People v. Mark Edward Scabavea. 24PDJ034. November 15, 2024.

Following a sanctions hearing, the Presiding Disciplinary Judge disbarred Mark Edward Scabavea (Missouri attorney registration number 61533) from the practice of law in Colorado, effective December 20, 2024.

Scabavea, a Missouri-licensed lawyer practicing in Colorado federal courts, engaged in misconduct in two clients' cases. In one of the matters, Scabavea abandoned his client's criminal case approximately three weeks before the client's jury trial without moving to withdraw and without another lawyer entered on the case. To protect the client, a lawyer who was helping Scabavea on the matter rushed to enter her appearance and successfully moved to continue the trial. Scabavea performed no additional work on the case. In addition, he failed to produce an accounting after the client requested one.

In the second matter, Scabavea agreed to help his immigration client obtain a work visa. Scabavea failed to provide his client with written information about the fee, save for one text setting forth a flat fee of $4,125.00 and a retainer of $1,500.00. Scabavea did not deposit his client's retainer in a trust account, and he knowingly converted the funds. Though Scabavea alleged that he completed work on his client's work visa application, he never sent the client the necessary paperwork. After his client obtained new counsel, Scabavea failed to surrender the forms he allegedly completed and the documents his client provided him. He also failed to refund his client's unearned advance retainer.

Scabavea's conduct violated Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 1.4(a) (a lawyer must reasonably communicate with the client); Colo. RPC 1.5(h) (a lawyer who represents a client on a flat-fee basis must describe in writing the services the lawyer will perform, the amount the client must pay and the timing of those payments, the amount the lawyer will earn upon completing specific tasks or events if the lawyer is to earn any portion of the fee before the representation concludes, and the amount or method of calculating fees the lawyer will earn if the representation is terminated before the lawyer completes the specified tasks or events); Colo. RPC 1.15A(a) (a lawyer must hold client property separate from the lawyer's own property); Colo. RPC 1.15A(b) (on receiving funds or other property of a client or third person, a lawyer must promptly deliver to the client or third person any funds or property that person is entitled to receive); Colo. RPC 1.16(d) (a lawyer must protect a client's interests on termination of the representation, including by returning unearned fees); Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Colo. RPC 8.4(d) (it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice).

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:** MARK EDWARD SCABAVEA	Case Number: **24PDJ034**
OPINION IMPOSING SANCTIONS UNDER C.R.C.P. 242.31(b)	

Mark Edward Scabavea ("Respondent"), a Missouri-licensed lawyer practicing in Colorado federal courts, failed to act with reasonable diligence and promptness in two clients' matters and failed to adequately communicate with the clients. In one of the matters, Respondent failed to keep the client's funds in a trust account, knowingly converted the client's advance retainer, and failed to return the converted fees to his client. Respondent's misconduct, which caused client harm and prejudiced the administration of justice, warrants disbarment.

I. PROCEDURAL HISTORY

On May 9, 2024, Jonathan P. Blasewitz of the Office of Attorney Regulation Counsel ("the People") filed an amended citation and an amended complaint with Presiding Disciplinary Judge Bryon M. Large ("the Court"). When Respondent did not answer within twenty-eight days, the People moved for entry of default. The Court ordered Respondent to answer the People's amended complaint and to respond to the motion for default no later than Tuesday, July 23, 2024. Respondent did not respond to the Court's order and did not file an answer or other responsive pleading.[1]

On August 2, 2024, the Court granted the People's motion for default, deeming all allegations and claims in the amended complaint admitted. On August 5, 2024, the Court issued a "Notice of Sanctions Hearing Under C.R.C.P. 242.27(c)," advising Respondent of his right to

[1] Respondent has not been wholly absent from this proceeding and has communicated with the People at irregular intervals. Notably, Respondent conferred with the People to convey that he did not object to their motion for protective order, filed on July 9, 2024; their witness list, filed on September 16, 2024; and their motion for remote testimony, filed on September 16, 2024.

attend the sanctions hearing, to be represented by counsel at his own expense, to cross-examine witnesses, and to present argument and evidence about the appropriate sanction.

On September 23, 2024, the Court held a sanctions hearing under C.R.C.P. 242.27 and C.R.C.P. 242.30. Blasewitz appeared on the People's behalf. Respondent appeared pro se. During the sanctions hearing, the Court heard testimony from Michon Hughes, Antonio Perez, and Respondent, and it admitted into evidence the People's exhibit 1.

II. FACTS AND RULE VIOLATIONS ESTABLISHED ON DEFAULT

The Court adopts and incorporates by reference the facts of this case, as fully detailed in the People's amended complaint.

