***People v. Michael John Heaphy*. 14PDJ110. September 9, 2015**.

Following a hearing, a hearing board disbarred Michael John Heaphy (attorney registration number 26088). Heaphy's disbarment took effect on June 6, 2016.

While representing a client in a copyright infringement matter, Heaphy knowingly converted over $14,000.00 in settlement funds, comingled his client's funds with his own, and then failed to act diligently or to respond to his client's communications. He paid full restitution plus interest, but only after his license to practice law was threatened with immediate suspension. Through this misconduct, Heaphy violated Colo. RPC 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Colo. RPC 1.4(a)(4) (a lawyer shall promptly comply with a client's reasonable requests for information); Colo. RPC 1.15(a) (2008) (a lawyer shall hold client property separate from the lawyer's own property); Colo. RPC 1.16(d) (a lawyer shall, on termination, take steps to the extent reasonably practicable to protect the client's interests); and Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). 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:** MICHAEL JOHN HEAPHY	Case Number: **14PDJ110**
OPINION AND DECISION IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)	

On July 7 and 8, 2015, a Hearing Board comprising Barbara Weil Laff and Forrest W. Lewis, members of the bar, and William R. Lucero, the Presiding Disciplinary Judge ("the PDJ"), held a hearing pursuant to C.R.C.P. 251.18. Charles E. Mortimer Jr. appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Michael John Heaphy ("Respondent") appeared pro se. The Hearing Board now issues the following "Opinion and Decision Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."

I. SUMMARY

While representing a client in a copyright infringement matter, Respondent knowingly converted the settlement funds he received on his client's behalf, commingled his client's funds with his own, and then failed to act diligently or to respond to his client's communications. He paid full restitution, including interest, but only after his license was threatened with immediate suspension. Through this misconduct, Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(a), 1.16(d), and 8.4(c). Taking into account the seriousness of Respondent's actions and the balance of aggravating and mitigating factors, the Hearing Board concludes that Respondent should be disbarred from the practice of law.

II. PROCEDURAL HISTORY

The People filed a "Petition for Immediate Suspension Pursuant to C.R.C.P. 251.8(a)(1)(B)" on December 22, 2014, based on Respondent's alleged conversion of client funds. The PDJ issued an order to show cause on December 22, 2014, ordering Respondent to address why his license should not be immediately suspended. Respondent responded on January 5, 2015. On January 12, 2015, the PDJ recommended to the Colorado

Supreme Court that Respondent be immediately suspended from the practice of law. The Colorado Supreme Court immediately suspended Respondent's law license on January 20, 2015.

On January 27, 2015, the People filed a complaint in this case; on February 21, 2015, they filed an amended complaint alleging violations of Colo. RPC 1.3, 1.4(a)(4), 1.15(a),[1] 1.16(d), and 8.4(c). Respondent responded to the amended complaint on March 17, 2015. The PDJ held a scheduling conference on March 30, 2015, and set the hearing for July 7-8, 2015.

On June 24, 2015, the PDJ granted the People's motion to allow absentee testimony under C.R.C.P. 43(i) and permitted the People's witness, David A. Knight (who resides in Australia), to testify via Skype at the hearing. Also before the hearing, the PDJ granted in part the People's motion in limine to take judicial notice of Respondent's answer to the People's petition for immediate suspension and the order to show cause. In that order, the PDJ took judicial notice of the fact that Respondent filed the response but declined to take judicial notice of the contents therein.[2] The PDJ also issued an order determining that Respondent's COLTAF records, which were accompanied by an affidavit from the custodian of records at Alpine Bank, were self-authenticating under CRE 902(11).

During the hearing, the Hearing Board considered the parties' stipulated facts and testimony from David A. Knight and Respondent. Respondent asserted his Fifth Amendment right against self-incrimination at the hearing in response to many of the People's questions.[3] The PDJ admitted exhibits 1, 2, 3, 10, and 11 and stipulated exhibit 9A.[4]

III. FINDINGS OF FACT AND RULE VIOLATIONS

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 23, 1995, under attorney registration number 26088.[5] He is thus

[1] Respondent's conduct was charged under an earlier version of Colo. RPC 1.15(a). The Colorado Supreme Court revised this rule in 2014.

[2] *See Doyle v. People*, 343 P.3d 961, 965 (Colo. 2015) (finding that a court may take judicial notice of the occurrence or operable effect of various proceedings or documents filed, but it may not take judicial notice of acts, conditions, or statements on the sole basis that they are reflected in court records).

[3] *See* C.R.C.P. 251.18(d). Respondent also asserted his Fifth Amendment right at his deposition in response to the People's request that he bring certain documents to his deposition, including his client's file and his bank records.

