***People v. Dallan J. Dirkmaat*. 15PDJ097. July 26, 2016.**

Following a reinstatement hearing, a hearing board concluded that Dallan J. Dirkmaat (attorney registration number 42620) should be granted reinstatement to the practice of law under C.R.C.P. 251.29. Dirkmaat was reinstated on July 26, 2016.

Dirkmaat was suspended from the practice of law for one year and one day, all but ninety days to be stayed upon his successful completion of two years of probation. During the served portion of his suspension, Dirkmaat answered an unexpected telephone call during which he made representations that amounted to the practice of law. Dirkmaat thereby technically violated his order of suspension. He then sought reinstatement of his license. Two hearing board members concluded that due to the brief duration and unexpected nature of the call, Dirkmaat's other efforts to comply with his order of suspension, and the lack of harm his actions occasioned, Dirkmaat should be reinstated to the practice of law. One hearing board member dissented.

Please see the full opinion and dissent 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:** DALLAN J. DIRKMAAT	Case Number: **15PDJ097**

OPINION AND DECISION GRANTING REINSTATEMENT UNDER C.R.C.P. 251.29(e)

Dallan James Dirkmaat ("Respondent")[1] was suspended from the practice of law for one year and one day, all but ninety days stayed upon his successful completion of two years of probation. During the served portion of his suspension, Respondent answered an unexpected telephone call during which he made representations that amounted to the practice of law. Respondent thereby technically violated his order of suspension. He then sought reinstatement of his license. The brief duration and unexpected nature of the call, Respondent's other efforts to comply with his order of suspension, and the lack of harm his actions occasioned militate against denying his petition for reinstatement.

I. PROCEDURAL HISTORY

As outlined below, effective December 11, 2015, Respondent was suspended from the practice of law for one year and one day, all but ninety days stayed upon the successful completion of a two-year period of probation. Respondent was slated to complete his ninety-day suspension on March 10, 2016.

On March 16, 2016, Catherine S. Shea, of the Office of Attorney Regulation Counsel ("the People"), filed with Presiding Disciplinary Judge William R. Lucero ("the PDJ") a "Notice of Filing of Affidavits by Respondent and Objection to Reinstatement." In that notice, the People stated that they had received affidavits from Respondent in support of his request for reinstatement under C.R.C.P. 251.29(b), but they questioned whether he had in fact complied with C.R.C.P. 251.28(b) by notifying clients of his suspension via certified

[1] Given the unusual procedural posture of this case, this opinion adheres to the naming and caption conventions employed in earlier phases of the case, namely, we refer to Dallan James Dirkmaat as Respondent, rather than Petitioner.

mail. The People noted that they were also investigating allegations that Respondent violated the PDJ's order of suspension by continuing to practice law.

By order of March 22, 2016, the PDJ held in abeyance Respondent's request for reinstatement under C.R.C.P. 251.29(b) and ordered him to file a response to the People's filing, along with any relevant documentation. In that order, the PDJ noted that the People had not made any specific allegations about Respondent's compliance—or lack thereof—with his suspension order.

In a supplemental objection to reinstatement filed on April 1, 2016, the People elaborated on their assertions that Respondent violated the order of suspension by continuing to practice law while suspended. The People also suggested that the PDJ allow them to file their supplemental objection as confidential because the matter had not become public.

John M. Richilano, counsel for Respondent, filed a response on April 4, 2016, asserting that at the time of Respondent's suspension he had just one client, Amber Patterson, and that he notified her by certified mail of his suspension. He provided a supporting affidavit from Patterson, and Respondent himself attested in an affidavit that he mailed Patterson notice by certified mail, from which he never received a return receipt after moving his office.