Respondent is not licensed to practice law in Colorado. He is licensed in Missouri, where he was admitted on April 22, 2009, under attorney registration number 61533. At all times relevant to this case, Respondent was admitted to the practice of law in the United States District Court for the District of Colorado. He was actively engaged in the practice of federal law in the State of Colorado using an address in Lakewood, Colorado.[2] Thus, Respondent is subject to the jurisdiction of the Colorado Supreme Court and this Court in this disciplinary proceeding.[3]

In 2022 and 2023, Respondent operated a solo practice. Respondent's only employee, T.B., was also his significant other.[4]

Cadet G. Matter

Cadet G. is originally from another country and was in that country's air force when he enrolled at the United States Air Force Academy in Colorado Springs.[5] While enrolled there, Cadet G. was accused of sexually assaulting a female cadet in an "intent to disenroll" proceeding.

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[2] This address is Respondent's registered business address with the Missouri bar and his last-known address that he used when communicating with the People.

[3] *See* C.R.C.P. 242.1(a)(2) ("Jurisdiction under this rule exists over . . . [a] lawyer not admitted to practice law in Colorado who provides or offers to provide any legal services in Colorado, including a lawyer who practices in Colorado pursuant to federal or tribal law."); Colo. RPC 8.5(a) ("A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.").

[4] The Court uses T.B.'s initials in lieu of T.B.'s full name.

[5] The Court suppressed Cadet G.'s name and other identifying information about him in the Court's file. *See* "Protective Order Entered Under C.R.C.P. 242.41(e)" (July 12, 2024).

Around May 4, 2022, Respondent learned of Cadet G.'s matters. Respondent met with Cadet G. and discussed representing him in the disenrollment proceeding. Respondent also cautioned Cadet G. that he could be charged federally for the sexual assault allegation and would need representation for that matter. Respondent and Cadet G. entered into an hourly fee agreement at a reduced rate of $160.00 per hour, which was half of Respondent's usual hourly rate. Respondent capped his fees at $15,000.00, excluding costs for experts.[6]

Respondent prepared for Cadet G.'s disenrollment hearing. Respondent interviewed witnesses himself—he did not use an investigator in the case—and met with Cadet G. in Colorado Springs to prepare Cadet G. to testify at the hearing. On June 10, 2022, Respondent submitted a thirty-one-page brief to support Cadet G.'s position. Even so, the supervisor directly above Cadet G.'s immediate chain of command recommended that Cadet G. be disenrolled.

On June 22, 2022, Cadet G. was indicted in federal court of aggravated sexual abuse under 18 U.S.C. § 2241(a)(1), which carries a possible penalty of imprisonment for life. A jury trial was scheduled for August 29, 2022, but Respondent successfully moved to continue the matter, which the court rescheduled for December 5, 2022.

Although Cadet G. faced serious criminal charges and thus had a Fifth Amendment right to remain silent, Respondent prepared him to make a presentation to his superintendent, a three-star general. Cadet G. made the presentation on October 3, 2022, while Respondent waited outside. Ordinarily, the Air Force Academy disenrolls cadets accused of sexual assault regardless of whether the cadets are ultimately acquitted during a criminal trial. But the superintendent agreed to make Cadet G.'s disenrollment contingent on the outcome of the criminal trial, even though the burden of proof in Air Force Academy proceedings is the preponderance of the evidence rather than beyond a reasonable doubt.

Thereafter, Respondent continued working on Cadet G.'s criminal matter. On October 5, 2022, he filed a motion seeking the alleged victim's mental health records. He also filed a second motion to issue subpoenas, motions to suppress the government's evidence, a leave to restrict, and a notice of FRE 404(b) evidence.

Respondent also reached out for help from his former law school classmate, Michon Hughes. Hughes is an Oklahoma-licensed lawyer, a resident of Oklahoma, and a former prosecutor. At the time, Hughes had limited jury trial experience and had never conducted a jury trial in federal court. Nor had she ever defended a criminal defendant at trial. Even so, Respondent believed that bringing Hughes onto the case would increase the likelihood of success at trial. Respondent, who planned to be first chair at the trial, wanted Hughes to cross-examine the alleged victim because they were both women. He discussed the matter with Cadet G., who agreed to add Hughes to the case. Sometime in October 2022, Respondent sent Hughes a thumb drive with the case's discovery.

[6] The People's complaint does not allege whether the agreement was reduced to writing or provided to Cadet G.

On the weekend of November 12 and 13, 2022, Hughes worked on motions for Respondent's review. That same weekend, Respondent told Hughes that he was "going to watch football and have one beer."[7] But the "one beer" turned into a week-long drinking binge. On November 14, 2022, Hughes attempted to contact Respondent to ask about the motions she had drafted. Respondent did not reply; his employee and significant other, T.B., responded instead and informed Hughes that she had taken Respondent to the emergency room and that he was not available. Respondent did not respond to Hughes's attempts to communicate about the case until early January 2023.

