***People v. Larry D. Brown*. 18PDJ067. July 17, 2019.**

A hearing board disbarred Larry D. Brown (attorney registration number 17409). The Colorado Supreme Court affirmed the hearing board's decision on February 24, 2020. Brown's disbarment is effective April 22, 2020.

Brown recklessly converted disputed funds that he held in his trust account for a client. He made misrepresentations to the client about the status of those funds. He then intentionally made several material misrepresentations to a bankruptcy court about the disputed funds. Later, he intentionally disobeyed the bankruptcy court's order to turn over the disputed funds, prejudicing the administration of justice.

Brown's conduct violated Colo. RPC 1.15A(a) (a lawyer shall hold property of clients separate from the lawyer's own property); Colo. RPC 1.15A(c) (a lawyer shall keep separate any property in which two or more persons claim an interest until there is a resolution of the claims); Colo. RPC 3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law); Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Colo. RPC 8.4(d) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

The case file is public per C.R.C.P. 251.31. 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:** LARRY DEAN BROWN, #17409	Case Number: **18PDJ067**

OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(b)

Larry Dean Brown ("Respondent") recklessly converted disputed funds that he held in his trust account. He made misrepresentations to the client about the status of those funds. He then intentionally made several material misrepresentations to the bankruptcy court about the disputed funds. Later, he intentionally disobeyed the bankruptcy court's order to turn over the disputed funds, prejudicing the administration of justice. Respondent's misconduct warrants disbarment.

I. PROCEDURAL HISTORY

On October 23, 2018, Erin R. Kristofco, Office of Attorney Regulation Counsel ("the People"), filed a complaint with Presiding Disciplinary Judge William R. Lucero ("the PDJ"), alleging that Respondent violated Colo. RPC 1.15A(a) (Claim I), 1.15A(c) (Claim II), 3.3(a)(1) (Claim III), 3.4(c) (Claim IV), 8.4(c) (Claim V), and 8.4(d) (Claim VI). Respondent filed an answer through his counsel, James M. Meseck and Dmitry B. Vilner, on November 13, 2018. The PDJ then set a two-day trial for late February 2019.

In early January 2019, the People filed a motion for summary judgment on all six claims pleaded in the complaint. The parties then fully briefed the motion, which the PDJ decided on February 15, 2019, granting summary judgment as to Claims I and II but denying summary judgment as to Claims III-VI.

Shortly thereafter, the PDJ continued the hearing slated for late February and stayed all pending deadlines due to an emergency in Meseck's family. The hearing was later reset for May 21-22, 2019.

The May hearing, held under C.R.C.P. 251.18, was heard by a Hearing Board comprising the PDJ, lawyer James L. Cox Jr., and citizen member Laurie Albright. Kristofco represented the People, and Respondent appeared with his counsel. A sequestration order was entered. The Hearing Board considered stipulated exhibits S1-S30 and the testimony of Respondent, Maria Flora, John Smiley, Karen Bershenyi (who also served as the People's advisory witness), Mark Andrews, Rhonda L. Werth-Hathaway, Elizabeth Granado, who testified via telephone, and Jessica Deal.

II. FACTUAL FINDINGS AND LEGAL CLAIMS

Respondent was admitted to practice law in Colorado on May 26, 1988, under attorney registration number 17409. He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.[1]

Findings of Fact[2]

Respondent, a Colorado native who belonged to a military family, grew up in Europe as his family was transferred to various posts. He returned to the United States to attend the U.S. Merchant Marine Academy. He then served in the Vietnam War as a naval pilot, and thereafter spent four years in the reserves. After an honorable discharge from the military, Respondent worked for a few years in real estate and as a commercial pilot for Continental Airlines. In 1985, he matriculated at the University of Denver College of Law.

After graduating from law school in 1988, Respondent formed L.D. Brown, P.C. ("the Firm"), of which he is the founder and sole owner. He has always exercised exclusive control of the Firm's trust account. Immediately after law school Respondent dabbled in real estate, small business, and bankruptcy law; in the mid-1990s he began specializing in bankruptcy work, and he now spends most of his time handling an equal number of Chapter 7 and Chapter 13 bankruptcies.[3]

Virginia Werth's Chapter 7 Bankruptcy

Virginia Werth retained the Firm for bankruptcy assistance sometime in 2013. Respondent oversaw the case, which was primarily staffed by Helen Arnold, an experienced bankruptcy practitioner in her own right.

As Respondent remembered, Werth, a widow, had been involved in a failed business venture and consequently was being sued both by Wells Fargo Bank and by her own family

[1] *See* C.R.C.P. 251.1(b).
[2] These findings, which we conclude have been established by clear and convincing evidence, are drawn from testimony at the disciplinary hearing where not otherwise indicated.
[3] *See* Ex. S29 (Respondent's resume).

members to recover funds that she lost while operating her business. Respondent testified that these family members were "vindictive" and "wanted to get their pound of flesh."

On December 26, 2013, the Firm filed for Chapter 7 bankruptcy relief on Werth's behalf. Harvey Sender, a Chapter 7 trustee ("Trustee"), was appointed to administer Werth's bankruptcy estate. The Trustee hired Maria Flora, a Colorado bankruptcy lawyer, to represent the Trustee's interests in Werth's matter. According to Respondent, the bankruptcy was relatively straightforward until one of Werth's relatives alerted the Trustee that Werth might have an ownership interest in a beachfront property in Guaymas, Sonora, Mexico ("the Mexico Property").

The Mexico Property was originally purchased in the 1980s by Werth's now-deceased husband, Ronald Werth, and two other of his family members, with each purchaser taking a one-third share. Mexican law prohibits foreign nationals from owning beachfront property, so the title to the Mexico Property was held in a trust, which named a Mexican financial institution as trustee and the three purchasers as beneficiaries.[4] When Ronald Werth passed away in 2004, his one-third beneficiary interest was distributed to the Ronald J. Werth Family Trust ("the Family Trust").[5] A few years after her husband died, Werth petitioned a Mexican court to transfer the Family Trust's one-third interest in the Mexico Property to Werth individually. Around October 2007, a judgment entered in the Mexico proceeding, distributing the Family Trust's interest to Werth individually.

The Mexico Property sold on May 20, 2014. Three days later, the Firm entered into a separate fee agreement and established an attorney-client relationship with Rhonda Werth-Hathaway, Werth's daughter and trustee for the Family Trust.[6] Four days after that, $22,060.81 in partial proceeds from the closing of the Mexico Property was wired into Respondent's trust account.[7] On October 28, 2014, another $30,000.00—the balance of the proceeds from the sale of Werth's one-third interest in the Mexico Property—was wired into Respondent's trust account.[8] In all, Respondent was given $52,060.81 from the sale to hold in his trust account.[9] Werth-Hathaway, as trustee of the Family Trust, authorized Respondent to use those proceeds to pay the Firm's legal fees in Werth's bankruptcy proceeding.

[4] Ex. S22 at 2, 7.
[5] Ex. S22 at 3. Werth was the primary beneficiary of the Family Trust. Until August 2013, when her daughter Rhonda Werth-Hathaway, replaced her, Werth was also the trustee of the Family Trust.
[6] Summ. J. Order at 3 (Feb. 15, 2019).
[7] Ex. S1.
[8] Ex. S5. As relevant to later phases of the Werth bankruptcy matter, Respondent contended at the disciplinary hearing that these wire transfers into his trust account in fact effected the transfer of those funds from Werth to the Family Trust, although he admitted that he was not aware of any writing or other documentation to that effect.
[9] The net proceeds from the sale totaled approximately $156,840.49. Ex. S13 at 3.

In June 2014, Flora, on the Trustee's behalf, conducted Werth's bankruptcy examination, which is akin to a deposition in civil litigation. Flora recalled Werth's testimony as generally vague but definitive as to the ownership of the Mexico Property: it belonged to the Family Trust, Werth claimed. When Flora learned that the Mexico Property had already been sold,[10] she filed an adversary action in autumn 2014 to force the turnover of the sale proceeds to the bankruptcy estate. In the ensuing litigation, Werth took the position that the Mexico Property was an asset of the Family Trust; that she therefore never owned the Mexico Property proceeds; and that as such the proceeds were not part of her bankruptcy estate.

