***People v. Jerry R. Atencio*. 16PDJ077. April 14, 2017.**

Following a sanctions hearing, the Presiding Disciplinary Judge disbarred Jerry R. Atencio (attorney registration number 08888) from the practice of law. Atencio's disbarment took effect on May 19, 2017.

Atencio agreed to represent a married couple in three separate matters: two concerning rental property that they owned, and one concerning estate planning documents. In the first matter, Atencio failed to answer the complaint, which resulted in entry of default judgment against his clients; his clients then lost title to their rental property and their water rights. Atencio did not inform his clients that his inaction caused them to lose their property. In the second matter, Atencio failed to assert affirmative defenses for his clients, resulting in judgment and an award of attorney's fees and costs in favor of the plaintiffs. Again, Atencio did not inform his clients of the orders. Atencio also pledged to prepare wills for his clients but never did so. He thereafter failed to respond to their attempts to communicate with him. Atencio then defaulted in this disciplinary proceeding.

Atencio's conduct violated Colo. RPC 1.3 (a lawyer shall act with reasonable diligence and promptness when representing a client), Colo. RPC 1.4(a)(3) (a lawyer shall keep a client reasonably informed about the status of the matter), Colo. RPC 1.4(a)(4) (a lawyer shall promptly comply with reasonable requests for information), Colo. RPC 8.1(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); and Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Please see the full opinion below.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** JERRY R. ATENCIO	Case Number: **16PDJ077**
OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(c)	

Jerry R. Atencio ("Respondent") committed misconduct in two separate client matters concerning real property in Bayfield, Colorado. In the first lawsuit, Respondent failed to answer the complaint, which resulted in entry of default judgment against Respondent's clients; his clients lost title to their real property. In the second matter, Respondent failed to assert his clients' affirmative defenses and to follow required procedures. In both cases, Respondent did not advise his clients of the outcome of the matters. Respondent also pledged to prepare his clients' estate documents but did not do so. He then failed to participate in this disciplinary matter. Respondent's misconduct warrants disbarment.

I. PROCEDURAL HISTORY

Respondent was immediately suspended from the practice of law on January 15, 2016. On October 25, 2016, Katrin Miller Rothgery of the Office of Attorney Regulation Counsel ("the People") filed a complaint with Presiding Disciplinary Judge William R. Lucero ("the Court").[1] Respondent failed to answer, and the Court granted the People's motion for default on December 28, 2016. Upon the entry of default, the Court deemed all facts set forth in the complaint admitted and all rule violations established by clear and convincing evidence.[2]

On March 7, 2017, the Court held a sanctions hearing under C.R.C.P. 251.15(b). Moore represented the People, and Respondent did not appear. The People elicited testimony from John Smith, Carolyn Smith, and attorney Brian Taylor. The Court admitted the People's exhibits 1 and 2.

[1] On December 9, 2016, Justin P. Moore substituted as counsel for the People.
[2] *See* C.R.C.P. 251.15(b); *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987).

II. ESTABLISHED FACTS AND RULE VIOLATIONS

The Court adopts and incorporates by reference the averments in the admitted complaint, presented here in condensed form. Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on September 29, 1978, under attorney registration number 08888. He is thus subject to the Court's jurisdiction in this disciplinary proceeding.[3]

Respondent and John and Carolyn Smith have been friends and neighbors for more than twenty years. The Smiths are an elderly couple who live in Parker; Respondent has since moved away. Respondent represented the Smiths in various legal matters while he was their neighbor, including in two cases related to their rental property in Bayfield. The Smiths began leasing this property to tenants in 2002. That same year, Respondent and the Smiths established a formal attorney-client relationship. But Respondent did not give them a written fee agreement. Nor did he render invoices, billing statements, or any other documents reflecting his fees or the time he spent working on their legal matters.

The First Lawsuit

On May 19, 2010, the Smiths' tenants in Bayfield filed a complaint against them alleging that in 2002 the Smiths orally agreed to sell the property for $130,000.00. The tenants sought specific performance of the agreement. Mr. Smith testified that the oral agreement was contingent on the tenants obtaining sufficient financing to purchase the property.