Hughes contacted ethics counsel and decided she needed to protect Cadet G. by entering her appearance in the case, which she filed on November 14, 2022. Hughes also filed an ends of justice motion to extend the motions hearing and to continue the jury trial for ninety days. In her motion, she wrote, "The lead counsel for this case has become severely ill and may very well be on his way to the hospital at this moment."[8] She continued, "The Defendant has previously filed a Motion to Suppress, which has been set for November 17th, 2022 before this honorable Court. To the best of undersigned's knowledge, no witnesses have been subpoenaed for this evidentiary hearing which is a direct result of lead counsel's illness."[9]

The federal prosecutor objected to Hughes's request to extend the motions hearing as untimely and argued that the defense had not articulated why it could not adequately prepare for a jury trial in three weeks.

On November 17, 2022, the court granted Hughes's motion in part and continued the jury trial by seventy days, to February 7, 2023. The court denied her request to extend the discovery and motions deadline.

Because Hughes had limited experience defending federal criminal cases, she sought experienced local counsel in Colorado. She contacted lawyer David Beller, who agreed to join the case on a low-fee basis. Beller entered his appearance on December 29, 2022.

In early January 2023, Respondent reached out to Hughes for the first time since the weekend of November 13, 2022. They spoke by telephone, and Hughes brought Beller into the conversation. Respondent was embarrassed about disappearing from the case and assured Hughes and Beller that it would not happen again. Respondent acknowledged that he struggled with alcohol use but stated that he wished to rejoin the case. But Hughes and Beller did not want Respondent to appear at counsel's table, as they believed that the judge was cross about his disappearance. They welcomed his help behind the scenes, however. Even so, Respondent disappeared again less than one week later and had no further involvement in the case. He never formally moved to withdraw from the case.

[7] Am. Compl. ¶ 24.
[8] Am. Compl. ¶ 30.
[9] Am. Compl. ¶ 30.

On February 7, 2023, the jury trial began. Hughes and Beller represented Cadet G. After a three-day trial, the jury acquitted him. Cadet G. was allowed to remain enrolled at the Air Force Academy under the agreement reached in the disenrollment proceedings; he was back on track to graduate in spring 2024.[10]

After the trial, Cadet G. requested an accounting of the funds he paid Respondent. Respondent never gave him an accounting. Respondent eventually provided an accounting to the People on March 13, 2023, after the People received the request for investigation against him. In the accounting, Respondent attempted to re-create his time spent on Cadet G.'s case. Some entries provide date ranges and time estimates for tasks that Respondent performed during those periods, which suggests that he neither contemporaneously made nor accurately kept the records. For example, one entry reads:

> 5/20/22 – 10/4/22
> Of the Approximately 15 trips to USAFA 12 trips were for regular meeting with Client. Each regular meeting lasted about 2 hours. One of the trips [was] to go over the evidence in the case which lasted about 4 hours. One of the trips was to practice Client's personal statement Client was to present to the Superintendent. One of the trips to USAFA was for the initial interview which Client was not charged. 31 hours - $4960.[11]

Though Respondent sent Cadet G. emails requesting payments at various intervals during the representation, he never sent Cadet G. actual invoices.

As established on default, Respondent's conduct during his representation of Cadet G. violated four Colorado Rules of Professional Conduct:

- Colo. RPC 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client. Though Respondent initially provided Cadet G. competent and diligent representation, he violated Colo. RPC 1.3 by abandoning Cadet G.'s case approximately three weeks before the jury trial started, without moving to withdraw and without another lawyer entered on the case. In addition, Respondent performed no work on the case after November 13, 2022, other than participating in one telephone conversation with the trial team and sending his work product to the trial team.

- Colo. RPC 1.4(a) requires a lawyer to reasonably consult with the client about how the client's objectives are to be accomplished and to keep the client reasonably informed about the status of the matter. Respondent violated this rule by failing to communicate with Cadet G. after the weekend of November 13, 2022; by neither informing Cadet G.

[10] At the sanctions hearing, Hughes confirmed that Cadet G. successfully graduated from the Air Force Academy.
[11] Am. Compl. ¶ 42.

that he would be unable to stay on the case nor conferring with his client about bringing another lawyer onto the matter; and by failing to send invoices to his client or otherwise keep his client informed about the hours he spent on the case or how he calculated his fees.

- Colo. RPC 1.15A(b) obligates a lawyer who receives a client's funds or other property to provide a full accounting of the funds or property if the client requests. Respondent violated this rule because he never provided an accounting despite Cadet G.'s request that he do so.

