People v. Gregson. 10PDJ005. December 16, 2010. Attorney Regulation. Following a hearing, a Hearing Board publicly censured Ronald E. Gregson (Attorney Registration No. 08996), effective December 8, 2010. Respondent improperly charged his client for fees and expenses associated with his travel back to Colorado after he moved his practice to Massachusetts, which contravened the plain language of their fee agreement. His misconduct constitutes grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.5(a) and 8.4(h).

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** RONALD E. GREGSON	Case Number: **10PDJ005**
DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)	

On June 28, 2010, a Hearing Board composed of Robert A. Millman, a member of the Bar, Frances L. Winston, a citizen Hearing Board member, and William R. Lucero, the Presiding Disciplinary Judge ("PDJ"), held a one-and-a-half-day hearing pursuant to C.R.C.P. 251.18. Charles E. Mortimer, Jr., appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Mark S. Bove appeared on behalf of Ronald E. Gregson ("Respondent") who also appeared. The Hearing Board now issues the following "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."

I. ISSUE AND SUMMARY

Attorneys must adhere to certain standards of conduct that define the duties they owe as professionals, including the obligation to charge reasonable fees according to reasonable terms. In this matter, Respondent drafted a hybrid fee agreement allowing him to retain hourly fees upon his withdrawal from the case, rather than seek fees before a court under quantum meruit. Respondent also pressed his client for trial retainers not contemplated in the fee agreement, and he charged her for fees and expenses associated with his travel back to Colorado after he moved his practice to Massachusetts. What, if any, is the appropriate sanction?

The Hearing Board finds clear and convincing evidence that Respondent violated Colo. RPC 1.5(a) (Claim II) and 8.4(h)[1] (Claim IV) by billing his client for fees and expenses arising from his travel to Colorado. But we do not find

[1] Because the vast majority of the conduct at issue concerning Colo. RPC 8.4(h) occurred prior to January 1, 2008, when that Rule was repealed, the Hearing Board refers to Colo. RPC 8.4(h) (1993 Version) (stating it is professional misconduct for a lawyer to "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law"). *See also* n.24, *infra.*

Respondent violated Colo. RPC 1.5(a) (Claim I) for retaining his hourly fees, nor do we conclude he violated Colo. RPC 8.4(d) (Claim III) or 8.4(h) (Claim IV) by seeking additional trial retainers. Given these circumstances, the Hearing Board determines public censure and restitution is warranted in this instance.

II. PROCEDURAL HISTORY

On January 5, 2010, the People filed a complaint, and Respondent filed an answer on February 2, 2010. Respondent filed a "Motion for Summary Judgment" on April 13, 2010. On April 22, 2010, the People filed "Complainant's 1) Response to Respondent's Motion for Summary Judgment, and 2) Cross Motion for Summary Judgment." Respondent later submitted a "Response to Complainant's Cross Motion for Summary Judgment." Because the case was not susceptible to a resolution as a matter of law and instead hinged on facts necessitating a hearing, the PDJ summarily denied both motions on June 1, 2010, with a written order following on June 16, 2010. The parties then stipulated to certain facts on June 18, 2010. At the June 28-29, 2010, hearing, the Hearing Board heard testimony and the PDJ admitted the People's exhibits 1-13[2] and Respondent's exhibits A-C.

III. FINDINGS OF FACT AND RULE VIOLATIONS

The Hearing Board finds the following facts and rule violations have been established by clear and convincing evidence.

Jurisdiction

Respondent took the oath of admission and was admitted to the Bar of the Colorado Supreme Court on September 29, 1978. He is registered upon the official records, Attorney Registration No. 08996, and is thus subject to the jurisdiction of the Hearing Board in these disciplinary proceedings.[3] Respondent's registered business address is 25B Main Street, Lenox, Massachusetts 01240.

The Fee Agreement

In March 2005, Michelle Garcia ("Garcia") contacted Respondent and eventually retained him as counsel to file a discrimination lawsuit in federal district court against her employer, City Market.[4] Garcia believed City Market

[2] Respondent stipulated to admission of the People's exhibits 1-11.
[3] *See* C.R.C.P. 251.1(b).
[4] Respondent represented Garcia before the U.S. District Court for the District of Colorado in the matter of *Michelle Garcia v. Dillon Cos. d/b/a City Market*, Civil Action No. 05-cv-2339-MSK-MEH.

failed to promote her within the company as quickly as her similarly-situated male counterparts.

Although Respondent represented Garcia from March 2005 onward, it was not until November 2, 2005, that the two entered into a fee agreement.[5] The fee agreement, though only two pages, is convoluted, poorly worded, and fails to explicitly anticipate certain events. Paragraph 3 of the agreement provides for a 33 1/3% contingent fee, yet Paragraph 4 requires Garcia to pay Respondent an hourly fee of $150.00—roughly half of what he would normally charge on an hourly basis. The contract then provides that the "total hourly fees paid by [Garcia] will be returned to [her] up to the amount of the contingent fee." Paragraph 11 of the agreement further muddies the waters:

> In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney. If the attorney and the client cannot agree how the attorney is to be compensated in this circumstance, the attorney will request the court or other tribunal to determine: (1) if the client has been unfairly or unjustly enriched if the client does not pay a fee to the attorney; and (2) the amount of the fee owed, taking into account the nature and complexity of the client's case, the time and skill devoted to the client's case by the attorney, and the benefit obtained by the client as a result of the attorney's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the client and the amount of such fee shall not be greater than the fee that would have been earned by the attorney if the contingency described in this contingent fee agreement had occurred.[6]

As discussed in more detail below, Respondent represented Garcia until April 16, 2008, when he was granted leave to withdraw as counsel due to health reasons. Rather than seek quantum meruit under Paragraph 11 of the

[5] From March to November 2005, Garcia paid Respondent a consultant fee of $150.00/hour.
[6] People's exhibit 1.

fee agreement, Respondent elected to retain the $150.00 per hour fee that he had charged, and that Garcia had paid, for that two-and-a-half-year period.[7]

Pointing to the agreement's language, the People allege Respondent violated Colo. RPC 1.5(a), which proscribes making an agreement for, charging, or collecting an unreasonable fee. Specifically, the People aver that either Respondent interprets and applies the fee agreement unreasonably or the Respondent interprets the fee agreement correctly but the agreement charges an unreasonable fee on its face.

As regards the first alternative, the People argue Respondent failed to comply with the strictures of paragraph 11 when read in conjunction with paragraph 4. Under this language, the People contend, Respondent's hourly fees were nothing more than an advance on an ultimate contingency fee and thus Respondent was *required*, when he withdrew from the case, to disgorge those hourly sums and seek under quantum meruit an award for the reasonable value of his services.

But we cannot adopt the People's interpretation of Respondent's obligations under paragraphs 4 and 11 of the fee agreement. We begin by acknowledging that the agreement is ambiguous on the issue of whether Respondent was obligated to return hourly fees and seek quantum meruit upon his withdrawal.[8] This ambiguity stems from the hybrid nature of the arrangement: it provides for the possibility of either hourly or contingent fees without a clear delineation as to when either might apply. Paragraph 4 mandates ongoing and periodic payment of a reduced hourly fee. Yet the title of the document and paragraph 11 characterize the agreement as a "contingent fee" arrangement whereby Respondent *may* seek quantum meruit should he withdraw. It also provides Respondent *will* request a court to make fee determinations should he and Garcia disagree about his compensation.

Because the fee agreement is fairly susceptible to more than one interpretation as to whether Respondent was required to return hourly fees upon his withdrawal, we look to extrinsic evidence, including parol evidence, to ascertain the intent of the parties and explain the terms of the fee agreement.[9]

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[7] Garcia was then compelled to retain successor counsel, who demanded a 37.5% contingent fee to take her case. With the assistance of this new counsel, Garcia settled her claim against City Market for $250,000.00. Of her total recovery, she paid Respondent $71,079.00 and successor counsel approximately $96,750.00; she kept only $82,171.00 of the total settlement.

[8] A contract is ambiguous when it is reasonably susceptible to more than one meaning, taking into account evidence of local usage and of the circumstances surrounding the making of the contract. *Cheyenne Mountain School Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993).

[9] *See id.* While we are cognizant that in contractual disputes a fee agreement must be interpreted and construed against the drafter, *Elliot v. Joyce*, 889 P.2d 43, 46 (Colo. 1994), we are also wary of unreservedly applying this rule of construction given the context of this matter; this is, after all, not an action to recover wrongfully collected sums, but rather a disciplinary

It is first worth noting that Respondent copied paragraph 11 of the fee agreement verbatim from Form 2 of Chapter 23.3 of the Rules of Civil Procedure Governing Contingent Fees. Form 2, in conjunction with the Chapter 23.3 Rules, assures that clients will know the terms and conditions of a contingency payment when contracting for an attorney's services; this form has been crafted to conform with a number of Colorado cases circumscribing an attorney's ability to seek quantum meruit recovery under contingency fee agreements.[10] That Respondent adopted Form 2 word for word suggests he intended in paragraph 11 to preserve fully his right to seek recovery through quantum meruit. But its inclusion does not likewise suggest to us that he or Garcia contemplated disgorgement of his hourly fees if he withdrew prior to the contingent event. Ultimately, we cannot penalize Respondent for inserting this wording into the contingent portion of the fee agreement when it hews to approved language and is consistent with requirements imposed in case law by the Colorado Supreme Court.[11]

We also find unconvincing the People's characterization of the hourly fees Garcia paid as mere advances. Throughout the course of the representation, Respondent charged Garcia a reduced hourly fee. Garcia, in turn, faithfully paid those bills every month and, notably, never demanded return of the fees when Respondent withdrew from the matter. Thus, while Garcia reasonably expected, based on paragraph 4, to recoup those sums out of Respondent's contingent fee following collection of a settlement or judgment, the wording of that paragraph does not support a similar expectation in the absence of a settlement or judgment. Indeed, Respondent testified it was his practice to explain to clients that they would "owe hourly fees no matter what happened;" specifically, he believes he told Garcia that if he could not collect a settlement

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proceeding where the People must prove by clear and convincing evidence that Respondent has violated a Rule of Professional Conduct.

[10] Historically, Colorado courts have looked upon quantum meruit as a protection available to an attorney to recover the reasonable value of his or her legal services from a client who benefitted from those services but would be unjustly enriched without paying a reasonable sum for them. *See Olsen & Brown v. City of Englewood*, 889 P.2d 673, 675 (Colo. 1995) ("There is no question that an attorney who withdraws for a justifiable reason or is terminated by a client without cause is entitled to compensation for services rendered. . . . Generally courts are in agreement that *quantum meruit* is an appropriate measure of recovery in such circumstances."). However, recent cases have limited an attorney's recourse to quantum meruit in contingency cases, barring recovery unless there is a very specific provision in the fee agreement detailing such recovery. *Joyce*, 889 P.2d at 46 (ruling attorney could not recover in quantum meruit for services rendered before attorney withdrew, absent specific reference to such contingency in fee agreement); *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444-45 (Colo. 2000) (prohibiting quantum meruit recovery when language in contingent fee agreement did not give client sufficient notice of that possibility).

[11] We do not read *Olson, Joyce,* or *Dudding* to *require* Respondent seek quantum meruit. To so construe those cases seems to us an improper transformation of what should be a remedy available to a provider of legal services into an additional obligation imposed on attorneys who employ a hybrid fee agreement.

or judgment, she would be "stuck paying [his] fees." Because we believe this to be a reasonable interpretation of the agreement and the one most likely to embody the parties' intent, we conclude the fee agreement imposed on Respondent no affirmative obligation to disgorge his hourly fees and seek recovery under quantum meruit after he withdrew from Garcia's case.

As regards the People's second alternative, the People urge that the fee agreement, as written, penalizes Garcia financially for terminating representation before the conclusion of the case by giving Respondent the authority to make a unilateral determination of how his fee will be calculated.[12] The People take exception to the arrangement because they believe it is unacceptably akin to a contingent fee agreement that improperly converts to an hourly fee in the event of termination. In short, the People challenge the ethical propriety of a hybrid fee agreement in which Respondent was to be compensated for his services by receiving the greater of a contingency fee or an hourly charge.

We first conclude that "hybrid fee" arrangements are not per se violative of Colo. RPC 1.5(a). Although we can find no Colorado authority directly addressing this question,[13] courts and ethics committees around the country have found similarly, noting that the cynosure in determining the propriety of a fee arrangement is not the structure of the fee agreement, but rather whether the fee itself is reasonable.[14] These authorities caution that contingent fee arrangements normally promise greater return for attorneys than hourly fees charged for the same representation; the higher fee is compensation for bearing the risk of receiving nothing if the client loses. But this risk-reward balance inherent in a contingent fee arrangement can be blunted by a hybrid fee, which may reduce or altogether eliminate the risk assumed by an attorney while guaranteeing the upside of a higher fee if the contingency comes to pass. As such, cases and ethics opinions tend to approve of hybrid structures in which

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[12] *See* People's complaint, ¶ 22.

[13] We note, however, that Rule 1 of Chapter 23.3 of the Rules of Civil Procedure Governing Contingent Fees allows for compensation arrangements that are "contingent in whole or in part," which lends support to our conclusion that hybrid agreements are not per se improper.

[14] *See, e.g., Boston & Maine v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 897 (1st Cir. 1985) (approving hybrid fee arrangement wherein lawyer received hourly charges and 15% of any recovery initially offered by defendant); *Compton v. Kittleson*, 171 P.3d 172, 176 (Alaska 2007) (noting use of hybrid fee agreement does not necessarily breach Rules of Professional Conduct); *McCabe v. Arcidy*, 635 A.2d 446, 452 (N.H. 1993) (recognizing, with respect to fee agreement combining both fixed fee and contingent percentage, that "[s]imply because an agreement combines two different forms of fee calculation does not render the agreement unreasonable"); *Disciplinary Counsel v. Smigelski*, Case No. HHBCV0840193232009, 2009 WL 3086500, at *3 n.3 (Conn. Super. Aug. 31, 2009) (unpublished) (noting hybrid contingency arrangement was neither per se unlawful or unethical, but was a factor to be considered in determining whether fee was reasonable); Ariz. Ethics Op. 03-06 (Sept. 2003) (concluding Arizona Rules of Professional Conduct do not prohibit hybrid fee structures, but resulting fee must not be excessive); N.Y. State Bar Op. 697 (41-97) (Dec. 30, 1997) (supporting hybrid fees so long as total fee charged is not excessive).

the attorney's reduced risk is counterbalanced by a reduced recovery, either via a smaller hourly fee or a lower contingent fee.[15]

Above all, these authorities encourage inquiry as to whether the amount of the fee itself is reasonable—as does Colo. RPC 1.5(a), which lists eight factors to aid in that determination. Only one of those factors addresses whether the representation is undertaken on a contingent fee basis. The remaining seven take into account the nature and scope of the matter and the attorney's skill, expertise, caseload, and effort.[16]

Considering these factors in totality, we cannot conclude the $71,079.00 Garcia paid Respondent was excessive; in fact, the sum is reasonable, given the reduced rate Respondent charged and the complexity of the case. This was a two-year effort to litigate a discrimination case in federal district court. Respondent was skilled in handling such matters: he has tried to a judge or jury over thirty similar cases and settled hundreds more.

In this instance, Respondent filed Garcia's case, conducted discovery, fought off summary judgment, prepared jury instructions, exhibits, and witnesses, drafted motions in limine, and brought the case to the brink of trial, when the trial was postponed pending further briefing. He then dealt with a second round of summary judgment motions while conducting additional discovery and research regarding new claims and defenses. Throughout, he billed Garcia half of his normal hourly rate. Garcia's successor counsel testified that Respondent's efforts laid a "helpful foundation" upon which he built, ultimately culminating in a $250,000.00 settlement.[17] In light of the substantial effort Respondent expended, his experience and expertise in litigating similar matters, and, most of all, the reduced hourly fee he charged Garcia, we cannot find Respondent violated Colo. RPC 1.5(a), as pled in Claim I of the People's complaint.[18]

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[15] *See Boston & Maine*, 778 F.2d at 897 (upholding hybrid with reduced contingency fee); Ariz. Ethics Op. 03-06 (noting excessive fees less likely when contingency fee is smaller or hourly rate has been discounted); Nevada Formal Op. 4 (1987) (endorsing fee arrangement of 20% reduction of hourly fee rate with 50% contingency on punitive damage recovery).

[16] The eight factors enumerated in Colo. RPC 1.5(a) are the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood the lawyer's acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results; the time limitation imposed; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer; and whether the fee is fixed or contingent.

[17] The federal district court docket in Garcia's case illustrates the value Respondent added. *See* People's exhibit 11.

[18] We do conclude Respondent violated Colo. RPC 1.5(a) as regards the fees he charged Garcia for his time spent in travel, as discussed *infra.*

Nor do we find that the fee agreement at issue here threatened to penalize Garcia financially for terminating Respondent's representation before the conclusion of the case. Contrary to the People's argument, upon termination of the relationship Garcia did not face immediate payment in an amount that might have exceeded the fair value of Respondent's services. Instead, she had *already paid* monthly bills for what she deemed to be a fair value: $150.00 per hour for Respondent's legal services. Thus, much like a straight hourly fee arrangement, had Garcia terminated the representation she would not have faced a deferred lump-sum payment that could have jeopardized her financially. Moreover, any contingent fee Respondent pursued would have been offset against the hourly fees Garcia had already paid. Accordingly, we can see no penalty that would have eventuated had Garcia terminated Respondent's representation prior to conclusion of the case.

Similarly, we do not conclude the fee agreement improperly impinged on Garcia's decision to settle her case. Just as with a straight hourly fee agreement, Garcia's decision to settle under this hybrid arrangement would necessarily have been informed by the strength of her case, the settlement offer, and the fees and costs already expended. We cannot conceive how the agreement here would disincentivize Garcia to settle for "too little" or otherwise differ in any meaningful way from an hourly charge.[19]

In sum, we find Respondent's fee agreement did not violate Colo. RPC 1.5(a). The fee agreement between Respondent and Garcia was neither unreasonable on its face, nor did Respondent interpret it unreasonably. Indeed, Respondent's fees were not excessive when measured against the eight factors enumerated in Colo. RPC 1.5(a), and the fee arrangement did not impermissibly burden Garcia's exercise of her settlement rights or her right to terminate Respondent's representation prior to conclusion of her case.

Respondent's Requests for Trial Retainers

Soon after November 2005, when the parties signed the fee agreement discussed above, Respondent and Garcia's working relationship became strained. Garcia believed Respondent wanted her to settle for too little, and despite Respondent's counsel to the contrary, Garcia filed on her own a charge

[19] We find the People's analogy to *Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007), unpersuasive. In that case, the attorney agreed to represent his clients for a contingent fee unless the clients settled for a sum that paid less than $175.00 per hour for the time he invested in the case, thus vesting him with some modicum of settlement control. *Id.* at 176. Notably, that arrangement entailed a "springing" obligation to pay for work already performed but never before chargeable to the clients, which the court found impermissibly burdened the client's right to settle the case. *Id.* at 179. But this is not a similar situation: because Garcia paid her monthly bills on an on-going basis, per the fee agreement, she never faced a "springing" obligation upon settlement.

of retaliation against City Market with the Equal Employment Opportunity Commission.

Respondent, meanwhile, felt Garcia did not take his advice seriously, failed to perceive properly the risks and weaknesses of her case, and was unreasonable in fashioning a negotiating position. Specifically, he faulted her decision to reject a settlement offer early in the litigation, and in October 2006, he moved to withdraw as counsel.[20] After reconsideration, however, Respondent retracted his motion to withdraw, principally because Garcia had suffered an emotional breakdown around that time, and he was concerned his withdrawal may have caused her to feel abandoned. Thus, Respondent continued to represent Garcia throughout 2006 and into 2007.

On March 19, 2007, with a trial date set for July 9, 2007, Respondent wrote to Garcia regarding upcoming expenses, stating, "I estimate the attorney hours required to prepare for and represent you at trial at . . . $35,000," and "[a]ccordingly, I expect to have a trial retainer of $30,000 by April 10, 2007, 90 days prior to trial."[21] Respondent testified he sought this retainer to impress upon Garcia that it was not worthwhile to take the case to trial, given the extraordinary expense and costs associated with doing so. Garcia refused to pay the retainer, viewing the demand as an attempt to bully and intimidate her.

On June 4, 2007, Respondent dropped his request for the trial retainer and instead requested payment of the balance due, plus an agreed credit balance of $1,000. Yet on July 1, 2007, Respondent sought a trial retainer of $10,000, and Garcia paid that amount on July 3, 2007;[22] she testified she felt she had no choice but to pay the retainer, fearing Respondent would leave her without legal counsel if she failed to accede to his demands.

After the trial was continued to May 2008, Respondent again told Garcia in a February 22, 2008, letter that "I will need a $10,000 trial retainer in April."[23] But Garcia refused to pay that sum, and Respondent filed an unopposed motion to withdraw from the case on April 14, 2008.[24]

The People argue Respondent violated Colo. RPC 8.4(d) and (h)[25] by knowingly making demands for retainers in a heavy-handed manner that were

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[20] *See* People's exhibit 6.
[21] People's exhibit 4.
[22] *See* People's exhibit 3.
[23] People's exhibit 5.
[24] *See* People's exhibit 8.
[25] The People's Third Claim for Relief claims a violation of Colo. RPC 8.4(d), alleging Respondent engaged in conduct prejudicial to the administration of justice. The People's Fourth Claim for Relief claims a violation of Colo. RPC 8.4(h), alleging Respondent engaged in conduct that reflects adversely on his fitness to practice law. In this case, Colo. RPC 8.4(h) (1993 Version) is

not authorized by the fee agreement, which provided only for a retainer of $1,000.00 and a credit balance of the same amount.[26] But although we have some reservations about Respondent's conduct, we conclude the People have not proven by clear and convincing evidence that Respondent violated the Rules of Professional Conduct by requesting these trial retainers.

Colorado cases addressing attorneys' demands for additional sums over and above those contemplated in the applicable fee agreement appear to fall into two categories: (1) those seeking unreasonable fees, and thus pled under Colo. RPC 1.5(a)[27]; and (2) those seeking reasonable fees in a coercive or stringent manner,[28] and thus generally pled under Colo. RPC 8.4(d) and 8.4(h). Because nothing presented at the hearing would suggest Respondent sought an unreasonable retainer in anticipation of trial, we focus instead on the manner in which Respondent sought those retainers.

While sparse, Colorado authorities addressing this second category suggest that it is improper for an attorney to threaten to withdraw on the eve of trial unless payment is made,[29] or to intimidate or harass clients or their families into paying overdue legal fees.[30] Thus, we read these cases as broadly standing for the proposition that requests for reasonable additional fees or retainers only fall afoul of the Colorado Rules of Professional Conduct when an attorney uses his position as legal representative coercively or as leverage to intimidate, threaten, or harass clients.

We do not find clear and convincing evidence of such conduct here. In March 2007, Respondent stated via letter that he "expected" a trial retainer of $30,000.00. Although Garcia testified she viewed Respondent's request as a tactic to intimidate her, we cannot endorse that interpretation in light of Garcia's refusal to pay the retainer and Respondent's willingness to drop the request.[31] In contrast, Respondent's July 1, 2007, request for a smaller trial retainer six days before trial, coupled with Garcia's acquiescence to that sum, leaves us with doubt as to whether Respondent used the impending trial date

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applicable because much of the conduct at issue occurred before January 1, 2008, the effective date of the Rule's amendment.

[26] *See* People's exhibit 1, ¶ 8.

[27] *See, e.g., People v. Jamrozek*, 921 P.2d 725, 726 (Colo. 1996) (concluding attorney charged excessive fee under a contingent fee contract by arbitrarily demanding additional $6,500.00 fee before attorney would furnish to client his settlement proceeds).

[28] *See, e.g., People v. Peters*, 849 P.2d 51, 54 (Colo. 1993) (noting fees charged, while reasonable, were objectionable because the methods used to collect were too "stringent").

[29] *See id.* at 53 (ruling conduct adversely reflected on attorney's fitness to practice law where attorney threatened not to appear for trial unless payment was made immediately).

[30] *See People v. Smith*, 773 P.2d 522, 525 (Colo. 1989) (holding that conduct adversely reflected on attorney's fitness to practice law where attorney wrote letter to client's mother to intimidate her into paying her son's fees).

[31] We reach the same conclusion with respect to Respondent's assertion in February 2008 that he would need an additional trial retainer.

as improper leverage to obtain the retainer. However, this evidence could also be interpreted as confirmation that Respondent and Garcia worked together on the financial aspects of the representation, as is normal in attorney-client relationships. Because no additional evidence was presented to elucidate the dynamic between Respondent and Garcia regarding these retainers, the People's case falls short of clearly and convincingly proving a violation of Colo. RPC 8.4(d) or 8.4(h).

Fees for Travel and Travel Expenses

In November 2005, a few days before signing the fee agreement with Garcia, Respondent opened an office in Lenox, Massachusetts. Respondent testified that initially he intended to take vacations in Massachusetts and to establish a satellite office there from which he could work. However, he also acknowledged that he planned to move his entire practice to Massachusetts over time, eventually leaving Colorado altogether. Effective April 2007, Respondent's office lease in Denver expired, and he changed his business address to his office in Lenox on the first of May, 2007.[32] Not until March 2007, however, did Respondent notify Garcia of his intention to relocate to the East Coast.

After Respondent moved to Massachusetts, he began to charge Garcia for expenses he incurred in travel to Colorado to work on her case, including expenditures for airfare, accommodation, food, ground transportation, and parking. All told, Respondent charged Garcia $16,105.00 in expenses relating to travel from Respondent's home in Massachusetts to Colorado for purposes of the litigation. Concomitantly, Respondent charged Garcia for the hours he spent traveling to Colorado, billing her $6,405.00 in attorney's fees for time he logged in transit regardless of whether he was working on her case.[33] Thus, between May 2007 and April 2008, Respondent billed Garcia $22,510.00 in fees and expenses associated with his decision to move his practice to Massachusetts. Even Respondent concedes these travel fees and expenses were "extraordinary."

Based on this conduct, the People allege violations of Colo. RPC 1.5(a), 8.4(d), and 8.4(h). Specifically, they point to the fee agreement, which states that "[a]uthority is given to the attorney to incur expenses and make disbursements up to a maximum of $3,000.000 which limitation will not be exceeded without the client's further written authority."[34] Respondent counters that Garcia verbally agreed to the increased expenses, and that typically,

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[32] *See* People's exhibit 7.

[33] Respondent failed to maintain accurate time records documenting whether he worked on Garcia's case during the days he commuted, but he testified that the time he spent actually working on her case was not a significant portion of the hours he billed for travel.

[34] People's exhibit 1, ¶ 6. *See also* People's exhibit 12.

attorneys are entitled to charge for any time they are taken away from billable work by a client's matters.

Guided by fundamental notions of fairness, we are persuaded that Respondent violated Colo. RPC 1.5(a) by billing Garcia for his travel time: Respondent intended as early as 2005 to eventually move thousands of miles away, yet he never alerted Garcia to these plans prior to entering into their attorney-client relationship.[35] Indeed, he notified Garcia of his change of residence only a little more than a month before he moved, at which point she faced the unenviable choice of seeking another attorney to take her case[36] or complying with Respondent's demands. Had Respondent been more candid, Garcia could have chosen other counsel in Colorado even before signing the fee agreement or, at a minimum, before paying Respondent substantial sums for handling her case. Because these fees appear excessive and unfair in this context, we find Respondent violated Colo. RPC 1.5(a).

We likewise conclude Respondent violated Colo. RPC 8.4(h) by charging Garcia for his travel-related expenses. Not only does Respondent's conduct strike us as fundamentally unfair, but it contravenes the plain language of the fee agreement he drafted, which mandates he seek Garcia's written approval of expenses exceeding $3,000.000. Because he did not do so, and because his failure to consult with Garcia forced her to expend unnecessarily thousands of dollars, we find Respondent's behavior does not withstand scrutiny when measured against the language of Colo. RPC 8.4(h), which proscribes conduct adversely reflecting on a lawyer's fitness to practice law.[37]

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law govern the selection and imposition of sanctions for lawyer misconduct. ABA *Standard* 3.0 mandates that, in selecting the appropriate sanction, the Hearing Board must consider the duty breached, Respondent's mental state, the injury or potential injury caused, and the aggravating and mitigating evidence.

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

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[35] *See ABA Comm. on Professional Ethics and Grievances,* Formal Op. 93-379 (1993) (noting that the *total amount* that the representation will cost the client is obviously a salient fact regarding the representation).

[36] Ultimately, Garcia was forced to find new counsel when Respondent withdrew for health reasons. As a result, after paying Respondent his hourly fees and successor counsel a contingency fee, she only retained approximately 24% of the settlement proceeds.

[37] Because we conclude these facts are better pled under Colo. RPC 8.4(h) (1993 Version), we need not and do not find Respondent also violated Colo. RPC 8.4(d) by billing his travel expenses.

Duty: Respondent violated his duty to his client, Garcia, since a lawyer must be candid with a client during the course of their professional relationship. Respondent also violated his duties as a professional when he charged Garcia unreasonable and improper travel fees.

Mental State: The Hearing Board concludes Respondent acted negligently when he failed to provide Garcia with accurate and complete information regarding his pending plans to relocate his practice to Massachusetts. We believe Respondent had every confidence in 2005 that Garcia's case would settle well before his move, and thus he considered it unnecessary to advise her of possible commuting fees and expenses arising from his relocation. As such, we find that Respondent did not knowingly or intentionally withhold from Garcia his plans to settle in Massachusetts, but rather that he was negligent in omitting this information from his advisement.

Injury: Respondent's conduct caused Garcia actual injury. Because Garcia was not notified of Respondent's intent to transfer residence until he was ready to move, she had little choice but to pay the travel fees and expenses he exacted; her other option was to secure new representation—and the added attorney's fees associated with that choice—in a very short time frame. We regard the tens of thousands of dollars Garcia was compelled to outlay to cover Respondent's travel, coupled with the stress and frustration occasioned by the Hobson's choice she faced due to Respondent's demands, as unqualified injury.

ABA *Standard* 3.0 – Aggravating and Mitigating Factors

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed, and mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline imposed. The Hearing Board considers evidence of the following aggravating and mitigating circumstances in deciding the appropriate sanction.

Substantial Experience in the Practice of Law – 9.22(i): The Hearing Board considers in aggravation that Respondent is a thirty-one year veteran in the practice of law, having been admitted to the Bar of Colorado in 1978.

Absence of a Dishonest or Selfish Motive – 9.32(b): The Hearing Board accords this factor some weight in mitigation. While Respondent charged Garcia fees and expenses associated with travel, which was arguably fueled by a selfish motive, no dispute exists that he actually incurred these expenses. Likewise, throughout the hearing, there was no intimation that Respondent was dishonest in accounting for the time he spent in travel.

Cooperative Attitude Toward Proceedings – 9.32(e): The People concede Respondent has been cooperative in these proceedings.

Character or Reputation – 9.32(g): At Respondent's behest, former federal district court magistrate Ed Schlatter testified to his positive impression of Respondent. Magistrate Schlatter stated that in every proceeding in which Respondent appeared before him, Respondent comported himself with competence and the required level of ethics. Magistrate Schlatter also discussed Respondent's commitment to his clients; on more than one occasion when Magistrate Schlatter mediated Respondent's clients' disputes, he witnessed Respondent offer to reduce his fees so that his clients would feel more satisfied with the outcome of the settlement. Overall, Magistrate Schlatter said, Respondent "does not have a bad reputation" among federal district magistrates and judges.

Remoteness of Prior Offense – 9.32(m): Respondent received a private admonition in 1987 for conduct dissimilar to that at issue here. We regard the existence of the prior discipline and the remoteness of that offense as offsetting one another, and therefore we consider these factors neither in mitigation or aggravation.

Sanctions Analysis Under ABA *Standards* and Case Law

ABA *Standards* 4.6 and 7.0 govern violations of Colo. RPC 1.5. ABA *Standard* 4.63 provides that reprimand, or public censure, is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, thereby causing the client injury or potential injury. Similarly, ABA *Standard* 7.3 identifies reprimand as the appropriate sanction when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and therefore causes injury or potential injury to a client. Of note, the commentary to ABA *Standard* 7.3 observes that courts typically impose reprimand when lawyers engage in a single instance of charging an excessive or improper fee.

Case law confirms public censure is warranted in this situation. In general, the Colorado Supreme Court has approved public censure as adequate in single instances of charging an excessive and improper fee, resulting in harm to a client.[38] Other cases in which suspension has been deemed

[38] *See In re Green*, 11 P.3d 1078, 1089 (2000) (approving of public censure where all but single instance of charging unreasonable fee was dismissed, and considering presence of one mitigating factor and several aggravating factors); *In re Wimmershoff*, 3 P.3d 417, 421 (Colo. 2000) (finding public censure adequate in single instance of charging excessive fee where two factors in aggravation and one in mitigation did not significantly tip the scales away from the presumed sanction); *People v. Wilson*, 953 P.2d 1292, 1293-94 (Colo. 1998) (upholding public censure for violations of Colo. RPC 1.5(d), 1.5(a), and 8.4(g) where special conditions and monitoring were imposed).

appropriate for charging unreasonable fees have usually involved several instances of excessive or unreasonable fees or additional violations of the Rules of Professional Conduct.[39] In light of the ABA *Standards* and the applicable case law—and given the few mitigating or aggravating circumstances—the Hearing Board concludes there is little cause to diverge from the presumed sanction of public censure.

V. CONCLUSION

An attorney is bound to treat his clients with candor and fairness, and this duty extends to financial and billing arrangements. In this case, the Hearing Board finds no clear and convincing evidence that Respondent's fee agreement or requests for trial retainers violated the Colorado Rules of Professional Responsibility, but we find Respondent's attempts to charge Garcia for travel expenses and fees, particularly in light of his failure to alert Garcia to his planned move out of state, contravene Colo. RPC 1.5(a) and 8.4(h).[40] Accordingly, the Hearing Board concludes public censure is warranted.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **RONALD E. GREGSON**, Attorney Registration No. 08996, is hereby **PUBLICLY CENSURED.** The censure **SHALL** become public and effective thirty-one days from the date of this order upon the issuance of an "Order and Notice of Public Censure" by the PDJ and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h). Respondent **SHALL** file any post-hearing motion or application for stay pending appeal **on or before Monday, September 20, 2010**. No extension of time will be granted.

2. Respondent **SHALL** pay restitution of $22,510.00 to Michelle Garcia for improper and excessive travel fees and expenses or, in the alternative, reimburse the Colorado Attorney's Fund for Client Protection for all proceeds that may have been paid to Michelle Garcia.

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[39] *See, e.g., People v. Walker,* 832 P.2d 935, 936 (Colo. 1992) (ordering suspension for 90 days where attorney charged clearly excessive fees in six matters and attorney's mental state was adjudged to be knowing); *People v. Nutt*, 696 P.2d 242, 249 (Colo. 1984) (ordering suspension for six months for excessive billing, failure to disclose financial interest in work, and improper compensation arrangement, coupled with previous discipline for attempts to collect clearly excessive fee).

[40] Colo. RPC 8.4(h) (1993 Version).

3. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days from the date of this order. Respondent shall have ten (10) days thereafter to submit a response.

DATED THIS 31ST DAY OF AUGUST, 2010.

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

(*Original Signature on File*)
ROBERT A. MILLMAN
HEARING BOARD MEMBER

(*Original Signature on File*)
FRANCES L. WINSTON
HEARING BOARD MEMBER

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