[4] Exhibits 1 and 11 were admitted not for the truth of the matter asserted, but for the limited purpose of showing that Respondent received them. Exhibit 3, a certified copy of "Respondent's Answer to the Petition and Response to Order to Show Cause," was admitted under CRE 801(d)(2) as an admission by a party-opponent. Exhibit 10, containing Respondent's COLTAF records, was admitted under CRE 803(6) pursuant to the business records exception to the hearsay rule.

[5] Stip. Facts ¶ 1. Respondent's registered business address is P.O. Box 1490, Vail, Colorado 81658. His registered home address is P.O. Box 504, Minturn, Colorado 81645. Stip. Facts ¶ 1.

subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in these disciplinary proceedings.[6]

The Hearing Board considered the testimony of each witness and all admitted exhibits and finds the following facts were established by clear and convincing evidence. Where not otherwise indicated, these facts are drawn from testimony provided at the hearing.

Respondent's Background

After graduating from the University of Michigan School of Law, Respondent moved to Buena Vista to work with an attorney who practiced civil litigation. In 1999, both he and that attorney relocated their practice to Denver. In 2002, Respondent moved to Vail and opened a solo practice known as Vail Valley Law, P.C. For the past twelve years, Respondent has practiced primarily in civil litigation. Respondent maintained a COLTAF account at Alpine Bank in Vail. He testified, however, that he rarely handled client funds, as most of his work was billed as an hourly fee and he did not accept retainers.

The Kira Matter

Art Photography by Kira ("Kira") is an Australian photography studio.[7] David A. Knight and his wife, Kira Likhterova, own Kira. Knight manages the company, and Likhterova is the photographer. Kira owned the copyright to a photograph taken of Sarah Guyard-Guillot, a Cirque de Soleil performer who died tragically in June 2013 during a performance in Las Vegas.[8] After Guyard-Guillot passed away, various news companies used Kira's photograph of the performer without permission in media reports about her death.[9]

In July 2013, Knight contacted Respondent by telephone. After speaking with Respondent, Knight retained him to represent Kira in various copyright infringement actions against any persons or entities located or found in the United States who were unlawfully using Kira's photograph.[10]

As Respondent explained at the hearing, under copyright law there is a significant distinction between the intellectual property rights that automatically attach to a photograph upon its creation and those rights that attach to a photograph formally registered under the U.S. Copyright Act. If someone infringes upon the rights to a registered photograph, Respondent testified, the owner may be entitled to statutory damages and attorney's fees, remedies that are unavailable to owners of unregistered images. Kira had not registered for the copyright to its image of Guyard-Guillot. Respondent stated that he advised Knight of the limited remedies available, and the parties agreed to the

[6] *See* C.R.C.P. 251.1(b).
[7] *See* Ex. 3 at 1.
[8] *See* Ex. 3 at 1.
[9] *See* Ex. 3 at 2.
[10] *See* Ex. 3 at 1.

representation on a contingency fee basis, with no retainer. Per the agreement, Respondent's costs first would be subtracted from any net recovery. Thereafter, Respondent was to receive one-third of the proceeds for his attorney's fees, and Kira would receive the remaining two-thirds. Respondent stated that it was Kira's intention to use any funds recovered to establish a trust for Guyard-Guillot's children.[11] Respondent agreed to assist Knight in finding counsel in the state of Nevada who could help Kira create the trust.

Respondent testified that he devoted a significant amount of time to tracking down the various infringers. As he explained, he combed through hundreds of websites, determined who was using Kira's image, and decided whether it was a viable entity to pursue for damages. Even though he spent many hours on the case—far more than his contingency fee would compensate him for—Respondent liked Knight and felt that he was doing "good work." Given that Knight was located in Australia, he and Respondent communicated with each other primarily by email and occasionally by telephone. According to Knight, at the beginning of the representation Respondent frequently emailed him about the progress of his case.

Through his investigative work, Respondent was able to identify many companies that were using Kira's photograph without proper permission. He sent written demand letters to those alleged infringers seeking compensation for their illegal use of Kira's photograph. Respondent testified that many of these letters went unanswered. Some companies, however, agreed to compensate Kira. Respondent succeeded in negotiating settlements in the form of "after-the-fact licensing agreements" from four infringers: NBC, CBS, ABC, and Defy Media.[12] Knight consented to the settlement proposed by these four companies. After these matters settled, Respondent and Knight agreed not to pursue settlement with any other infringers given the cost involved and the relatively modest amount available in damages.