- Finally, Respondent violated Colo. RPC 8.4(d), which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. By abandoning Cadet G.'s case, Respondent forced Hughes to rush to enter her appearance and to draft an ends of justice motion to continue the case. The prosecutor on the case expended time objecting to Hughes's motion, and the court expended resources adjudicating the matter. Ultimately, Respondent's actions delayed Cadet G.'s trial by three months.

Alberto Perez Matter

Around March 29, 2023, Peruvian citizen Alberto Perez requested Respondent's assistance in an immigration matter. Respondent had already performed immigration work for Perez, including obtaining work permits for Perez as well as Perez's spouse and daughter.[12]

Perez was in the process of seeking asylum and needed help to obtain a work visa by filing an I-140 form, which is an Immigration Petition for Alien Workers. Sometime in April 2023, Respondent agreed to prepare the I-140 form for Perez. In August 2023, Perez provided Respondent the information necessary to start working on the I-140 form.

When Perez told Respondent that a friend had hired another lawyer to complete the friend's I-140 form, Respondent said that he would charge seventy-five percent of the fee that Perez's friend paid for the legal work. On August 30, 2023, Respondent sent Perez a text message stating that he would charge a flat fee of $4,125.00 for the representation, with an initial $1,500.00 advance retainer. Respondent did not provide any other basis or rate of the fee that he would charge Perez for his services. Respondent did not send Perez a fee agreement. Respondent and Perez did not discuss the full terms and scope of the representation, nor did Respondent communicate those terms to Perez in writing. Respondent likewise did not discuss with Perez an hourly rate or communicate in writing the benchmarks or milestones upon which any portion of his fee would be earned. Further, Respondent did not communicate how expenses would be calculated if the representation terminated early.

[12] Perez initially met Respondent when Perez lived in Colorado. At the time, Perez was searching for a lawyer, and a Peruvian consular official recommended Respondent. Perez has since moved out of state.

Perez sent $1,500.00 to Respondent on August 30, 2023. Respondent did not place the unearned funds into a trust account. At that time, he did not have a trust account that met the requirements of Colo. RPC 1.15B. Respondent told Perez that day, "Today I will send your form for the USCIS [United States Citizenship and Immigration Services], and you should have it on Saturday [September 2, 2023]."[13]

At that time, Perez was working as a manager for a roofing company, which had agreed to sponsor him as a lawful permanent resident. An employer can "sponsor a foreign national to become a permanent resident based on a permanent job offer."[14] A sponsorship shows that the employee meets the necessary job qualifications and that the employer intends to hire the employee once the visa is approved. A sponsorship provides the employee with a place in line as they wait to immigrate to the United States. When the employee reaches the head of that line, they may be eligible to apply to immigrate. Because of those temporal limitations on lawful immigration to the United States, it was essential that Respondent act promptly on Perez's behalf.

To complete the I-140 form, Respondent needed Perez's signature on it. Perez, in turn, needed to obtain signatures from his employer's representatives, who lived approximately three hours away from him. On September 2, 2023, relying on Respondent's promise to send the I-140 form, Perez hired a driver to pick up the I-140 form and deliver it to his employer's representatives. Perez hired the driver because he could not afford to lose a day of work by making the six-hour round trip himself. But Respondent never sent the I-140 form. As a result, Perez had to pay the driver a cancellation fee.

Perez contacted Respondent and asked about the I-140 form. On September 3, 2023, Respondent told Perez that he "confirmed" that he had sent the form the previous day.[15] But Perez still did not receive the form, and on September 8, 2023, he texted Respondent and requested the tracking number. Respondent replied that he would provide the tracking number when he returned to his office, but he never provided it.

Respondent sent Perez a text message on Thursday, September 14, 2023, stating, "That's weird, maybe because of the holiday they are late so I will send it on Thursday overnight."[16] But Perez still did not receive the I-140 form; on September 16, 2023, Perez again texted Respondent, asking where the form was. Respondent replied that he had sent the form in the mail and that it should arrive on Monday, September 18, 2024. But when Perez again did not receive the I-140 form, he asked Respondent about the delay. Respondent replied that he was dealing with a family emergency. When Perez asked Respondent for a new tracking number, T.B. replied that Respondent had a family emergency involving his mother but would be sending the

[13] Am. Compl. ¶ 78.
[14] Am. Compl. ¶ 80 (citing https://www.uscis.gov/sites/default/files/document/guides/E2en.pdf).
[15] Am. Compl. ¶ 88.
[16] Am. Compl. ¶ 92.

documents to Perez by email within one or two days. Perez then demanded a refund of his $1,500.00. T.B. again replied on Respondent's behalf. She stated that Perez's money would be refunded and that his I-140 form was completed on Respondent's computer.

