People v. Bigley. 10PDJ100. May 17, 2011. Attorney Regulation. Following a sanctions hearing, the Presiding Disciplinary Judge suspended Michael F. Bigley (Attorney Registration Number 39294) for ninety days, effective June 17, 2011. Bigley neglected his representation of a client in a bankruptcy matter, failed to communicate with the client, and failed to inform the client of the imminent suspension of his law license. His misconduct constitutes grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.3, 1.4(a), and 3.4(c).

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** MICHAEL F. BIGLEY	Case Number: **10PDJ100**

DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(c)

On March 18, 2011, the Presiding Disciplinary Judge ("the Court") held a sanctions hearing pursuant to C.R.C.P. 251.15(b). Adam J. Espinosa appeared on behalf of the Office of Attorney Regulation Counsel ("the People"). Michael F. Bigley ("Respondent") did not appear, nor did counsel appear on his behalf. The Court now issues the following "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(c)."

I. SUMMARY

Respondent violated Colo. RPC 1.3, 1.4(a), and 3.4(c) by neglecting his representation of a client in a bankruptcy matter, failing to communicate with the client, and failing to inform the client of the imminent suspension of his law license. After considering the nature of Respondent's misconduct and its consequences, the aggravating and mitigating factors, and Respondent's failure to participate in these proceedings, the Court finds the appropriate sanction for Respondent's misconduct is suspension of his law license for ninety days.

II. PROCEDURAL HISTORY

The People filed a complaint in this matter on September 21, 2010, setting forth three claims for relief based on violations of Colo. RPC 1.3, 1.4(a), and 3.4(c). The People mailed the complaint on that date by certified and regular mail to Respondent's registered address of 4950 S. Yosemite St., F2-146, Greenwood Village, CO 80111. Respondent refused receipt of the complaint. The People filed a proof of attempted service on September 29, 2010. Respondent did not respond to the complaint.

On October 29, 2010, the People filed a motion for default, to which Respondent did not respond. The Court granted the People's motion and entered default on all claims in the People's complaint on November 29, 2010. Upon the entry of default, the Court deems the well-pled facts set forth in the complaint admitted and all rule violations established by clear and convincing evidence.[1]

III. ESTABLISHED FACTS AND RULE VIOLATIONS

The Court hereby adopts and incorporates by reference the factual background of this case fully detailed in the admitted complaint.[2] Respondent took the oath of admission and gained admission to the bar of the Colorado Supreme Court on October 22, 2007. He is registered upon the official records under attorney registration number 39294 and is therefore subject to the jurisdiction of the Court pursuant to C.R.C.P. 251.1.

Representation of Stephen Moersen

On June 9, 2009, Stephen Moersen ("Moersen") met with Respondent at the law firm of Morse and Associates, LLC ("Morse"), where Respondent was working as an associate. Moersen told Respondent that he wanted to file a bankruptcy petition and that he needed legal advice about a pending real estate and property lien related to the bankruptcy. Moersen explained that time was of the essence due to lien-related issues, so he requested that Respondent complete the bankruptcy filing on an expedited basis. At the sanctions hearing, Moersen testified that he offered to pay Respondent a premium in return for an expedited filing, but Respondent told him a premium was unnecessary.

The same day, Moersen signed a fee agreement and paid $1,599.00 to cover the agreed-upon costs and fees. Three days later, Moersen delivered the requested documents pertaining to his case to the law firm.

Moersen emailed and called Respondent on June 16 and 17, 2009, asking about the status of his case and providing a reminder to expedite the filing. Moersen also asked Respondent to contact his title agent regarding a possible lien on his home. Respondent did not return Moersen's calls and emails, nor did he return a phone call from Moersen's title agent.

On July 6, 2009, a managing attorney at Morse, Michael Baetz ("Baetz"), sent Moersen a letter telling him that a first draft of the bankruptcy petition was complete but more information was needed. Moersen responded in writing

[1] *See People v. Richards*, 748 P.2d 341, 346 (Colo. 1987); C.R.C.P. 251.15(b).
[2] *See* the People's complaint for further detailed findings of fact.

to Baetz and Respondent on July 17, 2009, enclosing the requested documents and asking about his pending bankruptcy. Neither Baetz nor Respondent responded to Moersen.

