sent, respondent deposited it into an interest-bearing account upon which he and Ledbetter were authorized to draw.

Respondent used some of the money to purchase appliances, one of which was for his home, and to pay operating expenses of the partnership. At one point, Ledbetter brought the matter to the attention of Enron's counsel, who demanded that the partners return the money.

When payment was not forthcoming, litigation ensued. Respondent defended on the ground that Enron was indebted to the partnership because it had failed to perform the terms of the office lease. Ledbetter eventually entered into a settlement with Enron for re-payment of one-half of the funds wrongfully retained. Respondent, on the other hand, continued in protracted litigation with Enron, engaging in numerous dilatory tactics. The court finally entered a judgment against respondent, on December 17, 1991, in the amount of $15,123.88. As of March 31, 1997, the judgment had not been satisfied.

The hearing board found that respondent's conduct in retaining funds to which he knew he had been not entitled and converting them to his own use and benefit violated all disciplinary rules with which he had been charged. A hearing panel of the Colorado Supreme Court agreed. The Supreme Court expressly found that respondent had violated DR 1-102(A)(4)(engaging in conduct involving dishonesty) and DR 1-102(A)(6) (engaging in conduct that adversely reflects on his fitness to practice law). The court was silent with respect to the DR 1-102(A)(1) (violating a disciplinary rule) (RPC 8.4(a)) charge.

D. The Tomko Matter

Count IV of the complaint charged respondent with having violated C.R.C.P. 241.6 and DR 1-102(A)(1) (violating a disciplinary rule) and DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice).

In December 1987, respondent ordered copies of depositions taken and transcribed by Thomas Tomko, at respondent's request. The copies were delivered to respondent in January 1988, together with a statement for $785.00. After six months of repeated billings and no payment, Tomko referred the matter to a

collection agency, which was equally unsuccessful in persuading respondent to pay the bill.

In November 1988, Tomko instituted suit against respondent. After causing further delays in the proceedings, respondent finally paid the bill in October 1989, just days before the scheduled trial. The hearing board found that respondent's conduct violated the rules with which he had been charged. A hearing panel of the Colorado Supreme Court agreed. The Supreme Court found that respondent had violated only DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice). The court was silent as to the DR 1-102(A)(1) (violating a disciplinary rule) charge.

The hearing board that considered all of these disciplinary matters received respondent's affirmative defense that, at times relevant to these incidents, he was "suffering from various, mental and emotional infirmities, injuries and illnesses." According to the hearing board, the evidence established that, during the approximately two-year period when these events were taking place, respondent underwent considerable emotional problems and stress, as a result of the termination of his transactional oil and gas practice, his attempt to establish himself as a high volume general practitioner, and the resulting

financial and marital difficulties that ensued. It concluded that respondent's personal and emotional problems "can be considered mitigating factors."

Two doctors diagnosed respondent as having suffered from a longstanding personality disorder. According to the board, even assuming that such a personality disorder constituted a mental disability within the meaning of Section 9.3(i) of the ABA Standards for Imposing Lawyer Sanctions, that condition could not be considered a mitigating factor in this case. There was no evidence that respondent had recovered from the disability, following "a meaningful and sustained period of successful rehabilitation", or that, even if respondent's condition was somewhat improved, the "recurrence of the misconduct is unlikely." Indeed, the persuasive evidence demonstrated that a personality disorder with anti-social aspects is not readily amenable to treatment.

The hearing board identified the following aggravating factors: (a) respondent's two previous admonitions; (b) his dishonest or selfish motive; (c) the pattern of misconduct; (d) the multiple offenses; (g) respondent's refusal to acknowledge the wrongful nature of his conduct; (h) his substantial experience in the practice of law; and (i) his

indifference to making restitution. According to the hearing board, these aggravating factors far outweighed any mitigating circumstances that existed in this case.

A hearing panel of the Colorado Supreme Court approved the hearing board's findings of fact. The court expressly rejected respondent's mental disorder as a mitigating factor. Like the hearing board, the court accepted respondent's "personal and emotional problems," as well as all aggravating factors identified by the board.

The Colorado Supreme Court consolidated both disciplinary actions. On March 31, 1997, the court disbarred respondent. Respondent did not report the Colorado disbarment to the OAE. Instead, the OAE learned of the disbarment from a third party, who is a member of the Colorado and New Jersey bars, earlier this year – twelve years after the Colorado discipline was imposed on respondent.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore,

adopt the findings of the hearing boards of the Supreme Court of Colorado, which were approved by the Court.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

In this case, (A) through (E) do not apply because the discipline for respondent's knowing conversion and knowing misuse of Enron's funds is the same in New Jersey as it is in Colorado, that is, disbarment.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state. . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

We begin our analysis with the Supreme Court of Colorado's disbarment of respondent on the ground that he had knowingly converted and misused Enron's funds. Specifically, the Colorado hearing board found that respondent had retained funds "to which he knew he was not entitled and convert[ed] them to his own use and benefit," a violation of the Colorado disciplinary rules comparable to New Jersey RPC 8.4(b) and RPC 8.4(c). The Colorado Supreme Court also determined that respondent's conduct violated these rules.