On September 30, 2023, Respondent sent a text message to Perez:

> Hi Alberto: I'm just checking my messages which appear above. I completely apologize for not getting the I-140 to you. I don't know what went wrong with the mail. Please understand that I have a lot of family problems right now that I have to deal with and I haven't been able to double check everything. I no way [sic] did I take your money and [do] nothing. I do believe that I earned the $1,500.00 but if you want to get someone else I will refund it anyway. Not only that, but I will send you the I-140 so your new lawyer won't have to do it saving you money. I respectfully request that you give me a few days to refund it to you. I'm so sorry I gave the impression that I just took your money and did nothing. I absolutely did not. Alternatively, because you are so unsatisfied with my services I will offer to complete your entire case with no further costs to you. Once again, I feel embarrassed and sad that I have disappointed you.[17]

Perez continued to demand an immediate $1,500.00 refund. Respondent asked for a few more days to make the refund. Over the next two days, Perez repeatedly requested a refund. But after Perez stated that he was going to call disciplinary authorities to file a report against Respondent, Respondent refused to honor his promise of a refund. Perez never received his I-140 form from Respondent and never received a refund.

As established on default, Respondent's conduct in Perez's matter violated five Colorado Rules of Professional Conduct:

- Respondent violated Colo. RPC 1.3 when he failed to send Perez the I-140 form or to otherwise take the steps necessary to enable Perez to file the form.

- Respondent violated Colo. RPC 1.5(h), which requires a lawyer who represents a client on a flat-fee basis to describe in writing the services the lawyer will perform, the amount the client must pay and the timing of those payments, the amount the lawyer will earn upon completing specific tasks or events if the lawyer is to earn any portion of the fee before the representation concludes, and the amount or method of calculating fees the lawyer will earn if the representation is terminated before the lawyer completes the specified tasks or events. In the Perez matter, Respondent violated Colo. RCP 1.5(h) because he did not provide Perez this information in writing, as required under the rule, save for one text message detailing only the flat fee of $4,125.00 and initial retainer of $1,500.00.

[17] Am. Compl. ¶ 100.

- Colo. RPC 1.15A(a) requires a lawyer who receives client funds to keep the funds in a trust account that complies with Colo. RPC 1.15B. At the time Perez hired Respondent, Respondent did not maintain a compliant trust account. As such, Respondent did not place Perez's $1,500.00 advance retainer into a trust account, thereby violating Colo. RPC 1.15A(a).

- Colo. RPC 1.16(d) obligates a lawyer, upon termination of the representation, to take steps to the extent reasonably practicable to protect a client's interests, including to surrender papers and property to which the client is entitled and to refund advance payment of fees or expenses that have not been earned or incurred. Respondent violated this rule in two respects. First, he failed to surrender to Perez or Perez's new counsel the forms he had allegedly completed and the documents Perez provided him. Second, Respondent failed to refund Perez's unearned advance retainer.

- Finally, Colo. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent accepted from Perez a $1,500.00 advance retainer as part of a flat fee for completing a specified scope of work, but he immediately treated those funds as his own property. He did so knowing both that he had not completed the work that entitled him to those funds and that Perez had not consented to him taking the funds for himself. Respondent thus knowingly converted his client's funds in violation of Colo. RPC 8.4(c).

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[18] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[19] When imposing sanctions after a finding of misconduct, the Court must consider the duty the lawyer violated, the lawyer's mental state, and the actual or potential injury the lawyer's misconduct caused. These three variables yield a presumptive sanction that the Court may then adjust based on aggravating and mitigating factors.

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

Duty: In the Cadet G. matter, Respondent violated his duties of diligence and communication. He also violated his duty owed as a professional to give Cadet G. a full accounting of client property. In addition, Respondent breached his duty to the legal system because his conduct delayed Cadet G.'s case and hindered the administration of justice. In the Perez matter, Respondent violated his duties to diligently represent his client and to adequately communicate in writing a flat-fee agreement. Respondent also breached his duty to safeguard

[18] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2d ed. 2019).
[19] *See In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

client funds as well as his duty to reasonably protect Perez's interests after the representation ended.

Mental State: The Court finds that Respondent acted knowingly during his misconduct in Cadet G.'s case. In the Perez matter, the Court's order entering default established that Respondent knowingly converted Perez's funds in violation of Colo. RPC 8.4(c). From the evidence taken at the sanctions hearing, the Court likewise finds that Respondent acted knowingly as to the other rule violations in that matter.

Injury: Respondent abandoned Cadet G. three weeks before his felony criminal jury trial that carried the potential for life imprisonment. In addition, Cadet G.'s disenrollment from the Air Force Academy was tied to the outcome of the jury trial. The Court thus readily finds that Respondent's misconduct caused very serious potential injury to Cadet G. The Court also finds that Respondent's misconduct caused Hughes actual injury. Hughes testified that she was panicked and overwhelmed when Respondent abandoned the case. She was also scared for Cadet G., she said, and worried that she would not secure a positive outcome in his case without Respondent.