After considering the parties' filings, the PDJ issued an order on April 5, 2016, indicating that he was inclined to immediately reinstate Respondent's license under C.R.C.P. 251.29(b) based on the evidence that Respondent had complied with C.R.C.P. 251.28(b).[2] The PDJ also proposed holding a hearing under C.R.C.P. 251.7(e) to address the People's allegations regarding Respondent's continued practice of law. Given that this matter is procedurally unusual, however, the PDJ invited the parties to file objections to the proposed course of action and also ordered Respondent to respond to the People's allegations that he practiced law while suspended.

In a submission filed April 8, 2016, the People objected to the PDJ's suggested procedure, arguing that the evidence regarding Respondent's alleged unauthorized practice of law should preclude his reinstatement under C.R.C.P. 251.29(b) because he had not fully complied with the order of suspension and with all applicable disciplinary rules. The People advocated that the PDJ hold a hearing to determine whether Respondent had in fact complied with his order of suspension.

Respondent filed a response to the People's allegations that he practiced law while suspended, submitting affidavits that, when considered in conjunction with the People's allegations, raised disputed issues of fact. However, Respondent did not comment on the

[2] Thereafter, the People did not raise Respondent's alleged failure to comply with C.R.C.P. 251.28 as a basis to deny Respondent's reinstatement.

PDJ's proposed procedure. Nor did he respond to the People's objection, or otherwise take a position concerning the proper procedural course going forward.

Thus, in an order issued on April 13, 2016, the PDJ reconsidered his position and deemed the People's objections well-taken. He reasoned that C.R.C.P. 251.29(b) requires an attorney to petition for reinstatement under C.R.C.P. 251.29(c) when the attorney fails to file a timely affidavit, so it follows that an attorney who is alleged to have submitted an affidavit with statements that are "not true" should likewise be required to petition for reinstatement under C.R.C.P. 251.29(c). That order provided, among other things, the following:

- Respondent would not be immediately reinstated under C.R.C.P. 251.29(b).

- The PDJ would treat Respondent's affidavit filed March 10, 2016, as a petition for reinstatement under C.R.C.P. 251.29(c), as supplemented by his responses dated April 4 and April 12, 2016. The PDJ would likewise treat the People's "Notice of Filing of Affidavits by Respondent and Objection to Reinstatement" and their supplemental objection as their response to his petition.

- A one-day hearing under C.R.C.P. 251.29(c) would be held before a hearing board. At the hearing, Respondent would bear the burden of proving by clear and convincing evidence the sole issue of his compliance with all applicable disciplinary orders and with all provisions of Chapter 20 of the Colorado Rules of Civil Procedure.[3]

On May 26, 2016, a Hearing Board comprising Lucy Hojo Denson and Marilyn Robertson, members of the bar, and the PDJ held the reinstatement hearing under C.R.C.P. 251.29(d). Respondent appeared with Richilano, and Shea represented the People. The Hearing Board considered testimony from Kristin Nolan Schelwat, Veronica Carmosino, Kristi Smith, and Respondent. The PDJ admitted stipulated exhibits S-A and S-B and Respondent's exhibits C and D.

II. FINDINGS OF FACT

The findings of fact here—aside from the sections describing Respondent's disciplinary history[4]—are drawn from testimony offered and exhibits introduced at the reinstatement hearing, where not otherwise noted.

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 25, 2010, under attorney registration number 42620. He is thus

[3] *See* C.R.C.P. 251.29(c)(4). The order provided that Respondent would not be required to prove his rehabilitation or his fitness to practice law, because he had only been suspended for a period of ninety days.

[4] The Hearing Board considers Respondent's past disciplinary history here because we are directed to do so by C.R.C.P. 251.29(e).

subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this reinstatement proceeding.[5]

In one prior case, Respondent was sanctioned for multiple offenses, as described in the following three paragraphs. After graduating from law school, Respondent represented multiple parties, including one of his childhood friends, Conley Hoskins, in various medical marijuana business transactions that raised the potential for conflicts of interest. In all but one transaction, Respondent failed to obtain proper written informed consent from the parties, and the one written waiver he did draft was insufficient to address all potential conflict issues. Through this conduct, Respondent violated Colo. RPC 1.7(a), which prohibits a lawyer from undertaking representations involving concurrent conflicts of interest without adequate safeguards.