On August 19, 2009, the Court approved a conditional admission of misconduct in disciplinary case number 08PDJ102 in connection with a domestic violence charge against Respondent. The Court's order approving the conditional admission suspended Respondent's law license for ninety days, effective September 21, 2009, and required Respondent to apply for reinstatement. On September 8, 2009, Respondent and Moersen spoke about Moersen's case. When Moersen asked when his petition would be filed, Respondent merely responded that he was "behind." Respondent did not tell Moersen his license would be suspended and he would be unable to represent him after September 21, 2009. Indeed, Respondent never advised Moersen of his suspension.

Moersen sent Respondent a letter on September 14, 2009, in response to a request Respondent had made for additional information, enclosing the requested documents. Moersen asked Respondent to contact him and asked when the petition was likely to be filed. Neither Respondent nor anyone else from his firm responded.

As a result of Respondent's impending suspension, Morse terminated Respondent's employment on September 18, 2009. Respondent did not notify Moersen that he had lost his position at the firm and that he could no longer represent him.[3]

Moersen called to check on the status of his case on September 28, 2009. His call went unreturned. Two days later, Moersen terminated Respondent's representation by letter. Moersen explained in the letter that Respondent had failed to file his bankruptcy petition for four months, despite his request to expedite the case. Moersen asked Morse to return his file and his money. Baetz responded on October 2, 2009, providing a detailed accounting and a refund of $814.00 in unearned fees. Moersen did not receive any work produced on his behalf, nor did he receive the balance of the $1,599.00 he had paid the firm in June 2009. Moersen hired another attorney to complete his bankruptcy matter.

Through his mishandling of Moersen's matter, Respondent violated Colo. RPC 1.3, 1.4(a), and 3.4(c).

Colo. RPC 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client. Respondent violated Colo. RPC 1.3 by inadequately communicating with Moersen regarding his bankruptcy matter,

[3] The People have not alleged that Respondent practiced law after the suspension of his license.

neglecting to file the bankruptcy petition, and failing to advise Moersen that his law license would be suspended.

Colo. RPC 1.4(a) requires a lawyer to reasonably communicate with a client, including by keeping the client reasonably informed, promptly complying with reasonable requests for information, and consulting with the client about relevant limitations on the lawyer's conduct. Respondent neglected his duties under Colo. RPC 1.4(a) by 1) failing to timely respond to Moersen's letters, emails, and calls; 2) failing to keep Moersen reasonably informed about the status of his case; 3) failing to maintain minimum communications with Moersen; 4) failing to promptly reply to Moersen's reasonable requests for information about his matter; and 5) failing to inform Moersen of his suspension.

Colo. RPC 3.4(c) provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. On August 19, 2009, the Court ordered Respondent to comply with C.R.C.P. 251.28 in connection with his suspension. Respondent received a copy of this order. He knowingly disobeyed the order and C.R.C.P. 251.28 by failing to notify Moersen of his suspension, failing to advise Moersen of his options for retaining another attorney, and failing to obtain Moersen's consent to working on the bankruptcy matter while Respondent wound down his practice.

IV. SANCTIONS

The ABA Standards for Imposing Lawyer Sanctions ("ABA *Standards*") and Colorado Supreme Court case law are the guiding authorities for selecting and imposing sanctions for lawyer misconduct.[4] In selecting a sanction after a finding of lawyer misconduct, the Court must consider the duty violated; the lawyer's mental state; the actual or potential injury caused by the lawyer's misconduct; and the existence of aggravating and mitigating evidence pursuant to ABA *Standard* 3.0.

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

Duty: By failing to appropriately communicate with Moersen and failing to represent him with reasonable diligence, Respondent neglected his duties to his client. Respondent's violation of his order of suspension represented a dereliction of his duties to the legal system.

Mental State: The complaint and evidence in this matter establish that Respondent knew or should have known he was acting in violation of Colo. RPC 1.3 and 1.4(a) and that Respondent knowingly violated Colo. RPC 3.4(c).

