

People v. Lindsey Scott Topper. 16PDJ004. July 27, 2016.

Following a sanctions hearing, the Presiding Disciplinary Judge disbarred Lindsey Scott Topper (attorney registration number 17133). Topper's disbarment took effect on August 31, 2016.

Topper agreed to represent two clients and accepted retainers from each of them, but he performed little to no work on their cases. He then precipitously closed his practice and moved to Kentucky without refunding any unearned fees. He never provided either client an accounting of work he performed. One client's numerous attempts to contact Topper failed, and Topper never responded to the disciplinary authority's investigatory requests for information, answered their complaint, or participated in any phase of his disciplinary proceeding.

Through this misconduct, Topper violated Colo. RPC 1.4(a)(3) (a lawyer shall keep a client reasonably informed about the status of the matter); Colo. RPC 1.4(a)(4) (a lawyer shall promptly comply with reasonable requests for information); Colo. RPC 1.5(a) (a lawyer shall not charge an unreasonable fee); Colo. RPC 1.5(b) (if a lawyer has not regularly represented a client, a lawyer shall communicate the basis or rate of the lawyer's fee in writing); Colo. RPC 1.15A(a) (a lawyer shall hold client property separate from the lawyer's own property); Colo. RPC 1.16(d) (a lawyer shall protect the client's interests upon termination); and Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Please see the full opinion below.

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| <p>SUPREME COURT, STATE OF COLORADO</p> <p>ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE</p> <p>1300 BROADWAY, SUITE 250 DENVER, CO 80203</p> | |
| <p>Complainant: THE PEOPLE OF THE STATE OF COLORADO</p> <p>Respondent: LINDSEY SCOTT TOPPER</p> | <p>Case Number: 16PDJ004</p> |
| <p>OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(c)</p> | |

Lindsey Scott Topper (“Respondent”) agreed to represent two clients and accepted retainers from each of them, but he performed little to no work on their cases. He then precipitously closed his practice and moved to Kentucky without refunding any unearned fees. He never provided either client an accounting of work he performed. One client’s numerous attempts to contact Respondent failed, and he never responded to the disciplinary authority’s investigatory requests for information, answered their complaint, or participated in any phase of this disciplinary proceeding. This misconduct warrants disbarment.

I. PROCEDURAL HISTORY

On January 21, 2016, Jacob M. Vos of the Office of Attorney Regulation Counsel (“the People”) filed a complaint in this matter with Presiding Disciplinary Judge William R. Lucero (“the Court”). The People sent the complaint four days later by certified mail to Respondent’s registered address of 4239 Briarwood Drive #4, Independence, Kentucky 41051. Respondent failed to answer, and the Court granted the People’s motion for default on April 1, 2016. Upon the entry of default, the Court deemed all facts set forth in the complaint admitted and all rule violations established by clear and convincing evidence.¹

On June 23, 2016, the Court held a sanctions hearing under C.R.C.P. 251.15(b). Vos represented the People; Respondent did not appear. The People elicited telephone testimony from Vincent Loggins, while Shanee Killingsworth and Janet Layne testified in person. The People’s exhibits 1-7 were admitted into evidence.

¹ See C.R.C.P. 251.15(b); *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987).

II. ESTABLISHED FACTS AND RULE VIOLATIONS

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 21, 1987, under attorney registration number 17133.² He is thus subject to the Court's jurisdiction in this disciplinary proceeding.³

Killingsworth Matter

In 2015, Shanee Killingsworth, who had previously hired Respondent in a dependency and neglect matter, retained him to represent her on an as-needed basis in a case involving child abuse charges filed against her ex-husband's girlfriend.⁴ In late February 2015, she signed an hourly fee agreement and paid Respondent a \$5,000.00 retainer.⁵ Under the fee agreement, she agreed to pay him \$275.00 per hour during a normal working day and \$300.00 per hour for "emergency time."⁶ Between February and April 2015, Respondent advised Killingsworth about her rights and responsibilities in the case.⁷ He also filed a stipulation for the appointment of a therapist for her daughter.⁸

Respondent fell out of contact with Killingsworth in May 2015, and he stopped responding to voicemails and emails in which she requested updates about her legal matters.⁹ On July 15, 2015, Killingsworth visited Respondent's office and found it vacant.¹⁰ She then contacted one of Respondent's former employees, who told her that Respondent had moved to Kentucky.¹¹ Respondent has not communicated with Killingsworth since April 2015.¹² He never issued any billing statements to her.¹³ He did not earn all of the \$5,000.00 retainer he received from Killingsworth, but he never refunded any portion of her retainer.¹⁴

In this matter, Respondent violated Colo. RPC 1.4(a)(3) (a lawyer shall keep a client reasonably informed about the status of the matter); Colo. RPC 1.4(a)(4) (a lawyer shall promptly comply with reasonable requests for information); Colo. RPC 1.5(a) (a lawyer shall not charge an unreasonable fee); Colo. RPC 1.16(d) (a lawyer shall protect the client's interests upon termination); and Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

² Compl. ¶ 1.

