People v. Daniel L. English. 23PDJ064. October 22, 2024.

Following a disciplinary hearing, a hearing board disbarred Daniel L. English (attorney registration number 01731), effective November 26, 2024.

English settled a medical malpractice matter for a client but failed to notify lienholders of the settlement. Then, exercising his ability to control the funds in his trust account, English unilaterally disbursed money to his client and to himself, leaving no money for the lienholders. English's misappropriation of funds and his failure to notify the lienholders of the settlement amounted to dishonest conduct. English also comingled his personal funds with client funds in his trust and business accounts, and he failed to maintain financial records that lawyers are required to keep.

Through this misconduct, English violated Colo. RPC 1.15A(a) (a lawyer must hold client property separate from the lawyer's own property); Colo. RPC 1.15A(c) (a lawyer must keep separate any property in which two or more persons claim an interest until there is a resolution of the claims); Colo. RPC 1.15D (a lawyer must maintain appropriate trust account records); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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:** DANIEL L. ENGLISH, #01731	Case Number: **23PDJ064**
OPINION IMPOSING SANCTIONS UNDER C.R.C.P. 242.31	

Daniel L. English ("Respondent") settled a medical malpractice matter for a client but failed to notify lienholders of the settlement. Then, exercising his ability to control the funds in the trust account, Respondent unilaterally disbursed money to his client and to himself, leaving no money for the lienholders. Respondent's misappropriation of funds and his failure to notify the lienholders of the settlement amounted to dishonest conduct. Respondent also comingled his personal funds with client funds in his trust and business accounts, and he failed to maintain financial records that lawyers are required to keep. Respondent's misconduct warrants disbarment.

I. PROCEDURAL HISTORY

Respondent was admitted to the practice of law in Colorado on April 26, 1972, under attorney registration number 01731. He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.[1]

On behalf of the Office of Attorney Regulation Counsel ("the People"), Erin R. Kristofco filed with Presiding Disciplinary Judge Bryon M. Large ("the PDJ") a four-claim amended complaint in this case on December 7, 2023, alleging that Respondent violated Colo. RPC 1.15A(a) (Claim I); Colo. RPC 1.15A(c) (Claim II); Colo. RPC 1.15D (Claim III); and Colo. RPC 8.4(c) (Claim IV).

On January 17, 2024, Respondent filed a handwritten answer to the People's complaint that included the following note: "I am providing Hospice care to my wife and do not have time to file an 'official' answer to the complaint. Attached is my handwritten answer. Please schedule a hearing trial [and] advise me of the date." The PDJ's administrator emailed the parties that day to

[1] C.R.C.P. 242.1(a).

set a scheduling conference. When Respondent did not timely respond, the PDJ's administrator notified the parties by email that the scheduling conference would take place via the Zoom videoconferencing platform on January 23, 2024, at 2:00 p.m. Respondent did not respond.

On January 23, 2024, the PDJ held the scheduling conference via Zoom. Respondent did not appear. The PDJ set this case for a two-day hearing to take place on August 26 and 27, 2024.[2]

On July 1, 2024, the People moved for an adverse inference in their favor as to all four claims. They argued that Respondent's failure to produce records he is required to keep per Colo. RPC 1.15D entitled them to the adverse inference under C.R.C.P. 242.30(b)(5)(B). When Respondent failed to respond, the PDJ deemed the motion confessed and granted the People's request for an adverse inference in their favor.

On July 25, 2024, the People requested permission under C.R.C.P. 43(i) to present the remote testimony of witnesses Mary Burkhalter and Bryan Davenport. On July 29, 2024, the PDJ held a prehearing conference with the parties. That day, the PDJ confirmed that Respondent did not object to the motion for remote testimony, and the PDJ granted the motion.

On August 21, 2024, Respondent moved to exclude the People's supplemental disclosures and testimony or, in the alternative, to continue the hearing. The next day, the People responded, opposing the motion. Ultimately, Respondent withdrew his motion to exclude at the hearing on August 26, 2024.

Respondent filed an emergency motion to continue the hearing on August 25, 2024, citing his spouse's emergency medical treatment the day before as good cause. On the morning of August 26, 2024, Respondent's legal assistant appeared on his behalf, explaining that Respondent could not attend the hearing. Because the evidence supporting Respondent's continuance request did not establish a genuine medical emergency, the PDJ directed Respondent to appear by 11:00 a.m. the same day to argue his motion. Respondent appeared at 11:15 a.m., withdrew his motion to continue, and represented that he wished to move forward with the hearing.

On August 26 and 27, 2024, a Hearing Board comprising the PDJ and lawyers Peter R. Bornstein and Diane Brown held a hearing under C.R.C.P. 242.30. Kristofco attended for the People, and Respondent appeared pro se. The Hearing Board received remote testimony via the Zoom videoconferencing platform from Mary Burkhalter and Bryan B. Davenport and in-person testimony from Donna Scherer and Respondent. The PDJ admitted the People's exhibits 1-28, 30, 32, 34, 36-37, and 39 as well as Respondent's exhibit F.[3]

[2] The PDJ notified the parties on July 15, 2024, that the hearing in this matter would take place in Courtroom 2A of the Lindsey-Flanigan Courthouse in Denver, Colorado 80204.

[3] The Court **SUPPRESSES** bank account numbers from exhibits 8 through 19, 21 through 23, and 39.

II. FINDINGS OF FACT

Since 1972, Respondent has practiced law exclusively in Colorado. Though he did domestic relations work for the first five years after his admission, he thereafter focused almost exclusively on representing plaintiffs in personal injury and medical malpractice matters.