Respondent's Trust Account Balances

In mid-2014, Respondent began to make the first of several disbursements from his trust account to his operating account with electronic notations like "Werth Fam Trust," "werth," and "Wer Fam Tst."[11] At the disciplinary hearing, Respondent repeatedly insisted that these entries did not relate to any specific client matter; they had "no correlation to where the money was from or who it was being held for or anything else," he insisted. Rather, he declared, the online banking system required him to electronically populate a memo line, so these notations were often "meaningless." Sometimes, he said, they were merely intended as "a trigger, a reminder, a checkpoint" to prompt him to reconcile his bank statements with his accounting system. The Hearing Board finds this explanation patently incredible and cannot give it any credence. We find that these notations are what they appear to be on their face: Respondent's shorthand notes documenting transfers to his operating account of funds that he was holding in trust for Werth's benefit.

Respondent made his first such withdrawal on August 1, 2014, in the amount of $5,000.00, which he notated "Werth Fam Trust."[12] The second transfer came a little more than three weeks later, on August 25, with a deposit of $2,500.00 into his operating account. This transfer was marked in his trust account bank records simply as "werth."[13] Troublingly, on September 10, 2014, the Firm sent Werth-Hathaway an invoice through August 2014 reflecting a total of $5,863.15 in billed fees and costs—significantly less than the $7,500.00 with "Werth" notations that he had already withdrawn from his trust account.[14] Respondent testified that he did not reference invoices when he made transfers from his trust account—he would simply estimate how much to transfer to his operating account based on his own "mental recordkeeping" of the amounts that should have been billed.

[10] In July 2014, Flora initiated an adversary proceeding to liquidate the Mexico Property, and only later discovered that it had already been sold. She soon dismissed that proceeding. Based on these facts, the PDJ has already held as a matter of law that by July 2014 Respondent was on notice that the Trustee claimed an interest in Werth's Mexico Property proceeds. *See* Summ. J. Order at 11 (Feb. 15, 2019).
[11] *See* Exs. S3, S6, S8, S15, S20, S24.
[12] Ex. S3.
[13] Ex. S3.
[14] Ex. S4.

In early December 2014, Respondent withdrew another $5,000.00 from his trust account, with the memo line electronically marked "Werth Fam Trust."[15] At the end of that month, the Firm sent Werth-Hathaway a second invoice for $5,370.00 in legal fees and costs.[16] So, by year's end 2014, the Firm had invoiced Werth-Hathaway around $11,233.15; yet by the same date Respondent had withdrawn from his trust account $12,500.00 in funds electronically earmarked as related to Werth.

On May 21, 2015, Respondent withdrew $3,500.00 from his trust account.[17] This withdrawal contained the entry "werth."[18] In September 2015, he transferred another $3,000.00 out of his trust account and into his operating account, accompanied by the annotation "Werth 3."[19]

In early November 2015, the Firm issued a third invoice, this time for $11,183.44.[20] The three invoices through November 2015 together document that the Firm had earned $22,416.59 for work on Werth's matter.[21] As a result, Respondent should have held in trust at that point $29,644.22 in proceeds from the Mexico Property sale.[22] Respondent's November 2015 trust account records, however, reveal a trust account balance of $8,241.14: a shortage of more than $21,000.00.[23] At the disciplinary hearing, Respondent acknowledged that he failed to hold the correct amount of money in trust and had made a mistake by transferring those funds to his operating account. When pressed to characterize the shortfall, he testified, "I would say $20,000 in today's world is relatively an insignificant deficit; however, in a trust account that is a notable deficit, and definitely once it was discovered it was taken care of."

The Firm issued in April 2016 a fourth invoice for work completed in the Werth bankruptcy matter. The invoice reflected $6,391.67 in fees.[24] On June 1, 2016, Respondent transferred $2,000.00 from his trust account into his operating account, with the notation "Werth."[25] About two weeks later, the Firm issued a fifth invoice, this time for $3,080.00,[26] bringing the

[15] Ex. S6.
[16] Ex. S7.
[17] Ex. S8.
[18] Ex. S8.
[19] Ex. S9. We interpret this notation as signifying that Respondent intended to withdraw from his trust account $3,000.00 in Werth-related funds.
[20] Ex. S10. A section of that invoice titled "Payment History" references a transfer in the same amount from funds held in trust into Respondent's operating account. But Respondent's November 2015 trust account records do not show any such transfer.
[21] $5,863.15 (Aug. 2014 invoice) + $5,370.00 (Dec. 2014 invoice) + $11,183.44 (Nov. 2015 invoice) = $22,416.59.
[22] $52,060.81 (Mexico property sale proceeds) - $22,416.59 (invoiced fees) = $29,644.22.
[23] Ex. S11. $29,644.22 (amount his trust account should have held) - $8,241.14 (amount his trust account did hold) = $21,403.08.
[24] Ex. S12. The invoice also notes that Respondent was holding a remaining $23,252.55 in trust.
[25] Ex. S15.
[26] Ex. S16.

billing total in the Werth matter to $31,888.26.[27] Accordingly, Respondent should have been holding $20,172.55 of Werth's funds in his trust account,[28] but on June 16, 2016, Respondent's trust account balance was only $16,784.75.[29] His trust account was thus deficient on that date by $3,387.80.[30] Although Respondent admitted at the disciplinary hearing that his June 2016 trust account balance was insufficient, he explained that this pattern was "an ongoing problem" through sometime in 2016, when "it was realized, and then it was corrected."

Respondent made another withdrawal of $5,000.00 on July 1, 2016, a transfer he marked "Werth."[31] The balance of his trust account at the end of July 2016 sat at $2,986.68.[32]

The Turnover Proceeding and the Freeze Order

The trial in Werth's turnover adversary proceeding was held on May 17, 2016. Judge Michael E. Romero, Chief Judge of the United States Bankruptcy Court for the District of Colorado, decided the matter on July 27, 2016 ("the Turnover Order").[33] He found that proceeds from the sale of the Mexico Property belonged to Werth as of the date of her bankruptcy petition and thus were property of her bankruptcy estate.[34] Judge Romero also noted that no action "was ever taken to transfer [Werth's] now-individual interest in the Mexican Trust back to the Werth Trust, [or] the Family Trust . . . ."[35] Accordingly, he ordered that the proceeds from the sale, "presently in [Respondent's] COLTAF account," . . . "are property of the estate and must be turned over to [the Trustee]."[36]

Respondent did not turn over the Mexico Property proceeds to the Trustee. Instead, he and Arnold appealed the Turnover Order to the Tenth Circuit Bankruptcy Appellate Panel (the "BAP"). On the Trustee's behalf, Flora then penned a letter to Respondent and Arnold, demanding that they promptly turn over $52,050.81 to the Trustee.[37] Respondent testified that he did not recall the letter but conceded that thereafter he again transferred to his operating account Werth's Mexico Property proceeds that he held in trust. Ten days after

[27] $5,863.15 (Aug. 2014 invoice) + $5,370.00 (Dec. 2014 invoice) + $11,183.44 (Nov. 2015 invoice) + $6,391.67 (Apr. 2016 invoice) + $3,080.00 (June 2016 invoice) = $31,888.26.
[28] $52,060.81 (Mexico property sale proceeds) - $31,888.26 (invoiced fees) = $20,172.55.
[29] Ex. S15.
[30] $20,172.55 (amount his trust account should have held) - $16,784.75 (amount his trust account did hold) = $3,387.80. On June 20, 2016, his trust account dropped again, to $9,784.55. This represents a $10,387.80 defalcation. $20,172.55 (amount his trust account should have held) - $9,784.55 (amount his trust account did hold) = $10,387.80.
[31] Ex. S20.
[32] Ex. S20.
[33] Ex. S13.
[34] Ex. S13 at 2-3 ("Thus as of [Werth's] December 26, 2013, bankruptcy proceeding, she owned, individually, a one-third interest in the Mexican Trust which owned the property.")
[35] Ex. S13 at 3.
[36] Ex. S13 at 3-4.
[37] Ex. S14.

appealing the Turnover Order, the Firm moved to stay the judgment pending appeal, without bond, to preserve the status quo during the appeal.[38]

In October 2016, Flora sought judicial protection of the Trustee's rights pending appeal by asking Judge Romero to order an accounting of the Mexico Property proceeds deposited into Respondent's trust account; to prohibit Respondent from making any new disbursements from his trust account pending further orders of the court; and to require Respondent to return to his trust account any funds removed since the Turnover Order issued.[39] Flora explained at the disciplinary hearing that she filed the motion because the Trustee grew concerned Respondent would continue to use the disputed Mexico Property proceeds to pay his legal fees.