In the end, Respondent recovered four payments totaling $21,500.00: (1) $2,500.00 from NBC, (2) $2,500.00 from CBS, (3) $15,000.00 from ABC, and (4) $1,500.00 from Defy Media.[13] These settlement funds were paid directly to Respondent, but only two checks—those from CBS and Defy Media—were written expressly to Respondent's COLTAF account.[14]

Respondent deposited the check from CBS into his COLTAF account on October 4, 2013.[15] Then, on October 25, 2013, he transferred $3,300.00, into his operating account, bringing the balance in his COLTAF account to $58.00.[16] He did not, however, distribute any of CBS's funds to Kira.

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[11] Ex. 3 at 2.
[12] Defy Media is also known as Alloy Digital. *See* Ex. 2 at 1.
[13] Am. Compl. ¶ 6; Am. Answer ¶ 6; Ex. 2 at 1.
[14] *See* Ex. 10 at 16, 28. Copies of the checks from NBC and ABC were not presented at the hearing.
[15] Ex. 10 at 13-16.
[16] Ex. 10 at 13.

On March 14, 2014, Respondent deposited Defy Media's $1,500.00 check into his COLTAF account.[17] Again, he did not distribute any of these funds to Kira. Between March 14 and May 23, 2014, Respondent's COLTAF account statements reflect numerous transfers to his operating account and withdrawals from his trust account.[18] By May 23, 2014, the balance in Respondent's COLTAF account was $25.00.[19] The balance remained steady at $25.00 through the end of December 2014.[20] At the hearing, Respondent agreed the evidence reflected that he had consumed the money he received from CBS and Defy Media within a month or two after he deposited it.

Respondent received settlement checks from NBC and ABC by March 2014.[21] He never deposited these funds into his COLTAF account.[22] Nor did he give them to Kira. According to Respondent, he may have deposited these two checks directly into his operating account, but he never verified whether this was so. He testified that he used his operating account to pay for his business expenses, including rent. Because he was able to deposit these funds into an account other than his trust account, we infer that these two checks were not written expressly to his COLTAF account.

After receiving all four payments, Respondent ceased communicating with Knight in March 2014. Knight stated that his efforts to reach Respondent thereafter included sending frequent emails, making telephone calls, and leaving voicemail messages. All of Knight's attempts were unsuccessful. Knight, worried that something had happened to Respondent, began searching the internet for Respondent's precise location and contacting businesses near Respondent's office in an effort to reach him. Knight still received no response from Respondent. Knight next reached out to the Vail Sheriff's Department, concerned for Respondent's safety. Finally, Knight contacted the Colorado Better Business Bureau and lodged a complaint against Respondent. Respondent admits that between May 1, 2014, and August 7, 2014, he did not communicate with Knight.[23] He explained that he did not respond to Knight because he had not yet found Nevada counsel to assist Kira and thus had nothing to report to Knight.[24]

After remaining unresponsive for more than five months, Respondent eventually sent Knight an email on August 8, 2014.[25] In this email, Respondent apologized for his lack of communication.[26] He explained to Knight that a series of personal problems prevented him from "attending to [his] legal duties in a timely fashion."[27] He informed Knight that he could

[17] Ex. 10 at 25-28; *see also* Ex. 3 at 2.
[18] *See* Ex. 10 at 25-30.
[19] Ex. 10 at 30.
[20] Ex. 10 at 31-37.
[21] *See* Ex. 3 at 2.
[22] *See* Ex. 10.
[23] Ex. S9A.
[24] Ex. 3 at 3.
[25] Ex. 2 at 2.
[26] Ex. 2 at 2.
[27] Ex. 2 at 2.

no longer assist him and terminated his representation.[28] Respondent indicated that he wanted "to make the appropriate arrangements" to send Knight the funds in his possession.[29] Knight wrote Respondent back with wire transfer instructions.[30] On August 12, Respondent emailed Knight with a final accounting of the settlement funds.[31] According to Respondent, he owed Kira $14,276.97 after subtracting $84.55 in costs and $7,138.48 for attorney's fees.[32] Respondent concluded his email by promising to remit to Kira by wire transfer the balance owed within the next few days.[33] He failed to do so.[34]

In his response to the People's petition for immediate suspension, Respondent stated that as of August 12, 2014, he had "every intention to immediately remit the entire amount" but "due to personal problems" he failed "to do that which he was obligated to do in a timely manner. . . ."[35] He emphasized in the response that he always intended "to satisfy his obligations" and that he knew he "failed to do right by" his client and "failed to live up to his obligations and responsibilities."[36] Respondent reiterated at the hearing that it was always his intent to pay Kira the money he owed.