D.N. Hires Respondent

On April 14, 2015, D.N. underwent hernia surgery at Clear Creek Surgery Center. During the procedure, she suffered a ripped trachea, resulting in anoxic brain injury. Shortly thereafter, D.N. hired lawyer Ken Lampton to file a Social Security disability insurance ("SSDI") claim.[4] Lampton put D.N. in touch with Respondent to pursue a malpractice claim against the anesthesiologist.

At the disciplinary hearing, Respondent explained the difficulty, from his perspective, of fighting personal injury cases. Even with a healthy plaintiff, he said, the success rate is around just 40 percent. But Respondent assessed D.N.'s malpractice claim as weaker—and thus recovery might be less likely—because D.N. had a history of other medical issues. Indeed, Respondent noted that D.N.'s case faced much steeper odds given her obesity, hypertension, chronic obstructive pulmonary disease, sleep apnea, and hypertension. As a result, Respondent agreed to take D.N.'s case but insisted on a larger than average contingency fee, given the difficulty he anticipated in litigating the case and the substantial sums he anticipated outlaying for experts and costs.

On May 13, 2015, D.N. and Respondent signed a fee agreement.[5] The agreement referred to Respondent's and Lampton's firms collectively as the "Firm." The agreement provided that the Firm was entitled to a 45 percent contingency fee for any amount recovered. The agreement also authorized Respondent to incur up to $25,000.00 in expenses in the prelitigation phase and up to $75,000.00 if Respondent filed a lawsuit. Among other things, the agreement mandated that Respondent provide D.N. with a monthly itemized statement and required Respondent to interplead disputed funds.

D.N. was insured through her spouse's employer, D&D Roofing. D&D Roofing had a self-funded medical insurance plan for its employees. Under that self-funded plan, D&D Roofing was responsible for covering costs of its employees' medical expenses up to $25,000.00. Coverage under HCC Life Insurance Company ("HCC Life"), D&D Roofing's stop-loss carrier, kicked in for expenses exceeding $25,000.00.

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[4] Though the Hearing Board was not shown any supporting documents, Respondent testified that Lampton secured a fully favorable SSDI determination in January 2018. Because neither Lampton's role nor the SSDI claim are at issue here, we accept Respondent's testimony as true.

[5] Ex. 1.

The Subrogation Claim

CNIC Health Solutions ("CNIC") is the claims administrator for D&D Roofing. CNIC paid out $113,294.97 for D.N.'s hernia surgery and for D.N.'s care resulting from the medical malpractice.[6] CNIC hired Phia Group ("Phia") as the subrogation representative for D&D Roofing and CNIC. As the subrogation representative, Phia was tasked with seeking reimbursement from the anesthesiologist for money D&D Roofing had paid out.[7] Because D.N. was pursuing a medical malpractice claim, both D&D Roofing and HCC Life had claims for reimbursement or subrogation from the anesthesiologist or his insurer. Thus, D&D Roofing sought to recover its $25,000.00 share, and HCC Life sought to recover the remainder. To do so, HCC Life and Phia asserted a lien against any award D.N. recovered.

Bryan B. Davenport, an Indiana lawyer specializing in recovery services for the self-insurance industry, represented HCC Life. On April 18, 2016, Davenport sent a letter notifying Lampton that he represented HCC Life, asserting a lien against any recovery D.N. obtained, and requesting a status update on D.N.'s efforts to seek recovery.[8] Mary Burkhalter, a senior claims recovery specialist for Phia, later contacted Lampton's office in September 2016. On September 19, 2016, she emailed Lampton to confirm Phia's subrogation representation of CNIC, provide a list of claims CNIC had paid totaling $113,294.97, and request a status update.[9] On October 10, 2016, Lampton's office informed Burkhalter via email that D.N. was still being treated and that Lampton's office would advise her when D.N.'s treatment had concluded.[10]

Due to the overlapping nature of their work, Burkhalter and Davenport were in continuing communication with each other during the course of the D.N. matter. Burkhalter explained that both Phia and HCC Life asserted a lien in the same amount, which was routine in similar cases. Under their arrangement, if one party made a successful recovery of the lien, that party would pass on the other company's share.

Burkhalter emailed Lampton's assistant to request a status update on D.N.'s matter on January 10, 2017. Three days later, Respondent responded via email.[11] In that email, Respondent stated that he and Lampton were co-counsel and acknowledged Phia's lien. Respondent also noted that he had not yet filed a lawsuit on D.N.'s behalf, as he was awaiting results from D.N.'s

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[6] Ex. 4.

[7] *See Hicks v. Londre*, 125 P.3d 452, 456 (Colo. 2005) ("Subrogation is an equitable principle that allows a party secondarily liable who has paid the debt of the party who is primarily liable to institute a recovery action in order to be made whole.") (cleaned up); *see also American Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 323 (Colo. 2009) (defining subrogation as "a form of restitution, an equitable principle that seeks to prevent a defendant from obtaining unjust enrichment").

[8] Ex. 5.

[9] Ex. 3; Ex. 6.

[10] Ex. 2 at 8.

[11] Ex. 7.

neuropsychological examination.[12] Burkhalter replied that she would follow up again in ninety days.

After Burkhalter again requested status updates in April and May 2017, Respondent called Burkhalter on May 15, 2017, to advise her that he recently filed a lawsuit for D.N.[13] On May 24, 2017, responding to an earlier email from Burkhalter, Respondent replied, again reporting that he filed suit on April 7, 2017, in Jefferson County.[14]

On September 18, 2017, Respondent called Burkhalter to alert her that the trial in D.N.'s case was set for August 13, 2018.[15] On February 28, 2018, Respondent again updated Burkhalter by phone; he told her that a recent mediation was unsuccessful and the case continued to be set for trial.[16]

At the disciplinary hearing, Respondent acknowledged that he was well aware of HCC Life's and Phia's liens, but he testified that he believed many of the enumerated expenses in the lien were not related to the malpractice. And for the expenses that remained, he was convinced that Lampton's success on D.N.'s SSDI matter would resolve those expenses. "I was positive Medicare would pay for the medical bills," he testified.