In 2011, one of Respondent's clients decided to purchase a medical marijuana dispensary with Hoskins. The client gave Respondent a check for partnership funds to place in his trust account, and Hoskins gave Respondent a check that he held instead of depositing. Aside from the partnership funds, there were no other client funds in Respondent's trust account at that time. Respondent understood that the funds belonged to the partnership and could be used by either partner. Respondent soon left on vacation and set aside three signed blank checks drawn on his trust account for Hoskins's use, thereby violating Colo. RPC 1.15(i)(2) (2008), which provided that all trust account withdrawals and transfers shall be made only by a Colorado lawyer or a person supervised by such a lawyer.

By January 2012, Hoskins—with his partner's knowledge—had withdrawn all the funds from Respondent's trust account. Soon thereafter, Hoskins's partner decided not to go forward with the purchase and emailed Respondent asking when his funds would be returned. The partner copied his own mother and father and a third person on the email. Respondent replied by email to all parties, assuring that the partner's funds were still in his trust account, which was a misrepresentation. Less than thirty minutes later, Respondent sent another email to the partner only, correcting the misrepresentation. He did not correct the misrepresentation with the other parties. The following day, Respondent provided the partner with a check from his trust account, which Hoskins had replenished via wire transfer. Respondent's misrepresentation violated Colo. RPC 8.4(c), which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Based on these several rule violations, the PDJ approved the parties' conditional admission of misconduct and suspended Respondent for one year and one day, all but ninety days stayed pending successful completion of a two-year period of probation, with conditions to include practice mentoring. The sanction took effect on December 11, 2015. That same day, Respondent mailed notice to his client Amber Patterson about his suspension via certified mail, return receipt requested.[6] Though he did not receive the return

[5] *See* C.R.C.P. 251.1(b).
[6] Resp. to Notice of Filing of Affidavits & Objection to Reinstatement Ex. D ¶ 2.

receipt for his certified mailing, he later learned that Patterson had received his certified notice.[7]

Respondent testified that he began the process of winding down his law practice as early as June 2013 in anticipation of his suspension, such that by December 2015 he maintained only one active case—that of Patterson—and had arranged with Kristi Smith, one of his former associates, to hand off that pending matter. He pivoted away from law, screened his calls heavily, and launched a new bespoke expediting business with his brother-in-law to deliver quickly "unique shipments for cargo of value," making more money doing so in one year than he had in any other while practicing law. During one such delivery run, while refueling at a Nevada truck stop, Respondent fielded a telephone call of three or four minutes. It is this telephone call alone that forms the basis for the People's objection to Respondent's reinstatement.

The call concerned a dispute brewing at Wee Katie's, a restaurant controlled by Galleit, Inc. Wee Katie's operated in a Denver LoHi building owned by Veronica Carmosino through Roni's Enterprises, Inc. In 2012, Carmosino hired Respondent to draft, among other documents, a lease for Wee Katie's. He did so, then terminated the representation. From time to time, however, Carmosino called Respondent to give him updates. The last such call came in mid-February 2016, when Carmosino recounted that the doors to the restaurant had been chained shut by the Department of Revenue because Wee Katie's had failed to pay sales taxes.[8] Respondent explained to Carmosino that he had been suspended from the practice of law, that he could not help her, and that Smith was available to represent her if she needed legal assistance. Carmosino declined Respondent's offer to put her in touch with Smith because, at that point, Carmosino "didn't think [she] needed an attorney" and "wanted to do this on [her] own." Carmosino testified that soon thereafter, the Department of Revenue removed its locks, which she immediately replaced with her own locks; she was concerned, she said, that her tenants might vacate the building quickly and remove certain fixtures that belonged to her.