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

Injury: Respondent's inadequate representation of Moersen caused Moersen injury. A speedy resolution of Moersen's bankruptcy matter was important to Moersen, as he made clear to Respondent. Moersen testified he explained to Respondent that rapid completion of the bankruptcy process would permit Moersen and his wife to sell their house to a prospective purchaser. Respondent caused a four-month delay in the resolution of Moersen's bankruptcy matter. As a result, Moersen testified that the prospective purchaser decided not to buy their house, and the sale the Moersens eventually completed netted them $2,000.00 less than what they would have received had they completed the sale with the initial prospective purchaser. In addition, Moersen testified that he was forced to borrow money to pay the attorney who completed his bankruptcy and that he never received any benefit from the unreturned funds he paid to Morse. Finally, Respondent injured the legal system by disregarding a court order.

ABA *Standard* 3.0 – Aggravating & Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of discipline to be imposed.[5] Mitigating circumstances include any considerations or factors that may justify a reduction in the degree of discipline to be imposed.[6] Because Respondent did not participate in the disciplinary proceeding, the Court is aware of just one mitigating circumstance here—inexperience in the practice of law. The Court considered evidence of the following aggravating and mitigating circumstances in deciding the appropriate sanction.

Pattern of Misconduct – 9.22(c): The Colorado Supreme Court has held that where "most of the conduct" underlying a disciplinary proceeding occurred before the imposition of discipline in a prior matter, the prior discipline should be treated as part of a pattern of misconduct, rather than as a prior disciplinary offense.[7] Respondent was suspended for three months in case number 08PDJ102, effective September 21, 2009. Respondent's misconduct in the instant matter began in June 2009. It is difficult to establish precisely when Respondent's misconduct ended because he never fulfilled his duty to notify Moersen of his suspension. But it is fair to say that Respondent's misconduct in the instant matter primarily occurred before his prior suspension took effect. Therefore, the Court does not consider Respondent's prior suspension as an aggravating factor under ABA *Standard* 9.22(a), but

[5] *See* ABA *Standard* 9.21.
[6] *See* ABA *Standard* 9.31.
[7] *People v. Williams*, 845 P.2d 1150, 1153 n.3 (Colo. 1993); *see also People v. Honaker*, 863 P.2d 337, 340 (Colo. 1993) (where misconduct in prior case and instant case occurred contemporaneously and most of the misconduct in instant case ended before entry of the prior order of suspension, with the exception of the lawyer's ongoing failure to return an unearned fee, the prior misconduct represented a pattern of misconduct rather than prior discipline).

rather considers it to form part of a pattern of misconduct under ABA *Standard* 9.22(c).

Multiple Offenses – 9.22(d): Through the varying types of misconduct in this matter, Respondent violated several Rules of Professional Conduct.

Inexperience in the Practice of Law – 9.32(f): Respondent was licensed to practice law in Colorado in 2007. As the People concede, he is relatively inexperienced in the practice of law.

Analysis Under ABA *Standards* and Colorado Case Law

The Court observes that the complaint in this matter alleges Respondent knowingly failed to perform services for Moersen and thereby caused *serious* injury or potential injury. ABA *Standard* 4.41 indicates that disbarment is the presumptive sanction under those circumstances. The People have only requested that the Court impose a ninety-day suspension, however, and Colorado Supreme Court case law also indicates that a short suspension is the proper sanction under the facts presented here, as further explained below.[8] The striking disparity between the presumptive sanction called for if the Court were to accept the People's allegation of injury, on the one hand, and the sanction the People requested at the sanctions hearing, on the other, necessitates further analysis of the standards governing the allegations admitted by entry of default.

The Court finds that, under applicable rules and case law, it is required to accept as true all well-pled facts and claims in a disciplinary complaint admitted by default.[9] But the Court is not required to accept the truth of a complaint's allegations concerning the appropriate sanction. Colorado's disciplinary rules contemplate a two-step process for imposing sanctions upon entry of default. If a respondent fails to answer a complaint and a motion for default is filed, the Court "shall enter a default and the complaint shall be deemed admitted . . . ."[10] A respondent then has the opportunity to appear at a final hearing and present arguments "regarding the form of discipline to be imposed."[11] The Hearing Board or the Court "shall review all pleadings, arguments, and the report of investigation and shall prepare a report setting forth its findings of fact and its decision" as to the proper sanction.[12] This rule affords the Hearing Board or the Court significant discretion to make factual

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[8] The Colorado Supreme Court generally does not disbar an attorney for neglecting client matters unless that neglect rises to the level of abandonment. *See, e.g., People v. Fritsche*, 897 P.2d 805, 806 (Colo. 1995); *People v. Southern*, 832 P.2d 946, 948 (Colo. 1992).