From 2002 onward, the Smiths and the tenants had an ongoing dispute about the oral agreement to purchase the property, which Respondent knew about. Between October 2002 and May 2010, Respondent communicated with the tenants and their attorney about the dispute. During this period, Respondent did not keep the Smiths fully informed about his communications with the tenants, nor did he tell them that the tenants had threatened to file a lawsuit against the Smiths.

On May 27, 2010, Respondent received by mail a copy of the tenants' summons and complaint as well as a notice of *lis pendens*. These documents were later personally served on Ms. Smith. On June 25, 2010, Respondent wrote to the tenants' attorney, stating that he would prepare and file an answer and counterclaims "within the allotted time period from the date of service of the complaint upon Carolyn Smith."[4] But he did not do so.

The court entered default judgment against the Smiths on August 31, 2010. This ruling divested the Smiths of title to their property, including water rights, and it directed the tenants to complete payments on the claimed purchase price. Respondent did not advise the Smiths of the default judgment or the court's award to the tenants of $7,521.63 in attorney's fees.

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[3] *See* C.R.C.P. 251.1(b).
[4] Compl. ¶ 19.

On May 2, 2014, the tenants wrote to the Smiths, informing them that they satisfied the $130,000.00 purchase price of the property, as the court had ordered.[5] This letter provided the Smiths the first notice that they had lost title to their property. When the Smiths gave Respondent the letter, he assured them he would "take care of it."[6] Instead, he took no further action on their behalf.

The Second Lawsuit

On July 5, 2011, the tenants filed a second lawsuit against the Smiths, alleging that the Smiths had improperly received a $5,000.00 payment in April 2006 from BP America Production Company ("BP") for an easement across the Bayfield property. The tenants claimed that they, and not the Smiths, should have received this payment from BP, despite the fact that the Smiths were the record owners of the property when they received BP's payment. The tenants also claimed that they did not discover the easement or BP's payment until September 2010.

Respondent agreed to file an answer on the Smiths' behalf, which he did on July 24, 2011. In the answer, Respondent generally denied the tenants' allegations, but he failed to assert any affirmative defenses, including that the tenants were aware of the easement long before they lodged the first lawsuit. Respondent also neglected to serve disclosures and failed to respond to numerous communications from the tenants' attorney. Further, he wholly failed to participate in drafting a Trial Management Order ("TMO"). On May 2, 2013, the tenants' attorney filed a TMO, which the court adopted as its order governing the course of the trial.

Thereafter, Respondent neglected to advise the Smiths of the nature and progress of the second lawsuit until approximately one month before the trial. Then, he did not assist them in preparing for their trial testimony, nor did he present any evidence at the trial in May 2013 concerning the tenants' actual knowledge of BP's easement. On June 3, 2013, the court entered judgment in favor of the tenants in the amount of $5,000.00 and awarded the tenants $619.80 in costs. Respondent did not inform the Smiths of the outcome of this trial.

Estate Planning Documents

During the first half of 2014, Respondent agreed to prepare wills for the Smiths, and he met with them for estate planning purposes. But thereafter he failed to respond to their telephone calls or to prepare draft wills. In October 2014, the Smiths terminated Respondent and hired attorney Brian Taylor. The Smiths asked Respondent to return their files, but he ignored their request until December 2014, when an attorney at Taylor's firm made a demand for the Smiths' files.

[5] Mr. Smith also testified that when he had received checks from the tenants with the word "mortgage" in the memo line, Respondent told him not to worry about that and to cash the checks.
[6] Compl. ¶ 28.

On April 15, 2015, Taylor filed a request for investigation with the People. Respondent responded, and on August 14, 2015, the People mailed Taylor's reply to Respondent, asking him to address five additional issues and to provide certain documents. On September 10, 2015, the People again requested Respondent's response and documents within ten days. The People sent Respondent a third request on December 23, 2015. Respondent never responded.