D.N. Settles

On May 25, 2018, D.N. signed a "Full and Final Release and Settlement Agreement," settling her claims against the anesthesiologist for $300,000.[17] In an attached handwritten settlement disbursement statement, Respondent listed the following:

1.	Settlement Proceeds	$300,000.00
2.	Attorney Fees (45% as per the CFA)[18]	135,000.00
3.	Litigation Expenses	100,000.00
4.	Net to Attorney (2 + 3)	235,000.00
5.	Net to Client	65,000.00
6.	Costs Prepaid by Client	6,000.00
7.	Adjusted Net to Client	71,000.00
8.	Professional Discount by Attorney	9,000.00
9.	Final Amount Paid to Client	80,000.00[19]

[12] Ex. 2 at 8.
[13] Ex. 2 at 9.
[14] Ex. 2 at 9.
[15] Ex. 2 at 9.
[16] Ex. 2 at 9.
[17] Ex. 20.
[18] CFA is shorthand for contingency fee agreement.
[19] Ex. 20 at 67.

Respondent attached a copy of the settlement agreement, the handwritten disbursement sheet, a typed version of the disbursement sheet,[20] and a bill of costs to a cover letter he sent to D.N. dated June 20, 2018. In that cover letter, Respondent explained that he issued a check for $80,000.00 to D.N.'s spouse. He also declared that D.N. had authorized him "to shred [her] entire file, including invoices and checks reflecting payments for the invoices relating to litigation expenses."[21] On the same date, Respondent issued a check for $80,000.00 from his trust account to D.N.'s spouse. That check cleared Respondent's trust account on June 21, 2018.[22]

Phia and HCC Life Continue to Pursue Subrogation

Burkhalter sought another update from Respondent on August 9, 2018, by facsimile. She did not receive a response. On September 10, 2018, Burkhalter contacted Lampton's office to request an update. Lampton's assistant advised Burkhalter that the parties were in negotiations, but the assistant expressed uncertainty about the negotiations' status.[23] Burkhalter followed up by sending a facsimile to Lampton's office the same day and again on September 17, 2018.

On October 11, 2018, Burkhalter sent facsimiles to Lampton's and Respondent's offices, requesting an update. The same day, a staff member in Lampton's office spoke with Burkhalter on the telephone and advised her to contact Respondent, as the case had settled.[24]

On October 17, 2018, Burkhalter attempted to call and fax Respondent, but her calls did not go through and the facsimile transmissions failed. She then emailed Respondent, copying Lampton and Davenport. In that email, she reminded Respondent that Phia was the subrogation representative in the case, made clear that Lampton's office had notified her of D.N.'s settlement, and requested a status update about when Phia could expect payment.[25] By October 23, 2018, Davenport had learned of Respondent's role in D.N.'s case. That day, he sent Respondent a certified letter in which he demanded HCC Life's recovery from D.N.'s settlement proceeds.[26]

Respondent sent a letter to Davenport on November 1, 2018, detailing D.N.'s settlement.[27] In that letter, Respondent explained that the case "went south," citing evidence issues, including

[20] The typed version is missing signatures and has incomplete information. Thus, we rely on the handwritten version, which Respondent and D.N. signed.
[21] Ex. 20 at 61.
[22] Ex. 21.
[23] Ex. 2 at 10.
[24] Ex. 2 at 10.
[25] Ex. 2 at 10.
[26] Ex. 24.
[27] Ex. 24.

D.N.'s medical history, that made proving the anesthesiologist's negligence difficult.[28] Respondent reported that the matter had therefore settled in mediation at Colorado's statutory non-economic cap of $300,000.00. He also explained that he had incurred $100,674.45 in litigation expenses, and he noted that he claimed attorney's fees of 40 percent based on his contingency fee with D.N.[29]

In response to another November 2018 letter from Davenport, Respondent drafted a reply letter on December 4, 2018.[30] Respondent explained that Lampton had minimally participated in the case; that Respondent seemingly overlooked, misfiled, or had forgotten about the lien from HCC Life; and that D.N.'s case settled for an amount much lower than he had expected.[31] Respondent also stated that because he accounted for the time he spent on D.N.'s matter, he was able to calculate his attorney's fees as approximately $87.00 per hour he spent on the case. Finally, Respondent offered to settle with HCC Life, and he invited Davenport to extend a settlement offer.

Later, in a letter dated December 18, 2018, Respondent advised Davenport that about three weeks earlier he shredded D.N.'s file with her authorization.[32] For the first time in that letter, Respondent asserted that Davenport's lien calculation erroneously contained items for D.N.'s abdominal hernia surgery itself, including the anesthesia treatment at issue in the malpractice case.[33] Those expenses would have been incurred even if there had been no medical malpractice, Respondent argued. He reiterated his wish to settle but emphasized the need to "separate the wheat from the chaff" by determining which expenses related to the medical malpractice claim.[34]

Soon thereafter, Respondent and Davenport reached an agreement to settle. On January 31, 2019, Davenport emailed Respondent, confirming an earlier telephone conversation in which he and Respondent agreed to settle HCC Life's recovery demands for $22,500.00, with $5,000.00 due on March 1, 2019, and the remainder due no later than December 31, 2019.[35]

Respondent did not make his agreed-upon payments, however. Having received no money from Respondent by May 2019, Davenport emailed Respondent on May 10, 2019, demanding the overdue $5,000.00.[36] But Respondent did not make a payment.