Knight testified that he never again heard from Respondent after the August 2014 email exchange. Knight made additional efforts to track down Respondent from abroad, including identifying who he believed to be Respondent's wife and emailing and calling her. Knight's renewed efforts to reach Respondent were likewise met with silence.

The People's Investigation

On October 28, 2014, the People sent Respondent a letter informing him that Knight had filed a request for investigation.[37] In this letter, the People instructed Respondent to immediately pay Kira the funds it was owed.[38] Respondent did not respond to this letter. Nor did he pay Kira its portion of the settlement. The People then sent Respondent a second letter on December 2, 2014, again asking him to reply.[39] He did not, and he did not send Kira its money. On December 15, 2014, the People sent Respondent a third letter, this time indicating that they had initiated an investigation and needed his response.[40] Respondent failed to comply and failed to remit to Kira its funds. Respondent testified that he received these letters but did not answer them because he was panicked, "locked up emotionally," in "shock," and experiencing "mental paralysis."

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[28] Ex. 2 at 2.
[29] Ex. 2 at 2.
[30] Ex. 2 at 1.
[31] Ex. 2 at 1.
[32] Ex. 2 at 1.
[33] Ex. 2 at 1.
[34] *See* Ex. 10 at 33.
[35] Ex. 3 at 3.
[36] Ex. 3 at 3-4.
[37] Ex. 11.
[38] Ex. 11 at 2.
[39] Ex. 11 at 3.
[40] Ex. 11 at 4-5.

On December 22, 2014, the People filed a petition seeking the immediate suspension of Respondent's law license. Respondent answered the People's petition on January 5, 2015.[41] He then made numerous deposits into his COLTAF account—which had a balance of $25.00—including earned fees from two client matters in the amounts of $4,616.52 and $8,500.00.[42] On January 13, 2015, he wired Kira $1,273.00, and on January 27, 2015, he wired Kira $7,489.45, bringing the balance in his COLTAF account back to $25.00.[43] Respondent also paid Kira eight percent interest from May 2014 to January 2015 in an effort to "recognize the time value of money and to remedy and correct any late payment." He acknowledged at the hearing that the funds he used to pay Kira were not a "direct flow-through" of the money he recovered from the infringers and that he could not trace those funds "dollar for dollar."

Colo. RPC 1.15(a) (2008) and Colo. RPC 8.4(c)

The People's first two claims allege that Respondent violated Colo. RPC 1.15(a) (2008) and Colo. RPC 8.4(c). Respondent contravened these rules, according to the People, by consuming the funds he received from CBS and Defy Media shortly after he deposited those funds into his COLTAF account. They also contend that Respondent violated these rules by failing to deposit the checks he received from NBC and ABC into his COLTAF account. In defense, Respondent argues that he cannot be found to have knowingly converted Kira's funds for three reasons: he was not familiar with the rules governing trust accounts; he never intended to keep Kira's money; and he eventually repaid the funds. At the hearing he did not dispute, however, that he improperly comingled Kira's funds with his own.

Colo. RPC 1.15(a) (2008) requires a lawyer to hold client property in a trust account, separate from the lawyer's own property. Subsection (b) of that rule requires a lawyer to promptly disburse any funds a client is entitled to receive that are in the lawyer's possession. The fact that a lawyer's comingling or temporary use of client funds causes no harm to a client is not a cognizable defense.[44] Colo. RPC 8.4(c) proscribes conduct involving dishonesty, fraud, deceit, or misrepresentation. A knowing conversion "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking."[45] Neither the lawyer's motive in taking the money, nor the lawyer's intent to return the funds, are relevant for disciplinary purposes.[46] In order to establish a violation of Colo. RPC 8.4(c), a culpable mental state

[41] Ex. 3.
[42] Ex. 10 at 38-44. Respondent testified that he was unaware of the prohibition against depositing earned funds into a trust account. The People did not bring a claim alleging a violation of the Rules of Professional Conduct based on these deposits.
[43] Ex. 10 at 38-39, 47-48.
[44] *See In re Trejo*, 185 P.3d 1160, 1172 (Wash. 2008) (finding that discipline is warranted even if a lawyer's comingling causes no actual harm because it results in the potential harm of having client funds attached by a lawyer's creditors).
[45] *People v. Varallo*, 913 P.2d 1, 11 (Colo. 1996) (quoting *In re Noonan*, 102 N.J. 157, 158, 506 A.2d 722, 723 (1986)).
[46] *Id*. at 10-11.

greater than simple negligence must be demonstrated.[47] "Knowing and intentional conversion [of client funds] may be established by various types of evidence."[48]

It is undisputed that Respondent succeeded in collecting $21,500.00 from four infringers by March 2014. Thus, per the fee agreement, Respondent was entitled to a legal fee of $7,138.48 plus costs of $84.55. Kira was therefore entitled to $14,276.97.[49] Accordingly, Kira's $14,276.97 should have remained in trust until Respondent distributed the money.[50] We conclude that the People have proved by clear and convincing evidence that Respondent knowingly misappropriated this $14,276.97 for his own purposes in violation of Colo. RPC 1.15(a) and 8.4(c).

