***People v. David Kenniston Fulton Sr.* 21PDJ006. September 24, 2021.**

A hearing board suspended David Kenniston Fulton Sr. (attorney registration number 33729) for six months, all to be stayed upon Fulton's successful completion of a two-year probation with conditions. The probation took effect October 29, 2021.

In 2016, Fulton represented a client and the client's business entity in a deal to purchase a local business. Fulton charged a flat fee for his services but did not provide his clients with a written statement setting forth the basis of his fee before beginning the representation or within a reasonable time thereafter. Fulton lent his clients over $30,000.00 in connection with the representation but did not provide a written statement as to whether he was representing them in the transaction. When Fulton and his clients later amended the loan agreement, he failed to advise them to seek independent legal review of the transaction, nor did he obtain their written informed consent to his role in the matter, including whether he was representing them in the transaction.

In late 2017, the client and his wife retained Fulton—who was also a licensed real estate broker—for real estate and legal services related to locating and purchasing a new home. Fulton did not give his clients a written basis or rate of his fee and expenses before commencing the representation or within a reasonable time thereafter. In 2018, Fulton provided his clients over $30,000.00 in three transactions related to the representation. He failed to provide his clients with written disclosures describing the terms of the transactions and advising his clients of the benefit of obtaining independent legal counsel to review the arrangements. He also did not secure his clients' written informed consent to his role in the transactions and to whether he was representing them in the matters.

Through this conduct, Fulton violated Colo. RPC 1.5(b) (a lawyer shall inform a client in writing about the lawyer's fees and expenses within a reasonable time after being retained if the lawyer has not regularly represented the client) and Colo. RPC 1.8(a) (a lawyer shall not enter into a business transaction with a client unless the client is advised to seek independent legal counsel and the client gives written informed consent to the transaction).

The case file is public per C.R.C.P. 251.31. 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:** DAVID KENNISTON FULTON SR., #33729	Case Number: **21PDJ006**
OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(b)	

David Kenniston Fulton Sr. ("Respondent") provided over $75,000.00 to his clients in a series of transactions without first obtaining the clients' written and informed consent to his role in the transactions, including whether he represented them in the transactions, thereby creating conflicts of interest. He deprived the clients of written advisements about the transactions and of opportunities to seek independent counsel. He also failed to communicate in writing the basis or rate of his fee and expenses before he began representing the clients. Respondent's misconduct warrants suspension from the practice of law for a period of six months, all to be stayed upon Respondent's successful completion of a two-year period of probation.

I. PROCEDURAL HISTORY

On January 26, 2021, David Shaw of the Office of Attorney Regulation Counsel ("the People") filed a complaint against Respondent with Presiding Disciplinary Judge William R. Lucero ("the PDJ"), alleging violations of Colo. RPC 1.5(b) (Claim I) and Colo. RPC 1.8(a) (Claim II). After securing an extension of time, Respondent answered the complaint on March 2, 2021, and the parties scheduled a hearing for August 10 and 11, 2021.

On July 26, 2021, the parties jointly filed a stipulation to all facts and rule violations alleged in the complaint. In the stipulation, Respondent admitted to violating Colo. RPC 1.5(b) and Colo. RPC 1.8(a). The next day, the PDJ granted the stipulation and converted the two-day disciplinary hearing to a one-day hearing on the sanctions.[1]

On August 10, 2021, a Hearing Board comprising the PDJ, citizen member Professor Matthew T. Daly, and lawyer Darla Scranton Specht held a remote hearing on the sanctions under C.R.C.P. 251.18 via the Zoom videoconferencing platform. Alan C. Obye

[1] "Order Granting Stipulation of Facts and Rule Violations and Converting Disciplinary Hearing to Hearing on the Sanctions" (July 27, 2021).

represented the People,[2] and Respondent appeared pro se. During the hearing, the Hearing Board heard the testimony of Respondent and his partner, Elizabeth Fulton. The complaining witness, Jonathan Gorst, also testified.[3] Respondent argued that Mr. Gorst's counsel, Ryan Jarvis, should not be allowed to observe the hearing, as Jarvis is opposing counsel in the ongoing civil litigation between Respondent and the Gorsts. The PDJ allowed Jarvis to observe the hearing, which is open to the public.[4]

During the hearing, the Hearing Board considered stipulated exhibits 4, 5, and 7.[5] Following the hearing, on August 17, 2021, the People submitted additional exhibits after conferring with Respondent:[6]

- "Respondent's Exhibits Offered Without Objection 1, 2, and 3";[7]
- "Respondent's Stipulated Exhibits 4 and 7";
- "Respondent's Stipulated Exhibit 5 (Filed Under Seal)";[8]
- "Respondent's Offered Exhibit 6."[9]

On August 20, 2021, the PDJ denied Respondent's request to introduce additional posthearing exhibits.[10]

II. FACTS AND RULE VIOLATIONS

Stipulated Facts and Rule Violations[11]

The Hearing Board finds the following facts and rule violations established by clear and convincing evidence based on the parties' stipulation to the facts and rule violations.

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[2] Obye substituted for Shaw as the People's counsel on June 4, 2021.

[3] Mr. Gorst attended the hearing to provide a statement as to the form of discipline to be imposed. *See* C.R.C.P. 251.18(a). The PDJ allowed Respondent to cross-examine Mr. Gorst after Mr. Gorst read his statement, which went far beyond the requested form of discipline to be imposed.

[4] *See* C.R.C.P. 251.31(c).

[5] The PDJ deemed stipulated exhibit 5 **CONFIDENTIAL**.