Just two days later, the bankruptcy court entered a brief three-sentence order ("the Freeze Order") prohibiting Respondent "from making any further disbursements from the [trust] account pending further orders of this court."[40] Respondent admitted that he did not abide by the Freeze Order, as he transferred funds out of his trust account after the order issued. He justified his failure to do so as a misunderstanding, noting that he had not read the Freeze Order "word for word" but had instead relied on Arnold's interpretation. Nevertheless, he displayed deep familiarity with the order at the disciplinary hearing, noting that he was involved in promptly seeking clarification from Judge Romero to specify that the Freeze Order applied only to the Werth funds. As he related, "[w]e went in immediately after that order . . . and pointed out to [the judge] that that tied up a lot of funds that had nothing to do with the Werth issue, and he amended that order" to apply only to funds held for Werth.

In November 2016, the bankruptcy court directed Respondent's firm to disclose how much money it held in trust. The Firm filed an advisement on November 21, 2016 ("the Advisement"), in which Respondent participated in making the following representations: (1) "As of July 27, 2016, the balance of the funds held in trust was $20,172.55," and (2) "No funds have been disbursed from this account since."[41] Neither of these statements was accurate, as Respondent conceded at the disciplinary hearing. As to the first representation, Respondent's trust account balance on July 27, 2016, was just $2,986.68—not $20,172.55, as he attested.[42] As to the second representation, on November 17, 2016, four days before the Advisement was filed, Respondent's trust account contained only $372.00.[43] Funds thus must have been disbursed from his trust account, as he had transferred all but $372.00 of the Mexico Property proceeds out of that account. Then, on November 22, 2016, a wire

[38] Ex. S17.
[39] Ex. S17.
[40] Ex. S18.
[41] Ex. S19.
[42] *See* Ex. S20.
[43] *See* Ex. S20.

transfer in the amount of $300,000.00 was deposited into Respondent's trust account from another client.[44]

Respondent offered a curious explanation for the misstatements in the Advisement. He testified that at the time the bankruptcy court ordered him to disclose his trust account balance, he was aware that his trust account records did not correspond exactly with the Werth billing records. Even so, he instructed Arnold to prepare a summary of the Mexico Property funds that *should have been* held in trust, based on Arnold's own accounting of billable work performed. Though he "did not necessarily agree" with Arnold's figure, he recalled, he also "did not feel that it was appropriate . . . to order her to change her beliefs on hours and billable hours."

This justification is all the more incriminating in light of two additional facts. First, Respondent testified that at the time the Firm "came up with the [Advisement] to the [bankruptcy] court that we still had $21,000.00 in our account, [] my mental calculations [of how much should have remained in the trust account] were down in the neighborhood of somewhere between six and eight thousand." And second, Arnold did not have access to the trust account or the trust account records—Respondent exercised exclusive control of the account and its records. Yet despite these two facts, Respondent did not bother to cross-check Arnold's calculations against the actual trust account records. Why? He said only, "If this is what was determined should've been part of the Werth billing record and the amount left, my pulling up anything out of the trust account would have not been productive." He continued, "Getting back to . . . this number was what became paramount at that time and making sure that those numbers did in fact balance." Yet he also insisted—disingenuously, in the Hearing Board's view—that he "believed at the time that it was an accurate statement to the court."

The BAP Decision

On May 8, 2017, the BAP affirmed the bankruptcy court's ruling. The BAP found that Werth, individually, owned a one-third interest in the Mexico Property at the time of her bankruptcy filing and, as a result, that interest—and the resulting proceeds—became property of the bankruptcy estate. The BAP thus affirmed the bankruptcy court's judgment that Werth was required to surrender the Mexico Property proceeds to the Trustee.[45]

The BAP also rejected three distinct arguments that the Firm advanced as to why the bankruptcy court had erred in concluding that the Mexico Property interest was part of the bankruptcy estate at the time of Werth's bankruptcy filing.[46] But—as relevant to later proceedings—the BAP never addressed any argument that Werth had transferred the Mexico Property proceeds to the Family Trust *after* she filed for bankruptcy protection. Nor,

[44] Ex. S21.
[45] *See* Ex. S22.
[46] Ex. S22 at 17-20.

for that matter, did Respondent recall raising that issue either before the bankruptcy court or on appeal.

At the disciplinary hearing, Flora testified that in the wake of the BAP's affirmance, Werth neither appealed the BAP decision nor turned over the Mexico Property proceeds to the Trustee. By the time it became clear that Flora would have to file yet another adversary proceeding in Werth's matter—this time to revoke Werth's bankruptcy discharge for failure to surrender all property to the bankruptcy estate—Flora had already begun the process of retiring and had closed her office. She withdrew from the case. The Trustee hired another lawyer, John Smiley, to see the case to completion.

One of Smiley's first acts after the BAP order became final and nonappealable was to call Respondent and Arnold directly to request that Werth relinquish the Mexico Property proceeds to the Trustee. Smiley, who spoke with Respondent (Arnold merely listened to the dialogue), described the conversation as "frustrating." And he characterized Respondent, who simply insisted that the proceeds were not part of the bankruptcy estate, as "intentionally" and "stunningly evasive." In Smiley's opinion, Respondent's reply was a mere "regurgitation of arguments that had previously been litigated and determined against his client in that case." Respondent, on the other hand, remembered the conversation as short and direct. He believed he was "clear from the beginning" that his firm had never held, and was not at the time holding, money for Werth and thus had nothing to turn over to the Trustee.[47]

Respondent recollected that throughout all phases of the bankruptcy litigation Werth was adamant that the Mexico Property proceeds belonged to the Family Trust, and he attempted to represent her wishes and interests as best he could.

The Contempt Order

On May 19, 2017, the Firm issued a sixth invoice in the amount of $51,276.40.[48] This sixth invoice indicated that a $20,172.55 payment had been transferred into the Firm's operating account. Respondent's trust account records, in turn, reflect a transfer of $20,172.55 on May 25, 2017, with the notation of "Transf to 1 d Brown Pc Wer Fam Tst."[49]

Respondent testified that he was "very aware" of this transfer and the legal bases on which the Firm relied to justify the transfer. Added together, the six invoices show that the Firm had billed Werth-Hathaway more than $80,000.00 in total —almost $30,000.00 more than the amount Werth had sought to withhold from the Trustee. Werth-Hathaway, who testified briefly, was complimentary of the Firm's work and believed that the Firm's fees had been earned. She was not aware that the Firm's legal fees were in excess of $52,000.00—she had

[47] *See* Ex. S26 at 3.
[48] Ex. S23.
[49] Ex. S24.

never been asked to pay more than that. She also conceded that it was "a little ridiculous" that in fighting to keep the Mexico Property proceeds the Firm exhausted the very corpus of funds it sought to retain for Werth's benefit.

On the Trustee's behalf, Smiley filed a complaint in July 2017, alleging that notwithstanding the Freeze Order Respondent continued to transfer Mexico Property proceeds out of his trust account to pay the Firm's attorney's fees and expenses.[50] Accordingly, Smiley requested recovery of post-bankruptcy-petition transfers of Mexico Property proceeds made from Respondent's trust account as well as attorney's fees and costs against Werth and the Firm.[51] Further, Smiley sought to revoke Werth's bankruptcy discharge. Smiley also moved for contempt sanctions against Werth and the Firm, arguing that they had notice of the Turnover Order, they expressly refused to comply with demands to relinquish the funds after issuance of the BAP decision, and thus they should be held in contempt and monetarily sanctioned for each day they continued to violate the Turnover Order.[52]

The bankruptcy court issued an order on November 9, 2017, directing the Firm to file a list of every transfer made from the Firm's trust account on Werth's or the Family Trust's behalf after the Turnover Order was issued in mid-October 2016. The Firm filed a responsive report a few days later ("the Report"), which Arnold signed for Respondent, over Respondent's signature block.[53] The Report attached an affidavit signed by Respondent.[54] In that filing, the Firm declared that it had not held any money belonging to Werth since before the filing of her bankruptcy petition; the Firm also represented that one transfer had been made from Family Trust funds: a May 25, 2017, transfer of $20,172.55 from the Firm's trust account to its operating account, as authorized by the Family Trust for the payment of legal fees and costs.[55] The report certified that the transfer "exhausted the funds of the Family Trust" held in the trust account.[56]

Respondent's attestation that these funds, transferred in late-May 2017, belonged to the Family Trust was not accurate. Respondent's trust account on November 21, 2016, held just $372.00, and the Family Trust had not since that time deposited additional funds into Respondent's trust account. As such, almost none of the transferred funds—only $372.00 of the $20,172.55 withdrawal—in fact came from the Mexico Property proceeds. During his testimony, Respondent seemed not to appreciate the gravity of this mismanagement. He recounted that, having realized Werth's Mexico Property proceeds had been improperly disbursed, he simply put money back into his trust account to "cover" those funds. "I can't tell you precisely where [the replacement funds] came from," he said, "but I can tell you it

[50] *See* Ex. S25 at 4.
[51] Exs. S25-S26.
[52] Ex. S26 at 6.
[53] Ex. S27.
[54] Ex. S27.
[55] Ex. S27.
[56] Ex. S27.

was my money, or money that came out of operating, to make sure that this account was made whole."[57] He remarked that although transferring funds from his operating account to his trust account was not a regular practice, "when I make a mistake and I know that things need to be covered, . . . my practice is to cover the shortfall, or to cover the problem, and that's exactly what we did here."

On January 8, 2018, the bankruptcy court ruled on the contempt motion, comprehensively chronicling the bankruptcy matter's procedural history ("the Contempt Order"). The court first considered whether Werth and the Firm had violated the Turnover Order. Of note, the Contempt Order addressed a new argument that Respondent had not formally advanced in any phase of the litigation up to that point: that Werth transferred ownership of the Mexico Property proceeds to the Family Trust *after* she had filed for bankruptcy protection. The court remarked, "Werth and Brown PC have now changed their story—instead of the Mexican Property and Sale Proceeds always being property of the Family Trust (the very same defense to the underlying turnover action rejected by the Court and the BAP), [they] now argue Werth did originally own the Sale Proceeds, but illegally transferred them to the Family Trust."[58] The Contempt Order stated that the Trustee had no knowledge of this argument until October 2016, that the Trustee likely "did not know precisely what transfers were made until very recently," and that "all the while, Werth and Brown PC concealed from the Trustee where the sale proceeds were and where the sale proceeds were going."[59] Though the court objurgated Werth's changed position as "strain[ing] credulity," it declined to hold Werth or the Firm in contempt for violating the Turnover Order, because the Trustee's motion did not discuss these matters and thus did not provide Werth, the Firm, or the Family Trust adequate notice or an opportunity to be heard on them.[60]

The bankruptcy court did, however, hold the Firm in contempt of the Freeze Order, finding that the court had "expressly prohibited" the Firm from transferring funds from its trust account but that the Firm "did so anyway."[61] The Contempt Order mentioned that the Firm had offered a "somewhat meandering" answer at a contempt hearing as to why it made the May 2017 transfer from its trust account.[62] The crux of the argument, which Respondent repeated at the disciplinary hearing, is as follows: because Werth had transferred the Mexico Property proceeds to the Family Trust through the wire transfers to Respondent's trust account in 2014—after the filing of her bankruptcy petition—the onus was on the Trustee to file an action seeking return of the improper post-petition transfer of the Mexico Property proceeds. Having failed to do so within the applicable statute of limitations or

[57] Respondent did not produce deposit slips or any other evidence to track the provenance of these "replacement funds," so the Hearing Board cannot make a finding of whether Respondent did in fact replenish his trust account with his own funds or whether he used the funds of other clients to balance his books.
[58] Ex. S28 at 9-10.
[59] Ex. S28 at 10.
[60] Ex. S28 at 14.
[61] Ex. S28 at 16.
[62] Ex. S28 at 15.

repose, the Trustee allegedly"no longer had power to challenge the Family Trust's title, [and] . . . the Family Trust exercised their prerogatives with their own property."[63]

The Contempt Order characterized the Firm's May 2017 transfer of funds as "staggeringly simplistic and bold to the point of arrogance," and the court noted that it was "frankly astonished, not that [the Firm] would reach its own conclusion on these questions, but that it would be so extremely confident in its conclusion to make the transfer without [c]ourt authorization or even notice to the Trustee."[64] Ultimately, that the Firm had reasons as to why it felt it could violate the Freeze Order was "irrelevant," the court observed; rather, "what matters is that [the Firm] took action expressly prohibited by the Freeze Order."[65] The bankruptcy court ordered the Firm to promptly transfer to the Trustee $20,172.55, plus interest running from May 25, 2017, as well as reasonable attorney's fees.

On January 16, 2018, the Firm finally issued a check to the Trustee for $20,314.12.[66] The Werth bankruptcy matter settled during summer 2018: Werth's bankruptcy discharge is still in effect; all her debts have been discharged; all assets of her bankruptcy estate have been administered; and all claims and adversary proceedings related to the matter have been or will soon be dismissed.

Rule Violations

Before analyzing each of the alleged rule violations here, we pause to address a global defense Respondent mounted. Throughout the disciplinary hearing, Respondent repeatedly traduced Arnold as responsible for the day-to-day operations of Werth's bankruptcy matter and, by implication, as the source of the ethical lapses at issue in this case. According to Respondent, during 2016 and 2017 Arnold suffered from cognitive and physical impairments, including "chemo brain," that resulted in her compromised judgment, loss of memory and concentration, and diminished overall functioning. He asserted that he relied in good faith on her legal acumen and bankruptcy experience and that he did not notice, until looking back in retrospect, the impact of her health problems on the trajectory of Werth's bankruptcy matter.

We dismiss this defense out of hand for several reasons. First, many of the claims pleaded in the complaint detailing trust account infractions have nothing to do with Arnold, who indisputably had no access to or control over Respondent's trust account. Second, though Respondent occasionally disclaimed involvement in the Werth bankruptcy matter, we adjudge him a willing and knowledgeable participant in all its key phases. We make this determination based on his own testimony as well as his manner and demeanor on the stand. Finally, Respondent introduced no evidence of Arnold's ostensible impairment—

[63] Ex. S28 at 15.
[64] Ex. S28 at 15.
[65] Ex. S28 at 15.
[66] Ex. S30.

Arnold was not called to testify, nor were her records subpoenaed—and he elicited very little testimony corroborating his claims that her alleged cognitive deterioration had any effect on the manner in which Werth's matter was handled.

Colo. RPC 1.15A(a)

Colo. RPC 1.15A(a) requires a lawyer to hold property of clients separate from the lawyer's own property. On summary judgment, the PDJ held that the undisputed facts established as a matter of law that Respondent violated this rule when he moved unearned client funds out of his trust account and into his operating account. The PDJ concluded, for example, that on September 10, 2014, the Firm sent an invoice for $5,863.15 for work on Werth's bankruptcy, yet Respondent's trust account notations showed that he had already transferred $7,500.00 of Werth-related funds from his trust account into his operating account. As another example, the PDJ found, the Firm had billed a total of $33,888.26 in attorney's fees for work on Werth's bankruptcy matter and thus should have held $20,172.55 in trust. Instead, the trust account records reflect a balance of only $9,784.75. By removing unearned funds from his trust account and transferring them to his operating account, Respondent failed to keep client or third-party funds separate from his own property. Accordingly, the PDJ entered summary judgment as to Claim I of the People's complaint.

Colo. RPC 1.15A(c)

The PDJ also entered summary judgment on the People's Claim II, premised on Colo. RPC 1.15A(c), which requires a lawyer to keep separate any property in which two or more persons claim an interest until there is a resolution of the claims. The PDJ concluded that Respondent violated this rule by transferring disputed funds—Werth's Mexico Property proceeds—from his trust account to his operating account, even though he was on notice that the Trustee claimed an interest in those proceeds as early as summer 2014, and even though the bankruptcy court had issued its Turnover Order in July 2016. The PDJ held that Respondent should have segregated Werth's Mexico Property proceeds or left them in his trust account until all disputes had been resolved.

Colo. RPC 3.3(a)(1)

At the disciplinary hearing, the People argued that Respondent thrice violated Colo. RPC 3.3(a)(1), which prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal or failing to correct a false statement of material fact or law. We agree with the People that Respondent violated this rule three times.

First, the People say, Respondent averred in his November 2016 Advisement that the Firm's trust account contained $20,172.55 as of July 27, 2016—a demonstrably false statement. At the disciplinary hearing, Respondent acknowledged that the Advisement was not accurate, yet he also insisted that he believed it was true at the time he submitted it. We cannot credit that patently disingenuous testimony. Respondent admitted that he tasked Arnold with

generating figures showing how much money the Firm *should* have held in trust—a task that depends on timekeeping—while the Advisement specifically purported to disclose how much money the Firm *actually* held in trust—a task that depends on recordkeeping and accounting. That Respondent delegated this critical task to Arnold, who had no access to trust account records, evidenced his intent not to faithfully report the facts but rather to create a fiction that aligned with Arnold's timekeeping reports. As he said, his "paramount" goal was to present to the court the appearance that his trust funds records and billing invoices were consistent. We thus conclude that Respondent knowingly made this false statement with the intent to conceal his mismanagement of funds from the bankruptcy court and from Werth. We also conclude that the contents of the Advisement were material, as they addressed the preservation of Werth's Mexico Property proceeds—the very subject of the litigation.

Second, the People allege, Respondent falsely represented in the November 2016 Advisement that no funds had been disbursed from his trust account since the Turnover Order had issued. Respondent agreed that this statement was in error—in November 2016, his trust account balance had in fact plummeted to just $372.00, confirming that at least one disbursement had been made—but he argued that he was nothing more than reckless in making this false statement. We again reject this defense. We find, as above, that Respondent affirmatively avoided reviewing his trust account records, which bespeaks an unwillingness to truthfully respond to the bankruptcy court's query. Respondent intentionally made this material misrepresentation.

Third, the People allege that Respondent materially misrepresented in his November 2017 Report that he transferred $20,172.55 of Werth-related funds out of his trust account in May 2017. He knowingly mischaracterized those funds as Werth-related, the People assert, as he was aware that his trust account in November 2016 had dipped to $372.00 and thus the funds must have come from another source.

We find the People have proved that Respondent knowingly made this material misrepresentation. Respondent reported to the bankruptcy court his transfer of $20,172.55 as a disbursement of Werth-related funds, and he attested in a sworn affidavit that his trust account had held no Werth-related funds since May 2017. But as explained above, the Report was not accurate. We conclude that Respondent was aware the Report was incorrect. Respondent explained that based on his mental calculations, his trust account balance should have sat around $6,000.00-$8,000.00 in June 2016—far less than the sum he reported he held in Werth-related funds in May 2017. Further, he noted that he became aware of mistakes in his trust account and took corrective steps by late 2016. And he testified that he was "very aware" of the transfer of funds in May 2017. Considering this circumstantial evidence and our assessment that Respondent's testimony, on the whole, is not credible, we find that he made this material misrepresentation in the Report knowingly.

Colo. RPC 3.4(c)

Colo. RPC 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Although the rule does not define the term "open refusal," commentators suggest that such a refusal is premised on "good faith and open noncompliance in order to test an order's validity."[67] "An open refusal permits the . . . court to assess the attorney's argument and allows opposing counsel to take action to protect her client from the opposing attorney's noncompliance."[68] Under the open refusal exception, a lawyer cannot "unilaterally and surreptitiously flout a court order."[69]

The People contend that Respondent violated this rule by refusing to turn over Werth's Mexico Property proceeds to the Trustee until the Contempt Order was issued in January 2018, even though more than eight months prior, on May 8, 2017, the BAP affirmed the bankruptcy court's ruling that the proceeds were property of the bankruptcy estate and thus had to be surrendered to the Trustee.[70] Respondent disagrees. He seems to argue in the alternative (1) that he merely skimmed the BAP decision and thus misunderstood it, and (2) that he read the BAP decision only as holding that the Mexico Property was Werth's at the time of her bankruptcy petition (leading to his putative good faith belief that the BAP decision left room for the argument that the proceeds had been transferred to the Family Trust and thus were no longer Werth's).[71]

We adopt the People's position and do not credit either of Respondent's defenses. As Werth's legal representative, Respondent had an obligation to review the BAP decision and to comply with it—particularly given that he alone controlled the trust funds subject to the BAP's decision. In any event, we find his narrative unavailing, because we conclude that Respondent carefully reviewed the BAP decision and made a calculated choice not to turn over the Mexico Property proceeds. Instead, relying on semantics, a very peculiar reading of the decision, and an argument that he had never raised before any tribunal, he consciously elected not to appeal or to openly challenge the order.

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[67] 2 Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering § 30.9, at 30-21 (3d ed. 2001, 2011 Supp.); *see Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979) (finding that after a court denied a writ of prohibition, the lawyer was required either to seek further review in the U.S. Supreme Court or to comply with the court's order under protest, preserving the issue for a subsequent appeal); *In re Ford*, 128 P.3d 178, 181 (Alaska 2006) (finding that a lawyer did not "openly refuse" to comply with a court's order, where the lawyer knew he was disobeying a valid order yet did not challenge the order, seek a stay, or request an expedited ruling from the appellate court); *Attorney Grievance Comm'n of Md. v. Levin*, 69 A.3d 451, 463-64 (Md. 2013) (finding that the proper course of action for a lawyer who thought an order was invalid was to raise objections with the court); *In re Jones*, 338 P.3d 842, 853 (Wash. 2014) (rejecting as inapplicable the open refusal exception because the lawyer failed to raise an assertion openly challenging the validity of a particular obligation).

[68] *Gilbert v. Utah State Bar*, 379 P.3d 1247, 1257 (Utah 2016).

[69] *Id.*

[70] The People's complaint does not allege that Respondent violated Colo. RPC 3.4(c) by disobeying the Freeze Order. Nor did the People seek to amend their complaint to add such a charge.

[71] A related branch of this argument involves whether the statute of limitations had run on an action by the Trustee to force return of the proceeds based on Werth's improper post-petition transfer. This issue was never litigated.

As the Contempt Order made clear, Werth and the Firm "changed their story" after Smiley moved for contempt sanctions. Until that point, the Firm had not asserted in a proceeding before any tribunal that Werth had improperly transferred the Mexico Property proceeds *after* she filed for bankruptcy protection. Indeed, Respondent testified that the Firm had not raised this argument before the bankruptcy court or the BAP. And Smiley was irritated that Respondent never clearly articulated this position, responding to his turnover demand in a "stunningly evasive" manner. For Respondent to then construe the BAP decision as addressing this shadow argument, let alone endorsing it, and then relying on that construction to bypass appeal yet flout the directive to turn over the proceeds, strikes the Hearing Board as the very opposite of an open refusal to comply.[72] Indeed, no court was ever asked to rule on this argument, nor was Smiley presented an opportunity to take action to protect his client. It also strikes the Hearing Board that concealing this new argument while waiting out the statute of limitations on a post-petition transfer action is the epitome of acting in bad faith. Indeed, these obfuscatory tactics evince Respondent's intent to flout the Turnover Order for his benefit: so that he could use the Mexico Property proceeds to pay the Firm's legal fees. We find that Respondent violated Colo. RPC 3.4(c).

Colo. RPC 8.4(c)

Colo. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In general, this rule comprises two categories of conduct: (1) conversion of client funds, and (2) dishonest conduct, including false statements, perjury, or dishonesty toward clients or a court. A claim premised on Colo. RPC 8.4(c) must include a finding that the lawyer possessed a culpable mental state greater than simple negligence.[73] But the People need not show actual knowledge or intent to deceive to prove a Colo. RPC 8.4(c) claim; they must simply establish that Respondent "deliberately closed his eyes to facts he had a duty to see" or that he "recklessly stated as facts things of which he was ignorant."[74] The People's complaint alleges that Respondent knowingly violated this rule in both ways, which we address in turn.

First, the People contend that Respondent knowingly converted the Mexico Property proceeds when he moved these unearned funds out of his trust account and into his operating account for his own use, taking funds that he knew did not belong to him and that he knew he was not authorized to take. The People maintain that Respondent either knowingly or recklessly did so, as evidenced by his invoices and trust account records. They say these records show that he transferred Werth-related funds from his trust account in excess of the sums the Firm had earned, based on the Firm's own billing invoices. They also claim that the balance of his trust account on several occasions fell far below the amount he

[72] *See Gilbert*, 379 P.3d at 1257 (finding an attorney violated a court directive by declining to formally or openly object, instead disregarding the order without taking any action to appeal, stay, or otherwise object).
[73] *In re Fisher*, 202 P.3d 1186, 1203 (Colo. 2009) ("a mental state of at least recklessness is required for an 8.4(c) violation"); *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992).
[74] *Radar*, 822 P.2d at 953 (citations and quotations omitted).

should have held in Mexico Property proceeds, again based on the Firm's own billing invoices.

Respondent disputes this interpretation and denies that he knowingly or recklessly converted funds. He insists that he always intended to hold sufficient funds in trust, but he acknowledges that he did not always carefully monitor the funds going in and out of that account, and his lack of oversight resulted in some discrepancies between his invoices and trust account records. Finally, he argues that the Firm's billing invoices, prepared almost exclusively by Arnold, did not accurately reflect the full extent of the work performed by the Firm; he claims that he made trust account withdrawals based on his own "mental calculations," which he adjudged to be more accurate than Arnold's contemporaneous timekeeping.

Knowing conversion of client funds "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."[75] Neither the lawyer's motive in taking the money nor the lawyer's intent to return the funds are relevant for disciplinary purposes.[76] That a lawyer's temporary use of client funds causes no harm to a client is likewise not a cognizable defense.[77] The People may prove conversion of client funds through "various types of evidence."[78]

Here, the evidence is plain that Respondent removed funds from his trust account in excess of amounts that had been invoiced. Likewise, it is clear that on several occasions his trust account balance plunged well below the amount of Werth-related funds he should have held in trust. What remains is to determine whether Respondent had a culpable mental state when he moved these funds. We find that he did act with a culpable mental state by recklessly converting the Mexico Property proceeds he held in trust. Respondent testified that he relied on his own estimates and mental recordkeeping to withdraw funds from his trust account, without referencing invoices. We consider this practice tantamount to deliberately closing his eyes to the incongruity between the Firm's billing invoices and the figures in his trust account ledgers. His own mismanagement—rounding and estimating when dealing with funds held in trust—and his lack of careful oversight led directly to the shortfalls in his trust account. To comply with the Rules of Professional Conduct, he should have disbursed from trust only those exact sums that had already been earned, as documented in the Firm's invoices. We cannot find, though, that he acted knowingly: we

[75] *People v. Varallo*, 913 P.2d 1, 11 (Colo. 1996) (quotation omitted).
[76] *Id*. at 10-11.
[77] *See In re Trejo*, 185 P.3d 1160, 1172 (Wash. 2008) (finding that discipline is warranted even if a lawyer's commingling causes no actual harm because it results in the potential harm of having client funds attached by a lawyer's creditors).
[78] *People v. Robnett*, 859 P.2d 872, 877 (Colo. 1993) (approving a hearing board's determination of conversion based on myriad factors, including findings that the lawyer's testimony was incredible, that the lawyer failed to deliver client funds until an investigation was launched, that the lawyer himself testified he used client funds for his own purposes, and that insufficient documentary evidence supported the lawyer's account).

accept as credible his testimony that he had no actual knowledge that he was removing unearned Werth-related funds from his trust account.

Second, the People contend that Respondent acted dishonestly when he made material misrepresentations to the court in his Advisement and in his Report. They also allege that Respondent engaged in separate acts of dishonesty when he misrepresented the amount of Werth-related funds that he had transferred on his invoices issued on September 10, 2014; December 29, 2014; November 6, 2015; April 28, 2016; June 14, 2016; and May 19, 2017.

Consistent with our findings above, we conclude that Respondent intentionally made material misrepresentations to the bankruptcy court in his Advisement and that he knowingly made a material misrepresentation to the bankruptcy court in his Report. We also conclude that he recklessly misrepresented in the invoices to Werth-Hathaway how much of the proceeds he transferred from trust into his operating account. Although Arnold was primarily responsible for preparing and sending the invoices to Werth-Hathaway, she had no access to the Firm's trust account and thus had to rely on Respondent's representations to her about his trust account transfers. Because he recklessly declined to reference invoices before making trust account transfers, we conclude he also recklessly misrepresented the amounts transferred.

Colo. RPC 8.4(d)

Colo. RPC 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Respondent violated this rule, the People argue, by failing to abide by the Freeze Order and by failing to turn over the Mexico Property proceeds until the Contempt Order issued. According to the People, these failures caused the court to expend judicial resources and caused opposing counsel to incur significant legal fees. Respondent contends that he was entitled to pursue a valid litigation strategy, and that his execution of that strategy did not so seriously impinge on the administration of justice as to warrant a finding of a rule violation. Respondent also observes that the Contempt Order was directed to the Firm, and not to him personally.

The Firm and Werth were ordered to turn over all of the Mexico Property proceeds, but they refused to do so and instead appealed the Turnover Order. In the meantime, Respondent transferred funds from his trust account in direct contravention of the bankruptcy court's Freeze Order. This recalcitrance, in turn, led to extended litigation in 2017, requiring the bankruptcy court to conduct a contempt hearing and to issue a lengthy Contempt Order rebuking the Firm for its litigation strategy. Given that Respondent maintained exclusive control of his trust account—and thus was responsible for violating the Freeze Order by transferring funds—we have no trouble concluding that Respondent's own contumacy prejudiced the administration of justice.

Though the Firm did not prevail on appeal before the BAP, neither did it turn over an amount equivalent to what should have remained of Werth's Mexico Property proceeds until eight months after the BAP decision. The Firm's refusal to surrender those funds

caused the Trustee to pursue a new adversary action, seek revocation of Werth's bankruptcy discharge, and request contempt remedies. The litigation was protracted, expensive, and time consuming. Flora estimated that her fees alone ran over $50,000.00. Because Respondent, as sole owner of the Firm, a knowledgeable participant in Werth's bankruptcy matter, and sole manager of the trust account, could have openly raised Werth's shadow argument well before November 2017—for example, in his conversation with Smiley—and because he could have brought the litigation to a much happier end simply by turning over the remainder of Werth's Mexico Property proceeds, we likewise find he prejudiced the administration of justice, as his involvement affected the timely and equitable resolution of Werth's bankruptcy matter to a serious and adverse degree.[79]

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[80] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[81] When imposing a sanction after a finding of lawyer misconduct, a hearing board 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 bedrock professional duties that underlie our system of justice: he flouted court orders, filed documents with the court containing deceitful statements, and prejudiced the administration of justice. He also behaved in ways inimical to his client-centered duties when he transferred disputed funds out of his trust account for his own benefit, recklessly converted his client's funds by grossly mismanaging his trust account, and made misrepresentations in client invoices about those funds.

Mental State: Respondent recklessly commingled his own funds with Mexico Property proceeds, recklessly converted client funds, recklessly misrepresented in the invoices to Werth-Hathaway the amounts he transferred from trust into his operating account, and knowingly misrepresented in his Report to the bankruptcy court the source of funds transferred from his trust account in May 2017. Respondent knowingly failed to keep separate the disputed Mexico Property proceeds until Werth's bankruptcy litigation had ended, intentionally made misrepresentations in his Advisement, intentionally violated a court order, and knowingly prejudiced the administration of justice.

[79] *See In re Mason*, 736 A.2d 1019, 1023 (D.C. 1999) (stating that in order to find a rule violation, the conduct must "at least potentially impact upon the process to a serious and adverse degree").
[80] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2015).
[81] *See In re Roose,* 69 P.3d at 46-47.

Injury: As Flora explained during her testimony, the Chapter 7 bankruptcy system is grounded in a series of prescribed actions by various players: an appointed Trustee is charged with collecting the assets of the debtor's estate and making a distribution of those assets, first to cover administrative expenses and then to recompense creditors. Smiley added that "the whole system is predicated on honest debtors getting a discharge," which a debtor is granted when she submits all of her property to a trustee to administer. In ideal circumstances, the trustee receives a fee and other administrative expenses are paid, the creditors are fully compensated, and the remaining funds are returned to the debtor. In unfavorable circumstances, sizeable administrative expenses proportionately reduce the amounts that creditors recoup. "That's not the way bankruptcy cases [are] supposed to run," Flora remarked.

Here, Werth's bankruptcy estate was so harmed. The Trustee amassed significant legal fees and costs generated by the protracted litigation necessitated by Respondent's misconduct, which in turn significantly injured Werth's creditors, who still have not been paid. Further, Werth sustained serious financial damage: Smiley estimated that around $37,000.00 in creditor claims were allowed in the Werth bankruptcy matter, with another $4,500.00 in fees going to the Trustee. If all of Werth's Mexico Property proceeds had been handed over to the Trustee when the Mexico Property was sold, Smiley posited, the Trustee would not have incurred additional fees, unsecured creditors would have been paid the full amount of their claims, and approximately $10,000.00 would have been returned to Werth. Instead, all of the Mexico Property proceeds were funneled into the Firm's coffers to fund the litigation—and then the Firm billed Werth-Hathaway almost $30,000.00 in addition.

To Flora, "the worst part" of Respondent's refusal to obey the Turnover Order was that it exposed Werth to serious risks, most notably that she might lose her bankruptcy discharge and that a money judgment might be entered against her personally for refusing to obey an order of court. Smiley, though, thought the greatest damage wrought by Respondent's misconduct lay in the harm to the bankruptcy system. He ruminated, "It is paramount that th[e bankruptcy] system work correctly; otherwise, [it] would be fraught with fraud and difficulty in administering." As such, he concluded, "you simply can't have debtors and their counsel taking property of the bankruptcy estate when they know . . . that the Trustee asserts it is property of the bankruptcy estate." Meanwhile, the bankruptcy court reflected on the harm done to its judicial function when Respondent refused to comply with court orders: "[w]hen a party takes matters into their own hands, taking action which it feels is proper but which is expressly contradicted by a valid court order, the Court's authority is diminished . . . ."[82] We add that Respondent's material misrepresentations to the bankruptcy court seriously undermined the judicial function by interfering with the adversarial system.[83]

[82] Ex. S28 at 16.

[83] *See In re Gabell*, 858 P.2d 404, 405 (N.M. 1993) ("When false evidence is presented during the course of litigation, the adversarial system is compromised. The effectiveness of our system of justice depends upon a

Given these findings, we conclude that Respondent's misconduct harmed the Trustee by exposing him to unnecessary and protracted litigation; injured Werth's financial picture, as she could have benefitted from a surplus of $10,000.00 in returned funds; seriously financially injured Werth's creditors, who have not been paid; seriously interfered with Werth's bankruptcy proceeding; threatened to seriously adversely affect Werth by jeopardizing her bankruptcy discharge and by subjecting her to monetary damages; and caused serious potential harm to the bankruptcy system as a whole.

ABA *Standards* 4.0-7.0 – Presumptive Sanction

We identify the following ABA *Standards* as applicable in setting the presumptive sanction in this matter, taking into account, however, that in cases involving multiple types of attorney misconduct the ABA *Standards* recommend the ultimate sanction should be at least consistent with, and generally greater than, the sanction for the most serious disciplinary violation.[84]

- Respondent's intentional violations of Colo. RPC 3.3(a)(1) are governed by ABA *Standard* 6.11, which calls for disbarment when a lawyer, with the intent to deceive the court, makes a false statement and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

- Respondent's conversion violations (Colo. RPC 1.15A and 8.4(c)) are governed by ABA *Standard* 4.12, which calls for suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to the client.

- Respondent's violation of Colo. RPC 3.4(c) is governed by ABA *Standard* 6.21, which calls for disbarment when a lawyer knowingly violates a court order with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

- Respondent's deceitful statements to his client (Colo. RPC 8.4(c)) are governed by ABA *Standard* 4.62, which calls for suspension when a lawyer knowingly deceives a client and causes injury or potential injury to the client.

full and truthful disclosure of facts at all stages of a legal proceeding. Only in this way can justice be attained and public confidence in the legal system be preserved.").

[84] ABA *Standards* Preface at xx.

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations that justify an increase in the degree of the sanction to be imposed, while mitigating factors warrant a reduction in the severity of the sanction.[85] As explained below, the Hearing Board applies six factors in aggravation, two of which are assigned great weight, and three factors in mitigation, one of which is entitled to great weight. We evaluate the following factors proposed by the parties.

Aggravating Factors

Prior Disciplinary Offenses – 9.22(a): Respondent was publicly censured in 1992 for prejudicing the administration of justice and for charging an unreasonable fee.[86] We accord some weight to this prior instance of discipline, given that Respondent was found to have violated the same ethical rule in both this and the prior matter. There, Respondent asserted a retaining lien and refused to return any documents belonging to the parents of his client until the client paid Respondent's legal fees. Only after a grievance was filed did Respondent assert that he withheld the documents to protect his client, an argument the Colorado Supreme Court deemed "astonishing" and not credible.[87] This misconduct was found to have prejudiced the administration of justice. Respondent also charged an improper or unreasonable fee by billing his client for the costs of defending the grievance.

Dishonest or Selfish Motive – 9.22(b): Respondent acted selfishly by consuming disputed funds for his own gain. He also acted dishonestly, as described above. We consider this a significant factor in aggravation.[88]

Pattern of Misconduct – 9.22(c): Respondent's persistent mismanagement of his trust account over a period of years constitutes a pattern of misconduct. His several misrepresentations to the bankruptcy court also form a pattern. We accord this aggravating factor moderate weight.

Multiple Offenses – 9.22(d): Respondent engaged in several discrete acts of misconduct, including reckless conversion of client funds, misrepresenting material facts to a tribunal, transgressing a court order, and recklessly misleading his client. Because each of these offenses is serious in its own right, this factor is entitled to significant weight.

Refusal to Acknowledge Wrongful Nature of Conduct – 9.22(g): The People maintain that Respondent has refused to acknowledge his wrongdoing. Respondent retorts that he

[85] *See* ABA *Standards* 9.21 & 9.31.
[86] *People v. Brown*, 840 P.2d 1085, 1089 (Colo. 1992).
[87] *Id.* at 1088-89.
[88] We reject application of the opposite factor, lack of selfish or dishonest motive, ABA *Standard* 9.32(b). Respondent argued that he did not gain anything financially, save for wages. That he consumed disputed funds to pay his wages seems sufficient, standing alone, to justify a finding of selfishness.

should not be penalized for mounting a defense and, in any event, that he has demonstrated remorse through expressions of embarrassment and pledges to reform his accounting practices. Although we agree with Respondent that he is entitled to defend himself, we nonetheless give this aggravating factor some weight. Respondent's insistence that Arnold was primarily culpable, paired with his excuse that this case boils down to his lack of accounting skills, confirms that he has not taken ownership of or responsibility for his actions.[89]

Substantial Experience in the Practice of Law – 9.22(i): Respondent has been licensed to practice law in Colorado since 1988. That he engaged in significant misconduct as a longstanding practitioner must be considered in aggravation.

Mitigating Factors

Cooperative Attitude Toward Proceedings – 9.32(e): The People state without elaboration that this mitigator ought to apply, so we assign this factor average weight.

Character or Reputation – 9.32(g): Respondent offered character testimony from four witnesses. We heard from Werth-Hathaway, who confirmed that she authorized Respondent to use the Mexico Property proceeds to pay her mother's legal fees. She recounted that the Firm represented her mother and the Family Trust skillfully and that she was well treated by Respondent and Arnold.

Lawyer Mark Andrews also testified on Respondent's behalf. In 2008, Andrews was introduced to Respondent, who became an informal mentor to him in bankruptcy matters. Andrews reflected that Respondent was "incredibly giving of his time" and never asked for anything in return. Andrews also stressed the important work Respondent performs for people of modest means, who fall into debt for a variety of reasons and need low-cost legal assistance to reorganize their financial affairs.

Next, Respondent elicited telephone testimony from lawyer Elizabeth Granado, who currently serves as elections manager for Pitkin County but who worked for Respondent for about a year around 2007. Granado praised Respondent as an employer for creating a warm and friendly firm culture. Respondent also was very knowledgeable, she said. As her mentor, he provided oversight and supervision while boosting her confidence, helping her to grow as a trial lawyer, and teaching her how to organize and keep files. According to Granado, Respondent is an asset to the legal community, because he provides a low-cost service to scores of low-income people. He takes his obligations to clients and courts seriously, she testified, and he is respected professionally.

[89] We will not award mitigating credit under ABA *Standard* 9.32(*l*) for Respondent's thin expressions of remorse, which we felt rang hollow.

Finally, lawyer Jessica Deal spoke movingly on behalf of Respondent, her former employer and mentor. Deal worked for Respondent for nine years, beginning around 2009. She loved working at the Firm and left—to go work for a firm closer to her home—"in tears," she said. Deal considers Respondent a close friend; she affirmed that she "would do anything for him." According to Deal, Respondent is "a class act," "a quality person and lawyer," and "worth his weight in gold." She described him as a "walking [bankruptcy] code." She relayed how he taught her to be comfortable around trustees and judges, exuding "confidence and calm" and giving her a lasting example of "how to proceed with grace under fire." He trained her to tend to clients "in the utmost fashion" so they knew their lawyers cared about them, including communicating clearly and accurately, being thorough, and charging a reasonable fee. Deal extolled Respondent's sense of ethics and his honesty. At his knee she learned the benefits of "not taking shortcuts" or sacrificing her credibility or integrity by churning quickly through cases. She recalled that as a young lawyer she "benefitted from his reputation." Respondent is "honorable," a "valuable person," and an "asset to the bar in general," Deal concluded.

We credit these witnesses' testimony and assign great weight to this mitigating factor, with particular emphasis on the themes undergirding the testimony of all three lawyers: Respondent's excellent character and reputation for mentorship and competency in the field of bankruptcy law.

Imposition of Other Penalties or Sanctions – 9.32(k): Respondent asks us to apply this factor, noting that the Firm promptly complied with the Contempt Order by giving the Trustee a check for $20,314.12. The People, likewise, agree to the use of this mitigator, pointing to the sanction levied by the bankruptcy court. The Hearing Board, however, does not find the parties' reasoning sound. The Firm was ordered to disgorge an amount equivalent to the disputed proceeds that it consumed in violation of the Freeze Order. This order was not so much a penalty as a directive to pay back to the Trustee what he was owed. We refuse to apply this mitigating factor.

Remoteness of Prior Offenses – 9.32(m): Respondent's prior offense, which dates back to the early 1990s, is largely mitigated by the passage of time.

Analysis Under ABA *Standards* and Case Law

The Colorado Supreme Court has directed the Hearing Board to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors.[90] We are mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[91] Though prior cases are

[90] *See In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *In re Fischer*, 89 P.3d at 822 (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

[91] *In re Attorney F.*, 285 P.3d at 327 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

instructive by way of analogy, hearing boards must determine the appropriate sanction for a lawyer's misconduct on a case-by-case basis. The Colorado Supreme Court has suggested that cases predating the 1999 revision to this state's disciplinary system generally carry less precedential weight than more recent cases.[92]

The People request that we disbar Respondent. Respondent requests, as best we can tell, something far short of that. But the parties have not steered our attention to any Colorado cases with a similar fact pattern. Nor have we found an analogous case in this jurisdiction.

Other jurisdictions, however, have considered situations more akin to the one we confront, and those cases can provide some guidance. For example, the New Hampshire Supreme Court disbarred a lawyer—who was already serving a suspension of two years—for filing a client's bankruptcy form that contained a statement the lawyer knew to be false.[93] There, the lawyer knew that the client's husband was earning money, but the client requested that the lawyer represent on a form that the husband earned no monthly income.[94] The lawyer complied, and also made the same false statement in response to two other questions on required forms.[95] The client was later made to withdraw her bankruptcy petition.[96] New Hampshire disbarred the lawyer, noting that any affirmative effort by a lawyer to mislead a court "is intolerable in the legal profession."[97]

Further, even though no Colorado cases may be directly parallel, our disciplinary jurisprudence points to certain principles that we can use to make a sanctions decision. First, Colorado case law is clear that suspension is appropriate when a lawyer converts client funds but acts without an intentional or knowing mental state.[98] Second, disbarment is

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[92] *Id.*

[93] *In re Clark's Case*, 37 A.3d 327, 328 (N.H. 2012)

[94] *Id.*

[95] *Id.*

[96] *Id.* at 329.

[97] *Id.* at 332; *see also Office of Disciplinary Counsel v. Grigsby*, 425 A.2d 730, 731 (Pa. 1981) (disbarring a lawyer who, in an action to garnish the lawyer's checking account, filed a sworn pleading falsely representing that the funds in the account belonged to his client and thus could not be touched by the creditor; the disciplinary court called false swearing an "egregious species of dishonesty which goes to the heart of the legal profession" and reasoned that the lawyer was not fit for legal practice, which "requires an allegiance and fidelity to truth") (citations and quotations omitted).

[98] *In re Haines*, 177 P.3d 1239, 1250 (Colo. 2008) ("[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); *People v. Dickinson*, 903 P.2d 1132, 1138 (Colo. 1995) (suspending a lawyer for misappropriating client funds because the lawyer's mental state did not rise to the level of knowing).

generally the presumptive sanction when a lawyer intentionally makes false statements to a court, which then acts in reliance on those statements.[99]

Here, Respondent engaged in several distinct types of very serious misconduct while representing Werth. At first, we believe, Respondent simply mismanaged his trust account, recklessly converting disputed funds he held in trust and recklessly issuing misleading invoices about Werth-related funds. After significant litigation, the bankruptcy court issued the Turnover Order and then the Freeze Order. When the bankruptcy court called upon Respondent to account for the status of Werth's Mexico Property proceeds, Respondent realized that to tell the bankruptcy court the truth about the funds would be to expose his conversion. So he filed with the bankruptcy court statements containing material falsehoods in order to conceal his misconduct in handling client funds. By the time the BAP upheld the Turnover Order, Respondent had consumed almost all of the Mexico Property proceeds. To justify keeping those proceeds as legal fees, he adopted a new argument premised on expiry of a statute of limitations for a post-petition transfer—an argument that he had neither raised before the courts nor explicitly discussed with Smiley. When, in his judgment, Werth's Mexico Property proceeds were no longer subject to the Trustee's reach, he defied the Freeze Order and purported to transfer into his operating account the remaining Werth-related funds he held in trust.

Two of these violations carry a presumptive sanction of disbarment, while other violations call for periods of suspension. When we consider in aggregate these presumptive sanctions, as the ABA *Standards* counsel us to do, the marked preponderance of aggravating factors over mitigating factors, and the instructive guidance from courts in sister jurisdictions, we conclude that Respondent should be disbarred.

IV. CONCLUSION

In his opening statement, Respondent's counsel urged us to view Respondent's actions through the lens of Hanlon's razor—the aphorism that one should never attribute to malice that which can be adequately explained by inadvertence. We have tried to do so, and have concluded that in some cases Respondent's misconduct can be ascribed to recklessness. But in other cases, we cannot explain Respondent's actions without reference to a more heightened mental state. Because we find that Respondent engaged in numerous types of misconduct, but especially because we find that he intentionally made false statements of material fact to the bankruptcy court and intentionally breached an order of the bankruptcy court, we conclude that Respondent must be disbarred.

[99] *See In re Cardwell*, 50 P.3d 897, 901 (Colo. 2002) (approving the use of ABA *Standard* 6.11 for intentional material misrepresentations to a tribunal); *cf. People v. Barnthouse,* 775 P.2d 545, 550-51 (Colo. 1989) (suspending a lawyer for one year and one day where, during his own divorce proceeding, the lawyer failed to follow court orders and knowingly but not intentionally made false statements on his financial affidavits).

V. ORDER

The Hearing Board therefore **ORDERS:**

1. **LARRY DEAN BROWN,** attorney registration number **17409,** will be **DISBARRED.** The disbarment will take effect upon issuance of an "Order and Notice of Disbarment."[100]

2. Within fourteen days of issuance of the "Order and Notice of Disbarment," Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the PDJ setting forth pending matters and attesting, *inter alia*, to notification of clients and other state and federal jurisdictions where he is licensed.

3. The parties **MUST** file any posthearing motion **on or before Wednesday, July 31, 2019**. Any response thereto **MUST** be filed within seven days.

4. The parties **MUST** file any application for stay pending appeal **on or before Wednesday, August 7, 2019.** Any response thereto **MUST** be filed within seven days.

5. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** submit a statement of costs **on or before Wednesday, July 31, 2019**. Any response thereto **MUST** be filed within seven days.

[100] In general, an order and notice of sanction will issue thirty-five days after a decision is entered under C.R.C.P. 251.19(b). 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.

DATED THIS 17th DAY OF JULY, 2019.

[original signature on file]

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

[original signature on file]

_____

JAMES L. COX JR.
HEARING BOARD MEMBER

[original signature on file]

_____

LAURIE ALBRIGHT
HEARING BOARD MEMBER

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