The Hearing Board first turns to Respondent's handling of the funds he received from CBS and Defy Media. Respondent's trust account balances from October 2013 to May 2014 indicate that Respondent misappropriated at least a portion of the funds Kira was entitled to receive from these entities. CBS gave Respondent a $2,500.00 settlement check on October 4, 2013. This check was written to Respondent's COLTAF account and entrusted to his care. Thus, Respondent was required under the rules to deposit the check into trust and to hold in trust these funds until he disbursed them.[51] Rather than promptly disbursing the funds to Kira,[52] however, he transferred $3,300.00 from his COLTAF account into his operating account on October 25, 2013, bringing the balance of his trust account to $58.00.[53] He knew he did not have Kira's permission to transfer its funds, yet almost immediately after receiving them he removed them from his trust account.

As with the funds he received from CBS, Respondent deposited the $1,500.00 check from Defy Media into his trust account. CBS's check was also written to Respondent's COLTAF account, so he was required to deposit the check into trust. Once again, he did not disburse any funds to Kira or leave the funds in trust. Instead he made multiple transfers from trust, including into his operating account, between March 14, the date of the deposit, and May 23, 2014. The balance in his COLTAF account thus dropped to $25.00—a balance far below the approximate amount he owed to Kira—constituting the misappropriation of Kira's funds. When Respondent transferred the funds into his operating account, we infer that he used a portion of the funds for his own purposes, for instance to pay rent and other overhead expenses. At the hearing, Respondent did not dispute that the funds from CBS and Defy Media were consumed shortly after they were deposited.

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[47] *In re Fisher*, 202 P.3d 1186, 1203 (Colo. 2009) ("a mental state of at least recklessness is required for an 8.4(c) violation"); *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992).
[48] *Robnett*, 859 P.2d at 877.
[49] Colo. RPC 1.15(a) (2008).
[50] Colo. RPC 1.15(a)-(b), (d)(1) (2008).
[51] Colo. RPC 1.15(b) (2008).
[52] *See* Colo. RPC 1.15(b) (2008); C.R.C.P. Ch. 23.3 Rule 4(c).
[53] Even though Respondent was entitled to one-third of the amount he received from CBS as a legal fee, the $58.00 balance is well below the amount that Kira should have received.

We next analyze Respondent's handling of the funds from NBC and ABC. Upon receiving these funds Respondent had a duty to deposit them in a separate trust account for Kira's benefit.[54] We infer that Respondent knew he was duty-bound to place these funds in trust for two reasons: (1) he established a trust account in the first place, and (2) he placed the checks he received from CBS and Defy Media in trust. Yet he did not deposit the NBC or ABC checks into trust. Respondent could not even state with certainty where the funds had been placed. He speculated at the hearing that he may have put the money in his operating account—an account that he used to pay overhead expenses—but that he never checked to confirm this. He agreed at the hearing that he did not have Kira's permission to use these funds. Collectively, Respondent's mishandling of these checks amounts to knowing misappropriation.

Respondent's post-settlement behavior also supports our conclusion that Respondent knowingly misappropriated Kira's funds. By August 8, 2014, Respondent knew that he owed Kira money. On that day, Respondent apologized to Knight by email for ignoring his communications over the prior few months. Also in that email, Respondent terminated their attorney-client relationship and acknowledged his obligation to send Kira the "client funds that remain[ed] in [his] possession."[55] He told Knight that he would make the appropriate arrangements to send these funds to Kira, even going so far as to ask Knight whether he wanted a check or a wire transfer. Four days later, Respondent sent Knight a final accounting of his services by email,[56] again acknowledging his obligation to remit to Kira $14,276.97. In that email, he also promised to wire this amount to the account Knight had designated within the next few days. Respondent took no such action. In fact, Knight never heard from him again. A detailed accounting to track these funds is unnecessary to reasonably infer that Respondent failed to remit these funds in August 2014 because he had consumed at least a portion of them. If he had them at his disposal, he should have, and almost certainly would have, paid them back immediately. Because he did not comply with this duty, we conclude that his failure was more than mere inadvertence and instead knowing misconduct.