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[28] Ex. 24. At the disciplinary hearing, Respondent returned to the same theme, recounting that many of the discovery disputes that emerged in the case centered around which conditions D.N. suffered due to the medical malpractice and which conditions were attributable to her poor health.
[29] Ex. 24.
[30] Ex. 26.
[31] Ex. 26.
[32] Ex. 27.
[33] Ex. 27.
[34] Ex. 27.
[35] Ex. 28.
[36] Ex. 31.

In 2020, HCC Life sued Respondent and his firm in Jefferson County court for the $22,500.00 principal. On July 31, 2020, that court entered judgment for $23,655.13, which included the principal, $951.78 in accrued interest from January 1, 2020, and litigation costs of $203.35.[37]

Only on February 24, 2021, did Respondent make his first payment toward the judgment by sending $250.00 to HCC Life. He continued to make occasional payments, generally for $250.00, until June 13, 2022.[38] By that point, Respondent had paid just $4,000.00. According to Davenport, on July 1, 2022, Respondent emailed him, offering to make one final lump sum payment of $5,000.00 the following month. Davenport acquiesced, and Respondent made the payment.

Davenport testified that HCC Life spent more money receiving and recording Respondent's small payments than they were worth. Davenport and HCC Life had spent scores of hours, including forty to fifty hours of uncompensated lawyer time, attempting to communicate with Respondent to pursue the money he owed. From Davenport's perspective, Respondent's offer of one final $5,000.00 lump sum payment was palatable, because it brought an end to the whole affair. In total, HCC Life received $9,000.00 from Respondent after asserting a $113,294.97 lien in the D.N. matter. Respondent forwarded the majority of that $9,000.00 more than four years after he collected the settlement proceeds in D.N.'s matter.

Though Respondent told Davenport that he kept track of his hours on the D.N. matter, he was unable to produce any record of his timekeeping. Respondent suggested that his time records might have been shredded. He explained that his practice is to shred client files whenever possible to prevent misuse of sensitive medical records. He also reported keeping a black binder notebook for each of his cases containing pertinent financial records that he is required to keep. He expected that all invoices, cancelled checks, and other financial records for D.N.'s case were in such a binder. He said he realized that the black binder notebook for the D.N. matter was missing in October 2018; he speculated that his staff may have shredded it in error. Further, Respondent could not produce a general ledger, a client ledger, or check copies related to D.N.'s matter.

Respondent's Bookkeeping and Trust Account Management

On February 1, 2018, Respondent's balance in his COLTAF account was $56,364.68.[39] On February 2, 2018, Respondent deposited $325,000.00 to his COLTAF account, presumably from a settlement in an matter unrelated to D.N., resulting in a balance of $371,364.68.[40] On February 5, 2018, Respondent wrote a check from his COLTAF account for $450.00 to Dr. Bennett

[37] Ex. 34.

[38] During that time period, Respondent also made two payments for $500.00 and one payment for $1,000.00. *See* Ex. F.

[39] Ex. 36 at 1.

[40] Ex. 36 at 1.

Machom, marking D.N.'s matter in the memo line.[41] On March 13, 2018, Respondent wrote a check from his COLTAF account for $4,500.00 to Atrium, also listing D.N.'s matter in the memo line.[42] Respondent reported that he cut these checks to cover expenses he advanced in D.N.'s matter. On April 16, 2018, Respondent wrote a check for $4,224.00 to Lampton.[43] According to Respondent, he did not pay these expenses by dipping into client funds he held in his COLTAF account; instead, he said, the payments were made from his own funds—his attorney's fees from a client settlement in January 2018—that he kept in his COLTAF account. He acknowledged, however, that at least as to the Atrium expenses he should have transferred the money to his business account before making the payment.

D.N.'s spouse gave Respondent a check for $6,000.00 for expenses on April 11, 2018, which Respondent deposited into his COLTAF account on April 12, 2018.[44] Four days later, Respondent wrote a check to "Cash" for $308.00, which Respondent says he used to pay his paralegal, who preferred to be paid in cash.[45] On April 25, 2018, Respondent obtained a cashier's check, presumably using COLTAF funds, to pay Dr. Stephen Johnson for expenses related to D.N.'s matter.[46] But Respondent redeposited the funds to his COLTAF account on May 9, 2018; the cashier's check bore the notation that it had not been used for its intended purposes. Respondent denied that he had used his COLTAF account in lieu of his business account, reasoning that that all of the money he used belonged to him, either because he earned it as attorney's fees in other matters or because he received it as a cost deposit in the D.N. matter.

By June 1, 2018, Respondent's COLTAF balance was $4.81.[47] On June 4, 2018, the entire account balance was withdrawn in a transaction labeled "Garnishment/Tax Levy," leaving a zero balance.[48] Respondent denied that he was aware of the garnishment, but he also denied that any client funds were garnished.

On June 14, 2018, Respondent deposited D.N.'s settlement proceeds of $300,000.00, raising his account balance to $300,000.07.[49] The following day, Respondent wrote a $25,000.00 check from his COLTAF account to his law firm.[50] That check posted on June 15, 2018, leaving a balance of $275,000.07 at the end of that day.

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[41] Ex. 8.

[42] Ex. 9. Respondent testified that Atrium is an employment agency that finds medical experts for plaintiffs' lawyers.

[43] Ex. 12.

[44] Ex. 36 at 5; Ex. 10.

[45] Ex. 13.

[46] Ex. 17.

[47] Ex. 36 at 9.

[48] Ex. 36 at 9.

[49] Ex. 18; Ex. 36 at 9. Other unrelated transactions occurred in Respondent's account between June 4, 2018, and June 14, 2018.