[9] C.R.C.P. 251.15(b); *People v. Richards*, 748 P.2d 341, 347 (Colo. 1987) ("[w]hen a default is entered . . . both the well pleaded facts and charges in the complaint are deemed admitted").

[10] C.R.C.P. 251.15(b).

[11] *Id.*

[12] *Id.*

findings regarding the appropriate sanction in the second phase of this process.

The ABA *Standards* and Colorado Supreme Court case law further indicate that facts concerning an appropriate sanction are to be determined during the sanctions phase of a disciplinary proceeding, not before.[13] The ABA *Standards* state that its governing model "requires a *court imposing sanctions*" to inquire into duty, mental state, injury, and aggravating and mitigating circumstances.[14] Likewise, in *In re Weisbard*, the Colorado Supreme Court stated: "A default . . . establishes only the truth of the allegations in the complaint. It does not establish the form of discipline . . . ."[15]

The two-step process established for the imposition of sanctions in default disciplinary matters comports with the procedures for default under C.R.C.P. 55(b). That rule contemplates, after entry of default, that

> [i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.[16]

The Colorado Supreme Court has found that "entry of default [under C.R.C.P. 55] applies only to the issue of petitioner's liability,"[17] and it provided further explanation in *Kwik Way Stores, Inc. v. Caldwell*:

> When a trial court determines that entry of default judgment is the appropriate sanction, the default establishes liability, but does not fix the amount of damages . . . . [The language of C.R.C.P. 55(b)(2)] places broad discretion in the hands of the trial judge and must be interpreted in light of the overriding principle that the rules of civil procedure be construed to secure the just determination of every

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[13] The Court notes that the possession of a particular mental state is an essential element of certain disciplinary rules. For instance, Colo. RPC 3.4(c) prohibits a lawyer from "*knowingly* disobey[ing] an obligation under the rules of a tribunal . . . ." (Emphasis added). Well-pled allegations in a complaint that a respondent possessed a mental state that forms an essential element of a claim for relief shall be deemed to be true upon entry of default for purposes of both establishing misconduct and imposing a sanction.

[14] ABA *Standards* § II (emphasis added). In illustrating how this model should be implemented, the ABA *Standards* explain that first a lawyer must be found to have engaged in ethical misconduct. *Id.* "To assign a sanction, however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyers' actions." *Id.*

[15] 25 P.3d 24, 26 n.1 (Colo. 2001).

[16] C.R.C.P. 55(b).

[17] *Snow v. Dist. Court*, 194 Colo. 335, 337, 572 P.2d 475, 476 (1977).

> action. We have interpreted C.R.C.P. 55(b)(2) as requiring the trial court to take evidence if further information is needed to determine damages.[18]

In view of the foregoing analysis and the principle of securing a just determination under C.R.C.P. 1, the Court finds that serious injury to Moersen has not been established by the complaint or the evidence presented at the sanctions hearing.[19] Although Respondent's misconduct caused meaningful injury to Moersen that is justifiably significant in Moersen's eyes, the injury does not qualify as "serious" under the precedent set forth in Colorado Supreme Court case law.[20]

Therefore, rather than applying ABA *Standard* 4.41 in this matter, the Court looks to ABA *Standard* 4.42, which provides that suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes the client injury or potential injury. Also applicable here is ABA *Standard* 6.22, which establishes that suspension is typically proper where a lawyer knowingly violates a court order or rule and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

In light of the as-yet unfulfilled requirement imposed in case number 08PDJ102 that Respondent petition for reinstatement to the bar, the Court finds the People's recommended sanction of a ninety-day suspension to be appropriate in this matter.[21] The Colorado Supreme Court has frequently

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[18] 745 P.2d 672, 678-79 (Colo. 1987) (citations omitted).

[19] The Court notes that, were it to accept the complaint's contention that Respondent caused serious injury, it would be forced to engage in a contorted reading of guiding authorities in order to bridge the gap between the short suspension called for by like cases and the presumptive disbarment called for by the ABA *Standards*. Such a practice might lead to a misperception that disciplinary standards are malleable and applied disparately.