[6] Respondent was not able to present his exhibits via the Zoom screen-sharing function during the hearing. To make a complete record, the PDJ directed the parties to file a notice specifying which exhibits Respondent wished to present and which exhibits were stipulated. On August 11, 2021, the People submitted a "Notice re: Respondent's Exhibits," containing Respondent's exhibits 1-7. But that notice, which included confidential stipulated exhibit 5, was not filed as suppressed. The PDJ therefore **STRIKES** and **SUPPRESSES** the People's notice of August 11, 2021.

[7] The PDJ **ADMITS** Respondent's exhibits 1, 2, and 3.

[8] During the hearing on August 10, 2021, Respondent emailed the PDJ's administrator attaching stipulated exhibits 4 and 5. He did not, however, ask the PDJ to suppress stipulated exhibit 5. The PDJ therefore **STRIKES** and **SUPPRESSES** the document Respondent filed on August 10, 2021, that contains stipulated exhibits 4 and 5.

[9] The People objected to Respondent's exhibit 6 as irrelevant and as potentially confusing the issues. The PDJ sustains the People's objection, declines to admit exhibit 6, and **STRIKES** and **SUPPRESSES** the People's "Amended Notice re: Stipulated Exhibits and Respondent's Offered Exhibits" dated August 12, 2021, which contains a copy of Respondent's exhibit 6.

[10] *See* "Order Denying Post-Hearing Motion to Amend Exhibits" (Aug. 20, 2021).

[11] Because the parties stipulated to the allegations in the complaint, we cite those allegations in this section.

Respondent was admitted to practice law in Colorado on May 14, 2002, under attorney registration number 33729.[12] He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.[13]

Respondent was a solo practitioner and real estate agent in Glenwood Springs before recently moving to Lakewood.[14] During the relevant timeframe, Jonathan and Marisa Gorst lived in Glenwood Springs.[15] The Gorsts began using Respondent for legal matters and real estate transactions in 2016.[16] That year, Respondent represented Mr. Gorst and his entity, Riviera Supper Club, Inc., in a deal to purchase a local piano bar.[17] Respondent charged Mr. Gorst and Riviera Supper Club $1,500.00 for his services.[18] He did not provide a written statement to Mr. Gorst or to Riviera Supper Club setting forth the basis of his fee or his expenses before representing them in the transaction.[19] Nor did he provide such a statement within a reasonable time after commencing the representation.[20]

In connection with the representation, Respondent lent $30,100.00 to Mr. Gorst and to Riviera Supper Club.[21] The parties used a deed of trust to secure the loan.[22] Respondent drafted a loan agreement and a deed of trust, which he attached to an email containing the following language:

> Jonathan and Marisa:
>
> Please review both documents carefully in full. . . . These are legal documents which have significant legal consequences and may warrant independent review by another attorney. As you know I am a licensed attorney and realtor in Colorado. . . .[23]

Respondent included nothing in the loan agreement, the deed of trust, or the accompanying email that stated whether he was representing the Gorsts in the transaction.[24]

In late 2017, the Gorsts retained Respondent for both real estate and legal services related to locating and purchasing a new home.[25] Respondent represented the Gorsts continuously from that time through late 2018.[26] He did not provide them with a written

[12] Compl. ¶ 1; Answer ¶ 1.
[13] Compl. ¶ 1; Answer ¶ 1.
[14] Compl. ¶ 4; Answer ¶ 4.
[15] Compl. ¶ 2.
[16] Compl. ¶ 3; Answer ¶ 3.
[17] Compl. ¶ 5.
[18] Compl. ¶ 8.
[19] Compl. ¶ 6; Answer ¶ 6.
[20] Compl. ¶ 7.
[21] Compl. ¶ 9.
[22] Compl. ¶ 9; Answer ¶ 9.
[23] Compl. ¶ 10; Answer ¶ 10.
[24] Compl. ¶ 11.
[25] Compl. ¶ 12.
[26] Compl. ¶ 13; Answer ¶ 13.

basis or rate of his fee and expenses before representing them in the matter.[27] Nor did he do so within a reasonable time after commencing the representation.[28]

On September 10, 2017, Respondent sent an email to a real estate agent conveying the Gorsts' offer to purchase a home.[29] In the email, Respondent wrote, "[a]s I am [the Gorsts'] attorney also, you may consider this a binding offer by me as their attorney in fact."[30] Respondent's signature line in the email read, "David K. Fulton Sr. Esq. . . . Colorado Bar License #33729."[31]

In January 2018, Respondent drafted and entered into an agreement and restatement to the loan agreement with Mr. Gorst and Riviera Supper Club.[32] The new loan balance was $23,985.47 and the terms of repayment changed from the previous agreement.[33] Respondent did not advise Mr. Gorst or Riviera Supper Club in writing that the advice of independent counsel was desirable for the transaction.[34] Neither Mr. Gorst nor Riviera Supper Club gave informed consent in writing to Respondent's role in the transaction, including whether Respondent was representing them in the matter.[35]

On February 4, 2018, Respondent gave the Gorsts a draft letter of intent to purchase a home.[36] The letter stated that "[b]uyer is represented [by] David K. Fulton Sr.[,] a licensed Real Estate Agent and Attorney."[37]

On March 3, 2018, the Gorsts contracted to sell their home at 1108 Minter Avenue in Glenwood Springs.[38] Respondent did not represent the Gorsts in the sale.[39] The Gorsts also owned a vacant lot next to the home.[40] Bank of Colorado held a deed of trust on the vacant lot.[41] The balance on the deed of trust was $17,239.93.[42] On March 22, 2018, Respondent went to Bank of Colorado and paid off the balance.[43] He has claimed this was a loan to the Gorsts.[44] There was, however, no written agreement for the transaction.[45] Further, Respondent did not inform the Gorsts in writing that the advice of independent counsel was