On the morning of February 25, 2016, Kristin Schelwat, an attorney representing Galleit, emailed Carmosino:

> My client contacted me this morning stating that you or your agent have placed chains on the property and barred their entrance. This is illegal and we will be contacting the police if the chains are not removed by 10:00 a.m. Further we will proceed with an immediate court action for damages and an injunction if this is not resolved by that time.

[7] Resp. to Notice of Filing of Affidavits & Objection to Reinstatement Ex. C.

[8] *See also* Resp. to Complainant's Suppl. Objection to Reinstatement Ex. A ¶ 7 ("Ms. Carmosino then explained to me that she was concerned that Gaileit [sic] was going out of business and that Gaileit [sic] had essentially cut off all communication with her. She added that she was aware that they were behind on a number of bills with other people as well as with her.").

> Based on our previous e-mails, I believe you to be a reasonable person[] and that this should not have escalated to this point. Please feel free to e-mail or call me to discuss, but my client needs access to the property immediately . . . .[9]

Carmosino remembered feeling quite upset when she read Schelwat's email. She strongly believed that she had not done "anything wrong"; she said, "I felt like, you can't push me around like this." Carmosino was uncomfortable communicating with Schelwat pro se, so not knowing what else to do, she decided to give Schelwat Respondent's name and telephone number. As Carmosino explained, Smith's information was not readily available at that moment, but Respondent's was, so—without Respondent's knowledge or permission—Carmosino fired off a message that said, "Kristin, You can contact my attorney on this matter, Dallan James Dirkmaat . . . ."[10] She included Respondent's telephone number and address. Carmosino expressed regret that she had referenced Respondent, recognizing that the unintended consequence of her email was Schelwat's telephone call to Respondent, which ultimately triggered this action.

Early that same afternoon, Respondent was traveling eastbound in Nevada on one of his delivery runs, exiting the freeway to fuel up. A call came in from a unknown number on his personal phone; the phone identified the caller as "Krist S." Respondent testified that he believed it was Kristi Smith. He would not have answered it, he said, but for the fact that he did not recognize the number, and he wondered if Smith had called him to discuss some important matter. But it was not Smith on the line; it was Schelwat.

Schelwat and Respondent have very different memories of the call. According to Schelwat, Respondent answered the phone, sounding "disheveled"; she introduced herself, told him that Carmosino had put chains on the doors to Wee Katie's, and insisted that the chains be removed. Respondent asked, "Is there anything else?," and Schelwat reiterated her demand that Carmosino remove the chains from the door, after which they could work out any other issues based on provisions of the lease.[11] Because Schelwat heard a lot of background noise on the phone, she asked if he needed a copy of the lease. He responded that he had a copy but that his client "wasn't going to do anything" about the chains. In that case, Schelwat stated, Galleit would have to file suit to gain access. He answered, "that will just delay everything, but that's fine with my client." Schelwat then inquired whether he was representing Carmosino and whether he would accept service for her, and he said "yes." At some point during the exchange, Schelwat had searched the internet for Respondent's name; one of the first results was Respondent's order of suspension, which she glanced at.

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[9] Ex. S-A.

[10] Ex. S-A.

[11] With prompting from the People, Schelwat testified that early on in their conversation Respondent asked her what she proposed to do, and she answered, "remove the chains." But Schelwat did not mention this language in a retelling of the exchange when responding to Hearing Board questions. Nor does that language appear in "Complainant's Supplemental Objection to Reinstatement," which sets forth Schelwat's account. With this in mind, we conclude that Respondent never specifically solicited a "proposal" from Schelwat, but that Schelwat interpreted his question "Is that all?" as its functional equivalent.

Surprised by what she saw, she inquired again as to whether he was representing Carmosino, and he replied in the affirmative. Schelwat then mentioned the suspension order, and Respondent backtracked, saying, "Well, I guess I'll have to refer this out."

