People v. James Stern. 22PDJ007. September 7, 2022.

A hearing board suspended James Stern (attorney registration number 36157) for six months. The suspension, which takes effect on November 15, 2022, carries with it the requirement that Stern petition to reinstate his law license by proving by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

In January 2019, Stern agreed to represent a seller's broker, the broker's agent, and a buyer's agent to recover a fee commission for a failed real estate transaction, which fell through after the seller refused to agree to the sale. Stern did not obtain his clients' written informed consent to the representation despite the risk that his representation of one or more of his clients would be materially limited by his responsibilities to the other clients or by his own personal interests. Stern filed a complaint against the seller in July 2019, and the seller filed counterclaims against the seller's broker and the broker's agent. After the broker's agent retained separate counsel to defend against the counterclaims, Stern ceased advocating for her interests regarding the fee commission, effectively abandoning his representation of her. But Stern never notified the broker's agent that he was withdrawing as her counsel and would no longer represent her in the fee commission matter.

Meanwhile, Stern negotiated an aggregate settlement with the seller's lawyer. Stern did not inform his clients of the material terms of the settlement, however, nor did he disclose to his clients the risks involved in the settlement or obtain his clients' written informed consent to settle their claims together. During the negotiations, Stern worked to increase his portion of the settlement to be paid as attorney's fees. Though Stern's contingency fee agreement entitled him to one-third of the gross settlement amount, Stern attempted to collect $60,000.00 as specially awarded attorney's fees plus one-third of the remaining portion of the settlement funds. The buyer's agent terminated Stern's representation soon after, and Stern continued to represent the seller's broker against his two former clients in the dispute over his attorney's fee that followed.

Through his conduct, Stern violated Colo. RPC 1.5(a) (a lawyer must not charge an unreasonable fee); Colo. RPC 1.7(a) (a lawyer must not represent a client if the representation involves a concurrent conflict of interest); Colo. RPC 1.8(g) (a lawyer must obtain informed consent in writing when settling an aggregate claim); Colo. RPC 1.9(a) (a lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to those of the former client unless the former client gives written informed consent); and Colo. RPC 1.16(d) (a lawyer must protect a client's interests upon termination of the representation).

The case file is public per C.R.C.P. 242.41(a). 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:** JAMES STERN, #36157	Case Number: **22PDJ007**
OPINION IMPOSING SANCTIONS UNDER C.R.C.P. 242.31	

In a joint representation, James Stern ("Respondent") signed several individuals and entities as clients. He did so without disclosing to them the significant risk that his representation of one or more of them would be materially limited by his responsibilities to the other clients and by his own personal interests. These risks eventually blossomed into actual conflicts. Later, he unilaterally terminated one client without notice and then, in the same matter, negotiated an aggregated settlement for his clients that was materially adverse to the interests of the former client. Respondent also elevated his personal interest in recovering an unreasonable attorney's fee award above his clients' interests. In an ensuing dispute over the distribution of the settlement funds, another of the clients terminated the representation. After the former client was awarded one-third of the settlement funds, Respondent appealed the award personally and on behalf of his remaining client in an attempt to claw back a portion of those funds from the former client. Respondent's misconduct warrants a six-month suspension with the requirement that he petition for reinstatement, if at all, under C.R.C.P. 242.39.

I. PROCEDURAL HISTORY

On February 1, 2022, Michele L. Melnick of the Office of Attorney Regulation Counsel ("the People") filed a complaint against Respondent with the Office of the Presiding Disciplinary Judge ("the Court"), alleging that Respondent violated Colo. RPC 1.5(a), Colo. RPC 1.7(a), Colo. RPC 1.8(g), Colo. RPC 1.9(a), and Colo. RPC 1.16(d).

On February 28, 2022, Respondent moved to stay this case due to a pending civil appeal or, in the alternative, to enlarge his time to answer. The Court denied Respondent's request to stay but granted him additional time to file a responsive pleading. Respondent answered the complaint on March 18, 2022.

Between July 12 and 14, 2022, a Hearing Board comprising Presiding Disciplinary Judge Bryon M. Large ("the PDJ") and lawyers Barbara Weil Laff and Marna M. Lake held a remote disciplinary hearing under C.R.C.P. 242.30 via the Zoom videoconferencing platform. Melnick represented the People, and Respondent appeared pro se. The Hearing Board received testimony from Sharon "Patty" Salazar, Rachel Ryckman, Michael J. Healy, Robin Mann, Cherami Ball Costigan, and Respondent. The PDJ admitted the People's exhibits 1-7, 9, 11-18, 20, 22, 28-29, 31-33, and 35-38 as well as Respondent's exhibits A-D and F-O. After the People rested their case in chief, Respondent moved under C.R.C.P. 50 for a directed verdict, which the PDJ denied in an oral ruling.

II. FINDINGS OF FACT[1]

Respondent was admitted to the practice of law in Colorado on January 25, 2005, under attorney registration number 36157. He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.

The Fee Agreement

This case begins with an unconsummated real estate transaction. Juan Miranda, the owner of 1132 South Sheridan Boulevard, entered into a listing agreement with real estate brokerage Phill Foster & Company ("PF&C") to market and sell the commercial property.[2] PF&C's broker Sharon "Patty" Salazar signed the agreement on the brokerage's behalf. Per the listing agreement, the brokers were entitled to receive as commission six percent of the ultimate sales price, divided evenly between seller's and buyer's brokers: PF&C was entitled to three percent, and the buyer's broker would receive the other three percent.[3] Under Salazar's separate arrangement with PF&C, she was promised seventy percent of PF&C's total commission.

Robin Mann, a real estate agent for brokerage HomeSmart Cherry Creek, learned of the listing and found cash buyers for the property. The buyers offered $760,000.00.[4] But at the July 2018 closing Miranda refused to sell, and the deal fell through. Eventually, the buyers settled their potential claims against Miranda arising from the failed sale.[5]

Mann, however, wanted compensation for his work. He contacted Respondent, who had represented him in the past, about helping to collect his portion of the commission. Respondent initially demurred, worrying that attorney's fees could dwarf the modest recovery. But Mann put Respondent in touch with Salazar and Phill Foster, managing broker of PF&C. With Foster's and Salazar's participation, Respondent eventually agreed to bring a breach of contract action to recoup the group's full six-percent commission. He volunteered to work on an hourly basis or for

[1] Factual findings are drawn from testimony offered at the hearing where not otherwise indicated.
[2] Ex. 20.
[3] Ex. 20 at 1457 ("Brokerage Firm offers compensation to outside brokerage firms, whose brokers are acting as: Buyer Agents: 3% of the gross sales price . . . .").
[4] *See* Exs. A-B.
[5] *See* Ex. 29 at 1784 (noting that Miranda paid approximately $27,000.00 to the prospective buyers of the property).

a contingency fee, whichever Foster and Mann preferred.[6] Because no one had the appetite for significant hourly fees, they chose to proceed on a contingency basis.

In January 2019, Respondent presented the brokers with a contingency fee agreement. Respondent's agreement lists Foster, PF&C, Salazar, HomeSmart Cherry Creek, and Mann as clients.[7] Respondent testified at the hearing that he deliberately listed all of these clients to protect his own interests: he included them, he said, so that everyone would be bound by the agreement that he was entitled to one-third of the total recovery. The contingency fee agreement, patterned after Form 2,[8] entitles Respondent to thirty-three and one-third percent of the gross amounts recovered from any settlement that occurs more than sixty days before the trial date. The fee agreement also notes that the gross amounts do not include specially awarded attorney's fees. A disclosure statement appended to the fee agreement states, "the court or an arbitrator may sometimes award Attorneys fees in addition to an amount of recovery being claimed," and it cautions clients that their fee agreement should include a provision detailing how any specially awarded attorney's fees will be accounted for and handled.[9] Respondent's contingency fee agreement does not contain such a provision.

Foster signed personally as well as for PF&C. He also signed on Salazar's behalf; Salazar authorized Foster to do so after he pressured her to endorse the agreement expeditiously.[10] Mann and Salazar testified that Respondent never explained to them the risks or benefits of joint representation, including whether their communications with him would be confidential. Likewise, they said, Respondent did not counsel them about how potential conflicts or disagreements between them might be resolved, explain what specially awarded attorney's fees are, or advise them to seek the advice of an independent lawyer before signing the agreement. At the hearing, Respondent acknowledged as much, recounting that he was loath to encourage his new clients to retain separate counsel due to the expense.