³ See C.R.C.P. 251.1(b).

⁴ Compl. ¶¶ 4, 7.

⁵ Compl. ¶ 8; Ex. 6.

⁶ Compl. ¶ 9; Ex. 5.

⁷ Compl. ¶ 10. *But see* Ex. 2 (an email from Killingsworth dated March 18, 2015, noting that she had not heard back from Respondent after leaving three voicemails several weeks prior).

⁸ Compl. ¶ 11.

⁹ Compl. ¶ 12.

¹⁰ Compl. ¶ 13.

¹¹ Compl. ¶ 14; Exs. 3-4.

¹² Compl. ¶ 18.

¹³ Compl. ¶ 16.

¹⁴ Compl. ¶¶ 15, 17; Ex. 1.

Loggins Matter

Vincent Loggins is currently subject to an involuntary commitment at the Colorado Mental Health Institute in Pueblo, Colorado, after pleading not guilty by reason of insanity to a second degree assault in 1991.¹⁵ Loggins is a military veteran and receives veteran benefits.¹⁶ He used some of those funds to hire Respondent as private counsel, paying Respondent an \$8,000.00 retainer in summer 2014.¹⁷ Loggins did not receive a fee agreement but understood that Respondent would bill against that retainer on an hourly basis.¹⁸ Respondent did not deposit the retainer into his COLTAF account, instead placing the money into a separate private account.¹⁹ Respondent reviewed Loggins's file, met with Loggins a few times, and filed an appearance in Loggins's criminal matter, but he did not file any substantive motions in the case.²⁰

In February 2015, Respondent told Loggins that he was winding down his practice and could no longer serve as his attorney.²¹ Because Respondent did not earn the entirety of the retainer, Loggins expected a billing statement and refund of the unearned portion of his retainer.²² However, Respondent provided neither to him.²³ Respondent has not communicated with Loggins since February 2015.²⁴

In this matter, Respondent violated Colo. RPC 1.4(a)(3); Colo. RPC 1.5(a); Colo. RPC 1.5(b) (if a lawyer has not regularly represented a client, a lawyer shall communicate the basis or rate of the lawyer's fee in writing); Colo. RPC 1.15A(a) (a lawyer shall hold property of clients in the lawyer's possession separate from the lawyer's own property); Colo. RPC 1.16(d); and Colo. RPC 8.4(c).

Failure to Cooperate

Respondent changed his registered address to 4239 Briarwood Drive #4, Independence, Kentucky 41051.²⁵ Yet Respondent has not responded to the People's repeated communications mailed to that registered address.²⁶ Nor has he responded to voicemails or messages that the People have left with him and have attempted to pass to him through his former colleagues.²⁷ Respondent has thereby violated Colo. RPC 8.1(b) (a

¹⁵ Compl. ¶ 31.

¹⁶ Compl. ¶ 32.

¹⁷ Compl. ¶¶ 33-34; Ex. 7.

¹⁸ Compl. ¶ 34.

¹⁹ Compl. ¶ 35.

²⁰ Compl. ¶¶ 36-37.

²¹ Compl. ¶ 38.

²² Compl. ¶¶ 39-40.

²³ Compl. ¶¶ 40-42

²⁴ Compl. ¶ 43.

²⁵ Compl. ¶ 59.

²⁶ Compl. ¶ 60.

²⁷ Compl. ¶ 61.

lawyer shall not knowingly fail to respond to lawful demands for information from a disciplinary authority).

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (“ABA Standards”)²⁸ and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.²⁹ When imposing a sanction after a finding of lawyer misconduct, the Court must consider the duty violated, the lawyer’s mental state, and the actual or potential injury caused by the misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

ABA Standard 3.0 – Duty, Mental State, and Injury

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

Mental State: The Court’s order entering default establishes that Respondent knowingly converted client funds and knowingly failed to respond to the People. Further, the Court received testimony that Respondent shuttered his office and ceased operations knowing that he had active cases with unearned retainers.

Injury: Respondent’s abandonment of Killingsworth and Loggins, coupled with his failure to refund the unearned portion of their retainers, caused those clients serious actual injury. Killingsworth testified that as a single mother, she needs every bit of the money that Respondent has “run off” with. Five thousand dollars is “a pretty big hit,” she explained, as it represents approximately twenty percent of her income in any given year. Because she does not have those funds available to her, she has not been able to hire another lawyer to give her advice in ongoing matters concerning her daughter. Loggins explained that he, too, has been deprived the use of his funds, precluding him from hiring another attorney to pursue his objectives. Loggins also identified certain original documents—including his birth certificate—that Respondent never returned to him.