[50] Ex. 19; Ex. 36 at 9.

On June 20, 2018, Respondent initiated four electronic transfers from his COLTAF account to his business account totaling $225,000.00.[51] Those transfers left a balance of $50,000.07 in his COLTAF account.

On June 21, 2018, Respondent returned $100,000.00 to his COLTAF account, electronically transferring those funds from his business account.[52] The same day, Respondent's $80,000.00 check to D.N.'s spouse, dated June 20, 2018, cleared Respondent's COLTAF account. His end-of-the-day COLTAF balance was $70,000.00.

Finally, on June 25, 2018, in two transactions, Respondent transferred a total of $30,000.00 from his COLTAF account to his business account, leaving a COLTAF balance of $20,000.07.[53] By July 18, 2018, his COLTAF balance dwindled to $294.57.[54] And by the end of August 2018, the balance in his COLTAF account was just $1.07.[55]

At the disciplinary hearing, conceded that his bookkeeping practices were "sloppy." When pressed as to why he kept earned fees in his COLTAF account, Respondent reported that he simply did not "bother" to transfer his own money from his COLTAF account into his operating account. He conceded that he ought to have done so. Respondent denied keeping his personal funds in his COLTAF account to avoid creditors or garnishments.

III. LEGAL ANALYSIS

Colo. RPC 1.15A(a) (Claim I)

Colo. RPC 1.15A(a) requires a lawyer to segregate property belonging to clients or third persons from the lawyer's own property when the lawyer holds that property in connection with a representation. The People argue, in effect, that Respondent violated this rule in two ways: first, by commingling his earned funds with his clients' settlement funds in his COLTAF account, and second, by commingling earned funds and client property in his business account.

The Hearing Board first considers the People's assertion that Respondent commingled his own funds with client property in his COLTAF account. Though the People do not clearly allege in their complaint how Respondent comingled his funds with client property in his COLTAF account, Respondent acknowledged that he kept his own earned funds in his COLTAF account and paid business and personal expenses from that account. When we consider that testimony in

[51] Ex. 36 at 9.
[52] Ex. 36 at 9.
[53] Ex. 36 at 9.
[54] Ex. 36 at 11.
[55] Ex. 36 at 13.

conjunction with the adverse inference we must draw against Respondent, we conclude that Respondent violated this rule by comingling funds in his COLTAF account.[56]

We turn next to the People's allegation that Respondent commingled funds in his business account. Respondent deposited D.N.'s settlement proceeds in his COLTAF account on June 14, 2018. The next day, he transferred $25,000.00 to his business account. Then, on June 20, 2018, Respondent transferred another $125,000.00 from his COLTAF account to his business account, leaving only $50,000.00 in his COLTAF account that day.

Respondent counters that by June 20, 2018, he was entitled to distribute legal fees and recover his costs, that D.N. was entitled to $80,000.00, and that there were no valid liens. Even were we to accept this argument, which we do not adopt, as explained further below, Respondent's COLTAF balance dropped below the $80,000.00 that he should have held for D.N. As a result, Respondent comingled at least $30,000.00 of D.N.'s property in his business account. We thus find that Respondent violated Colo. RPC 1.15A(a) by comingling his business account funds with, at a minimum, $30,000.00 of D.N.'s funds.

Colo. RPC 1.15A(c) (Claim II)

Colo. RPC 1.15A(c) requires lawyers to keep separate any funds in their possession "in which two or more persons (one of whom may be the lawyer) claim interests" until the claims are resolved. This rule is premised on the principle that lawyers "should hold property of others with the care required of a professional fiduciary."[57] The People argue that Respondent violated this rule by disbursing D.N.'s settlement funds even though he knew that HCC Life and Phia had asserted a $113,294.97 lien on D.N.'s settlement proceeds. Respondent did so, say the People, by moving disputed funds to his business account on June 20, 2018, distributing the client's settlement funds to the client without notifying or paying HCC Life or Phia, and spending the funds he distributed to himself.

We begin our examination by briefly tracing the timeline of Respondent's interaction with HCC Life and Phia as to their lien. Though we are uncertain exactly when Respondent first learned of the lien, the evidence is clear that by January 13, 2017, when Respondent emailed Burkhalter in response to her request for a status update, Respondent knew of the lien. Respondent also

[56] Though the People do not bring a separate charge based on this conduct, we note that Respondent acknowledged withdrawing money using a check drawn from his COLTAF account payable to "cash," which is prohibited under Colo. RPC 1.15C(a).

[57] Colo. RPC 1.15A(c) cmt. 8; *see In re Storey*, 2022 CO 48, ¶¶ 62-63 (affirming a hearing board's conclusion that a lawyer failed to safeguard funds with the care required of a professional fiduciary). *But see Accident and Injury Medical Specialists v. Mintz*, 2012 CO 50, ¶¶ 30-33 (distinguishing a lawyer's ethical duties to hold property of others under the care required of a professional fiduciary but rejecting premise that a lawyer is an actual fiduciary giving rise to a cause of action to third parties in tort).

advised Burkhalter by email on May 24, 2017, that he had filed suit in D.N.'s matter, suggesting his implied understanding that Phia claimed some interest in proceeds from the case. His knowledge of the lien is further evidenced in his email to Burkhalter on September 18, 2017, when he apprised her that the case had been set for trial, as well as in his telephone update on February 28, 2018. Given this context, we are clearly convinced that Respondent was fully aware of Phia's and HCC Life's lien when he received the $300,000.00 settlement in D.N.'s matter in June 2018.