The Court finds that Respondent caused Perez serious financial harm. Respondent failed to return Perez's retainer and failed to complete the work in Perez's case, which compounded Perez's financial injury because he had to pay for another lawyer to help him complete his I-140 form. More significantly, Respondent's inaction delayed Perez's case and undermined the potential sponsorship with his employer. Perez thus lost out on a lucrative employment opportunity that would have benefited him and his family. In addition, Perez said that because Respondent never sent the completed I-140 form, Perez unnecessarily paid $250.00 to retain a driving service to deliver the form to Perez's employer's representatives.[20]

In addition, Perez testified that the delay in his case led to personal and emotional injuries because he was unable to leave the country to visit his son, who was hospitalized in Peru. Because his asylum claim was pending, Perez feared he would be prevented from reentering the United States if he left the country.

Finally, by converting client funds and prejudicing the administration of justice, Respondent's misconduct tarnished the reputation of the legal profession.

ABA *Standards* 4.0-8.0 – Presumptive Sanction

[20] Perez's account differs from the People's allegation that Perez incurred an $80.00 fee when he cancelled the driver after the I-140 form was not delivered. *See* Am. Compl. ¶ 86. The Court credits Perez's testimony over the People's allegation, which the People conceded was incorrect at the hearing.

ABA *Standard* 4.11 provides that disbarment is generally appropriate when a lawyer knowingly converts client property, thereby causing a client injury or potential injury. Disbarment is also generally appropriate under ABA *Standard* 4.41(a) and (b) when a lawyer abandons the practice of law or knowingly fails to perform services for a client, causing the client serious or potentially serious injury.

Under ABA *Standard* 6.22, suspension is generally appropriate when a lawyer knows that they are violating a court order or rule, injuring or potentially injuring a client or interfering or potentially interfering with a legal proceeding. Finally, under ABA *Standard* 7.2, suspension is generally appropriate when a lawyer knowingly engages in conduct that violates a professional duty—here, failing to provide Cadet G. with an accounting, failing to communicate with Perez the basis of the flat fee, and failing to return Perez's unused fee—and thereby injures or potentially injures a client, the public, or the legal system.

Because "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct," the Court finds that the presumptive sanction in this case is disbarment.[21]

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating factors justify an increase in the degree of the sanction to be imposed, while mitigating factors warrant a reduction in the severity of the sanction.[22] As explained below, the Court applies four aggravating factors and two mitigating factors.

Aggravating Factors

Dishonest or selfish motive – 9.22(b): The People ask the Court to apply this aggravating factor, arguing that Respondent selfishly retained money he did not earn. The People argue that this factor should be given great weight because the sum Respondent retained was significant to Perez. At the sanctions hearing, Respondent testified that he had earned Perez's fee and denied acting with a selfish motive in the representation. The Court finds that Respondent evinced a selfish motive by using Perez's funds for his own purposes and by refusing to return those funds. The Court is particularly troubled by Respondent's decision to rescind his offer to repay Perez after Perez vowed to file a complaint with disciplinary authorities. Respondent texted Perez, "Considering all the work I put in your case, you get nothing back. It's certainly in your right to go to the [disciplinary authorities]. I was being kind to offer your money back. But that is no longer on the table."[23] This retraction strikes the Court as a selfish and petulant

[21] ABA *Annotated Standards for Imposing Lawyer Sanctions*, at xx.
[22] *See* ABA *Standards* 9.21 and 9.31.
[23] Ex. 1 at 5.

attempt at retribution after Perez exercised his right to report Respondent's misconduct. The Court thus applies this factor.

Multiple offenses – 9.22(d): The Court applies this factor, noting that Respondent committed several types of misconduct in two separate client matters.

Bad faith obstruction of the disciplinary proceeding – 9.22(e): The People ask the Court to apply this aggravating factor, arguing that Respondent was largely unresponsive to disciplinary authorities' requests. Indeed, at the sanctions hearing, Respondent acknowledged that he was not cooperative during the proceeding. "I've been hiding in a hole in my house, trying to wish it all away," he said. Even so, the Court does not perceive in Respondent's conduct that he intentionally sought to thwart the disciplinary proceeding. Moreover, Respondent conferred with the People regarding several matters and participated in the sanctions hearing. The Court finds that Respondent's inactions were avoidant but not obstructive. Thus, the Court declines to apply this factor.

Vulnerability of the victim – 9.22(h): The Court applies this factor because, as non-citizens, both Cadet G. and Perez were particularly vulnerable to adverse legal consequences resulting from Respondent's breach of the duties he owed them.

Substantial experience in the practice of law – 9.22(i): Respondent had been practicing law for thirteen years at the time of his earliest misconduct in this case. The Court applies this aggravating factor.