ABA Standards 4.0-7.0 – Presumptive Sanction

Disbarment is the presumptive sanction for Respondent’s misconduct in this case. ABA Standard 4.11 states that disbarment is generally appropriate when a lawyer knowingly converts client property, causing the client injury or potential injury. Disbarment is also warranted under ABA Standard 4.41, which calls for disbarment when a lawyer abandons the practice and causes serious or potentially serious injury to a client.

²⁸ Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2015).

²⁹ See *In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

ABA Standard 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of the presumptive sanction to be imposed, while mitigating circumstances may warrant a reduction in the severity of the sanction.³⁰ Six aggravating factors are present here: Respondent’s dishonest or selfish motive; multiple offenses; his refusal to acknowledge the wrongful nature of his conduct; Loggins’s vulnerability; Respondent’s substantial experience in the practice of law; and his indifference to making restitution.³¹ The Court is aware of but one mitigator: Respondent lacks a prior disciplinary record.³²

Analysis Under ABA Standards and Colorado Case Law

The Court is aware of the Colorado Supreme Court’s directive to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,³³ mindful that “individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases.”³⁴ Though prior cases are helpful by way of analogy, the Court is charged with determining the appropriate sanction for a lawyer’s misconduct on a case-by-case basis.

Colorado case law identifies disbarment as the proper sanction when a lawyer knowingly converts client funds, absent significant mitigation.³⁵ When conversion is coupled with abandonment, disbarment is all the more appropriate.³⁶ Here, the six aggravating factors outweigh the sole mitigator. Moreover, the serious nature of the misconduct, relevant case law, and Respondent’s failure to participate in this proceeding militate in favor of imposing the presumptive sanction of disbarment.

IV. CONCLUSION

Respondent violated his duties to his clients and the profession by closing his practice, moving to Kentucky, and abandoning his active cases. He did not refund unearned fees, provide billing statements, or return his clients’ property, causing them serious financial injury. His later failure to respond to disciplinary charges suggests his apparent indifference to his law license. Cases such as this one—those involving conversion, abandonment, and failure to participate in the ensuing disciplinary proceeding—clearly

³⁰ See ABA Standards 9.21 & 9.31.

³¹ ABA Standards 9.22(b)-(e) & (g)-(j).

³² ABA Standard 9.32(a).

³³ See *In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

³⁴ *In re Attorney F.*, 285 P.3d at 327 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

³⁵ *In re Haines*, 177 P.3d 1239, 1250 (Colo. 2008); *In re Cleland*, 2 P.3d 700, 703 (Colo. 2000).

³⁶ See, e.g., *In re Stevenson*, 979 P.2d 1043, 1043-44 (Colo. 1999); *People v. Townshend*, 933 P.2d 1327, 1329 (Colo. 1997); *People v. Roybal*, 949 P.2d 993, 996-98 (Colo. 1997); *People v. Lefly*, 902 P.2d 361, 364 (Colo. 1995).

warrant disbarment, particularly where, as here, the aggravating factors overwhelmingly predominate. The Court has no trouble concluding that Respondent should be disbarred.

V. ORDER

The Court therefore **ORDERS**:

1. **LINDSEY SCOTT TOPPER**, attorney registration number **17133**, is **DISBARRED**. The **DISBARMENT SHALL** take effect only upon issuance of an “Order and Notice of Disbarment.”³⁷
2. Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c), concerning winding up of affairs, notice to parties in pending matters, and notice to parties in litigation.
3. Respondent also **SHALL** file with the Court, within fourteen days of issuance of the “Order and Notice of Disbarment,” an affidavit complying with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the Court setting forth pending matters and attesting, inter alia, to notification of clients and other jurisdictions where the attorney is licensed.
4. The parties **MUST** file any post-hearing motion or application for stay pending appeal **on or before August 17, 2016**. No extensions of time will be granted. Any response thereto **MUST** be filed within seven days.
5. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** file a “Statement of Costs” **on or before August 17, 2016**. Any response thereto **MUST** be filed within seven days.
6. Respondent **SHALL PAY, no later than Monday, December 26, 2016, RESTITUTION** in the following amounts: \$5,000.00 to Shanee Killingsworth, and \$8,000.00 to Vincent Loggins. Respondent’s payment of full restitution is a condition precedent to his filing a petition for readmission.

DATED THIS 27th DAY OF JULY, 2016.

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

³⁷ In general, an order and notice of disbarment will issue thirty-five days after a decision is entered pursuant to C.R.C.P. 251.19(b) or (c). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

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Christopher T. Ryan
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