Although the hearing board did not offer any basis for its recommendation that respondent be disbarred, it presumably relied upon the obvious, namely, that respondent had knowingly converted and knowingly misused funds to which he was not

entitled. The Supreme Court did, however, explain the basis for its decision to disbar respondent.

The court began its analysis by noting that "[t]he most serious ethical violation in these proceedings involved the knowing conversion of Enron's $28,000 check." First, the court acknowledged that, under the ABA Standards for Imposing Lawyer Sanctions (1991 & 1992 Supp.)[7] in the absence of mitigating circumstances, disbarment is "generally warranted" when an attorney "engages in serious criminal conduct a necessary element of which includes . . . misappropriation, or theft . . . or . . . engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." In this regard, the court noted that, in addition to respondent's

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[7] The imposition of discipline in New Jersey is based on precedent.

misappropriations in the Enron and Clarke matters,[8] respondent had "seriously neglected a number of client matters."

The Colorado court also observed that it has "repeatedly held that a lawyer's knowing misappropriation of funds, whether belonging to a client or third party, warrants disbarment except in the presence of extraordinary factors of mitigation." In this respect, the court rejected respondent's argument that his mental disabilities and personal and emotional problems were sufficient to overcome disbarment. Specifically, the court observed that the injuries that led to respondent's transfer to disability inactive status "occurred after the most serious misconduct and the misappropriation in this case."

Finally, the court rejected respondent's assertion that his conversion of the funds that belonged either to the landlord or to the contractor rendered the facts of his case distinguishable from those involving either "the conversion of client funds or funds the respondent held as a fiduciary," in which disbarment

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[8] We are unable to agree that there was a misappropriation in the Clarke matter. Nowhere in the court's opinion is there any explanation for its finding that respondent misappropriated funds in that case.

would be virtually automatic. The court stated: "We do not find that difference to be critical given the circumstances of this case and the extent and seriousness of the respondent's other acts of misconduct."

We note that the record in this case could have been more complete, given that respondent was disbarred. It would be more helpful to our analysis if we knew whether the check was made payable to respondent's firm or to the contractor, how the check wound up in respondent's firm, and what respondent believed to be the purpose of the check. Nevertheless, in motions for reciprocal discipline, we are bound by the facts found by the Colorado Supreme Court, which disbarred respondent. We are certain that the review of the Colorado hearing board, the hearing panel, and the Supreme Court was thorough and that their findings and conclusions were supported by the evidence. Otherwise, they would not have concluded that respondent had knowingly converted and knowingly misused Enron's funds.

This case is strikingly similar to that of In re Wilewski, 192 N.J. 468 (1995). There, the attorney was one of two name partners in a Jersey City law firm. In the Matter of Henry J. Wilewski, DRB 94-252 (May 23, 1995) (slip op. at 2). The firm

maintained its business and trust accounts at National Community Bank, in Jersey City. Ibid.

On April 6, 1990, Wilewski deposited a $15,000 check into the firm's trust account. Ibid. Mistakenly, the bank credited the account with $1,500,000. Id. at 2-3. Wilewski learned of this mistake in May 1990. Id. at 3. He did not notify the bank. All the funds remained in the account until July 1990. Ibid. At that time, Wilewski began to remove funds from the trust account and place them in the business account. Ibid. In total, he spent $196,236.81 of the $1.5 million. Id. at 4.

In February 1991, the bank learned of the error. Its attorney informed the OAE of both the error and Wilewski's use of the funds. Ibid. At the same time, the branch manager arranged a meeting with Wilewski and his partner. Ibid. As it turned out, Wilewski had acted alone. His partner was unaware of either the bank's mistake or Wilewski's misconduct. Id. at 5-6, 8-9. Moreover, Wilewski admitted to using the bank's funds in July 1990, because the law firm's revenues had decreased and expenses had to be paid. Id. at 6-7.

The Supreme Court accepted our recommendation of disbarment for Wilewski's knowing conversion and knowing misuse of the bank's monies. Id. at 12. In making our recommendation, we

stated that there was "nothing to distinguish the importance of safeguarding an employer's funds versus clients' funds or bank funds." Ibid. It follows, therefore, that, in this case, respondent's knowing conversion and misuse of Enron's funds should result in his disbarment in New Jersey.

We note that the Colorado record contains no word from respondent with respect to the charges brought against him. Moreover, the matter before us was adjourned twice so that respondent could retain counsel and submit a brief. Respondent has submitted nothing for our consideration. Neither he nor any counsel on his behalf appeared for oral argument.

In light of our recommendation that respondent be disbarred, there is no need for us to consider the appropriate measure of discipline to be imposed for respondent's other ethics violations.

Member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and

actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jeffrey D. Lavenhar
Docket No. DRB 09-210

Argued: November 19, 2009

Decided: December 16, 2009

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Clark						X
Doremus	X					
Stanton	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	8					1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel