

People v. Jay Brett Freedman. 21PDJ052. February 9, 2022.

The Presiding Disciplinary Judge held a sanctions hearing and disbarred Jay Brett Freedman (attorney registration number 38810). The disbarment took effect on March 16, 2022.

This reciprocal discipline case arose out of discipline imposed on Freedman in California and Arizona. On December 16, 2015, the Supreme Court of California disbarred Freedman after he defaulted in two disciplinary cases. The order entering default established that Freedman intentionally, recklessly, or repeatedly failed to perform with competence when he failed to prosecute a civil action for fraud; failed to appear on his clients' behalf at a show cause hearing; failed to respond to discovery requests; failed to oppose a motion to compel discovery; failed to appear at a hearing on the motion to compel discovery; and failed to seek a waiver of costs from the defendants before filing a request to voluntarily dismiss the action. The order entering default also established that Freedman knowingly or with gross negligence made a false statement to his client; failed to keep his clients informed of significant developments in their case; failed to release the clients' file; and failed to respond to requests for information from disciplinary authorities. Freedman was disbarred under a California rule that requires a lawyer's disbarment when the lawyer fails to respond to disciplinary charges and thus defaults.

On April 23, 2020, Freedman defaulted in a Nevada reciprocal disciplinary proceeding, which was premised on his California discipline. The Supreme Court of the State of Nevada concluded that Freedman's misconduct warranted substantially different discipline than that imposed in California, reasoning that Nevada rules do not call for disbarment when a lawyer defaults in a disciplinary case and that disbarment in Nevada is irrevocable. The Nevada court thus suspended Freedman for five years and one day.

Freedman's misconduct constitutes grounds for reciprocal discipline under C.R.C.P. 242.21. Because Freedman did not participate in this matter or assert any affirmative defense, the Presiding Disciplinary Judge imposed reciprocal discipline of disbarment.

The case file is public per C.R.C.P. 242.41(a)(1). Please see the full opinion below.

<p style="text-align: center;">SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203</p>	
<p>Complainant: THE PEOPLE OF THE STATE OF COLORADO</p> <p>Respondent: JAY BRETT FREEDMAN, #38810</p>	<p>Case Number: 21PDJ052</p>
<p style="text-align: center;">OPINION IMPOSING RECIPROCAL DISCIPLINE UNDER C.R.C.P. 242.21</p>	

The Presiding Disciplinary Judge (“the Court”) entered an order of default against Jay Brett Freedman (“Respondent”). Following a sanctions hearing, the Court imposed reciprocal discipline and disbarred Respondent.

I. PROCEDURAL HISTORY

On July 21, 2021, Justin P. Moore of the Office of Attorney Regulation Counsel (“the People”) filed a complaint with the Presiding Disciplinary Judge (“the Court”). The same day, the People sent a copy of the complaint to Respondent via certified mail at his registered business address.¹ The People sent Respondent a letter on September 2, 2021, reminding him to answer the complaint and advising him that they would move for default if he did not do so.

On September 15, 2021, the People moved for entry of default and requested that the Court hold a hearing as to the sanction to be imposed. Because Respondent did not respond, the Court granted the People’s motion on October 8, 2021. On 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

The Court held a sanctions hearing via the Zoom videoconferencing platform on January 6, 2022.³ Moore represented the People; Respondent did not appear, despite the People’s many reported attempts to contact him via email and telephone. During the hearing,

¹ The People also sent Respondent the complaint by email and by certified mail to two other known addresses. *See* “Proof of Service of Citation and Complaint” (July 22, 2021).

² *See* C.R.C.P. 242.27(a); *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987).

³ The Court sent notice of the sanctions hearing to Respondent at his registered home, business, and email addresses. *See* “Notice of Sanctions Hearing Under C.R.C.P. 242.27(c)” (Oct. 18, 2021).

the Court admitted the People's exhibits A and B.⁴ The Court also admitted the People's exhibits C and D.⁵

On January 7, 2022, the Court issued an "Order Directing Supplemental Briefing on Sanctions Hearing," reiterating its oral instructions to the People at the hearing to address whether the five-year rule of limitation set forth in C.R.C.P. 242.12 applies to the proceeding; whether a lawyer's failure to self-report under C.R.C.P. 242.11 abrogates the rule of limitations in C.R.C.P. 242.12; and why the People reasonably should not have discovered Respondent's misconduct earlier. On January 20, 2022, the People filed "The People's Supplemental Argument Re: The Applicability of C.R.C.P. 242.12." Respondent did not file a response.

II. LEGAL STANDARDS

C.R.C.P. 242.21(a) provides that "[a] final adjudication of misconduct constituting grounds for discipline issued in another jurisdiction conclusively establishes such misconduct for purposes of this rule and conclusively establishes that the same discipline should be imposed in Colorado" Under C.R.C.P. 242.21(b)(3), the Court may, without a hearing board, issue a decision imposing the same discipline as was imposed by the other jurisdiction if the People do not seek substantially different discipline and the respondent does not assert a valid defense. But the Court may not impose reciprocal discipline if the respondent establishes by clear and convincing evidence that: the procedure followed in the other jurisdiction did not comport with due process; the proof upon which the other jurisdiction based its determination of misconduct is so infirm that the determination cannot be accepted; the imposition of the discipline would result in grave injustice; or the misconduct proved warrants a substantially different form of discipline in Colorado.⁶

III. FACTS AND RULE VIOLATIONS ESTABLISHED ON DEFAULT

Respondent took the oath of admission and was admitted to practice law in Colorado on July 26, 2007, under registration number 38810.⁷ He is thus subject to the Court's jurisdiction in this reciprocal disciplinary proceeding.⁸

On December 16, 2015, the Supreme Court of California ("California Supreme Court") issued an order disbarring Respondent from the practice of law in California.⁹ It did so on the

⁴ The Court took judicial notice of exhibits 1 and 2 of the complaint and admitted those exhibits as the People's exhibits A and B.

⁵ On January 7, 2022, the People filed "The People's Admitted Non-Stipulated Exhibits C and D, and Corrected Non-Stipulated Exhibit D," which contained the attestation of Elvia Mondragon, Clerk of Attorney Registration for the Colorado Supreme Court, affirming that the effective date of Respondent's registered address is May 13, 2013, not July 26, 2007, as Mondragon initially attested to in exhibit D. The Court **ACCEPTS** "The People's Admitted Non-Stipulated Exhibits C and D, and Corrected Non-Stipulated Exhibit D" and **ADMITS** the corrected exhibit D.

⁶ Colo. RPC 242.21(a)(1)-(4).

⁷ Compl. at 1.

⁸ See C.R.C.P. 242.1(a)(1); Compl. at 1.

recommendation of the State Bar Court of California, which entered an order of default against Respondent in two disciplinary cases, deeming admitted six violations of the California Rules of Professional Conduct and the California Business and Professions Code.¹⁰ The State Bar Court recommended Respondent's disbarment under Cal. St. Bar R. 5.85(A), which requires a lawyer's disbarment when default is entered after the lawyer fails to respond to disciplinary charges and the lawyer fails to have the default set aside.¹¹ The recommendation followed the State Bar Court's determination that due process and procedural requirements had been met.¹²

On April 23, 2020, the Supreme Court of the State of Nevada ("Nevada Supreme Court") adjudicated a petition for reciprocal discipline, based on the California order.¹³ Respondent did not self-report his disbarment to the Nevada State Bar.¹⁴ Though Respondent did not participate in the Nevada proceedings, the Nevada Supreme Court declined to impose reciprocal discipline and concluded that Respondent's misconduct warranted substantially different discipline in Nevada than the discipline imposed in California.¹⁵ Instead, it imposed a five-year and one-day suspension.¹⁶

Respondent did not report his California discipline or his Nevada discipline to the People.¹⁷

⁹ Compl. ¶ 1; Ex. A.

¹⁰ Ex. A at 1. The order entering default established the facts of the California State Bar's notice of disciplinary charges, including that Respondent "intentionally, recklessly, or repeatedly failed to perform with competence" when he did not prosecute a civil action for fraud; failed to appear on his clients' behalf at a show cause hearing; failed to respond to discovery requests; failed to oppose a motion to compel discovery; failed to appear at a hearing on the motion to compel discovery; and failed to seek a waiver of costs from the defendants before filing a request to voluntarily dismiss the action. Ex. C at 2; Ex. A at 5. The order entering default also established that Respondent willfully violated professional code provisions by knowingly or with gross negligence making a false statement to his client; failing to keep his clients informed of significant developments in their case; failing to release the clients' file; and failing to respond to requests for information from disciplinary authorities. Ex. A at 5-6; Ex. C at 3-4. Finally, Respondent failed to comply with the probationary conditions of his prior discipline. Ex. A at 7; Ex. C at 4-5.

¹¹ Ex. A at 1-2.

¹² Ex. A at 2-4 (describing the State Bar Court's findings supporting entry of default); *see also* Ex. C at 1 (notice of disciplinary charges alerting Respondent that his failure to respond could lead to entry of default and a recommendation for disbarment).

¹³ Compl. ¶ 2; Ex. B.

¹⁴ Compl. ¶ 3; Ex. B at 1.

¹⁵ Compl. ¶ 4; Ex. B at 2-3. The Nevada Supreme Court reasoned that because Nevada rules do not call for disbarment when a lawyer fails to seek to set aside entry of default in a disciplinary case, and because disbarment in Nevada is irrevocable and thus not equivalent to the disbarment imposed in California, which allows a disbarred lawyer to seek reinstatement, the misconduct warranted substantially different discipline in Nevada. Ex. B at 2-3.

¹⁶ Compl. ¶ 5; Ex. B at 3-4.

¹⁷ Compl. ¶ 6.

IV. ANALYSIS

The Rule of Limitations Does Not Bar Reciprocal Discipline in this Case

The Court first examines whether Colorado's rule of limitation in disciplinary proceedings bars the People's action. Under the rule of limitation set forth in C.R.C.P. 242.12, "[d]isciplinary sanctions . . . may not be based on conduct reported more than five years after the date the conduct is discovered or reasonably should have been discovered. . . ." Such an affirmative defense must be set forth in an answer to the People's complaint.¹⁸ Likewise, under the civil rules, a defense based on a statute or other rule of limitation is an affirmative defense that must be pleaded by a defendant,¹⁹ typically in an answer.²⁰

The People filed a complaint on July 21, 2021, seeking reciprocal discipline for Respondent's violations of California rules, for which he was disbarred on December 16, 2015. Though the period between Respondent's disbarment and the People's complaint exceeds the five-year limitation set forth in C.R.C.P. 242.12, the People contend that Respondent was required to raise a claim that this proceeding is time-barred as an affirmative defense. Because Respondent did not do so, they say, the rule of limitation does not apply to this proceeding.

The Court agrees. Respondent has not asserted the rule of limitation or any affirmative defense in this proceeding. He also failed to appear and raise any defense at the sanctions hearing, despite having been notified of the hearing by the People and the Court. Because Respondent has not made the rule of limitation a defense, the Court finds that C.R.C.P. 242.12 does not preclude it from imposing reciprocal discipline in this case.²¹

Reciprocal Discipline of Disbarment is Appropriate in this Case

The People urge the Court to impose reciprocal discipline and disbar Respondent. The reciprocal discipline rule, they say, allows the Court to deviate from the discipline imposed in California only if Respondent affirmatively demonstrates by clear and convincing evidence that one of the defenses enumerated in C.R.C.P. 242.21(a) applies. Respondent, they argue, did not raise any of these defenses. Moreover, they say, the Court must impose reciprocal discipline under C.R.C.P. 242.21 because insufficient facts exist in the record that they have—and thus the

¹⁸ C.R.C.P. 242.26.

¹⁹ *Knighton v. Howse*, 448 P.2d 641, 642 (Colo. 1968); *see also Gunderson v. Weidner Holdings, LLC*, 2019 COA 186, ¶ 9 ("The statute of limitations is an affirmative defense [under C.R.C.P. 8(c)] that must be pleaded and proved by the defendant.") (citations omitted).

²⁰ *Bristol Bay Productions, LLC v. Lampack*, 2013 CO 60, ¶ 41 ("[A]ffirmative defenses under C.R.C.P. 8 'cannot be raised by motion but only by answer.'") (quoting *Markoff v. Barenberg*, 368 P.2d 964, 965 (Colo. 1962)).

²¹ Because the Court has determined that the rule of limitation does not apply in this case, it declines to address the additional arguments set forth in "The People's Supplemental Argument Re: the Applicability of C.R.C.P. 242.12."

record before the Court—to support a different sanction.²² Notwithstanding the paucity of record, however, they maintain that the California complaint and order demonstrate the California proceeding comported with due process and the determination of Respondent's misconduct did not rely on infirm proof. The People also contend that Respondent's misconduct does not warrant a substantially different form of discipline in Colorado because the misconduct implicates Colo. RPC 1.1, Colo. RPC 1.4, Colo. RPC 1.16(d), Colo. RPC 3.4(c), Colo. RPC 8.1(b), and Colo. RPC 8.4(c). As such, they argue, disbarring Respondent for the established rule violations would not result in a grave injustice.