At the time Respondent received the settlement funds, he intended to claim 45 percent of those proceeds, or $135,000.00, plus $100,000.00 in litigation expenses. Further, he was aware that HCC Life and Phia sought $113,294.97 in subrogation. Thus, when Respondent received the $300,000.00 in proceeds, claims on that settlement totaled $348,295.97, far exceeding the settlement corpus. Respondent also knew that D.N. hoped to collect some amount herself.

Even if we were to credit Respondent's testimony that he believed some portion of HCC Life's and Phia's lien fell outside the scope of the medical malpractice claim, and even if we were to accept his belief that Medicare would eventually pay the outstanding balances, we cannot find his conduct was consistent with Colo. RPC 1.15A(c).[58] On June 20, 2018, Respondent elected to distribute $80,000.00 to D.N. and the remaining $220,000.00 to himself. Before doing so, Respondent did not notify Phia or HCC Life that he was in possession of the settlement proceeds, and he never sought their agreement to release any portion of the lien. Instead, he unilaterally decided how to distribute these disputed funds, which runs directly contrary to the rule's directive that lawyers must segregate contested funds "until the dispute is resolved."[59] That a lawyer has the ability to control funds in the trust account does not bestow upon the lawyer the authority to unilaterally choose how to disburse disputed funds. Because Respondent was required to hold the settlement funds with the care required of a professional fiduciary, because HCC Life's and Phia's liens were unresolved, and because Respondent never verified whether Medicare had satisfied or would satisfy those liens, Respondent's distribution of the disputed proceeds contravened Colo. RPC 1.15A(c).

Colo. RPC 1.15D (Claim III)

Lawyers are required to maintain certain financial records related to the lawyer's representation of clients for seven years under Colo. RPC 1.15D. Those records include transaction records recording the name and address of each person for whom the funds are held and the amount held for the person, the date and amount of each disbursement, and the name and address of each person to whom the disbursement is made and the amount disbursed to the person. The rule also requires that lawyers maintain records that track all deposits in and

[58] While we understand Respondent's argument that some of the items covered in the lien may not have been appropriately included, Respondent concedes that other charges were properly asserted.

[59] Colo. RPC 1.15A(c).

withdrawals from any bank accounts maintained in connection with the lawyer's legal services, including the date, payor, and description of each deposit and the date, payee, and purpose of each disbursement. In addition, lawyers are expected to maintain copies of written communications setting forth the basis or rate for fees charged and copies of writings describing terms of engagement for legal services.

The People argue that Respondent violated this rule by failing to keep appropriate records of D.N.'s settlement funds and his distribution thereof, by failing to keep a financial record of HCC Life's and Phia's lien, by failing to keep copies of written communications setting forth the basis or rate of fees he charged in D.N.'s matter, and by failing to maintain financial records related to D.N.'s matter for seven years.

Per the PDJ's pretrial order, we apply an adverse inference here under C.R.C.P. 242.30(b)(5)(B). Respondent did not produce the required records related to his financial management of his law firm and D.N.'s matter. Just as compelling, Respondent conceded that he could not find the detailed financial records for D.N.'s matter that he said he kept in a black binder notebook. Respondent thus transgressed his duties under Colo. RPC 1.15D.

Colo. RPC 8.4(c) (Claim IV)

Colo. RPC 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The People appear to argue that Respondent violated this rule in three ways. As an initial matter, they say, Respondent engaged in dishonesty by omission when he failed to disclose to HCC Life and Phia that D.N.'s case settled. Next—and most pivotally—the People allege that he effectively converted third-party funds when he disbursed a substantial portion of the settlement funds to himself, even though he was aware of HCC Life's and Phia's lien. Finally, the People argue that Respondent violated this rule by entering into a settlement agreement to pay HCC Life and Phia $22,500.00 yet failing to tender that agreed-upon amount.

We begin by addressing the People's first assertion. We find that Respondent acted dishonestly by failing to notify Phia and HCC Life that D.N.'s case had settled. Respondent was aware of the lien no later than January 2017. Burkhalter's persistent request for status updates about the case underscored Phia's and HCC Life's ongoing interest in the settlement. Thus, when the case settled but Respondent did not, at a minimum, alert Burkhalter to that fact, Respondent failed "to disclose information that should be disclosed," thereby violating Colo. RPC 8.4(c).[60] We explicitly reject Respondent's arguments that he believed a portion of the lien did not relate to the fallout from the malpractice and that Medicare would pay the lien. But Respondent conceded that at least some portion of the lien was valid. And we were never shown convincing evidence that Respondent told Phia or HCC Life that Medicare would cover the lien. Respondent's omission was an act of dishonesty that flouted his professional responsibilities.

[60] *Storey*, ¶ 64.

We next turn to the People's second and primary assertion. They argue that Respondent distributed the settlement funds, including more than $100,000.00 to himself, knowing that Phia and HCC Life had asserted a lien as to at least some portion of the funds. He also knew that neither Phia nor HCC Life was aware of his distribution. Once he moved the disputed funds to his business account, Respondent used those disputed funds to pay personal bills and other expenses. In doing so, he misappropriated funds that he ought to have held in trust, putting those funds to his own use, and he dishonestly deprived Phia and HCC Life of the opportunity to negotiate the proper distribution of the settlement proceeds. In this way, Respondent violated Colo. RPC 8.4(c).

The People's final contention under Colo. RPC 8.4(c) is that Respondent acted dishonestly by failing to abide by his $22,500.00 settlement with HCC Life and Phia. To be clear, we have higher expectations of lawyers when it comes to settling their personal disputes, and we view Respondent's behavior as dishonorable. But because we see the settlement as a lawyer's transaction to resolve a lawyer's personal liability, we do not find a rule violation on this basis. From our perspective, Respondent failed to live up to the terms of a settlement agreement he entered into with a plaintiff who brought a lawsuit against him. Consequently, we see no bad faith in Respondent's negotiated agreement to settle the case against him or dishonesty in his failure to pay. Further, we are wary of mobilizing the disciplinary system to resolve business disputes between parties.[61] Indeed, Respondent and HCC Life eventually disposed of the dispute when Respondent finally paid the agreed-upon settlement amount of $5,000.00.