[27] Compl. ¶ 14.
[28] Compl. ¶ 15.
[29] Compl. ¶ 16.
[30] Compl. ¶ 17.
[31] Compl. ¶ 18; Answer ¶ 18.
[32] Compl. ¶ 19; Answer ¶ 19.
[33] Compl. ¶ 19; Answer ¶ 19.
[34] Compl. ¶ 20.
[35] Compl. ¶ 21.
[36] Compl. ¶ 22.
[37] Compl. ¶ 23.
[38] Compl. ¶ 24.
[39] Compl. ¶ 25; Answer ¶ 25.
[40] Compl. ¶ 29; Answer ¶ 29.
[41] Compl. ¶ 29; Answer ¶ 29.
[42] Compl. ¶ 30; Answer ¶ 30.
[43] Compl. ¶ 31; Answer ¶ 31.
[44] Compl. ¶ 31; Answer ¶ 31.
[45] Compl. ¶ 32; Answer ¶ 32.

desirable for the transaction.[46] He also did not give them a reasonable opportunity to seek the advice of independent counsel before he paid off the deed of trust.[47] The Gorsts did not give informed consent in writing to the essential terms of the transaction and to Respondent's role in the transaction, including whether he was representing them in the transaction.[48]

Also on March 22, 2018, the prospective buyers of the Gorsts' property at 1108 Minter Avenue raised inspection objections.[49] Even though Respondent was not representing the Gorsts in connection with the home sale, he gave $18,000.00 to the buyers' real estate agent to resolve the objections.[50] Respondent claimed that the payment was a loan.[51] There was no written agreement for the transaction, however.[52] Respondent did not advise the Gorsts in writing that the advice of independent counsel was desirable for this transaction.[53] Nor did he provide them a reasonable opportunity to seek the advice of independent counsel before he paid the funds to the buyers' real estate agent for the purposes of resolving the objections.[54] In addition, the Gorsts did not give informed consent in writing to the essential terms of the transaction and to Respondent's role in the matter, including whether Respondent was representing them.[55] The prospective buyers eventually cancelled the contract and returned the $18,000.00.[56]

Respondent was, however, representing the Gorsts in the potential purchase of a new home at 48 Creekside Court in Glenwood Springs.[57] The Gorsts contracted to buy the home on March 3, 2018.[58] On March 20, 2018, Respondent signed an inspection objection notice on their behalf.[59] His signature described him as "David K[.] Fulton[,] Attorney in Fact."[60] On March 27, 2018, Respondent sent an inspection resolution form to the home's real estate agent.[61] Respondent signed the inspection resolution form as the Gorsts' "Attorney in Fact."[62] On March 30, 2018, Respondent sent Mr. Gorst a lease that he had

[46] Compl. ¶ 33; Answer ¶ 33.
[47] Compl. ¶ 34.
[48] Compl. ¶ 35; Answer ¶ 35.
[49] Compl. ¶ 36; Answer ¶ 36.
[50] Compl. ¶ 37; Answer ¶ 37.
[51] Compl. ¶ 39; Answer ¶ 39.
[52] Compl. ¶ 40; Answer ¶ 40.
[53] Compl. ¶ 41; Answer ¶ 41.
[54] Compl. ¶ 42.
[55] Compl. ¶ 43; Answer ¶ 43.
[56] Compl. ¶ 38; Answer ¶ 38.
[57] Compl. ¶ 26; Answer ¶ 26.
[58] Compl. ¶ 27.
[59] Compl. ¶ 28.
[60] Compl. ¶ 28.
[61] Compl. ¶ 44.
[62] Compl. ¶ 44.

prepared for the property at 1108 Minter Avenue.[63] Respondent included a line at the end of the lease that stated, "Prepared by David K. Fulton, Esq."[64]

On April 17, 2018, the Gorsts cancelled their contract to purchase 48 Creekside Court.[65] The seller's realtor refused to return $10,000.00 in earnest money until the Gorsts signed a release form.[66] Respondent objected to the form and advised the Gorsts not to sign it.[67] He also gave the Gorsts $10,000.00 and told them they could repay him when the matter was resolved.[68] There was no written agreement for the transaction.[69] Respondent did not advise his clients in writing that the advice of independent counsel was desirable for the transaction.[70] Nor did he give them a reasonable opportunity to obtain the advice of independent counsel before lending them the $10,000.00.[71] The Gorsts did not give informed consent in writing to the essential terms of the transaction and to Respondent's role in the matter, including whether he was representing them in the transaction.[72]

After the Gorsts cancelled the contract to purchase the Creekside home, Respondent continued representing Mr. Gorst for several months in connection with Mr. Gorst's efforts to purchase the Eagle's Club in Glenwood.[73] Respondent later claimed that Mr. Gorst owed him costs associated with the representation.[74] Respondent did not inform Mr. Gorst in writing the basis or rate of his fee and expenses before commencing to represent him in connection with the purchase of the club.[75] Further, he did not provide Mr. Gorst a written basis or rate of his fee and expenses within a reasonable time after commencing the representation.[76]

The Gorsts' lawyer-client relationship with Respondent ended in 2018.[77] On November 21, 2018, Respondent filed a lawsuit against Ms. Gorst claiming she owed him $17,239.93 plus interest from his payment on the deed of trust with Bank of Colorado.[78] On March 20, 2020, Respondent filed a lawsuit against Mr. Gorst based on the same