Respondent, on the other hand, says that Schelwat adopted a rushed, aggressive attitude from the outset. According to Respondent, she introduced herself as an attorney for Galleit, but the connection was bad, he was distracted, and he did not have the context to understand who she was or why she was calling. She mentioned chains on doors and a violation of a lease. After some back and forth, he heard her ask, "Aren't you familiar with what's going on at Wee Katie's?" The tone of her question, he thought, implied that he was "stupid." He started to reply that Roni's Enterprises was a former client and that he had drafted the lease for Wee Katie's, but Schelwat interrupted him and demanded that Carmosino get rid of the chains. Respondent was irritated that she cut him off in a "rude" way, and he resolved to hang up. He said, "Is there anything else?" She repeated the demand and asked whether the chains would be removed, and he answered, "I don't know anything about this." Schelwat then asked, "Are you representing Carmosino?," and Respondent replied, "Look, you called me. I don't know what you're talking about." Schelwat retorted, "I have it right here that you are a suspended attorney." He acknowledged that was true, and he volunteered to pass on her contact information to Smith.

Both Respondent and Schelwat described feeling rattled after the call. Schelwat contacted the Colorado Bar Association ethics hotline for advice; based on those conversations, Schelwat filed a report with the People alleging that Respondent had practiced law while suspended. She also sent Carmosino an email, writing, "Your attorney is currently under suspension . . . . I asked him about this and he said that he will be sending my contact information on to another attorney, apparently. He also advised that you won't do anything about this, and for us to file a lawsuit."[12] Meanwhile, Respondent called Smith and his attorney, Richilano, worried that his conversation with Schelwat might interfere with his reinstatement. He later contacted Carmosino to let her know that he had talked to Smith about the situation. Smith, in turn, reached out to Carmosino, who then hired her for representation in the matter.[13] Schelwat and Smith both testified that they have been able to work together and that they hope to resolve the issue on behalf of their respective clients.

We are called upon to decide which of these two very dissimilar versions of this exchange more accurately reflects what actually occurred. We have carefully weighed each witness's testimony, motive, state of mind, demeanor, and manner while on the stand, coupled with what little corroborative evidence we have available. We do not doubt that Respondent was distracted and unprepared for the conversation, the telephone connection was imperfect, and Schelwat's tone was confrontational. But we are compelled, after examining the evidence, to adopt Schelwat's account as credible. Schelwat initiated the call

[12] Ex. S-A.
[13] Ex. S-B.

while she was in her office and focused on the conversation, and thus better positioned to remember what happened. Schelwat was less emotionally involved in a personal sense, and thus better able to objectively recall the exchange. Schelwat had no motive to present the facts in a manner other than in the way she remembered them, and thus was less likely to mold her story to suit a particular narrative. And Schelwat's testimony is substantiated by the email that she sent to Carmosino almost immediately after her exchange with Respondent, and thus given more credence in our assessment.

Respondent challenges Schelwat's testimony as nonsensical: how could he solicit a proposal or make any representation about what Carmosino would or would not do, he asks, when he was not acquainted with recent developments at Wee Katie's? We disagree with this factual premise. Respondent's affidavit suggests that when he last talked with Carmosino, she had provided him with some background about "what was going on."[14] This information, coupled with Schelwat's questions and demands, provided Respondent sufficient context to piece together a decent understanding of what had happened prior to the call.

Respondent also points out that, with only two weeks remaining on his period of suspension, he had no motive to act on Carmosino's behalf and jeopardize his bid for reinstatement. The People posit that Respondent may have viewed the conversation as not particularly serious—one that would fly under the radar—but an interaction nevertheless that would lead to a lucrative opportunity to represent Carmosino. We are not convinced by the People's hypothesis, which attributes to Respondent a particularly culpable mental state. Instead, we believe that Respondent was caught off guard by the conversation, took offense at Schelwat's posturing, and reacted rashly without much, if any, thought to the consequences.