Rule Violations

As established in the admitted complaint, Respondent's inaction in the two lawsuits violated Colo. RPC 1.3, which requires a lawyer to act with diligence in representing a client. His lack of communication with the Smiths in those two cases also implicates Colo. RPC 1.4(a)(3), which requires a lawyer to keep clients reasonably informed about the status of their matters. By failing to respond to the Smiths' phone calls regarding their estate planning documents, Respondent transgressed Colo. RPC 1.4(a)(4), which requires a lawyer to promptly comply with reasonable requests for information.

Respondent also violated Colo. 8.1(b), which prohibits a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority, when he failed to respond to the People's requests for information. Finally, by failing to inform the Smiths that they had lost title to their property and by leading them to believe that they had representation in the first lawsuit, Respondent contravened Colo. RPC 8.4(c).

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[7] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[8] When imposing a sanction after a finding of lawyer misconduct, the Court must consider the duty violated, the lawyer's mental state, and the actual or potential injury caused by the misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

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

Duty: Respondent violated several obligations central to the lawyer-client relationship, including his duties of diligence, communication, honesty, and loyalty. He also violated his duty to the legal profession by disregarding the People's requests for information during their investigation.

Mental State: The Court's order entering default establishes that Respondent knowingly violated Colo. RPC 8.1(b) and 8.4(c). The admitted facts in the complaint establish a strong inference that he also violated Colo. RPC 1.3, 1.4(a)(3), and 1.4(a)(4) with a knowing state of mind when he failed to act with diligence during his representation of the Smiths, to

[7] Found in ABA *Annotated Standards* for Imposing Lawyer Sanctions (2015).
[8] *See In re Roose,* 69 P.3d 43, 46-47 (Colo. 2003).

respond to his clients' and opposing counsel's communications, to participate in drafting the TMO in the second lawsuit, to prepare the Smiths for the second trial, and to fully inform the Smiths of status of the two lawsuits. He further acted knowingly when he assured the Smiths that he would prepare their wills yet failed to do so.

Injury: Respondent's failure to respond to the tenants' first lawsuit caused serious and substantial injury to the Smiths, including the loss of title to their property (and all water rights) and the loss of a substantial retirement income. His neglect of the Smiths' case also resulted in a award to the tenants of attorney's fees and costs. Mr. Smith testified that Respondent was the first lawyer they had ever hired and that they completely placed their trust in Respondent to represent their interests in the two lawsuits. Mr. Smith stated that when they learned months after the first case that they had in fact lost title to their property due to Respondent's neglect, they felt betrayed and helpless. Ms. Smith testified that the property was their "nest egg," and she was saddened by the loss of this valuable asset. Not having the rental income from that property, attested Ms. Smith, has put a damper on their spending. She is concerned that a large part of their retirement security was gone and that their grandchildren never had the opportunity to enjoy the property.

By not advancing affirmative defenses on the Smiths' behalf in the second lawsuit, Respondent caused the Smiths additional injury, including the loss of the $5,000.00 easement payment and the payment of additional attorney's fees. According to Taylor—the Smiths' subsequent counsel—Respondent should have raised certain affirmative defenses on the Smiths' behalf, including that they were the record title owners of the property when they received BP's $5,000.00 payment. Not doing so, said Taylor, caused them to lose their case. Taylor also testified that when he received Respondent's file, he was shocked to discover numerous mistakes. Taylor stated that at one point, Respondent was even reprimanded by the district court for his conduct. Further, Taylor stated that when he filed a malpractice suit against Respondent for the Smiths, Respondent continually avoided service of process and thereafter failed to participate in the litigation, resulting in a default judgment entered against him for $305,858.27. Despite this favorable judgment, Taylor stated, the Smiths have been unable to collect any money from Respondent.

Finally, Respondent caused injury to the legal system through his failure to participate in the disciplinary proceedings. He undermined the public's trust in lawyers and the justice system.