[63] Compl. ¶ 45; Answer ¶ 45.
[64] Compl. ¶ 45; Answer ¶ 45.
[65] Compl. ¶ 46; Answer ¶ 46.
[66] Compl. ¶ 47; Answer ¶ 47.
[67] Compl. ¶ 48; Answer ¶ 48.
[68] Compl. ¶ 49; Answer ¶ 49. The situation was resolved ten days later; the Gorsts' $10,000.00 was returned, and they in turn paid Respondent back. Compl. ¶ 50; Answer ¶ 50.
[69] Compl. ¶ 51.
[70] Compl. ¶ 52; Answer ¶ 52.
[71] Compl. ¶ 53; Answer ¶ 53.
[72] Compl. ¶ 54; Answer ¶ 54.
[73] Compl. ¶ 55.
[74] Compl. ¶ 56.
[75] Compl. ¶ 57; Answer ¶ 57.
[76] Compl. ¶ 58.
[77] Compl. ¶ 59.
[78] Compl. ¶ 60.

transaction.[79] The Gorsts have spent more than $30,000.00 in attorney's fees defending against Respondent's lawsuit.[80]

Through the conduct described above, as stipulated by the parties, Respondent violated Colo. RPC 1.5(b).[81] That rule states in relevant part, "[w]hen a lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation."[82] Respondent had not regularly represented Mr. Gorst, Ms. Gorst, or Riviera Supper Club when he represented them at various times from 2016 through 2018.[83] He did not inform any of these clients in writing of the basis or rate of his fee and expenses before commencing the representations.[84] Nor did he do so within a reasonable time after commencing the representation.[85]

In addition, Respondent violated Colo. RPC 1.8(a).[86] That rule states:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in writing in a manner that the client can reasonably understand; (2) the client is advised in writing that the advice of independent counsel is desirable, and the client is given reasonable opportunity to seek such advice; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[87]

Respondent failed to comply fully with the provisions of Colo. RPC 1.8(a) when acting as the Gorsts' lawyer over the course of several years:

- In connection with the 2016 loan for more than $30,000.00 to Mr. Gorst and Riviera Supper Club, Respondent failed to secure written informed consent regarding his role in the transaction, including whether he represented them in the transaction;[88]

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[79] Compl. ¶ 61.
[80] Compl. ¶ 62.
[81] Compl. ¶ 68.
[82] Colo. RPC 1.5(b).
[83] Compl. ¶ 65.
[84] Compl. ¶ 66.
[85] Compl. ¶ 67.
[86] Compl. ¶ 72.
[87] Colo. RPC 1.8(a).
[88] Though the People allege in paragraph 71 of the complaint that the loan was for $31,100.00, this figure appears to be transcribed in error, as the parties elsewhere agree that the loan amount was $30,100.00. *See* Compl. ¶ 9; Answer ¶ 9.

- In connection with the January 2018 amendment and restatement of installment promissory note for $23,985.47 to Mr. Gorst and Riviera Supper Club, Respondent did not advise Mr. Gorst and Riviera Supper Club in writing that the advice of independent counsel was desirable for this transaction. Respondent failed to secure written informed consent from Mr. Gorst and Riviera Supper Club to his role in the transaction, including whether he was representing them in the transaction;[89]

- In connection with the payment of $17,239.93 of March 22, 2018, to satisfy the Gorsts' deed of trust on their vacant lot with Bank of Colorado, Respondent did not fully disclose in writing to the Gorsts the terms of the transaction. Respondent did not advise the Gorsts in writing that the advice of independent counsel was desirable for the transaction. Respondent failed to secure written informed consent from the Gorsts to the essential terms of the transaction and to his role in the transaction, including whether he was representing them in the transaction;[90]

- In connection with the March 2018 payment of $18,000.00 on the Gorsts' behalf to the prospective buyers of their home, Respondent did not fully disclose to the Gorsts in writing the terms of the transaction. He did not advise them in writing that the advice of independent counsel was desirable for the transaction. Respondent failed to secure written and informed consent from the Gorsts to the essential terms of the transaction and his role in it, including whether he was representing them in the transaction;[91]

- In connection with the April 2018 loan of $10,000.00 to the Gorsts to cover their temporary loss of earnest money, Respondent did not fully disclose in writing to them the terms of the transaction. Nor did he advise them in writing that the advice of independent counsel was desirable for the transaction. Respondent failed to secure written informed consent from the Gorsts to the essential terms of the transaction and his role in it, including whether he was representing them in the transaction.[92]

Facts Established at Hearing on the Sanctions

Factual findings in this section are drawn from the testimony at the hearing on the sanctions where not otherwise indicated. The Hearing Board considers the testimony and

[89] Compl. ¶ 71.
[90] Compl. ¶ 71.
[91] Compl. ¶ 71.
[92] Compl. ¶ 71.

exhibits for the limited purpose of determining the appropriate sanction to be imposed in this matter.

In 1974, Respondent passed the Ohio bar examination. In the five years that followed, he served in the military as a JAG officer. Respondent obtained his license to practice law in Maine and New Hampshire, and he opened his first law office in Maine in 1986. He practiced law in Maine and New Hampshire until moving to Colorado in 2001 to reconnect with his high school girlfriend and current partner. Respondent said that his legal practice in Colorado was secondary to his real estate activities and that he was licensed in Colorado solely because he "didn't want to be introduced at parties as a lawyer who didn't practice law in the state he lived in."[93] He never advertised as a lawyer in Colorado, and he did not maintain a physical office for his practice in Glenwood Springs. He claimed that he never earned money from practicing in Colorado other than one occasion when he provided legal services to his family.[94]

Respondent called the Gorsts his "best friends in Glenwood Springs." He testified that he knew Mr. Gorst wanted to own a piano bar, so he helped Mr. Gorst and Riviera Supper Club purchase a restaurant in 2016.[95] He billed Riviera Supper Club $1,500.00 for his legal work and claimed that the figure would have been much higher if he had billed at an hourly rate. He acknowledged that he had no fee agreement identifying the client in the representation. He lent the Gorsts $30,100.00 during the representation so that they could "get [their] offer in" to secure the purchase of the business after another prospective buyer made a competing offer.