These facts and circumstances, taken in total, lead us to accept Schelwat's version as the most accurate account of her telephone conversation with Respondent.

III. LEGAL ANALYSIS

As set forth in the PDJ's order, the Hearing Board has been convened to decide the sole issue of whether Respondent complied with all applicable disciplinary orders and all provisions of Chapter 20 of the Colorado Rules of Civil Procedure.[15] More specifically, we are tasked with determining whether Respondent violated his disciplinary order, which suspended him from practicing law for a period of ninety days, effective December 11, 2015.[16]

[14] Resp. to Complainant's Suppl. Objection to Reinstatement Ex. A ¶ 7.

[15] Typically, an attorney who has suspended for more than one year must also prove by clear and convincing evidence that the attorney is fit to practice law and has been rehabilitated. *See* C.R.C.P. 251.29(b).

[16] After the effective date of a suspension order, a suspended lawyer may not "act as an attorney," C.R.C.P. 251.28(b) and (c), nor may that lawyer "practice law in this jurisdiction," Colo. RPC 5.5(a)(1). *See also People v. Cain*, 957 P.2d 346, 346-47 (Colo. 1998) (finding that a suspended lawyer engaged in the unauthorized practice of law by acting as an attorney during his period of suspension).

The People contend that Respondent engaged in the unauthorized practice of law in two main ways: first, by soliciting a proposal from Schelwat; and second, by representing Carmosino's interests when he told Schelwat that Carmosino would not take any action and when he invited Schelwat to proceed with litigation. That Respondent held himself out as Carmosino's attorney was not itself the unauthorized practice of law, the People maintain, but rather evidence that he in fact intended to represent her interests. Respondent disagrees with Schelwat's account but argues that even if we are to accept her version as correct, those actions do not amount to the unauthorized practice of law. He is entitled, he says, to gather information for Carmosino's use, which is precisely the type of permitted activity a paralegal often performs. Further, to penalize him for failing to say everything he ought to have said during a short call that he received "out of the blue" is unfair and unduly punitive, he argues.

Colorado Supreme Court case law holds that one who acts "in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting that person in connection with these rights and duties" engages in the practice of law.[17] Settled case law also holds that a "person engages in the unauthorized practice of law by offering legal advice about a specific case, drafting or selecting legal pleadings for another's use in a judicial proceeding without the supervision of an attorney, or holding oneself out as the representative of another in a legal action."[18]

As mentioned above, we do not find that Respondent specifically solicited a proposal from Schelwat. Instead, we find only that Schelwat interpreted some of Respondent's remarks as requesting that she outline her suggested course of action. Accordingly, we decline to conclude that Respondent engaged in the practice of law on that basis. We do, however, determine that he strayed into impermissible territory when he spoke on Carmosino's behalf, first by rebuffing Schelwat's demand to remove the chains, and then by encouraging Schelwat to pursue court action instead. We view those statements as declarations made in a representative capacity to protect, enforce, and defend Carmosino's rights. Likewise, we conclude that by asserting he represented Carmosino and would accept service for her, Respondent affirmatively held himself out as Carmosino's representative in an imminent legal action and thus practiced law while suspended. This conduct violated his suspension order.

We are mindful, however, that "[t]echnical violations of the disciplinary orders and rules will not always preclude reinstatement."[19] To determine whether a technical violation should bar reinstatement, we must examine the nature of the violation, including whether the violation affected clients or opposing parties and whether it caused harm or potential harm.[20]

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[17] *People v. Shell*, 148 P.3d 162, 171 (Colo. 2006).
[18] *Id.*
[19] *In re Price*, 18 P.3d 185, 191 (Colo. 2001).
[20] *Id.*