Mitigating Factors

Absence of prior disciplinary record – 9.32(a): The Court finds no evidence that Respondent has been previously disciplined in Colorado or another jurisdiction. The Court thus applies this factor.

Personal or emotional problems – 9.32(c): At the sanctions hearing, Respondent testified that his father's failing health during Cadet G.'s case triggered him to begin drinking, which burgeoned into a pattern of drinking that led to a relapse of his alcohol use disorder, negatively impacting his work and all aspects of his life. The Court finds that Respondent was, and still is, suffering from the effect of these issues. The Court readily concludes that Respondent's personal and emotional problems—particularly his father's illness—detrimentally affected his conduct in Cadet G.'s case. In contrast, there is no evidence that the same issues contributed to Respondent's misconduct in Perez's case. During that matter, Respondent testified, he abstained from alcohol use. Indeed, Respondent acknowledged that he might have simply made a mistake and sent Perez's I-140 to the wrong client.

In sum, the Court finds that Respondent's personal and emotional problems significantly contributed to his misconduct in Cadet G.'s case but have no causal nexus to the Perez matter. The Court thus applies this factor.

Mental disability or chemical dependency including alcoholism – 9.32(i): Respondent testified at the sanctions hearing that he suffered from severe, but undiagnosed, depression. He also testified to a long history of alcohol use disorder. The People admit that Respondent suffers from this disorder but contend that the evidence in this case does not satisfy the elements required to apply this factor.

The Court agrees with the People. Though Respondent's testimony about his severe undiagnosed depression and long history of alcohol abuse was credible, the Court cannot credit Respondent for this mitigating factor, as he did not establish the four elements required to apply it.[24] First, Respondent did not provide medical evidence to support his claim that he suffers from a chemical dependency. Second, the Court does not find that Respondent's alcohol use disorder had any bearing on his misconduct in Perez's matter, though the Court agrees that it contributed to Respondent's misconduct in the Cadet G. matter. Third, Respondent's recovery is neither meaningful nor sustained. At the sanctions hearing, Respondent testified that he participated in an intensive outpatient program in May 2023 for alcohol abuse issues, currently receives Vivitrol injections to treat his alcohol use disorder, and has not been drinking. But when the Court inquired when he last consumed alcohol, Respondent candidly admitted that he did so just three days prior. While the Court commends Respondent's candor and wishes him the best in his journey toward sobriety, the Court cannot find that he is currently in a meaningful or sustained period of recovery. Finally, for the same reasons the Court cannot find that Respondent has recovered such that that recurrence of his misconduct is unlikely. Thus, this mitigating factor does not apply.

Analysis Under ABA *Standards* and Case Law

The Colorado Supreme Court directs this Court to exercise discretion in imposing a sanction because "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[25] As such, the Court determines the appropriate sanction for a lawyer's misconduct on a case-by-case basis, looking to the ABA *Standards* for guidance in the exercise of that discretion. The ABA *Standards* set forth a theoretical framework that provides for "the flexibility to select the appropriate sanction in [a] particular case" after carefully considering the applicable aggravating and mitigating factors.[26] Thus, while prior decisions regarding the imposition of sanctions for lawyer misconduct can be persuasive, the Court is free to distinguish those cases and deviate from the presumptive sanction when appropriate.

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[24] *See* ABA *Standard* 9.32(i)(1)-(4).
[25] *In re Attorney F.*, 2012 CO 57, ¶ 20 (*quoting In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).
[26] *Id.* ¶ 3.

Under the ABA *Standards'* framework, the Court begins with a presumptive sanction of disbarment under ABA *Standards* 4.11, 4.41(a), and 4.41(b). To the presumptive sanction of disbarment, the Court applies four aggravating factors, which are marginally offset by two mitigating factors. Because disbarment is the ultimate sanction under Colorado's lawyer disciplinary regime, and there is insufficient mitigation in this case to overcome the aggravators, the Court finds that disbarment remains the appropriate sanction for Respondent's misconduct under the ABA *Standards* framework as a whole.

In factually similar cases, the Colorado Supreme Court has disbarred lawyers for knowingly converting client property, thereby injuring clients. Indeed, knowing misappropriation of client funds almost always warrants disbarment unless extraordinary mitigating factors apply.[27] The Colorado Supreme Court has also found disbarment is appropriate when a lawyer abandons the lawyer's practice, especially when the lawyer fails to properly preserve client funds.[28]

Here, the facts established on default show that Respondent knowingly converted Perez's funds. Respondent asked for and accepted a $1,500.00 retainer from Perez on August 30, 2023.[29] From September 4 to September 20, 2023, Respondent stated or implied that he had mailed the I-140 to Perez around eight times.[30] But he never sent the form to Perez. Nor did he return Perez's fee despite stating that he would do so, rescinding his promise when Perez

[27] *See People v. Varallo*, 913 P.2d 1, 10-11 (Colo. 1996) (concluding that a lawyer's absence of prior discipline and evidence of his good character did not overcome the presumption of disbarment for the lawyer's knowing use of his client's funds for his personal benefit); *see also People v. Lavenhar*, 934 P.2d 1355, 1359 (Colo. 1997) (finding that a lawyer's misconduct, including knowingly misappropriating third-party funds, which was exacerbated by seven aggravating factors, warranted disbarment).