Respondent claimed that he was mindful about his responsibilities as a lawyer when he entered into the transactions with Mr. Gorst and Riviera Supper Club.[96] He recalled advising the Gorsts in writing to seek independent counsel to review the $30,100.00 loan, and he speculated that he "probably" provided them additional explanation orally.[97] He did not similarly advise them for the later transactions, he explained, because "they already knew [about the advisement] and it would have been insulting" to repeat it; he worried that it would have seemed like he was "gloating over them."

Respondent testified that he paid off the lien on the Gorsts' vacant lot while he represented them in their attempted purchase of a new home at Creekside Court. He made the payment to help the Gorsts get their "dream home," he said. The Gorsts needed to sell the vacant lot to finance the purchase of the new home, he explained, and eliminating the

[93] Respondent testified that he had been a real estate broker in Colorado for more than ten years until transferring his real estate license to inactive status in January 2019.

[94] We note that Respondent's testimony and the stipulated facts establish that he also received compensation from Riviera Supper Club for the legal services he provided in 2016.

[95] Respondent specified that the transaction was for the restaurant business only and not for real estate. *See also* Answer ¶ 5 (stating the same).

[96] Respondent acknowledged attending ethics courses as part of his continuing legal education requirements.

[97] Respondent testified that he counseled the Gorsts to have an independent lawyer review the matter because he stood to benefit from the loan, as the IRA from which he drew funds for the loan would accumulate interest.

lien freed up money that they otherwise would have had to pay to Bank of Colorado after selling the vacant lot.[98] Respondent considered the transaction to be an oral loan "at that stage."[99] He did not commit the terms of the transaction to writing after making the payment because "[he] trusted [the Gorsts]" to repay him. Respondent's partner, Fulton, echoed his testimony on this point. She testified that Respondent and Mr. Gorst were close friends after meeting in 2014, that Respondent valued the friendship, and that he never expected any negative consequence to come from his transactions with the Gorsts and Riviera Supper Club. The relationship deteriorated when their partnership to renovate a historic arts building in Glenwood Springs fell through.[100] This depressed Respondent and affected his health, Fulton said.[101] She stated that Respondent did not intentionally do anything wrong and did not set out to take advantage of the Gorsts. She further noted that Respondent used "all of the money that [he] had in the bank" to pay off the lien.

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[102] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[103] When imposing a sanction after a finding of lawyer misconduct, the Hearing Board must 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 the Hearing Board may then adjust based on aggravating and mitigating factors.

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

Duty: Respondent violated his duty of client loyalty to both the Gorsts and Riviera Supper Club by engaging in business transactions with them or on their behalf without appropriately notifying them of the potential conflicts of interests that could arise from his role in those transactions. Respondent also violated his duty as a professional to provide the Gorsts and Riviera Supper Club with a written basis of his fee and expenses.

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[98] *See also* Ex. 1 at 2 (discussing relying on funds from Respondent to finance the purchase of the Creekside Court home).

[99] The Hearing Board heard considerable testimony from both Respondent and Mr. Gorst as to whether the transaction was in fact a loan. Because Respondent admitted to the facts establishing the rule violations in this case, we need not—and therefore do not—make further findings of fact concerning the arrangements, if any, between Respondent and the Gorsts regarding these various transactions.

[100] Respondent stated that he and Mr. Gorst had partnered to acquire and renovate the Durand Opera House in downtown Glenwood Springs. Mr. Gorst ended the venture on August 1, 2018. *See* Ex. 3 at 18-19. Respondent described feeling "double-crossed" by the business dispute that followed because Mr. Gorst took Respondent's ideas for the project to a new partner. The dispute soon included Respondent's payment on the lien, and Respondent filed a complaint for attempted theft against Mr. Gorst with the district attorney in Glenwood Springs. *See* Ex. S4. Mr. Gorst, in turn, lodged a complaint against Respondent with the Division of Real Estate at the Colorado Department of Regulatory Agencies. *See* Ex. S7.

[101] Respondent also testified that the stress of the situation with the Gorsts has caused physical and mental health issues. *See* Ex. S5 (notes from Respondent's Veteran Administration counselor confirming the same).

[102] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2d ed. 2019).

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

Mental State: We find that Respondent acted knowingly when he entered the business transactions with his clients without fully complying with Colo. RPC 1.8(a).[104] Lawyers in Colorado are presumed to be aware of their professional duties under the rules.[105] But we need not rely on this presumption to conclude that Respondent in fact knew that he had not provided full disclosures required under Colo. RPC 1.8(a). We find that Respondent knew of his responsibility, as evidenced by his 2016 email advisement to the Gorsts to seek independent counsel to review the loan for $30,100.00. His own testimony confirms his knowledge: he testified that he decided not to similarly advise them in later transactions because he believed that doing so might harm his relationship with them. We find clear and convincing evidence that Respondent was aware of the nature and circumstance of his conduct when he violated Colo. RPC 1.8(a).

Likewise, we find that Respondent knowingly violated Colo. RPC 1.5(b). He knew that he had not regularly represented the Gorsts or Riviera Supper Club when he began counseling them in 2016. Even so, he never provided them a written basis or rate of his fee and expenses.