IV. SANCTIONS

In determining sanctions, we are guided by the framework established by the American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[62] and Colorado Supreme Court case law.[63] Following the ABA *Standards'* framework, we 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 we may then adjust, in our discretion, based on aggravating and mitigating factors.[64]

ABA Standard 3.0 – Duty, Mental State, and Injury

Duty: Respondent violated his duty to the legal system, including his duty to act honestly. Respondent also violated his duty as a professional to maintain necessary financial records relating to his representation of clients. Finally, Respondent violated his duty to clients to preserve their property by segregating client property from his own.

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[61] *See In re Betterton-Fike*, 2020 CO 19, ¶ 35.
[62] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2d ed. 2019).
[63] *See In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).
[64] *In re Attorney F.*, 2012 CO 57, ¶ 15 (Colo. 2012).

Mental State: As to all four claims, we find that Respondent acted knowingly.

Injury: Respondent harmed the legal profession and the reputation of lawyers through his dishonest conduct. Further, Respondent caused HCC Life and Phia actual financial injury, as they recovered less than 10 percent of the value of their lien in the D.N. matter. Finally, Respondent caused his clients potential injury by exposing their property to creditor garnishments by comingling client funds with his own money.[65]

ABA Standards 4.0-8.0 – Presumptive Sanction

We are most concerned by Respondent's misappropriation of funds. Under ABA *Standard* 5.11(b), disbarment is generally appropriate when a lawyer engages in intentional noncriminal conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law. Although no *Standard* presents a perfect match in this instance, *Standard* 5.11(b) is the best fit because we find that Respondent's dishonesty seriously adversely reflects on his fitness to practice law.[66]

As to Respondent's comingling, suspension is appropriate under ABA *Standard* 4.12. That *Standard* applies when a lawyer knows or should know that they are dealing improperly with client property, thereby injuring or potentially injuring a client.

Because the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct,"[67] we begin our analysis with disbarment as the presumptive sanction.[68]

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[65] That Respondent's COLTAF account was garnished demonstrates the serious harm that can result from comingling. *See Shidler*, 901 P.2d 477, 479 (Colo. 1995) ("[c]ommingling is dangerous to the client and a serious disciplinary offense because it can subject client funds to the claims of the lawyer's creditors").

[66] The People urge us to apply ABA *Standard* 4.11, which calls for disbarment when a lawyer knowingly converts client property and causes injury or potential injury to a client, as well as ABA *Standard* 4.12, which calls for suspension when a lawyer knows or should know that the lawyer is dealing improperly with client property and causes injury or potential injury to a client. Because the ABA *Standard* 4.0 series addresses violations of duties owed to clients, however, neither *Standard* seems applicable. Nonetheless, the concepts advanced in ABA *Standard* 4.11 give us comfort that beginning with disbarment as the baseline in our sanctions analysis is appropriate.

[67] ABA *Annotated Standards for Imposing Lawyer Sanctions* at xx.

[68] We reject other standards under ABA *Standard* 5.1. For example, ABA *Standard* 5.12 calls for suspension when a lawyer knowingly engages in *criminal* conduct that does not involve elements of dishonesty. This matter is not a criminal matter, and Respondent's dishonesty is varied, recurring, and striking. And ABA *Standard* 5.13 calls for reprimand when a lawyer knowingly

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.[69] As explained below, we apply five factors in aggravation. No factors in mitigation apply.

Aggravating Factors

Prior Disciplinary Offenses – 9.22(a): Respondent has been disciplined before. In case number 18PDJ022, he was censured for failing to comply with a contingency fee requirement in a medical malpractice case and for failing to segregate disputed funds when he did not believe that an asserted lien was valid. His misconduct there violated contingency fee rules as well as Colo. 1.15A(c). We apply this factor because we believe that Respondent has not learned necessary lessons from this prior misconduct, which bears marked similarities to the conduct at issue here.

Respondent was privately admonished in 1993 for improper fee sharing with another lawyer. Because that misconduct occurred more than thirty years ago, we decline to give the private admonition aggravating weight.

Dishonest or Selfish Motive – 9.22(b): Though the People urge us to apply this factor, we decline to do so; because Respondent's acts of dishonesty form the basis for the Colo. RPC 8.4(c) rule violation, to apply this factor would be tantamount to "double counting" that same misconduct.[70]

Pattern of Misconduct – 9.22(c): Respondent engaged in a sustained pattern of mishandling his COLTAF account, so we apply this factor. We also apply this factor in recognition that, roughly contemporaneous with his misconduct in D.N.'s case, Respondent engaged in similar misconduct as memorialized in disciplinary case number 21PDJ030.[71] In that matter, Respondent

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engages in any other conduct that involves dishonesty that adversely reflects on a lawyer's fitness to practice law. We find Respondent's misconduct is most analogous to ABA *Standard* 5.11, as ABA *Standards* 5.12 and 5.13 strike us as significantly less apt.

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

[70] *Cf. In re Gallagher*, 26 P.3d 131, 139 (Or. 2001) (declining to apply an aggravating factor with the same factual basis as an underlying rule violation).