Moreover, Respondent delayed paying Kira any funds until January 2015, when his law license was threatened with immediate suspension. Respondent ignored the People's three communications during autumn 2014, and he made no effort during that timeframe to make Kira whole, despite the People's urging to do so. Respondent acknowledged that he received these communications. When he finally made payments to Kira in January 2015, he admitted that he used earned funds, which he had received from other clients and then deposited into his COLTAF account.[57] Indeed Respondent testified at the hearing that the money he gave to Kira in January 2015 was not a "direct flow-through of the money" he had

[54] Colo. RPC 1.15(a), (d)(1) (2008).
[55] Ex. 2 at 2.
[56] Ex. 2 ("This email is intended to serve as a final accounting between us.").
[57] *See People v. Dickinson*, 903 P.2d 1132, 1136 (Colo. 1995) (concluding that an attorney who deposited client funds into operating account, wrote checks from that account, and reimbursed the client with other funds violated the precursor to Colo. RPC 8.4(c)).

recovered from the infringers, and that he could not trace the money dollar-for-dollar. Respondent's testimony directly supports the inference that Respondent had consumed at least a portion of Kira's funds by January 2015. Had he not consumed Kira's money, he simply could have transferred Kira's funds from his operating account into trust before making payments.

In defense, Respondent essentially argues that his conduct was negligent. He contends that he was unfamiliar with the rules governing trust accounts. But this is no defense; lawyers are presumed to know the rules of Professional Conduct.[58] Moreover, we find incredible these claims because the evidence demonstrates otherwise. Respondent maintained a trust account, he accepted checks written to this account, he deposited the checks from CBS and Defy Media into COLTAF, and he rendered Kira an accounting when he terminated his representation—all steps he was obligated to complete under the rules.

Respondent also maintains that it was always his intent to remit to Kira the entire balance he owed.[59] Factually and legally this defense fails. Factually, we find Respondent's testimony somewhat incredible; we question whether Kira ever would have received the funds it was due if the People had not petitioned for Respondent's immediate suspension.[60] Legally, Respondent's intention to return the funds is irrelevant to our analysis.[61] Intent to permanently deprive a client of his or her funds is not an element of knowing misappropriation.[62] Even though Respondent eventually paid Kira the money to which it was entitled, Respondent exercised possession and control over these funds from March 2014 until January 2015, resulting in a deprivation of Kira's funds, even if only temporarily.[63]

Based on this analysis, we find that Respondent knowingly misappropriated and mishandled Kira's funds. Even though Respondent was entitled to a legal fee of $7,138.48, the evidence demonstrates that he knowingly misappropriated $14,276.97 from Kira in violation of Colo. RPC 1.15(a) and 8.4(c).

Colo. RPC 1.4(a)(4)

Next, the People charge Respondent with a violation of Colo. RPC 1.4(a)(4), which mandates that a lawyer must promptly comply with reasonable requests for information.

[58] *Varallo*, 913 P.2d 1, 10; Colo. RPC 1.15(d)(1).
[59] *See* Ex. 3 at 3.
[60] *People v. Robnett*, 859 P.2d 872, 877 (Colo. 1993) (finding that the evidence supported a knowing conversion where the respondent testified that he personally used a portion of his client's funds, did not repay the funds, and unpersuasively stated that he had oral permission to use the client's funds); *see People v. Wechsler*, 854 P.2d 217, 220 (Colo. 1993) (upholding a determination of knowing conversion where a portion of the respondent's testimony was incredible and the respondent failed to deliver client funds until after the filing of a request for investigation).
[61] *Varallo*, 913 P.2d at 10-11.
[62] *Id.* at 11 (citing *In re Barlow*, 657 A.2d 1197, 1201 (N.J. 1995)).
[63] *Id.*

The People contend that Respondent violated this rule when he failed to respond to Knight's reasonable requests for information concerning his case.

The Hearing Board finds clear and convincing evidence of Respondent's failure to promptly respond to Knight's communications from March 2014 until the representation was terminated. Respondent ceased communicating with Knight in March 2014, after he received the last of the settlement checks. Knight, who resided in another country, testified that he experienced great difficulty reaching Respondent from March 2014 onward. Knight tried to contact Respondent frequently after March 2014, expending significant effort to contact local businesses, a woman he believed to be Respondent's wife, and the Colorado Better Business Bureau—yet all of his attempts went unanswered. Knight stated that after Respondent emailed him on August 8 and 12, 2014, he never heard from him again. Respondent himself agreed that he did not communicate with Knight during this time period.[64] In fact, when Respondent finally sent an email to Knight on August 8, 2014, he recognized and apologized for his lack of response to Knight's communications over the prior few months.[65] Accordingly, we find that through this conduct Respondent has violated Colo. RPC 1.4(a)(4).[66]

Colo. RPC 1.3

The People also aver that Respondent violated Colo. RPC 1.3, which requires a lawyer to act with reasonable diligence and promptness in representing a client, when he neglected to promptly deliver Kira's funds and to complete the representation in March 2014. According to the People, Respondent took no action on Kira's behalf between March 2014 and August 2014, ignoring his duties under this rule.