The Court agrees with the People's analysis. Rule 242.21(a) is clear on its face that an order imposing discipline in another jurisdiction establishes that the same discipline should be imposed in Colorado unless the respondent shows by clear and convincing evidence that any of the available defenses apply. Here, Respondent has not alleged any defense or otherwise participated in the proceeding; the Court should therefore impose reciprocal discipline of disbarment.

That the California Supreme Court based its order on Respondent's failure to move to set aside the order of default, rather than on the facts and rule violations established on default, does not compel a different conclusion. To the contrary, the facts before the Court are sufficient to support findings that Respondent was afforded due process in California and that California did not base its determination of misconduct on infirm evidence.

Nor would Respondent's misconduct necessarily warrant a substantially different form of discipline in Colorado, where lawyers have been disbarred for misconduct akin to Respondent's, including in a reciprocal discipline matter.²³ The misconduct established on default, moreover, could be sufficient to support disbarment following an analysis under the American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA Standards").²⁴ For example, under the California State Bar's notice of disciplinary charges, Respondent intentionally, recklessly, or repeatedly failed to perform with competence in five separate instances during a client matter, failed to keep the clients informed about significant developments in their case, and knowingly or with gross negligence made a misrepresentation to one of the clients concerning the case. Respondent's misconduct therefore does not warrant a substantially different form of discipline

²² See C.R.C.P. 242.21(b)(2) (requiring a respondent who wishes to raise an enumerated defense to file a full copy of the record of the disciplinary proceeding in the other jurisdiction).

²³ See *People v. Sousa*, 943 P.2d 448, 449 (Colo. 1997) (imposing reciprocal discipline and disbarring a respondent for misconduct that included violations of Colo. RPC 8.4(c) and 8.1(b) established on default); see also *People v. Valley*, 960 P.2d 141, 142-43 (Colo. 1998) (disbarring a lawyer following her default in two disciplinary cases for misconduct that included violations of Colo. RPC 1.4(a), 8.4(c), and 1.16(d)); *People v. Roybal*, 949 P.2d 993, 996-98 (Colo. 1997) (disbarring a lawyer for violations of Colo. RPC 1.1, 1.4(a), and 8.4(c), and other rules, following his default in two disciplinary matters).

²⁴ Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2d ed. 2019).

in Colorado. By extension, the Court finds that disbarring Respondent would not result in grave injustice.²⁵

In sum, the Court finds that neither C.R.C.P. 242.21(a), nor Colorado case law, nor the ABA *Standards* demand a sanction other than disbarment as reciprocal discipline for Respondent's misconduct in California.

V. CONCLUSION

Respondent did not participate in this reciprocal discipline proceeding, resulting in default. His failure to assert any affirmative defense or other enumerated defense under C.R.C.P. 242.21(a) leads the Court to conclude that it should follow the California Supreme Court's disbarment order and impose reciprocal discipline.

VI. ORDER

The Court therefore **ORDERS**:

1. **JAY BRETT FREEDMAN**, attorney registration number **38810**, is **DISBARRED** from the practice of law in Colorado. The **DISBARMENT SHALL** take effect only upon issuance of an "Order and Notice of Disbarment."²⁶
2. To the extent applicable, Respondent **MUST** timely comply with C.R.C.P. 242.32(b)-(e) concerning winding up of affairs, notice to current clients, duties owed in litigation matters, and notice to other jurisdictions where Respondent is licensed or otherwise authorized to practice law.
3. Within fourteen days after issuance of the "Order and Notice of Disbarment," Respondent **MUST** file an affidavit with the Court under C.R.C.P. 242.32(f), attesting to his compliance with C.R.C.P. 242.32.
4. Any posthearing motion **MUST** be filed **no later than February 23, 2022**. Any response thereto **MUST** be filed within seven days of the motion.
5. Any motion for stay pending appeal under C.R.C.P. 242.35 **MUST** be filed **on or before the date on which the notice of appeal is due**.

²⁵ The Court also notes that disbarment in Colorado, unlike in Nevada, is not irrevocable. *See* C.R.C.S. 242.10(a)(1) (providing that a disbarred lawyer may not petition for readmission for at least eight years after the disbarment takes effect).

²⁶ In general, an order and notice of sanction will issue thirty-five days after a decision is entered under C.R.C.P. 242.31(a) or (b). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 242.34, C.R.C.P. 242.35, or other applicable rules.

6. Respondent **MUST** pay the administrative fee of \$224.00 and all costs of this proceeding. The People **MUST** file a statement of fees, costs, and restitution **no later than February 23, 2022**. Any response thereto **MUST** be filed within seven days of the statement.



DATED THIS 9th DAY OF FEBRUARY, 2022.

William R. Lucero

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

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