[20] *See, e.g., In re Righter*, 992 P.2d 1147, 1148 (Colo. 1999) (holding that attorney's neglect of clients' matter leading to entry of default against clients, which caused clients to waste over $25,000.00 in attorney's fees and to pay a default judgment of $101,000.00, which was significantly in excess of what they otherwise would have paid, amounted to serious injury); *In re Scott*, 979 P.2d 572, 573-74 (Colo. 1999) (holding that where a client "sustained a catastrophic financial burden and [underwent] serious personal problems" because of the attorney's misconduct, the attorney caused serious or potentially serious harm); *People v. Shock*, 970 P.2d 966, 967 (Colo. 1999) (approving hearing board's determination that attorney did not cause serious injury or potential injury even where attorney had effectively abandoned clients in two separate matters).

[21] ABA *Standard* 2.3 indicates that "[g]enerally, suspension should be for a period of time equal to or greater than six months . . . ." This rule of thumb appears to be designed to protect the public by ensuring that a lawyer who has committed serious misconduct cannot resume practice without demonstrating rehabilitation through a reinstatement proceeding. *See id.* Here, Respondent is subject to the reinstatement requirement by virtue of his stipulated admission of misconduct in case number 08PDJ102. As such, the Court finds that a longer suspension is unnecessary in this matter.

imposed suspensions ranging from thirty to ninety days upon attorneys who have significantly neglected a client's matters.[22] Suspensions lasting six months or longer, by contrast, are typically warranted for cases involving neglect of multiple clients' cases, particularly egregious instances of neglect, and cases involving both neglect and other serious transgressions.[23] Given the paucity of mitigating factors and Respondent's failure to participate in these disciplinary proceedings, a ninety-day suspension is warranted here.

V. CONCLUSION

Respondent violated the fundamental duty of diligent representation of his client. He also failed to appropriately communicate with his client and disregarded the order suspending his law license. The evidence establishes that Respondent acted knowingly and caused his client injury. The Court adopts the People's position and determines that the appropriate sanction in this matter is suspension for ninety days. After Respondent has served that suspension, he will be required to petition for reinstatement to the bar in accordance with the conditional admission of misconduct entered in case number 08PDJ102.

VI. ORDER

The Court therefore **ORDERS**:

1. Michael F. Bigley, Attorney Registration No. 39294, is hereby **SUSPENDED FOR NINETY DAYS**. The suspension **SHALL** become effective thirty-one days from the date of this order upon the issuance of an "Order and Notice of Suspension" by the Court and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).

2. Respondent **SHALL** file any post-hearing motion or application for stay pending appeal with the Court **on or before June 6, 2011.** No extensions of time will be granted.

3. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days of the

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[22] *See, e.g., People v. Stevenson*, 980 P.2d 504, 505 (Colo. 1999); *People v. Wright*, 947 P.2d 941, 943 (Colo. 1997); *People v. Myers,* 908 P.2d 101, 102 (Colo. 1995); *People v. C de Baca*, 862 P.2d 273, 275 (Colo. 1993); *People v. Ross*, 810 P.2d 659, 660 (Colo. 1991).

[23] *See, e.g., In re Fisher*, 202 P.3d 1186, 1204 (Colo. 2009); *In re Righter*, 992 P.2d at 1149; *People v. Regan*, 831 P.2d 893, 896 (Colo. 1992); *People v. Gaimara*, 810 P.2d 1076, 1078-80 (Colo. 1991); *People v. May*, 745 P.2d 218, 220-22 (Colo. 1987). Public censures are generally reserved for cases of minor neglect and cases in which numerous factors mitigate an attorney's neglect of a client matter. *See, e.g., People v. Kram*, 966 P.2d 1065, 1067-68 (Colo. 1998); *People v. Smith*, 769 P.2d 1078, 1080-81 (Colo. 1989).

date of this order. Respondent shall have ten (10) days within which to respond.

DATED THIS 17th DAY OF MAY, 2011.

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Copies to:

Adam J. Espinosa — Via Hand Delivery
Office of Attorney Regulation Counsel

Michael F. Bigley — Via First Class Mail
Respondent
4950 S. Yosemite St.
F2-146
Greenwood Village, CO 80111

Susan Festag — Via Hand Delivery
Colorado Supreme Court