Injury: We find that Respondent harmed the Gorsts when he failed to advise them about possible conflicts of interest because he deprived them of adequate counsel—including advisements to have other lawyers review the transactions—and foreclosed their options to pursue other avenues.

At the hearing, Mr. Gorst testified that Respondent's lawsuits against him and Ms. Gorst have caused them significant emotional and mental strain. He detailed their grievances against Respondent, alleging that Respondent harassed them in an attempt to obtain repayment of the funds used to pay off the lien on the vacant lot. Mr. Gorst also insisted that neither he nor his wife ever agreed that Respondent should pay off the lien. He stated that they have outlaid "over $50,000.00" to defend against Respondent's lawsuits.[106] Based on Mr. Gorst's stance, the People argue that Respondent harmed the Gorsts by suing to recoup the money he had provided them without the advisements mandated by our ethics rules.

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[104] "Knowing" is the conscious awareness of the nature or attendant circumstances of the conduct, without the conscious objective or purpose to accomplish a particular result. ABA *Annotated Standards* Preface at xxi.

[105] *In re Attorney C*, 47 P.3d 1167, 1173 n.12 (Colo. 2002). Indeed, Respondent acknowledged that he had attended continuing legal education classes—including ethics courses—since obtaining his law license in Colorado.

[106] Respondent acknowledged at the hearing that the litigation against the Gorsts involved "a lot of back-and-forth" during the motions practice. He filed the lawsuit against Ms. Gorst on September 11, 2018, in Garfield County case 18CV013. Respondent said he named Ms. Gorst as the defendant to avoid issue preclusion and res judicata in his litigation against Mr. Gorst. Mr. Gorst, in contrast, claimed that Respondent's lawsuit was an intimidation tactic, noting that Respondent once told him, "if you really want to mess with someone, just sue his wife." Respondent testified that his complaint against Mr. Gorst in Garfield County case 20CV009 was dismissed for failure to prosecute. Respondent then filed a complaint against Mr. Gorst in Garfield County case 21CV007 for return of money lent; unjust enrichment; civil theft; civil fraud; negligent and/or intentional infliction of emotional duress; liable and slander; conspiracy and harassment; malicious prosecution; and abuse of process. Respondent told the Hearing Board that the abuse of process claim remains pending.

We cannot endorse the People's rationale, as they have not shown to our satisfaction a causal nexus between Respondent's stipulated misconduct and the later dispute and civil litigation between Respondent and the Gorsts. While Respondent's failure to provide the Gorsts proper advisements deprived them of valuable information about his role in the transactions and his own financial interests in them, that failure did not in fact cause the Gorsts further injury but instead benefitted them: with the deed of trust on their vacant lot satisfied, they had recourse to additional funds to pursue purchase of the Creekside residence. In our view, the later litigation, which is too attenuated to attribute to Respondent's admitted misconduct, was spawned by business disputes and the resultant soured friendship between Respondent and Mr. Gorst.[107] We find that the actual injury the Gorsts sustained as a result of Respondent's violation of Colo. RPC 1.8(a) was minimal.

ABA *Standards* 4.0-8.0 – Presumptive Sanction

Under the ABA *Standards*, the presumptive sanction for Respondent's misconduct is suspension. ABA *Standard* 4.32 calls for suspension when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, causing the client injury or potential injury. ABA *Standard* 7.2 also applies to Respondent's admitted violation of Colo. RPC 1.5(b) regarding a written statement of the basis or rate of a lawyer's fee. ABA *Standard* 7.2 calls for suspension when a lawyer knowingly engages in conduct that is a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

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.[108] As explained below, the Hearing Board applies two factors in aggravation and four factors in mitigation, one of which we weigh heavily.[109]

Aggravating Factors

Pattern of Misconduct – 9.22(c): Respondent stipulated that he failed to provide full disclosures under Colo. RPC 1.8(a) to the Gorsts and Riviera Supper Club in five separate transactions with his clients. Nor did he provide them with a written basis for his fee or rate during his legal representation of them in multiple matters from 2016 to 2018. However, because these rule violations took place within the context of one client relationship, we assign this factor only average weight.

[107] Similarly, we acknowledge Mr. Gorst's testimony that he and Ms. Gorst have experienced mental and emotional stress from the litigation, but we do not specifically attribute that stress to Respondent's admitted misconduct.

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

[109] Mr. Gorst requested that the Hearing Board disbar Respondent or, in the alternative, require Respondent to petition for reinstatement. A complaining witness's recommendation as to the appropriate sanction, however, is neither an aggravating nor a mitigating factor under ABA *Standard* 9.4(e).

Substantial Experience in the Practice of Law – 9.22(i): Respondent has been a Colorado-licensed lawyer since 2002 and was first admitted to practice law in 1974. This, too, we consider an aggravating factor. Yet the uncontested testimony during the hearing indicates that his practice since receiving his Colorado law license in 2002 has been limited. We therefore accord this factor average weight.

Mitigating Factors

Absence of Prior Discipline – 9.32(a): Respondent has no prior discipline in over four decades of practice, but we find this fact merits just average mitigating weight due to his very limited practice for close to twenty years while living in Colorado.

Absence of a Dishonest or Selfish Motive – 9.32(b): We find clear and convincing evidence that Respondent entered into the business transactions with the Gorsts and Riviera Supper Club without any dishonest or selfish motive, other than perhaps being too eager to please Mr. Gorst, his friend. As Respondent's partner, Fulton, mentioned, Respondent valued his friendship with Mr. Gorst and did not anticipate that any negative consequences would come from the transactions at the time he made them. Indeed, Respondent and Fulton credibly testified that he entered into the transactions in good faith.[110] We grant this factor significant weight.