[71] *See People v. Honaker*, 863 P.2d 337, 340 (Colo. 1993) (considering misconduct that occurred contemporaneously in a separate discipline case as a pattern of misconduct rather than as prior discipline); *People v. Williams*, 845 P.2d 1150, 1152 n.3 (Colo. 1993) ("Because most of the conduct forming the basis of the present disciplinary proceeding occurred before the imposition of the six-month suspension on the respondent in [the respondent's earlier disciplinary case], we elect to consider that suspension as more appropriately establishing a part of the pattern of misconduct under ABA Standards 9.22(c) rather than as a prior disciplinary offense under 9.22(a).").

was suspended for eighteen months for conduct involving failure to maintain required financial records and comingling personal and client funds. Further, Respondent failed to segregate settlement funds and disburse funds to a medical provider lienholder. Respondent also failed to maintain required financial records and provided unauthorized financial assistance to his client. Respondent's misconduct in that matter violated Colo. RPC 1.8(a), Colo. RPC 1.15A(a); Colo. RPC 1.15A(c); and Colo. RPC 1.15D.

Multiple Offenses – 9.22(d): Respondent violated four Colorado Rules of Professional Conduct involving failure to keep required financial records, mishandling client funds, and dishonesty. Accordingly, we apply this factor.

Refusal to Acknowledge Wrongful Nature of Conduct – 9.22(g): Although Respondent acknowledged that he owed the lienholders a duty to account for their liens when disbursing settlement proceeds, he insisted that HCC Life's and Phia's lien was premised on inapplicable medical services. Further, when we queried Respondent about his unilateral decision to distribute funds to himself—even though the claims on the settlement exceeded the total settlement amount—Respondent insisted he was entitled to the sums he arrogated to himself. When we consider these answers in the context of his earlier disciplinary cases, we have no choice but to apply this factor in aggravation.

Substantial Experience in the Practice of Law – 9.22(i): Respondent was admitted as a Colorado lawyer in 1972, and he has practiced in this field for nearly the entirety of his career. We therefore apply this factor.

Analysis Under ABA Standards and Case Law

The Colorado Supreme Court directs hearing boards to exercise discretion in imposing a sanction because "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[72] As such, we determine 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* give us 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.[73] Thus, while prior decisions regarding the imposition of sanctions for lawyer misconduct can be persuasive, we are free to distinguish those cases and deviate from the presumptive sanction when appropriate.

Under that theoretical framework, we begin with a presumed sanction of disbarment under ABA *Standard* 5.11(b). We apply five factors in aggravation, with no counterbalancing factors in mitigation. Because disbarment is the ultimate sanction under Colorado's lawyer disciplinary

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

regime, and because no mitigating equities exist to offset the factors in aggravation, we find disbarment remains the appropriate sanction under the ABA *Standards* as a whole.[74]

We also look to prior analogous cases with a goal of achieving consistency in lawyer discipline. In *People v. Kleinsmith*, the Colorado Supreme Court affirmed a hearing board's opinion disbarring a lawyer for misappropriating money entrusted to the lawyer to pay a client's expenses.[75] The *Kleinsmith* court held that "[k]nowing conversion or misappropriation occurs when a lawyer takes money that has been entrusted to him or her by a client or third party, knowing that it is the client or third party's money and that the client or third party has not authorized the taking."[76] And under canonical disciplinary law in Colorado, a lawyer who engages in knowing conversion is "almost invariably" disbarred.[77] This is so because "[m]isuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers."[78]

V. CONCLUSION

Respondent assumed total control and discretion in distributing funds from a personal injury settlement. Rather than waiting to make the distribution until the claims on the limited and disputed funds were resolved, Respondent allocated money to himself and to his client. When he did so, the medical lienholders were left without reimbursement or recourse. Further, Respondent failed to maintain appropriate records that all lawyers are required to maintain, and he mismanaged his COLTAF account, comingling his personal funds with funds of his clients. Respondent thus harmed the legal profession and the reputation of lawyers. He also financially injured the lienholders. Respondent has twice been disciplined for similar conduct, but that discipline has failed to meaningfully alter his understanding of his duties in managing client funds. We find that disbarment is the only adequate remedy.

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[74] Even if we began the sanction analysis with suspension as a baseline, Respondent's striking dishonesty and the applicable aggravating factors at work here would lead us to find that disbarment is appropriate under the ABA *Standards* framework.

[75] 2017 CO 101, ¶ 14.

[76] *Id.*

[77] *People v. Varallo*, 913 P.2d 1, 11 (Colo. 1996); *see also People v. Buckley*, 538 P.3d 763 (Colo. O.P.D.J. 2023); *People v. Cornejo*, 535 P.3d 144, 169 (Colo. O.P.D.J. 2023); *People v. Heaphy*, 470 P.3d 728, 743-44 (Colo. O.P.D.J. 2015); *People v. Katz*, 58 P.3d 1176, 1193-95 (Colo. O.P.D.J. 2002).

[78] *People v. Buckles*, 673 P.2d 1008, 1012 (Colo. 1984).

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **DANIEL L. ENGLISH**, attorney registration number **01731**, is **DISBARRED.** The disbarment will take effect on issuance of an "Order and Notice of Disbarment."[79]

2. 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.

3. 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.

4. The parties **MUST** file any posthearing motions **no later than Tuesday, November 5, 2024**. Any response thereto **MUST** be filed within seven days thereafter.

5. 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.

6. Respondent **MUST** pay the reasonable costs of this proceeding. The People **MUST** submit a statement of costs **no later than Tuesday, November 5, 2024**. Any response challenging the reasonableness of those costs **MUST** be filed within seven days after.

DATED THIS 22nd DAY OF OCTOBER, 2024.

BRYON M. LARGE
PRESIDING DISCIPLINARY JUDGE

PETER R. BORNSTEIN
HEARING BOARD MEMBER

DIANE BROWN
HEARING BOARD MEMBER

[79] 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.