[28] *See People v. Townshend*, 933 P.2d 1327, 1329 (Colo. 1997) (disbarring a lawyer for abandoning two client matters and failing to account for or refund unearned fees); *People v. Jamrozek*, 914 P.2d 350, 354 (Colo. 1996) (disbarring a lawyer who accepted fees from clients and then abandoned them, causing the clients substantial harm); *People v. Williams*, 845 P.2d 1150, 1152-53 (Colo. 1993) (disbarring a lawyer who abandoned a client's case and failed to account for or return a $500.00 retainer); *People v. Southern*, 832 P.2d 946, 947-48 (Colo. 1992) (disbarring a lawyer after the lawyer failed to appear or diligently represent clients in multiple matters, causing the clients serious and potentially serious injury); *People v. Quintana*, 752 P.2d 1059, 1062 (Colo. 1988) (disbarring a lawyer after the lawyer failed to file written findings on behalf of a client, resulting in the loss of the client's child support benefits for one year; failed to pursue nonsupport proceedings on behalf of another client; failed to return the clients' unearned funds; and misappropriated funds belonging to a third client).

[29] Ex. 1 at 4. The Court notes that though Respondent insisted at the sanctions hearing that he had worked on Perez's case and had earned the $1,500.00 retainer, he did not corroborate his account with evidence showing that he worked on the case.

[30] Ex. 1 at 4-6.

threatened to report Respondent to disciplinary authorities.[31] As for Cadet G.'s matter, Respondent abandoned his client and seriously jeopardized Cadet G.'s enrollment in the Air Force Academy and, indeed, his ability to live a life free from confinement.

In sum, the twin guiding authorities of the ABA *Standards* and Colorado jurisprudence unmistakably point to disbarment for Respondent's misconduct.

Finally, because Respondent did not earn yet did not return the $1,500.00 fee that Perez paid, the Court finds that Perez is entitled to restitution from Respondent in the amount of $1,500.00.[32]

IV. CONCLUSION

The duty of diligence and the duty to preserve client property are foundational to the client-lawyer relationship. Respondent failed to meet those duties by abandoning one client's case and by keeping another client's advance retainer although he had not completed the work the client paid him to perform. Disbarment is the most drastic sanction this Court can impose. The Court does so reluctantly, especially given Respondent's personal struggles and his commendable candor at the sanctions hearing. Even so, Respondent's serious misconduct must be met with disbarment.

V. ORDER

The Court **ORDERS:**

1. **MARK EDWARD SCABAVEA,** Missouri attorney registration number **61533**, is **DISBARRED** from the practice of law in Colorado. The disbarment will take effect upon issuance of an "Order and Notice of Disbarment."[33]

2. Respondent **MUST** pay restitution totaling $1,500.00, **no later than Friday, December 20, 2024**, to Alberto Perez, care of the Office of Attorney Regulation Counsel.

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[31] Ex. 1 at 6.

[32] Though Perez unnecessarily paid $250.00 to the driver service awaiting the I-140 form that Respondent never sent, that money is not repayable as restitution because Perez did not pay or entrust that money to Respondent. *See* C.R.C.P. 241 (defining restitution as "the return of fees, money, or other things of value that were paid or entrusted to a lawyer").

[33] 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.

3. To the extent applicable, Respondent **MUST** promptly 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 Disbarment," Respondent **MUST** file an affidavit with the Court under C.R.C.P. 242.32(f), attesting to his compliance with C.R.C.P. 242.32. 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 Monday, December 2, 2024**. Any response thereto **MUST** be filed within seven days.

6. The parties **MUST** file any application for stay pending appeal **no later than the date on which the notice of appeal is due**. Any response thereto **MUST** be filed within seven days.

7. Respondent **MUST** pay the costs of this proceeding. The People **MUST** submit a statement of costs **no later than Monday, December 2, 2024**. Any response challenging the reasonableness of those costs **MUST** be filed within seven days thereafter.

8. As part of any petition for readmission, Respondent **MUST** demonstrate that he has paid all restitution and has fully reimbursed the Attorneys' Fund for Client Protection.

DATED THIS 15th DAY OF NOVEMBER, 2024.

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BRYON M. LARGE
PRESIDING DISCIPLINARY JUDGE