When we do, we conclude that Respondent's behavior was momentary, anomalous, and quickly rectified—a quintessential technical violation of his suspension order. To be sure, Respondent exercised bad judgment during his minutes-long telephone call with Schelwat. But we do not believe that Respondent acted intentionally or that he engaged in an extended pattern of misconduct. He notified Carmosino in mid-February that he could not represent her, and he offered to put her in touch with Smith. But when he was confronted by Schelwat in a noisy, confusing, unexpected call, he felt belittled and reacted impetuously to bolster his bruised ego. By the end of the call, he conceded that he had been suspended and could not represent Carmosino, and he volunteered to forward Schelwat's contact information to Smith; he then immediately reached out to Richilano, Smith, and Carmosino to sort out the situation. Schelwat hung up the phone knowing that Respondent could not act as Carmosino's lawyer. And Smith informed Schelwat about seventy-two hours later that she was representing Carmosino. Neither Schelwat nor Carmosino were meaningfully affected, nor was anyone harmed.

The issue in this case involves Respondent's noncompliance with disciplinary orders and rules, specifically the prohibition against practicing law while suspended. However, a reinstatement proceeding is not discipline. It is a way for a lawyer who has been suspended for a significant period of time to establish his or her qualifications to practice law again. Nor are disciplinary proceedings punishment.[21] Rather, the primary purpose of disciplinary proceedings is to protect the public.[22] Under C.R.C.P. 251.29(g), Respondent would be precluded from again seeking reinstatement for two years were we to deny his reinstatement. Such a result would not increase the protection afforded to the public, as we deem Respondent's actions an aberration. Indeed, his conversation with Schelwat was bookended by his efforts to avoid engaging in legal practice.

In our view, Respondent's short-lived conversation with Schelwat, which was thrust upon him while he was distracted, should not meaningfully detract from the bigger picture: throughout the period of his suspension, Respondent made consistent efforts to abide by his suspension order and the disciplinary rules by winding down his practice, notifying his remaining client, and steering well clear of the practice of law. Further, his representations during this brief call occasioned no real harm, and protection of the public is not jeopardized, in our estimation, by Respondent's reinstatement. Accordingly, we do not find that this technical violation of Respondent's suspension order should prevent him from being reinstated.

IV. CONCLUSION

Respondent identified Carmosino as his client and made representations on her behalf during a brief and unanticipated telephone call, thereby engaging in the practice of law and violating his order of suspension. But those fleeting, unplanned representations,

[21] *Id.*

[22] *People v. Richardson*, 820 P.2d 1120, 1121 (Colo. 1991).

while foolish, did not cause any harm, and thus we conclude that Respondent should be reinstated to the practice of law.

V. ORDER

1. The Hearing Board **GRANTS** the "Affidavit of Dallan Dirkmaat Pursuant to Rule 251.29(b)," which the Hearing Board has treated as a petition for reinstatement under C.R.C.P. 251.29(c). Respondent **DALLAN JAMES DIRKMAAT**, attorney registration number **42620**, is **REINSTATED** to the practice of law, effective immediately.

2. Respondent is placed on a **TWO-YEAR PERIOD OF PROBATION**, in accordance with the PDJ's order approving the conditional admission of misconduct, effective immediately.

3. Respondent's remaining **SUSPENSION OF NINE MONTHS AND ONE DAY** is **STAYED** pending his compliance with all conditions of his probation, as set forth in the PDJ's order approving the conditional admission of misconduct.

4. No more than twenty-eight days and no fewer than fourteen days prior to the expiration of the period of probation, Respondent **SHALL** file an affidavit with the People stating that he has complied with all terms of his probation and **SHALL** file with the PDJ notice and a copy of such affidavit and application for an order showing successful completion of the period of probation. The People will have seven days to file any objection. Upon receipt of Respondent's notice and absent objection from the People, the PDJ will issue an order showing that the period of probation was successfully completed.