On January 22, 2019, Respondent penned a letter to Michelle McCarthy, Miranda's then-lawyer, demanding that Miranda pay his clients PF&C, Foster, Mann, and Salazar their earned commission.[11] McCarthy responded that no commission was due, and she promised to vigorously defend Miranda.[12] In late February 2019, Respondent received an email from lawyer Michael J. Healy, whom Miranda had retained to file claims against Salazar.[13] Healy alleged that Salazar had provided Miranda flawed advice while acting as Miranda's real estate agent. Healy also remarked, however, that Miranda's and Salazar's competing claims could be resolved if both parties signed

[6] Ex. 28.
[7] Ex. 16.
[8] C.R.C.P. Chapter 23.5, Form 2 (repealed effective Jan. 1, 2021).
[9] Ex. 16 at 963.
[10] Presumably, Mann also signed the fee agreement in some capacity, though his signature does not appear on the copy of that agreement admitted as an exhibit, which provides signature blocks both for Mann individually and as President of HomeSmart Cherry Creek. *See* Ex. 16 at 964.
[11] Ex. 4 at 317.
[12] Ex. 4 at 319.
[13] Ex. 29 at 1784.

a mutual release agreement, which would obviate further litigation and avoid the resulting attorney's fees. But Respondent questioned Healy's legal bases for a claim against Salazar. Later, Respondent agreed to accept service on behalf of Salazar, whom he identified as his client.[14]

The Litigation

Respondent filed a one-claim complaint on July 9, 2019, in Denver District Court, captioned *Phill Foster & Company v. Juan Miranda*. According to Mann, PF&C paid the filing fee, and Mann himself paid for service of process. In the complaint, PF&C alone was named as plaintiff. Foster, Salazar, and Mann were not named parties. But the complaint's sole claim, which alleges breach of contract, avers that "Plaintiffs fully performed their part of the contract," that "Plaintiffs brought a buyer ready, willing and able to buy," and that "Plaintiffs sustained damages" as a result of Miranda's breach of contract.[15] The complaint concludes with a request by the "Plaintiffs" for a judgment against Miranda.[16] Both Mann and Salazar testified that they believed they were included as plaintiffs in the complaint.

On August 9, 2019, Miranda filed an answer and counterclaims against PF&C.[17] A few days later, lawyer Cherami Ball Costigan, who was retained by PF&C's errors and omissions ("E&O") insurance carrier to defend PF&C against Miranda's counterclaims, entered her appearance.[18] Respondent soon sent an email calling for "all the attorneys, parties and [Mann]" to gather together to "get up to speed on the facts, . . . discuss the factual and legal strengths and weaknesses of the claims and counter claims, and discuss a strategy going forward."[19] In that email, Respondent noted that Ball Costigan would defend PF&C. He also reported that he recommended Salazar retain her own counsel, through her E&O carrier, to defend her personally against Miranda's counterclaims. He added, "I represent [PF&C] in its claim against Miranda. I do not represent any of you in regard to the E&O claims, which I expect will be dismissed."[20]

Respondent then reached out to Salazar's E&O carrier, urging it to appoint counsel for Salazar because he could not defend her against claims of negligence or take protective action on her behalf. He remarked, "If there are any potential conflicts, defenses and cross-claims, Ms. Salazar needs counsel to represent her interests before options are foreclosed and orders are issued, without input from Ms. Salazar."[21] The carrier relented, agreed to retain Rachel Ryckman as Salazar's E&O lawyer, and noted, "All communication regarding Patty's claim should continue with Patty here on out since you are not her counsel."[22] Respondent testified that he interpreted

[14] Ex. 29 at 1781.
[15] Ex. 14 at 1741.
[16] Ex. 14 at 1741.
[17] *See* Ex. 33 at 1507.
[18] Ex. 22.
[19] Ex. 7 at 389.
[20] Ex. 7 at 389.
[21] Ex. D at 1220.
[22] Ex. D at 1220. This email appears to contain two contradictory messages. The Hearing Board assumes it contains a typographical error, though no testimony illuminated how the email should properly read.

this directive as forbidding him to communicate directly with Salazar. He also suggested that it effectively marked the end of his representation of Salazar, though he never sent Salazar a letter terminating his services or verbally advised her of his intentions. In contrast, Salazar viewed her arrangement as paralleling that of PF&C's: Respondent would continue to advance the brokers' collective claim to a commission, including her own, while Ryckman would defend Salazar personally against any potential counterclaim, much like Ball Costigan was positioned to defend PF&C.

Ryckman promptly reached out to Respondent and Ball Costigan to announce that she was "retained to represent Ms. Salazar relative to this matter."[23] On August 23, 2019, Respondent, Salazar, Mann, Foster, Ball Costigan, and Ryckman met to discuss the lawsuit Respondent filed as well as the counterclaims and defense strategy.[24] At the time, Ryckman was not aware that Respondent had agreed to represent both Salazar and Mann, and she recalled feeling "surprised" that Mann attended the meeting, as he was the adverse broker in the transaction. Similarly, Ball Costigan was not aware at the time that the contingency fee agreement listed both Mann and Salazar as Respondent's clients.

The court set a jury trial for April 2020[25] and a case management conference for December 2019. During that conference, Healy argued that PF&C, as the lone plaintiff, was not entitled to the full six-percent commission. He reasoned that under the listing contract, PF&C, the seller's broker, was due only three percent. Soon thereafter, in an effort to capture the full six-percent commission, Respondent amended the complaint to add Mann, the buyer's broker, as a plaintiff in his individual capacity.[26] Respondent testified that he did not otherwise modify the complaint. He signed the amended complaint as "Attorney for Plaintiffs."[27]

Between December 2019 and February 2020, Ball Costigan paid to notice several depositions, including at least one with a Spanish language translator. She also filed a summary judgment motion to dismiss Miranda's counterclaim. In February 2020, the scheduled mediation in the case was pushed to a later date, even though the deadline for expert reports was fast approaching.[28]

The Settlement Negotiations

In mid-February 2020, Healy contacted Ball Costigan to discuss settlement. Because Ball Costigan participated in the litigation only to defend against Miranda's counterclaim, and not to affirmatively seek some redress for PF&C, she referred Healy to Respondent to negotiate a settlement. On behalf of PF&C, Foster, and Mann, Respondent began to negotiate an aggregate settlement with Healy. He did so without disclosing to his clients the nature of the claims

[23] Ex. D. at 1221.
[24] Ex. 11 at 478.
[25] Ex. C.
[26] Ex. 15.
[27] Ex. 15 at 1755.
[28] Ex. 37 at 1572.

involved and the fact that each of the clients would participate in the settlement. None of the clients gave him written informed consent to settle their claims together.

Respondent and Healy remembered that Healy initially offered to settle all claims for a sum more than $45,600.00—the full amount of the six-percent commission. Respondent and Healy also testified that Respondent sought additional money to cover attorney's fees. According to Healy, he offered on Miranda's behalf to settle for $95,600.00.

On February 20, 2020, Respondent demanded $105,600.00: $45,600.00 for the six-percent commission and $60,000.00 for "all attorney fees and costs."[29] Respondent testified that this figure roughly compensated him for the hours he had worked. When he had last looked at his billing sheets, he explained, he had earned approximately $55,000.00 at $400.00 per hour, and he knew that he had worked at least another ten hours since that time. So, Respondent said, he "rounded it up to $60,000.00" to "see if [Healy] would agree to that."[30]

The same day, Respondent emailed Ryckman, announcing that he had just received from Healy a soon-expiring settlement offer containing a release of claims.[31] Ryckman responded later in the day, inquiring whether Healy would include Salazar in the global release and proposing release language to include in the settlement agreement.[32] Respondent urgently replied, "I need to know within the next 5 minutes what is your carrier's position and if Ms. Salazar is going to waive her commission," concluding, "If I hear from you before there is a final settlement, I may be able to include Ms. Salazar in the final settlement, if we can get to terms."[33] Ryckman swiftly responded. She conveyed an offer from Salazar's insurance carrier to pay $7,500.00 to release Salazar from all claims, and she also made clear that Salazar would not waive her claim to a portion of the commission.[34]

Twenty minutes later, Respondent emailed Healy, with copies to Mann, Foster, and Ball Costigan. Respondent wrote that after consulting with his clients, he was authorized to offer a global and mutual release between, on the one hand, Miranda and all affiliated entities and persons, and, on the other hand, Salazar, Foster, PF&C, and Mann. In exchange, Miranda would pay $45,000.00 "in settlement of commissions owed" and $60,000.00 "in settlement of all attorney fees and costs."[35]

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[29] Ex. J at 1028.

[30] Respondent claimed that he tracked his hours in the case, although he never furnished proof of his work to Healy, the People, or the Hearing Board. As a point of comparison, Respondent testified that Ball Costigan, who had taken several depositions and filed a motion for summary judgment, had billed approximately $40,000.00, while Healy testified that Ball Costigan's estimated fees were around $32,000.00. As an inducement to the parties to settle, PF&C's E&O carrier waived its right to attempt to collect Ball Costigan's fees and costs. *See* Ex. 37 at 1573.

[31] Ex. 37 at 1576.

[32] Ex. 37 at 1571-72.

[33] Ex. 37 at 1571.

[34] Ex. 37 at 1570-71.

[35] Ex. J at 1028 (making this offer in two separate emails).

The following morning, on February 21, 2020, Respondent again contacted Ryckman, reporting, "I received a counter offer and I've spoken with my clients. We are close. Can your carrier move their offer up to $11,000 paid to Mr. Healey? Patty will give and get a full release of claims."[36] On the carrier's behalf, Ryckman soon agreed to offer $10,000.00.[37] According to Healy, however, neither Healy nor Miranda insisted that Salazar's carrier pay a portion of the settlement. Instead, Healy said, Respondent pushed Salazar's carrier to contribute additional sums "to get up to the $105,600.00 number that [Respondent] wanted."[38]

Miranda accepted the offer. According to Healy, Miranda felt he had to do so because he did not have pockets deep enough to assume the risk of being forced to pay additional attorney's fees, which had already grown so large that they eclipsed the commission corpus. Respondent recalled that all the brokers and their lawyers were "jubilant" about the outcome.

Respondent emailed Healy, Ball Costigan, Ryckman, Foster, and Mann, announcing that Salazar's insurance carrier "agreed to pay $10,000 to make the settlement happen."[39] He also attached a "General Release and Settlement Agreement" for the parties' signatures, inviting comments and edits.[40] The agreement recited, in general, that Miranda would pay $95,600.00 and Salazar would pay an additional $10,000.00, all to be delivered into Respondent's trust account. The agreement did not specify how these amounts were determined, what portion of the settlement amount Respondent's clients were entitled to receive, or what portion was designated as attorney's fees. And no clause in the agreement addressed specially awarded attorney's fees.

Healy promptly replied that Respondent needed to change the agreement to "clarify that if Patty Salazar does not pay the $10,000, she will owe this to you, not Miranda."[41] Ryckman likewise replied by email, requesting that Respondent make several changes. Among them, she insisted that the $10,000.00 payment be routed to Healy's trust account, not Respondent's.[42] Ryckman testified at the disciplinary hearing that she requested this change because Salazar's insurance carrier was willing to contribute the money to release Miranda's claims against Salazar, not to pay Respondent's fees. In the same email, Ryckman also noted that Salazar had not waived her claim to a portion of the commission, and she asked Respondent to confirm the computation

[36] Ex. 37 at 1570.

[37] Ex. F at 1226.

[38] *See also* Ex. 36 at 1732 (March 2020 email from Salazar to Respondent claiming, "there is evidence of the $95,000 settlement being presented to you by [Miranda] and/or his attorney Mr. Healy prior to you speaking with Rachel Ryckman and requesting her to ask my E&O insurance company to give money towards the 'negotiations.' What negotiations? . . . According to the evidence, the $95,000 amount was already presented to you by Mr. Healy. I am sure as my attorney you are aware there are negative consequences for me if my E&O insurance was to payout any money . . . .").

[39] Ex. F at 1226.

[40] *See* Ex. 17 (final and executed version). The settlement agreement also includes as a party Aldofo Miranda, Juan Miranda's brother, who is thus listed in many of the later legal documents. For ease of reading, this opinion mentions only Juan Miranda when discussing those documents.

[41] Ex. F at 1225.

[42] Ex. F at 1224.

in writing to avoid misunderstandings.[43] At the disciplinary hearing, Ryckman explained that Salazar worried that in executing the global release, she would be signing away her claim to a commission, leading her to seek assurances that she would receive monetary compensation. Respondent told both Healy and Ryckman that their edits had been incorporated. In response to Ryckman's query about the commission sum, Respondent replied simply, "the computation for commissions is $45,000."[44] He did not detail the sums that Salazar or his other clients would receive if she accepted the offer.

The Fee Dispute

Miranda, Foster, and Mann signed the agreement. Salazar refused. Ryckman testified that Respondent had in fact failed to incorporate into the agreement the language she requested to protect Salazar—language on which Salazar's insurance carrier's $10,000.00 contribution hinged. Nor did Respondent clarify how much Salazar was due to receive from the settlement. And in the days following February 21, 2020, Ryckman learned that Respondent had made representations that he was counsel for Salazar, which concerned her, given the "inconsistent positions" that he had taken in the matter.[45] Ultimately, Ryckman asked Respondent and Ball Costigan point blank how much Salazar would receive if she signed the release and her insurance carrier paid $10,000.00.[46] Respondent did not respond; it was Ball Costigan, instead, who confirmed that Salazar's portion of the commission would be $10,640.00.[47] Ryckman, in turn, informed Ball Costigan that Salazar would sign the release if she were allotted $15,960.00, the amount she earned in the transaction.[48]

On March 2, 2020, Miranda transferred $95,600.00 to Respondent's trust account per the settlement agreement. Ball Costigan, who wished to finalize the settlement, tried unsuccessfully to find a resolution that would satisfy Salazar.[49] Respondent, in contrast, refused to respond to Salazar's attempts to communicate with him about the commission division, instead complaining to Ryckman that her client continued to email him directly.[50] Ryckman explained in a responsive email that Salazar had contacted Respondent about the commission amount based on Respondent's role as Salazar's lawyer, as established in their contingency fee agreement, reminding Respondent that Ryckman was retained only "to represent [Salazar] in the defense of any actual or potential claims."[51] Ultimately, Respondent and Ball Costigan chose to move forward without Salazar's signature by filing a stipulation to dismiss with prejudice the claims between

[43] Ex. F at 1225.
[44] Ex. F at 1224.
[45] Ex. O at 1232.
[46] Ex. O at 1232.
[47] Ex. O at 1231.
[48] Ex. O at 1231.
[49] *See* Ex. H.
[50] Ex. 36 at 1730.
[51] Ex. 36 at 1730. Ryckman's email echoed Salazar's near-contemporaneous communications castigating Respondent for failing to communicate with her and failing to protect her interests. *See* Ex. 36 at 1730-31 (Salazar emailing Respondent, "I am very sure it has been stated to you several times both in writing and verbally throughout this case that attorneys Cherami and Rachel are NOT involved in the commission portion, yet as my attorney you continue to disregard this.").

Miranda, Foster, PF&C, and Mann. As a result, the stipulation did not purport to dismiss any claims Miranda might have against Salazar.[52]

Meanwhile, Mann sought to rescind his signature on the settlement agreement and terminated Respondent's representation.[53] According to Mann, during the settlement phase he had understood that he would net around $22,800.00, the full amount of his commission. But when Respondent told Mann that he needed to take a "haircut" and would receive only $15,200.00—$7,000.00 less than expected—he concluded that Respondent was not representing his best interests and instead was trying to take his settlement money and "label it legal expenses."

On March 10, 2020, Ball Costigan filed the stipulation for dismissal with prejudice.[54] The same day, Mann filed a pro se handwritten motion requesting an emergency status conference and an extension of time to retain a new lawyer. In that filing, Mann announced that he was revoking or rescinding his signature on the settlement agreement, and he pleaded with the court to review the matter for "improprieties."[55]

Two days later, Respondent responded to Mann's emergency motion on behalf of PF&C alone.[56] In that response, he defended the proposed commission division, which he limned in an unsigned disbursement sheet attached to the response. The disbursement sheet reads in part:

NET RECOVERY $45,600.00

$35,600 from Juan Miranda + $60,000 for total attorney fees and costs
$10,000 from Sharon Salazar's insurance carrier

Computation of Contingent Fee: 33% of Gross
Recovery = $45,600.00

Total Fee (and expenses advanced by attorney)* $15,200.00[57]

Per the disbursement sheet, Respondent was to secure $60,000.00 in attorney's fees as well as one-third of the total $45,600.00 commission, for a total of $75,200.00.[58] Mann was to receive $15,200.00 in commission as the buyer's broker. PF&C was to collect the same amount on the

[52] *See* Ex. I (discussing Miranda's possible bases for claims against Salazar).
[53] Ex. K. Respondent moved to withdraw as Mann's counsel on April 8, 2020. *See* Ex. 33 at 1504.
[54] Ex. 33 at 1504.
[55] Ex. 18.
[56] Ex. 38.
[57] Ex. 1. At the disciplinary hearing, Respondent testified that he advanced costs and expenses in litigating the commission, but he neither specifically identified any of those expenses nor substantiated his testimony with documents detailing the types or amounts of expenses.
[58] In the response, Respondent contended that the "gross amount collected" in the settlement "does not include specially awarded attorneys' fees and costs awarded to the client." Ex. 38 at 137.

seller's side, retaining $4,560.00 as the managing broker and passing $10,640.00 on to Salazar as the seller's broker. Salazar's portion, however, was designated as contingent on her insurance carrier's payment of $10,000.00; if her carrier did not contribute $10,000.00, PF&C was to keep $4,560.00 and Salazar would be apportioned only $640.00.[59]

PF&C's response to Mann's emergency motion, authored by Respondent, justified the proposed reduced commission for Salazar: "Ms. Salazar's refusal to sign the settlement agreement has reduced the net commission funds from the $30,400 to $20,400."[60] He expounded on his reasoning at the disciplinary hearing, noting that he considered Miranda's payment of $95,600.00 as funding $60,000.00 of his own attorney's fees and then $35,600.00 toward the commission. Only with the $10,000.00 chipped in by Salazar's carrier would the brokers recoup the full $45,600.00 commission. Even though Respondent insisted at the disciplinary hearing that his "entire focus was on getting the commission paid, the full amount," he also acknowledged that, in the absence of the carrier's $10,000.00 contribution, he could have lowered his attorney's fees by a commensurate amount, rather than shaving that sum off his clients' portion. But he defended his decision not to: "obviously I wanted to be paid for a lot of my attorney's fees and my time and costs . . . That's not unethical to want to be paid."

In early April 2020, the court denied the stipulation for dismissal and instead set the matter for a telephone conference on May 5, 2020, giving Mann three weeks to retain counsel.[61] Because, as Healy recalled, Miranda was "desperate" to exit the litigation and did not want to "incur another dime in attorney's fees," Healy moved in mid-April 2020 to interplead $45,600.00 with the court and to dismiss all claims against Miranda. Healy noted in the interpleader motion that Miranda paid the agreed-upon $95,600.00 to Respondent in settlement of the claims against Miranda, consisting of "the full 6% commission that was owed to [PF&C] . . . and $50,000.00 in settlement of Plaintiffs' claims for attorney's fees."[62] Healy argued that Mann should not be permitted to hold up the settlement, observing that Mann was not a party to the listing agreement that Miranda signed, that no privity of contract existed between the two, and that the listing agreement designated no third-party beneficiaries.

Meanwhile, Ryckman continued to push for a signed release but gained no traction.[63] In the lead-up to the court's conference, Ryckman and Respondent traded emails. Respondent asked with alarm why Salazar had made a new demand for $24,763.20. Ryckman relayed Salazar's computation: "$105,600 settlement; Less 33% to attorney Jim Stern; Less 50% to broker Mann; Remaining subtotal of $35,376.00 is divided 70/30."[64] Respondent categorically rebuffed these

[59] *See* Ex. 1.

[60] Ex. 38 at 140. At the hearing, Respondent also reasoned that a $10,000.00 shortfall should come out of Salazar's share, not Mann's or PF&C's, as Salazar was "the one who got everybody into this mess."

[61] Ex. M.

[62] Ex. 2 at 149. On behalf of PF&C, Ball Costigan responded to the interpleader motion, joining in the request to dismiss Miranda from the case. *See* Ex. L.

[63] *See* Ex. 12.

[64] Ex. 13 at 495.

figures as an unethical invitation to share attorney's fees in contravention of Colo. RPC 5.4(a). He wrote in response:

> Despite your client's demand to share in attorney fees, the funds to be disbursed to your client will include only her share of the commission settlement funds received and disbursed to [PF&C]. I have counseled my client that Ms. Salazar's demand to share in attorney fees is unreasonable and contrary to well established legal principals and law. I assume you have counseled your client on this issue as well.[65]

Ryckman replied that Salazar was "operating under the contingency fee agreement" between Respondent and Salazar, that she was not advising Salazar about the original claim that Respondent filed, and that she was merely "serving as the information conduit in this regard because [Respondent] refuse[d] to speak to [Salazar] directly about the fee agreement issue."[66]

The court held the conference on May 5, 2020. Foster appeared with Respondent and Ball Costigan, Mann appeared with his newly retained counsel, Joseph Murr, and Healy appeared on Miranda's behalf. Salazar attended as a nonparty, along with Ryckman. The court dismissed Miranda from the case with prejudice and dismissed all claims asserted by or against Miranda.[67] Following the conference, Ryckman, who had "lost trust and confidence" in Respondent, reached out to Healy directly to settle any potential claims between Salazar and Miranda. Healy confirmed by email on May 5, 2020, that Miranda did "not have any claims against and [would] not be bringing any claims against Patty Salazar."[68] With that, Salazar's E&O insurance carrier pulled its offer to contribute $10,000.00 toward settlement. Salazar soon thereafter obtained new counsel, Lyndsey M. O'Connell, to represent her interests in the commission dispute.[69]

Mann eventually abandoned his quest to rescind his signature on the settlement agreement. In October 2020, the court noted that the sole remaining issue—the fee dispute—was not a part of the litigated controversy and should not bar settlement and dismissal of the case.[70] Due to the ongoing fee dispute, the court ordered Respondent to keep the settlement funds in his trust account until the parties could agree in writing how to divide the funds. But no agreement was reached.

In January 2021, Respondent filed a notice with the court.[71] He reported having discovered that Mann was not the buyer's broker and thus lacked any claim to a portion of the broker's commission under the listing agreement. Instead, Respondent asserted, HomeSmart Cherry Creek was the buyer's broker, and Mann was merely an agent working on behalf of that entity.

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[65] Ex. 13 at 494.
[66] Ex. 13 at 494.
[67] Ex. G.
[68] Ex. 35.
[69] *See* Ex. 33 at 1502.
[70] *See* Ex. 32 at 1794.
[71] Ex. 32 at 1793.

Asserting that he should not and could not reach an agreement with Mann to divide the fees, Respondent announced his intention to distribute the funds per his agreement with PF&C, absent some further intervention from the court.[72]

In response, the court set a hearing to decide the attorney's fee dispute and thus how to distribute settlement funds.[73] In the order, the court posed trenchant questions about Respondent's representation of Mann, including why Respondent entered into a contingency agreement listing Mann as president of HomeSmart Cherry Creek, and why Respondent entered into a settlement agreement that included Mann, if Mann had never been a proper party to the dispute. Finally, expressing concern that Respondent might disburse some of the settlement funds despite the court's October 2020 order, the court directed Respondent to deposit the settlement proceeds into the court's registry.

On June 21, 2021, the court held the scheduled hearing.[74] Respondent represented PF&C and Foster. At the hearing, Respondent argued that he was entitled to forty percent of $35,600.00 in recovered commissions and all $60,000.00 in attorney's fees for a total of $78,240.00, or eighty-two percent of the settlement amount.[75]

The court issued a written ruling on September 1, 2021.[76] It deemed unreasonable under Colo. RPC 1.5 Respondent's claimed fee, noting that the case "was a simple breach of contract case that never went to trial" and that involved "no novel or difficult questions."[77] Relying on the plain language of the contingency fee agreement, the court held that Respondent was entitled to only one-third of the total gross recovery, or $31,866.66. It directed the clerk of court to make that payment to Respondent. The court also instructed the clerk to distribute $31,866.67 to Mann and $31,866.67 to PF&C, which in turn was to divide those funds with Salazar according to their commission agreement.[78]

The clerk distributed the funds. Though Respondent declined, based on attorney-client privilege with PF&C, to say whether PF&C has meted out Salazar's portion of the commission funds, Salazar testified that as of the date of the disciplinary hearing she had not received any money.

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[72] Also around this time, Respondent filed in the Miranda litigation a statement of attorney's lien against Mann and a property that Mann owned. Respondent's asserted lien was based on attorney's fees that Mann allegedly owed for work Respondent had performed in an unrelated case captioned *4500 Steele Street LLC v. Vitameds, LLC and Jimmy Ray Smith, II*. Ex. 6. The court declined to take any action on the filing, explaining that the Miranda litigation was not the proper vehicle through which to seek attorney's fees allegedly arising out of an entirely unrelated case. Ex. 5.

[73] Ex. 32 at 1791.

[74] *See* Ex. 31.

[75] *See* Ex. 3 at 215.

[76] Ex. 3.

[77] Ex. 3 at 218.

[78] The trial court's order did not resolve its earlier questions about Mann's role at HomeSmart Cherry Creek.

In October 2021, Respondent appealed the court's ruling on PF&C's behalf, listing Mann as the responding party.[79] Respondent later added himself personally as an appellant. He testified that he felt compelled to appeal the court's finding that he had taken an unreasonable fee in contravention of Colo. RPC 1.5, which he characterized as a "blemish" on his good record.

According to Respondent, he explained to Foster that the appeal was "almost not at all in [PF&C's] benefit," as PF&C would lose some of the money the court had awarded it if Respondent were to prevail. But Foster has steadfastly supported the appeal, Respondent reported, even if the appeal works to the brokerage's financial detriment. The appeal is currently pending.

III. ANALYSIS OF CLAIMS

Claim I – Colo. RPC 1.5(a)

Claim I of the People's complaint alleges that Respondent violated Colo. RPC 1.5(a), which prohibits a lawyer from agreeing to, charging, or collecting an unreasonable fee or an unreasonable amount for expenses. Whether a fee is reasonable depends on a variety of factors, including the time, labor, and skill involved; whether the matter precludes the lawyer from taking other employment; the customary fee for similar services in the locality; the amounts involved and the results obtained; client- or circumstance-imposed time limitations; the nature and length of the lawyer's professional relationship with the client; the lawyer's experience, reputation, and ability; and whether the fee is fixed or contingent.[8o]

The People contend that Respondent violated this rule by charging $60,000.00 in specially awarded attorney's fees, leaving only $35,600.00 of the total settlement for recovery of the broker's commissions. Respondent disputes that his fee was unreasonable, and he notes that the issue is currently on appeal. Respondent insists that he was entitled to collect the one-third contingency fee outlined in his fee agreement as well as the $60,000.00 in attorney's fees that he negotiated. And Respondent argues that Colo. RPC 5.4(a) forbids him from sharing the $60,000.00 in attorney's fees with his clients.

The Hearing Board agrees with the People that Respondent attempted to collect an unreasonable fee in contravention of Colo. RPC 1.5(a). We begin by observing that the amount Respondent sought as remuneration was not consistent with a plain-language reading of his contingency fee agreement or the settlement agreement. Respondent's fee agreement entitled him to one-third of the gross amounts collected. Though the disclosure appended to the fee agreement states that courts or arbitrators may grant specially awarded attorney's fees, the agreement itself contains no provision about handling or accounting for such awards. The settlement agreement, meanwhile, provides that Miranda will pay $95,600.00 and Salazar will pay an additional $10,000.00. These amounts are not specifically apportioned to any particular

[79] Ex. 9.

[8o] *See* Colo. RPC 1.5(a)(1)-(8).

category or individual, and no clause in the settlement agreement addresses specially awarded attorney's fees. And to be clear, neither a court nor an arbitrator granted any attorney's fees.

We thus view the classification of $60,000.00 as specially awarded attorney's fees to be an arbitrary contrivance of Respondent's own making, anchored to no legal ruling or language in any of the operative agreements.[81] Merely because Respondent conceived of and labeled the $60,000.00 as attorney's fees does not make it so. That money did not transform into "specially awarded attorney's fees" as described in Respondent's contingency fee agreement; the $60,000.00 was not granted by a court or arbitrator as specially awarded attorney's fees, and the settlement agreement itself does not carve out these funds for Respondent specifically. For these reasons, we dismiss Respondent's contention that Colo. RPC 5.4(a) precluded him from sharing that $60,000.00 sum more equitably with his clients.

But even if one were to accept that the $60,000.00 figure should have been reserved exclusively for Respondent's compensation, his bid to collect that sum *plus* one-third of the remaining commission corpus strikes us as patently unreasonable. As an initial matter, Respondent's post-settlement attempts to obtain more than $60,000.00 in legal fees were not yoked to his representations during settlement negotiations about the total sum he planned to collect. During his negotiations with Healy in February 2020, Respondent offered to settle for "$45,000 paid in settlement of commissions" and "$60,000 paid in settlement *of all attorney fees and costs*."[82] Respondent copied Mann, Ball Costigan, and Foster on that email, and he repeated that same offer at least once more, with the same carbon copy recipients.[83] According to Mann, these communications set his expectation that the commission would be divided as if the real estate transaction had closed. As a result, Mann's assumption that he would receive $22,800.00, the full measure of his commission, was upended when he later learned that his portion would be reduced by Respondent's withdrawal of a one-third contingency fee.[84]

Just as critical, the Hearing Board finds that Respondent's fee formula of $60,000.00 plus one-third of the commission amount is unreasonable under the criteria set forth in Colo. RPC 1.5(a). For purposes of argument, we take Respondent at his word that he spent about 150 hours on this matter, earning around $60,000.00 at his $400.00 hourly rate.[85] But Respondent did not testify that he rightfully earned more than that figure. To the contrary, Respondent said

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[81] Indeed, Healy did not adopt Respondent's characterization of these funds. Healy viewed Miranda's payment as funding the full six-percent commission and $50,000.00 in attorney's fees. *See* Ex. 2 at 149.

[82] Ex. J (emphasis added).

[83] Respondent used this language again in the final disbursement statement, itemizing "$60,000 for total attorney fees and costs." Ex. 1 at 147.

[84] *Cf. People v. Nutt*, 696 P.2d 242, 247-48 (Colo. 1984) (opining that because "contingent fee arrangements have long been recognized as a potential source of a conflict of interests," a lawyer should enter contingency agreements "only in those instances where the arrangement will be beneficial to the client").

[85] We have some reason to question this assumption, given that the register of actions indicates Respondent's active involvement in the case through February 21, 2020, was limited to negotiating with Healy and to filing the complaint, a notice to set trial dates, and an amended complaint. Ball Costigan, in comparison, billed somewhere between $32,000.00 and $40,000.00; to earn that sum, she took several depositions, and she filed an answer to the counterclaims, a proposed case management order, and a summary judgment motion.

$60,000.00 roughly compensated him for the hours he had worked through the February 2020 settlement date. This clear and convincing testimony tells us that Respondent was not entitled to another $15,200.00 in recognition of additional time, effort, or work performed.[86] Likewise, evidence suggesting that Ball Costigan's total fees ranged around $40,000.00 militates against finding that Respondent was due a sum well exceeding $60,000.00 based on customary fees for similar work or the amounts involved in the case. And of the remaining enumerated factors of Colo. RPC 1.5(a), we received evidence as to only one: that Respondent was working under a contingency fee. We adjudge that factor as running counter to a finding that his fee was reasonable, as we see no "reasonable correlation" between the services Respondent provided and the amount he claimed as a contingent fee over and above the $60,000.00.[87] Accordingly, we conclude that Respondent violated Colo. RPC 1.5(a).

Claim II – Colo. RPC 1.7(a)

The People next claim that Respondent violated Colo. RPC 1.7(a), which prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. Under the rule, a concurrent conflict exists in two circumstances: first, if the representation of one client will be directly adverse to another client; or second, if a significant risk exists that the representation of one or more clients will be materially limited by a personal interest of the lawyer or the lawyer's responsibilities to another client, a former client, or a third person. Notwithstanding a concurrent conflict, a lawyer may represent a client if, among other things, each affected client gives written informed consent to the representation.[88]

According to the People, Respondent flouted this rule in at least three discrete ways: (1) by agreeing to represent both the seller's-side and buyer's-side brokers to recover their real estate commissions without providing appropriate disclosures or obtaining their informed written consent to the concurrent conflict of interest; (2) by attempting to maximize his attorney's fees at his clients' expense; and (3) by representing PF&C in an appeal in which Respondent's arguments are directly adverse to the financial interests of PF&C. Respondent contends that no conflict between the brokers existed, as their interests were unified in recovering the full six-percent commission from Miranda. Respondent also disputes that he put his own financial interests ahead of his clients' interests. Moreover, he contends that PF&C is fully supportive of the appeal.

The Hearing Board concludes that Respondent violated Colo. RPC 1.7(a) by undertaking representation of PF&C, Mann, and Salazar without obtaining their informed consent to this concurrent conflict. From the outset, the arrangement carried an inherent and significant risk that Respondent's joint representation could be materially limited by the brokers' potentially conflicting defenses or disputes about liability arising from counterclaims. The arrangement also

[86] *See* Ex. 3 at 218 (trial court's order noting this "was a simply breach of contract case that never went to trial. There were no novel or difficult questions . . . .").
[87] *Nutt*, 696 P.2d at 248; *see also Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 571 (Colo. App. 2010) (deeming unreasonable contingent fees "unearned by either effort or a significant period of risk") (quotation and citation omitted).
[88] *See* Colo. RPC 1.7(b).

foreshadowed the risk that his professional judgment might be clouded by his own personal interests. As he testified, he enlisted all three brokers as clients to protect *himself* from any future attempts they might make to seize a portion of his attorney's fees.

But Respondent never advised any of his clients about these perils of the joint representation. He did not advise them of the nature of the potential conflicts or the specific ways in which the conflicts might affect his ability to effectively represent each of them. Respondent failed to mention that as jointly represented clients they could expect no client-lawyer confidentiality or attorney-client privilege.[89] And he neglected to discuss the intrinsic risks of representing several clients in a matter involving the distribution of a fixed amount of money.

This latent risk became patent in February 2019, when Healy flagged for Respondent various ways in which Salazar allegedly provided Miranda flawed advice and rendered inadequate assistance. At that point, Respondent's illusion of the brokers' unity of interests should have crumbled: Respondent faced the prospect of becoming embroiled in a dispute between seller's and buyer's brokers over the extent of Salazar's liability and the appropriate distribution of limited funds. But even with this new information, Respondent never made the requisite disclosures or obtained written waivers from his clients consenting to his conflicted representation. To ignore these red flags was to disregard his obligations under Colo. RPC 1.7(a).

The Hearing Board also finds that Respondent violated Colo. RPC 1.7(a) during settlement by placing his own personal interest in maximizing attorney's fees ahead of his clients' interests. According to Healy, Respondent wanted a settlement figure of not less than $105,600.00, going so far as to press Ryckman to solicit additional settlement funds from Salazar's E&O carrier. At the same time, Respondent began to characterize $60,000.00 of the settlement funds as inviolate attorney's fees, not to be disturbed or shared. When Salazar's carrier's contribution threatened to fall through, Respondent notated his disbursement sheet to reflect that the commission, not his attorney's fees, would be reduced by the shortfall. He accounted for the funds in this manner even though Healy's stated intent was to pay the entire amount of the commission.

These facts are disquieting. From them, we infer that Respondent conceived of filling two separate monetary buckets in the settlement—one to cover the $45,600.00 in brokers' commissions, and another to cover his own attorney's fees. We posit that he intended to fill his own attorney's fees bucket first, and only when his bucket reached capacity was he willing to redirect the spigot to cover his clients' commission. In fact, Respondent explained at the hearing that he considered Miranda's payment of $95,600.00 as funding $60,000.00 of his own attorney's fees and then $35,600.00 toward the commission. We conclude that Respondent's personal interest in recouping a robust attorney's fee for himself materially interfered with his efforts to recover Mann's and PF&C's full commissions during negotiations.

[89] A lawyer must inform jointly represented clients of "the implications of the common representation, including the possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved," including the possibility that the attorney-client privilege might not attach to their communications. Colo. RPC 1.7 cmt. 30.

Finally, we turn to the People's allegation that Respondent continues to violate Colo. RPC 1.7(a)(1) by representing PF&C in an appeal while advancing a position adverse to PF&C's financial interests. Respondent candidly acknowledged the conflict at the disciplinary hearing and testified that he explained to Foster that the appeal may redound to PF&C's economic detriment. Nevertheless, Respondent said, Foster chose to pursue the appeal because he believes that Respondent deserves to receive full compensation for the representation.

We are convinced that Respondent's personal desire to obtain additional attorney's fees runs counter to PF&C's financial interests. Even so, we cannot find that the People have proved this allegation by clear and convincing evidence. First, the People presented no evidence that Respondent's representation of PF&C may be materially limited by his own personal interest. Apparently, both Respondent and PF&C agree that the appeal may harm PF&C's financial picture but that it should go forward, anyway. Second, and more important, the People presented no evidence showing that Respondent failed to secure PF&C's written informed consent to a conflict. Accordingly, we do not find a violation of Colo. RPC 1.7(a) by clear and convincing evidence as to Respondent's appeal of the attorney's fee award on PF&C's behalf.

Claim III – Colo. RPC 1.8(g)

The People's third claim alleges that Respondent violated Colo. RPC 1.8(g), which prohibits a lawyer "who represents two or more clients" from making an "aggregate settlement of the claims of or against the clients" unless each client gives written informed consent after the lawyer discloses the risks involved in the settlement. The lawyer's disclosure must include the "existence or nature of all the claims or pleas involved and of the participation of each person in the settlement."[90] This disclosure should also inform the clients of all the material terms of the settlement, including what the other clients will receive if the settlement offer is accepted.[91]

The People allege that Respondent violated this rule by negotiating an aggregate settlement on behalf of PF&C, Foster, and Mann without taking the appropriate prophylactic measures to protect them. Respondent disputes that he made an aggregate settlement, reasoning that the settlement and release he negotiated with Healy purported to settle just one claim only between PF&C and Miranda, as Mann ultimately rescinded his signature on the settlement agreement.

The Hearing Board concludes that Respondent made an aggregate settlement of the claim that PF&C and Mann brought against Miranda. We also find that Respondent did so without obtaining his clients' written informed consent. We credit Mann's testimony that Respondent never disclosed to him the existence or nature of the claims involved in the settlement, the participation of each person in the settlement, or the material terms of the

[90] Colo. RPC 1.8(g).
[91] Colo. RPC 1.8 cmt. 13.

settlement, including how much money the other participants would receive if he were to accept the settlement offer.

Respondent's legal defenses to this claim lack merit. Colo. RPC 1.8(g) focuses on whether a lawyer settles a claim on behalf of "two or more clients," not whether more than one claim was settled. In February 2020, Respondent purported to settle one claim on behalf of the two named plaintiffs, PF&C and Mann. That Mann ultimately sought to disaffirm his signature provides Respondent no cover to argue that he negotiated the settlement on just one party's behalf. Rather, Mann's attempted rescission illustrates the ills this rule seeks to prevent: *because* Respondent never provided Mann with the appropriate disclosures while negotiating the aggregate settlement, Mann was dissatisfied when he learned of the settlement's parameters and attempted to withdraw his assent. In the same vein, we find it is no defense that Respondent decided many months after the settlement agreement was inked that Mann lacked a claim to the commission under the listing contract. At the time Respondent negotiated, finalized, and executed the settlement agreement, he did so for both PF&C and Mann. Accordingly, we conclude that Respondent violated Colo. RPC 1.8(g).

Claim IV – Colo. RPC 1.9(a)

Fourth, the People claim that Respondent violated Colo. RPC 1.9(a), which prohibits a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent to the new representation in writing.

The People allege that Respondent breached this rule by attempting to renegotiate Salazar's portion of the seller's commission while continuing to represent PF&C. They also claim that he violated the rule by knowingly representing PF&C in the attorney's fee dispute against his erstwhile clients Mann and Salazar, whose interests in that dispute are materially adverse to PF&C's. Respondent challenges this claim on two main legal grounds. First, Respondent contends that the attorney's fee dispute is not substantially related to the underlying litigation against Miranda. And second, Respondent argues that he is not representing an adverse interest against Mann or Salazar in the attorney's fee dispute and instead is merely defending himself against their claims.

The Hearing Board examines each element of Colo. RPC 1.9(a) in turn. First, a lawyer-client relationship previously existed between Respondent and Mann and Salazar. Indeed, Respondent conceded at the disciplinary hearing that he was "on the hook" as to the allegation that both Salazar and Mann became his clients when they signed his contingency fee agreement. Further, at different points, both Salazar and Mann became former clients of Respondent: Salazar became so when Respondent effectively stopped representing Salazar's interests in mid-2019, and Mann ended his attorney-client relationship with Respondent on March 9, 2020.

As for whether the underlying brokers' commission litigation and the resultant attorney's fee dispute are substantially related, we unequivocally conclude that they are. Matters are substantially related if "they involve the same transaction or legal dispute."[92] Here, Respondent represented Salazar, Mann, and PF&C in a lawsuit to recover their commission. His representation in that lawsuit involved many of the same underlying facts, persons, and communications as the ongoing dispute as to how to distribute funds from that lawsuit, in which he serves as counsel for PF&C. Put another way, the brokers' lawsuit seeking to recoup the real estate commission gave rise to Respondent's attorney's fees dispute; without the former, the latter never would never have eventuated. As such, Respondent's representation of Mann, Salazar, and PF&C against Miranda involved the same transaction or dispute as Respondent's representation of PF&C in the attorney's fees dispute. But neither Salazar nor Mann gave their informed consent to Respondent's conflicted representation.

We also adjudge PF&C's interests in the attorney's fee dispute, as represented by Respondent, to be materially adverse to Mann's and Salazar's interests. An adversarial dynamic first manifested during the February 2020 settlement negotiations, when Respondent was no longer representing Salazar. At that time, Respondent pushed Salazar's insurance carrier to contribute more money to the settlement, even though Salazar faced negative consequences if her carrier were to pay out any money. According to Respondent's calculations, Salazar would fully recoup her commission portion only after Respondent was able to drive the settlement figure to $105,600.00 and his calculated attorney's fees to at least $60,000.00.[93] As a corollary, if Salazar's carrier declined to contribute $10,000.00 to the settlement, Respondent proposed to reduce Salazar's commission portion by a commensurate amount while preserving the same, larger settlement amounts for himself and for his then-current clients, PF&C and Mann. Given the way in which Respondent accounted for the inflow of funds, Salazar's interests were materially adverse not only to Respondent's own interests but also to PF&C's and Mann's interests.

A material adversity of interests between PF&C, on the one hand, and Mann and Salazar, on the other, crystallized once Miranda exited the litigation. From March 2020 onward, Mann and Salazar sought to maximize their portion of the total brokers' commission, unreduced by Respondent's claimed attorney's fees. According to Respondent, however, PF&C's position has consistently been that Respondent is entitled to all settlement amounts he collected exceeding $45,600.00, plus one-third of the brokers' commission. In this zero-sum fee dispute, where Respondent's financial incentives align with PF&C's purported position, Respondent has a motive to actively work against his former clients' full monetary recovery.[94] If Salazar and Mann are awarded less, Respondent will garner more. This oppositional stance continues while Respondent appeals the trial court's findings on PF&C's behalf. Acting as PF&C's lawyer, Respondent continues to affirmatively challenge the trial court's award to Salazar and Mann. In the ongoing

[92] Colo. RPC 1.9 cmt. 3.

[93] Ex. 1.

[94] *See People v. Frisco*, 119 P.3d 1093, 1096 (Colo. 2005) (limiting the scope of Colo. RPC 1.9 to "representations that combined the same or substantially related legal disputes with a motive to harm a former client, in order to advance the interests of a current client").

appeal, Respondent argues that Mann and Salazar never had a valid claim to the commission and alleges that the trial court erred in ordering PF&C to split its attorney's fees with them.

In sum, Respondent initially represented PF&C, Mann, and Salazar in the brokers' commission litigation. Respondent later represented only PF&C in the same matter when a dispute arose between PF&C and the other brokers about the proper division of the settlement proceeds, taking positions adverse to Mann's and Salazar's financial interests.[95] On these facts, we find that Respondent violated Colo. RPC 1.9(a).

Claim V – Colo. RPC 1.16(d)

Finally, the People claim that Respondent ran afoul of Colo. RPC 1.16(d), which requires a lawyer to take steps to the extent reasonably practicable to protect a client's interests upon the termination of the representation, including by giving reasonable notice to the client and allowing the client time to retain other counsel.

The People maintain that Respondent violated this rule because he unilaterally terminated Salazar's representation without informing her of his intent to do so, without clearly communicating that he would no longer represent her in any capacity, and without advising her to hire counsel to represent her interests in the commission lawsuit.[96] Respondent contests the claim. He says that he made extraordinary efforts to find a lawyer for Salazar in August 2019, imploring her E&O insurance carrier to appoint counsel. Only after he succeeded, he adds, when Ryckman announced her role as Salazar's counsel in August 2019, did he cease to represent Salazar. At that point, Respondent notes, Salazar's insurance carrier told him that he was not Salazar's counsel.

We do not hesitate to decide this claim in the People's favor. In August 2019, Respondent asked Salazar's E&O carrier to appoint counsel because he could not *defend* Salazar against Miranda's counterclaims or otherwise take protective action on her behalf. He did not seek—nor would Salazar's carrier have appointed—replacement counsel to affirmatively prosecute her claims for a commission. Salazar, for her part, well understood the arrangement: Ryckman would defend her while Respondent continued to press for the brokers' commissions. Both Salazar and Respondent were familiar with this type of dual representation, which mirrored Ball Costigan's and Respondent's respective duties for PF&C. Given this context, we view as disingenuous Respondent's narrative that Ryckman substituted both as Salazar's defense counsel and as her lawyer in the commission lawsuit.

[95] *See* Colo. RPC 1.9 cmt. 1 ("Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.").

[96] The People's complaint also alleges that Respondent unilaterally terminated Mann, but the Hearing Board finds no basis for that portion of the claim. Mann terminated Respondent's representation by email on March 9, 2020. Respondent later moved to withdraw, which the court allowed.

Yet Respondent ceased to advocate for or communicate with Salazar after Ryckman signed on as E&O counsel to defend against a potential counterclaim by Miranda. Respondent never notified Salazar that he was withdrawing as her counsel. Respondent did not inform Salazar that he would no longer represent her in the commission fee matter. Respondent never told Salazar that he would not communicate with her going forward. And Respondent did not advise Salazar to seek other counsel to help her recover her portion of the brokers' commission. Due to Respondent's silence, Salazar continued to believe for another six months thereafter that Respondent was still her lawyer, relying on him to advance her interests.

Finally, the Hearing Board disagrees that Respondent's behavior was justified because he obeyed Salazar's E&O carrier's instruction that "[a]ll communication regarding Patty's claim ***should continue with Patty*** here on out ***since you are not her counsel***."[97] We are not swayed that this internally inconsistent third-party directive exempted Respondent from the mandates of Colo. RPC 1.16(d) or absolved his behavior in abandoning Salazar without any notice.[98] We therefore find that Respondent violated Colo. RPC 1.16(d).

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[99] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[100] When imposing a sanction after a finding of lawyer misconduct, the Hearing Board must consider the duty the lawyer violated, the lawyer's mental state, and the actual or potential injury caused by the lawyer's misconduct. These three variables yield a presumptive sanction that the Hearing Board may then adjust based on aggravating and mitigating factors.

ABA Standard 3.0 – Duty, Mental State, and Injury

Duty: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."[101] These essential elements fell by the wayside when Respondent represented Salazar, Mann, and PF&C. Respondent violated his duty of loyalty when, to his clients' detriment, he charged and attempted to collect an unreasonable fee. Respondent also ignored his duty to Salazar, Mann, and PF&C to provide conflict-free representation. Finally, Respondent is continuing to violate his duty of loyalty to his former clients by pursuing an appeal in PF&C's name challenging Mann's and Salazar's commission award.

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[97] Ex. D at 1220 (emphasis added).

[98] Third-party communications about a lawyer's termination do not suffice to give a client reasonable notice that the lawyer intends to end the representation. *See People v. Rivers*, 933 P.2d 6, 7-8 (Colo. 1997) (finding a violation of Colo. RPC 1.16(d) when a lawyer failed to notify a client that he would no longer represent the client after the client's girlfriend fired the lawyer).

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

[100] *See In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

[101] Colo. RPC 1.7 cmt. 1.

Mental State: Throughout the underlying commission litigation Respondent acted knowingly. Respondent knew of the possible conflicts between the three brokers yet recruited and retained them as clients. He knew of the conflict between his personal financial motive in obtaining a significant fee award and Mann's and PF&C's interests. Yet he sought to collect an unreasonable fee and knowingly continued to pursue it in the face of his former clients' reasoned objections. Finally, Respondent was aware that he never personally informed Salazar that he would no longer represent her interests or act as her lawyer.

Injury: Respondent caused his clients and former clients actual and potential harm by inviting conflicts of interest into the representation without warning his clients of the pitfalls associated with the joint representation. Respondent also harmed his clients by charging an unreasonable fee and attempting to collect that fee, which in turn resulted in their accruing additional thousands of dollars in attorney's fees to litigate the matter. Salazar also testified that Respondent betrayed her trust in him and consequently undermined her faith in the legal profession.

ABA Standards 4.0-8.0 – Presumptive Sanction

Under the ABA *Standards*, suspension is the presumptive sanction in this matter. ABA *Standard* 4.32 provides that suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, causing the client injury or potential injury. Likewise, ABA *Standard* 7.2 calls for suspension when a lawyer knowingly engages in conduct that violates a professional duty—here, attempting to collect an unreasonable fee in violation of Colo. RPC 1.5(a) and failing to protect a client's interest on termination in violation of Colo. RPC 1.16(d)—thereby causing injury or potential injury to a client, the public, or the legal system.

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.[102] As explained below, we apply three factors in aggravation, assigning substantial weight to two of those factors. We also apply two factors in mitigation, according limited weight to one factor.

Aggravating Factors

Dishonest or Selfish Motive – 9.22(b): The People allege that Respondent acted in this matter primarily for his own financial gain. We agree and place great weight on the aggravating factor of selfishness. Notwithstanding glaring conflict risks, Respondent purposely lined up PF&C, Mann, and Salazar as clients to guarantee that he could protect his own fees. He peremptorily designated $60,000.00 of settlement funds as attorney's fees, maximizing his fees at his clients'

[102] *See* ABA *Standards* 9.21 and 9.31.

and former client's expense. Respondent attempted to place an attorney's lien on Mann's recovery for fees that he claims Mann owed him for a wholly unrelated case. And he lodged an appeal to claw funds back from Mann's and Salazar's court-ordered awards. These acts were fueled by a decidedly selfish motive.