Unless the attorney-client relationship is terminated, as provided for in Colo. RPC 1.16, an attorney should carry through to conclusion all matters undertaken for his or her client.[67] Actual prejudice to a client's matter is not a requisite element of this rule.[68]

We find that the People have proved by clear and convincing evidence Respondent's violation of this rule. Despite ceasing all communication with Kira between March and August 2014, Respondent did not terminate his representation until he sent Knight an email on August 8, 2014. Thus, Respondent and Kira still had an attorney-client relationship until that time, and Respondent was required to honor the obligations he owed Kira until the representation ended. This necessarily included resolving any matters related to the settlement with the four infringers and promptly distributing settlement proceeds to Kira. Respondent also agreed to assist Kira in finding a Nevada attorney who could help Kira

[64] *See also* Ex. 3 at 2-3; Ex. S9A.
[65] Ex. 2 at 2; *see also* Ex. 3 at 3 (admitting that he had not reached out to Knight during this period).
[66] *See People v. Damkar*, 908 P.2d 1113, 1114 (Colo. 1996) (disciplining a lawyer under Colo. RPC 1.4(a)(4) for failing to reply promptly to clients' requests for information).
[67] Colo. RPC 1.3 cmt. 4.
[68] *See, e.g., Att'y Grievance Comm'n v. Davis*, 825 A.2d 430, 448 (Md. 2003) (rejecting an argument that a showing of prejudice is required to support a finding that an attorney lacked diligence in representing a client).

establish a trust for Guyard-Guillot's children, which he did not do. Through this conduct, Respondent flouted his obligations under Colo. RPC 1.3(a).[69]

Colo. RPC 1.16(d)

Finally, the People assert that Respondent should have paid Kira the settlement funds he held when he terminated the representation by email on August 12, 2014. His failure to do so, they claim, violated Colo. RPC 1.16(d), which provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest." The People also contend that Respondent effectively abandoned Kira after receiving the final settlement check in March 2014, thereby contravening this rule.

We find clear and convincing evidence that Respondent violated Colo. RPC 1.16(d) when he failed to take steps to protect Kira's interests by declining to remit the funds he owed Kira in August 2014.[70] Respondent terminated the attorney-client relationship on August 12, 2014. He thereafter failed to disburse to Kira the settlement funds he had in his possession.[71] Respondent told Knight that he would promptly wire the settlement funds in August 2014, yet he waited until he was faced with the prospect of the immediate suspension of his law license to do so. Accordingly, we find that Respondent's conduct violated Colo. RPC 1.16(d).

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[72] When imposing a sanction after a finding of lawyer misconduct, the Hearing Board must consider the duty 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 may be adjusted in consideration of aggravating and mitigating factors.

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[69] *See Fla. Bar v. Walton*, 952 So.2d 510, 513 (Fla. 2006) (finding a violation of the Florida analogue to RPC 1.3 where a lawyer for seven months withheld reimbursable costs to his opponent because the opponent's payment of the judgment was $0.23 short); *Ky. Bar Ass'n v. Burgin,* 412 S.W.3d 872, 874-75 (Ky. 2013) (finding a violation of the Kentucky analogue to RPC 1.3 where a lawyer failed to deposit a settlement check in a trust account or to take steps to have it replaced until several years later, after the client filed a bar complaint and turned the file over to bar counsel); *In re Ricci*, 735 A.2d 203, 207 (R.I. 1999) (disciplining a lawyer under R.I. RPC 1.3 for retaining a client's settlement funds for a year before paying the client's medical providers, even though the client was not harmed).

[70] The Hearing Board disagrees with the People, however, that Respondent's conduct amounted to abandonment in violation of Colo. RPC 1.16(d). Abandonment is more commonly associated with a violation of Colo. RPC 1.3 rather than Colo. RPC 1.16(d), which deals with safekeeping client funds.