ABA *Standards* 4.0-7.0 – Presumptive Sanction

Two ABA *Standards* are on point here. First, ABA *Standard* 4.41(b) calls for disbarment when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. Second, ABA *Standard* 4.62 provides that suspension is generally appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to a client. Where multiple instances of attorney misconduct have occurred, the ABA *Standards* counsel that the ultimate sanction should at least be consistent with the

sanction for the most serious disciplinary violation and generally should be greater than the sanction for the most serious misconduct.[9]

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of the presumptive sanction to be imposed, while mitigating circumstances may warrant a reduction in the severity of the sanction.[10] Six aggravating factors are present here: Respondent's dishonest or selfish motive, a pattern of misconduct, multiple offenses, his refusal to acknowledge the wrongful nature of his misconduct, his substantial legal experience, and the vulnerability of his clients.[11] The Court is aware of one mitigating factor: Respondent lacks a prior disciplinary record.[12]

Analysis Under ABA *Standards* and Colorado Case Law

The Court heeds the Colorado Supreme Court's directive to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,[13] mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[14] Though prior cases are helpful by way of analogy, the Court is charged with determining the appropriate sanction for a lawyer's misconduct on a case-by-case basis.

Here, the People ask for disbarment, pointing to two cases in support,[15] and the Court agrees, given the seriousness of his neglect, the serious injury he caused, his abandonment of three legal matters, the misrepresentations he made to his clients, and his apparent lack of concern for this proceeding.[16] Respondent's failure to participate in these proceedings and his failure to pay the malpractice judgment demonstrate that he no longer wishes to practice law and has no intention of changing his behavior in response to disciplinary sanctions. Although Respondent has no prior disciplinary history, he has substantial experience—more than thirty years—in the practice of law, and the misconduct at issue here reflects particularly poorly on such a long-standing practitioner.

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[9] ABA *Standards* § 2 at 7.
[10] *See* ABA *Standards* 9.21 & 9.31.
[11] ABA *Standards* 9.22(b)-(d) & (g)-(i).
[12] ABA *Standard* 9.32(a).
[13] *See In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).
[14] *In re Attorney F.*, 285 P.3d at 327 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).
[15] *See People v. Dulaney*, 785 P.2d 1302, 1305 (Colo. 1990) (disbarring a lawyer who engaged in neglect of multiple client matters and deceived clients with the intent to hide the attorney's neglect); *People v. Murray*, 887 P.2d 1016, 1021 (Colo. 1994) (disbarring a lawyer for neglect and failure to communicate with clients in ten separate cases).
[16] *Cf. People v. Demaray*, 8 P.3d 427, 427 (Colo. 1999) (suspending an attorney for three years for his neglect of one client's criminal matter and his failure to respond to the People's investigation where he had no prior discipline and inexperience, but noting that disbarment arguably applied under ABA *Standard* 4.41 because the attorney caused potentially serious harm).

III. CONCLUSION

Respondent abdicated his duties to his clients and the legal system. He not only knowingly deceived his clients but also bears responsibility for entry of default against them. Then he failed to advance affirmative defenses, disregarded opposing counsel's and his clients' attempts to communicate with him, and ignored many requests for information from disciplinary authorities. The Court thus disbars Respondent.

IV. ORDER

The Court therefore **ORDERS:**

1. **JERRY R. ATENCIO**, attorney registration number 08888, is **DISBARRED.** The **DISBARMENT SHALL** take effect only upon issuance of an "Order and Notice of Disbarment."[17]

2. To the extent applicable, Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c).

3. Within fourteen days after the effective date of the disbarment, Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the Court setting forth pending matters and attesting, *inter alia*, to notification of clients and of other jurisdictions where the attorney is licensed.

4. Any application for stay pending appeal **MUST** be filed with the Court **on or before Friday, May 5, 2017**. Any response thereto **MUST** be filed within seven days.

5. Respondent **SHALL** pay the costs of these proceedings. The People **SHALL** submit a statement of costs **on or before Friday, April 28, 2017**. Any response thereto **MUST** be filed within seven days.

DATED THIS 14th DAY OF APRIL, 2017.

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

[17] In general, an order and notice of disbarment will issue thirty-five days after a decision is entered under C.R.C.P. 251.19(b) or (c). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

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