Pattern of Misconduct – 9.22(c): The People urge us to apply this aggravating factor, reasoning that over several years Respondent engaged in a pattern of misconduct by attempting to collect unreasonable fees. We will not apply this factor. Though Respondent has doggedly pursued the same course of conduct for more than two years, he has attempted to collect just one unreasonable fee in one litigation matter during that time. We see no repeated pattern but instead a single, sustained campaign to squeeze as much money from the representation as possible.

Refusal to Acknowledge Wrongful Nature of Conduct – 9.22(g): We should apply this aggravator, the People argue, because Respondent has no remorse and has refused to acknowledge the harm resulting from his conduct. Respondent does not dispute the People's characterization, declaring that he has nothing about which to be contrite. We do note that at the hearing, Respondent testified that he had made a "mess" of the joint representation by signing PF&C, Mann, and Salazar as clients. But Respondent then insisted that the mistake "didn't hurt [Salazar or Mann] in any way." Respondent also acknowledged that if Salazar's carrier had not volunteered to contribute to the settlement, he could have lowered his attorney's fees rather than reducing the recovered commission amount. Even so, Respondent blamed his former clients for the ensuing litigation, lobbing ad hominem attacks at Mann and oppugning Salazar, who to date has received no money, as fickle and greedy. Ultimately, we find that Respondent trivialized the harm that Mann and Salazar have suffered while refusing to acknowledge his failings in the matter. We weigh this aggravating factor heavily.

Substantial Experience in the Practice of Law – 9.22(i): Respondent was licensed in Colorado in 1994. According to his own account, his general practice has included a broad spectrum of work. This factor warrants average weight in aggravation.

Mitigating Factors

Absence of Prior Discipline – 9.32(a): In Respondent's over thirty years of law practice he has never been disciplined. We accord this mitigating factor moderate weight.

Full and Free Disclosure to the Disciplinary Board or a Cooperative Attitude Toward the Proceedings – 9.32(e): Respondent asks us to apply this mitigating factor. He claims that he participated in this process fully, honestly, and without reserve, giving the People every document they requested and answering every question they asked. While we agree that Respondent's participation merits some modest mitigation, we decline to give this factor more than a little weight, as his failure to stipulate with the People to duplicative exhibits slowed the proceeding and inconvenienced the tribunal.

Character and Reputation – 9.32(g): Respondent testified that he enjoys an excellent reputation for honesty, forthrightness, and dedicated volunteer legal work. Respondent described transitioning from social work into law as a natural extension of his desire to help people, and he detailed several instances in which his pro bono involvement changed the course of his clients' lives. We do not apply this factor, however, because he offered no other testimony or evidence to substantiate his claims of excellent character and reputation.

Analysis Under ABA Standards and Case Law

The Hearing Board heeds the Colorado Supreme Court's directive to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,[103] mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[104] Though prior cases can inform through analogy, the Hearing Board is charged with determining the appropriate sanction for a lawyer's misconduct on a case-by-case basis.[105]

In this case, we consider primarily two classes of cases: those that address a lawyer's failure to properly handle conflicts of interest, and those that address a lawyer's attempt to charge an unreasonable fee. In the first category, suspensions for knowing conflicts violations appear to cluster in the three-to-six-month range in length. For example, a Colorado lawyer was suspended for three months for representing conflicting interests; in his capacity as a client's trustee, he was duty-bound to exercise his own professional judgment as to the advisability of investments, yet he drafted documents for the trust's ill-advised loans to the client's father, who was also the lawyer's client.[106] Similarly, a Louisiana lawyer was suspended for ninety days for failing to obtain informed consent to a joint representation, negotiating an aggregate settlement for three siblings in a will contest, and distributing the will's proceeds as directed by one of the siblings.[107] An Oregon lawyer also received a ninety-day suspension for allocating lump-sum settlement proceeds among his jointly represented clients without obtaining their informed consent to his method of dividing those proceeds.[108] Finally, a Tennessee lawyer was suspended for six months because he represented in the same lawsuit two clients whose interests were obviously adverse, even after an appellate court prohibited the lawyer from representing either client and the lawyer was publicly censured for the same conduct.[109]

In the second class of cases—those imposing sanctions for a lawyer's knowing attempt to collect an unreasonable fee—suspensions tend to fall around six months in length. We look

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[103] *See In re Attorney F.*, 2012 CO 57, ¶ 20; *see also In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

[104] *Attorney F.*, ¶ 20 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

[105] *Id.* ¶ 15.

[106] *In re Cohen*, 8 P.3d 429, 434 (Colo. 1999).

[107] *In re Hoffman*, 883 So. 2d 425, 432-33, 435 (La. 2004).

[108] *In re Gatti*, 333 P.3d 994, 1007-08 (Or. 2014).

[109] *Cody v. Bd. of Prof'l Responsibility*, 471 S.W.3d 420, 425 (Tenn. 2015).

primarily to *People v. Nutt*.[110] There, a lawyer was suspended for six months for billing a client an excessive fee for performing work the lawyer had not done as well as for failing to disclose his interest as a holder of a long-term mortgage on his clients' property.[111] Another case we consider is *In re Obert*, where an Oregon lawyer was suspended for six months for, among other things, knowingly collecting an unreasonable fee, wrongfully depositing it into his business account, and failing to provide his client a proper refund.[112]

With these benchmarks in mind, and based on the weight we accord to the three applicable aggravating factors, we conclude that Respondent should be suspended for a period of six months. While Respondent proved to be an effective advocate for his clients' interests when they aligned with his own, he was blinded to risks of conflicts by his own selfish profit motive, which jeopardized his clients' financial and legal standing. But perhaps more troubling still is his refusal to reflect on his conduct, coupled with his staunch insistence that he was always in the right. We worry that with such an orientation, Respondent may pose a continued risk to the public. For that reason, we require that he petition for reinstatement, if at all, under C.R.C.P. 242.39. To further protect the public, we also require Respondent to include in any petition for reinstatement proof of his successful completion of the People's ethics school.

V. CONCLUSION

Respondent's joint representation in the underlying matter was riddled with conflicts to which his clients never consented—conflicts between his clients, between his client and former clients, and between his clients and his own financial self-interest. He unremittingly pursued an attorney's-fees-first approach, and he unilaterally terminated a former client without notice. This behavior bespeaks an indifference to his duty of loyalty, which is "perhaps the most basic of [a lawyer's] duties."[113] Respondent's misconduct warrants a six-month suspension, with the added requirement that, to reinstate his law license, he must prove by clear and convincing evidence that he has rehabilitated from his underlying misconduct, is fit to practice law, and has complied with all disciplinary rules and orders.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **JAMES STERN**, attorney registration number **36157**, is **SUSPENDED** from the practice of law for a period of **SIX MONTHS**, with the requirement that he petition for reinstatement, if

[110] 696 P.2d at 242.
[111] *Id.* at 246-47, 249.
[112] 282 P.3d 825, 834, 844 (Or. 2012).
[113] *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 2012 MT 15, ¶ 31 (quotations and citation omitted).

at all, under C.R.C.P. 242.39. The suspension will take effect upon issuance of an "Order and Notice of Suspension."[114]

2. As part of any petition for reinstatement under C.R.C.P. 242.39 from the suspension imposed in this case, Respondent **MUST** demonstrate that he successfully completed the ethics school offered by the People.

3. 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 he is licensed or otherwise authorized to practice law.

4. Within fourteen days of issuance of the "Order and Notice of Suspension," 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. As provided in C.R.C.P. 242.41(b)(5), lists of pending matters, lists of clients, and copies of client notices under C.R.C.P. 242.32(f) must be marked as confidential attachments and filed as separate documents from the affidavit.

5. The parties **MUST** file any posthearing motions no later than **Wednesday, September 21, 2022**. Any response thereto **MUST** be filed within fourteen days thereafter.

6. The parties **MUST** file any application for stay pending appeal no later than **Wednesday, September 28, 2022**. Any response thereto **MUST** be filed within seven days thereafter.

7. Respondent **MUST** pay the reasonable costs of this proceeding. The People **MUST** submit a statement of costs no later than **Wednesday, September 14, 2022**. Any response challenging the reasonableness of those costs **MUST** be filed within seven days thereafter.

DATED THIS 7th DAY OF SEPTEMBER, 2022.

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BRYON M. LARGE
PRESIDING DISCIPLINARY JUDGE

/s/ Barbara Weil Laff

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BARBARA WEIL LAFF
HEARING BOARD MEMBER

[114] 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)(6). In some instances, the order and notice may issue later than the thirty-five days by operation of C.R.C.P. 242.35, C.R.C.P. 59, or other applicable rules.

/s/ Marna M. Lake

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MARNA M. LAKE
HEARING BOARD MEMBER