5. Under C.R.C.P. 251.29(i), Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** submit a statement of costs **on or before Tuesday, August 9, 2016.** Respondent **MUST** file his response, if any, **within seven days thereafter.** The PDJ will then issue an order establishing the amount of costs to be paid and a deadline for the payment.

6. Any posthearing motion **MUST** be filed with the Hearing Board **on or before Tuesday, August 16, 2016**. Any response thereto **MUST** be filed **within seven days**.

7. This decision may be appealed under C.R.C.P. 251.27.

HEARING BOARD MEMBER MARILYN ROBERTSON, *dissenting in part and concurring in part*:

I concur with the majority's legal finding that Respondent engaged in the practice of law when he spoke by phone to attorney Kristin Schelwat. There is no dispute among us with that finding.

I also concur with the majority's legal finding that Respondent practiced law while suspended and that in so doing, Respondent expressly violated this court's order. Again, there is no dispute among us with that finding.

The real crux of our differences is threefold: 1) the majority's legal finding that Respondent's violation of this court's suspension order was simply a technical violation, 2) their legal finding that no real harm was incurred by Respondent's violation, and 3) their resultant decision to lift Respondent's suspension and reinstate him to the practice of law.

As to our first difference, it is my conclusion that Respondent's violation of the PDJ's suspension order was a substantive, not merely technical, violation of this order. Although such violation took place during a short phone conversation, Respondent knowingly engaged in the practice of law during that call, and in so doing, knowingly violated the PDJ's order.

Regarding our second point of difference, contrary to the majority's conclusion, I conclude that there was much harm incurred by Respondent's violation. There was significant harm incurred to the legal system; specifically, to opposing counsel who felt forced to seek an ethics opinion, and then file this complaint, to the Office of Attorney Regulation Counsel who had to investigate and pursue this complaint, and to the PDJ and the Hearing Board members who considered, heard, and decided this case.

Lastly, I disagree with the majority's ultimate decision to lift Respondent's suspension, and reinstate him to the practice of law. Under C.R.C.P. 251.29(b) and (d), in his reinstatement proceeding, Respondent has the burden of proving by clear and convincing evidence that he has fully complied with the order of suspension and with all applicable provisions of this statute. Respondent has failed to meet this burden.

The majority's opinion, by their findings that Respondent engaged in the practice of law, and that he violated his suspension order, would necessarily have to likewise conclude that Respondent did not meet his burden of proof.

However, surprisingly, the majority opinion skirts what should be the determinative issue. Instead, the majority seemingly simply ignores the fact that Respondent did not meet his burden of proof.

The majority focuses on their legal findings of technical violation and no real harm to justify their decision to lift Respondent's suspension order and reinstate him to the practice

of law. To conclude that Respondent's express violation of the PDJ's suspension order was a mere technical violation both minimizes the sanctity of the PDJ's orders and sets a bad precedent for the future.

My conviction that the majority's decision to lift Respondent's suspension order and reinstate him to the practice of law is an improper one compelled me to pen this dissent. Respondent did not meet his burden of proof as required under the applicable statutes. Having failed to meet his burden, the majority's decision to lift his suspension order and reinstate him is improper.

Finally, under C.R.C.P. 251.29(e) the Hearing Board shall consider the attorney's past disciplinary record in making its decision. In a prior case, Respondent was disciplined for multiple offenses of attorney misconduct, as highlighted in the majority opinion. All of these instances of attorney misconduct show a pattern of Respondent exhibiting poor judgment while representing clients.

Given the incontrovertible conclusion that Respondent failed to meet his burden of proof by clear and convincing evidence that he did not violate his suspension order, and considering his past disciplinary history, I must respectfully dissent from the majority opinion lifting Respondent's suspension order and reinstating him to the practice of law.

DATED THIS 26th DAY OF JULY, 2016.

Originally signed

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Originally signed

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LUCY HOJO DENSON
HEARING BOARD MEMBER

Originally signed

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MARILYN L. ROBERTSON
HEARING BOARD MEMBER

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