Cooperation with Disciplinary Proceedings – 9.32(e): The People acknowledge—and we agree—that Respondent has made full and free disclosures during this proceeding. We give this factor average weight in mitigation.

Remorse – 9.32(l): Respondent expressed sincere regret for failing to commit to writing the terms of his payment on the Bank of Colorado lien. He also conveyed some remorse that the litigation between him and the Gorsts has negatively affected them. We weigh this factor only lightly in mitigation.

Analysis Under ABA *Standards* and Case Law

The Hearing Board heeds the Colorado Supreme Court's directive to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,[111] mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[112] Though prior cases can inform through analogy, the Hearing Board is charged with determining the appropriate sanction for a lawyer's misconduct on a case-by-case basis.

[110] Respondent also testified that he sought repayment of the lien payoff on the same terms on which the Gorsts had agreed to pay Bank of Colorado. *See also* Ex. 2 at 3; Ex. 3 at 21.

[111] *See In re Attorney F.*, 2012 CO 57, ¶ 20; *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

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

Here, the People request a six-month suspension. Respondent argues that any period of suspension should be subject to probation, noting that he needs his license to continue work on a title dispute in Maine and that a suspension would affect his ability to represent himself and other entities in pending litigation.

Colorado cases involving the type of rule violations in this matter occasionally have resulted in public censure but have more typically yielded suspensions of various lengths. In *People v. Wollrab*, for instance, a hearing board suspended a lawyer for nine months with the requirement that he petition for reinstatement after he drafted for himself a lifetime lease for an office space with terms that "were egregiously unfavorable to his clients," the landlord.[113] The lease eliminated the protective provisions that benefitted his clients and provided him the office space at below-market rates.[114] The hearing board found that the lawyer's misconduct caused actual financial injury to his clients, that the lawyer's misconduct was knowing, and that four significant aggravators applied, including prior disciplinary offenses and a dishonest or selfish motive.[115]

In *In re Cimino*, a lawyer entered an improper business transaction as a creditor investor in a corporation while simultaneously representing the corporation.[116] The corporation authorized the lawyer to prepare minutes and promissory notes for the loans he had made to the corporation.[117] The lawyer did not advise shareholders or corporate officers to obtain independent counsel to review the matter.[118] After he failed to timely prepare the promissory notes and minutes authorizing the debt, he resigned as director and sued the corporation to collect on the debt.[119] The Colorado Supreme Court concluded that a thirty-day suspension was appropriate where the potential for injury existed and the three aggravating factors—including prior discipline and a dishonest or selfish motive—outweighed the two mitigating factors.[120]

In a third case, *People v. Ginsberg*, a lawyer made a $25,000.00 loan to a longtime client without disclosing the potential conflict of interest to his client.[121] The loan carried an excessive 30 percent interest rate.[122] The Colorado Supreme Court approved the parties' stipulation to a ninety-day served suspension after considering two mitigating factors and five aggravating factors, including the lawyer's prior discipline and a selfish motive.[123] The Colorado Supreme Court noted that the client suffered little actual damage aside from the

[113] 439 P.3d 1259, 1265 (Colo. O.P.D.J. 2018).
[114] *Id.*
[115] *Id.* at 1263.
[116] 3 P.3d 398 (Colo. 2000).
[117] *Id.* at 399.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 401-02.
[121] 967 P.2d 151, 152 (Colo. 1998).
[122] *Id.*
[123] *Id.* at 153.

excessive interest rate, but it stated that "at least the potential for additional harm was present."[124]

In contrast to these cases, the Colorado Supreme Court in *People v. Potter* approved a hearing board's recommendation to publicly censure a lawyer after he accepted a loan from his client without advising her of his potential conflict of interest.[125] The lawyer did not discuss a repayment schedule with his client or give her a promissory note or other writing confirming the loan, and he did not advise her to seek independent counsel to review the matter.[126] The hearing board determined that the lawyer acted knowingly but that he did not have the objective to deceive or take advantage of his client.[127] The hearing board publicly censured the lawyer, noting that the lawyer's misconduct resulted in neither actual nor potential client injury. Further, significant mitigating factors were present.[128]

With these authorities guiding us, we turn to Respondent's misconduct. As Respondent admitted, he violated Colo. RPC 1.8(a) in five separate transactions with the Gorsts and Riviera Supper Club when he failed to get their signed, written consent to his role in those matters. With the exception of one email attaching the agreement for the $30,100.00 loan, he did not properly advise the Gorsts about his role in the transactions and the potential for the transactions to create conflicts of interest, nor did he provide them an opportunity to seek outside counsel. This harmed his clients, bringing this case in line with *Wollrab* and *Ginsberg*, although we do not find that Respondent's admitted misconduct caused anything more than minimal injury. Moreover, the evidence at hearing established that, like the lawyers in *Cimino* and *Wollrab*, Respondent's misconduct was knowing. In contrast to the lawyers in *Wollrab*, *Cimino*, and *Ginsberg*, however, Respondent did not have a deceptive or selfish motive when he engaged in the stipulated misconduct—a significant mitigating factor that positions this case closer to *Potter*.

Nevertheless, the presumptive sanction here is suspension, as the existence of actual harm warrants a sanction greater than public censure. Where the presumptive sanction is suspension, six months is generally considered the baseline period of suspension, to be adjusted based on aggravators and mitigators.[129] Given the relevant case law and the absence of a selfish or dishonest motive, we conclude that a six-month suspension, all stayed on successful completion of conditions attached to a two-year period of probation, is an appropriate sanction. We also find that probation is fitting because Respondent is unlikely to harm the public and can be adequately supervised, is able to conform his practice to professional standards, and has not committed acts warranting disbarment.[130] As conditions of his probation, Respondent must submit to practice monitoring and attend the

[124] *Id.*
[125] 966 P.2d 1060, 1061 (1998).
[126] *Id.*
[127] *Id.* at 1062.
[128] *Id.*
[129] *See* ABA *Standard* 2.3.
[130] C.R.C.P. 251.7(a)(1)-(3).

one-day ethics school sponsored by the People.[131] Further, he must not violate the Colorado Rules of Professional Conduct.[132]

IV. CONCLUSION

During 2016 to 2018, Respondent represented two clients—his best friends—in several matters, but he failed to provide them a written basis for his fee and expenses. He also engaged in a series of transactions with his clients but did not adequately advise them of the potential conflicts of interest that could result from those matters—in some instances providing no advisements at all—despite knowing of his duty to do so. Respondent harmed the clients by depriving them of adequate counsel and limiting their opportunities to seek independent legal review of the transactions and pursue other courses of action. The actual injury, however, was minor, as the transactions benefited his clients. Moreover, Respondent did not seek to benefit himself in the transactions but instead worked to advance his clients' interests. Therefore, the appropriate sanction here is a six-month suspension to be fully stayed subject to Respondent's completion of a two-year period of probation with conditions.

V. ORDER

The Hearing Board therefore **ORDERS:**

1. **DAVID KENNISTON FULTON SR.**, attorney registration number **33729**, is **SUSPENDED** from the practice of law for a period of six months, **ALL TO BE STAYED** upon his successful completion of a of **TWO-YEAR** period of **PROBATION**, with the conditions identified in paragraph 2 below. The probation will take effect upon issuance of an "Order and Notice of Probation."[133]

2. Respondent **SHALL** successfully complete a **TWO-YEAR PERIOD OF PROBATION** subject to the following conditions:

    a. He will commit no further violations of the Colorado Rules of Professional Conduct;

    b. He will attend at his own expense the ethics school offered by the People no later than six months after his probation begins;

    c. During the period of his probation, Respondent must meet quarterly with an independent practice monitor selected by the People in conjunction

[131] *See* C.R.C.P. 251.7(b)(2) & (4).
[132] C.R.C.P. 251.7(b)(13).
[133] In general, an order and notice of sanction will issue thirty-five days after a decision is entered under C.R.C.P. 251.19(b). In some instances, the order and notice may issue later than the thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

with Respondent.[134] Respondent shall bear all costs of complying with this condition of probation.

i. Respondent and the People shall select the monitor **no later than the effective date of the probation**. Also by that date, Respondent shall provide a copy of this opinion to the monitor and execute a release authorizing the monitor to notify the People if Respondent fails to fully participate in the required monitoring.

ii. The monitoring shall be designed to minimize the possibility that Respondent's misconduct will reoccur. To that end, on or by the date of their first meeting, Respondent shall provide the monitor with a written statement listing all matters in which he is providing legal services during the probationary period, including active litigation; real estate or other transactions in which he renders legal services; pro bono legal services; or any service in which he acts in his capacity as a Colorado-licensed lawyer or represents himself as such. For each matter, Respondent shall specify in his written statement to the monitor whether he has a personal relationship with the client or clients and whether he has regularly represented the client or clients. Thereafter, by each quarterly meeting, Respondent shall notify the monitor in writing of all additional matters in which he has provided legal services as described in this paragraph.

iii. The monitor will review Respondent's client files to determine whether Respondent is entering fee agreements with his clients that meet the requirements of the Colorado Rules of Professional Conduct and, when required under the rules, whether Respondent has adequately advised his clients of potential conflicts of interest.

iv. The monitor shall submit quarterly reports to the People during the period of probation. The reports should include a description of the matters reviewed and any instances of Respondent's noncompliance with the monitoring conditions.

v. Respondent's compliance with this practice monitoring program does not waive the attorney-client privilege, the work-product doctrine, or other protections Respondent is entitled to claim to keep protected information confidential. All reports and communications between Respondent, the monitor, and/or the People relating to this monitoring program shall be confidential.

[134] The meetings may be held remotely if Respondent or the practice monitor has concerns about meeting in person due to the COVID-19 pandemic.

3. If, during the period of probation, the People receive information that any condition may have been violated, the People may file a motion with the PDJ specifying the alleged violation and seeking an order that requires Respondent to show cause why the stay should not be lifted and the sanction activated for violation of the condition. The filing of such a motion will toll any period of suspension and probation until final action. Any hearing will be held under C.R.C.P. 251.7(e).

4. No more than twenty-eight days and no less than fourteen days before the expiration of the period of probation, Respondent **SHALL** file an affidavit with the People stating whether he has complied with all terms of probation and shall file with the PDJ a notice and a copy of such affidavit and an application for an order showing successful completion of the period of probation. On receipt of this notice and absent objection from the People, the PDJ will issue an order showing that the probation was successfully completed. The order will become effective upon the expiration of the period of probation.

5. The parties **MUST** file any posthearing motions **on or before Friday, October 8, 2021**. Any response thereto **MUST** be filed within seven days.

6. The parties **MUST** file any application for stay pending appeal **on or before Friday, October 15, 2021**. Any response thereto **MUST** be filed within seven days.

7. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** file a statement of costs **on or before Friday, October 8, 2021**. Any response thereto **MUST** be filed within seven days.

DATED THIS 24th DAY OF SEPTEMBER, 2021.

William R Lucero

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

/s/ Matthew T. Daly

MATTHEW T. DALY
HEARING BOARD MEMBER

/s/ Darla Scranton Specht

DARLA SCRANTON SPECHT
HEARING BOARD MEMBER

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