[71] *See, e.g., In re Sather*, 3 P.3d 403, 415 (Colo. 2000) (finding that a lawyer violated Colo. RPC 1.16(d) by only partially repaying the client's retainer three months after his discharge and paying the remainder five months after his discharge); *People v. Sigley*, 917 P.2d 1253, 1254 (Colo. 1996) (finding that a lawyer violated Colo. RPC 1.16(d) by waiting more than seven months after his discharge to return unearned funds).

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

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

Duty: Respondent did not fulfill his duties of candor and loyalty to his client Kira when he knowingly converted and neglected to safeguard Kira's funds. He also disregarded his duty to Kira to act with diligence and to reasonably communicate with Knight. As a professional he also acted in dereliction of his duty to terminate his representation of Kira and to promptly distribute settlement funds to his client.

Mental State: The Hearing Board concludes that Respondent acted knowingly when he converted funds belonging to Kira and failed to safeguard those funds. We also determine that Respondent, acting with consciousness awareness, failed to respond to Knight's attempts to communicate with him and delayed the delivery of Kira's settlement funds.

Injury: Knight testified that Respondent's misconduct did not cause actual harm to Kira. But a lawyer causes a client potential injury by commingling client funds with the lawyer's own funds; to do so creates a risk that the lawyer's creditors will gain access to the client's funds or that the lawyer will misuse the funds.[73] Additionally, any time a lawyer converts client funds that conduct deprives the client of the use of those funds. Respondent's misconduct also compromised the integrity of the legal profession by seriously tarnishing the public's perception of attorneys and eroding the public's confidence in the legal system.[74]

ABA *Standards* 4.0-7.0 – Presumptive Sanction

ABA *Standard* 4.11 provides that disbarment is typically warranted when a lawyer knowingly converts client property and thereby causes the client injury or potential injury.[75] This standard is applicable to Respondent's violations of Colo. RPC 8.4(c) and 1.15(a).

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[73] *See Sather*, 3 P.3d at 416 (indicating that the attorney, who partially repaid unearned funds many months after being discharged, caused actual harm by preventing the client from hiring alternate counsel and by subjecting the funds to the claims of the attorney's creditors) (citing *People v. Shidler*, 901 P.2d 477, 479 (Colo. 1995) ("[c]ommingling is dangerous to the client and a serious disciplinary offense because it can subject client funds to the claims of the lawyer's creditors")); *In re Cleland*, 2 P.3d 700, 705 (Colo. 2000) (finding substantial potential for injury where a lawyer failed to keep about $4,500.00 in client funds separate from his own funds; knowingly misappropriated $5,000.00 in client funds; in other matters, knowingly misappropriated about $1,400.00 and commingled funds on numerous occasions; charged an unreasonable fee; and in a final client matter, failed to communicate and falsely told the client he had filed and settled a matter); *see also Trejo*, 185 P.3d at 1172 (finding that discipline was warranted even if a lawyer's comingling caused no actual harm because it created the potential for client funds to be attached by the lawyer's creditors).

[74] *People v. Radosevich*, 783 P.2d 841, 842 (Colo. 1989) ("[Conversion] destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system."); *People v. McMahill*, 782 P.2d 336, 338 (Colo. 1989) ("A[] lawyer's theft of his client's funds destroys the attorney-client relationship and severely damages the public's perception of attorneys and its confidence in our legal system.").

[75] Although Appendix 1 of the ABA *Standards* indicates that the standards applicable to violations of Colo. RPC 8.4(c) are ABA *Standards* 4.6 and 5.1, the Court determines that ABA *Standard* 4.1, "Failure to Preserve the Client's Property," is more relevant to conversion in violation of Colo. RPC 8.4(c).

Respondent's violation of Colo. RPC 1.3 and 1.4(a) requires that we look to ABA *Standard* 4.42, which calls for suspension when a lawyer knowingly fails to perform services for a client and causes that client injury or potential injury. Likewise, ABA *Standard* 7.0, which addresses Respondent's violation of Colo. RPC 1.16(d), provides for suspension where a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

Where multiple instances of attorney misconduct have occurred, the ABA *Standards* counsel that the ultimate sanction should at least be consistent with the sanction for the most serious disciplinary violation and generally should be greater than the sanction for the most serious misconduct.[76] Thus, we begin our analysis with disbarment as the presumptive sanction.

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of the presumptive sanction to be imposed, while mitigating circumstances may warrant a reduction in the severity of the sanction.[77] The Hearing Board considers evidence of the following four aggravating factors and four mitigating circumstances in deciding the appropriate sanction.

Dishonest or Selfish Motive – 9.22(b): We find that Respondent acted with a dishonest and selfish motive when he knowingly converted and failed to safeguard Kira's funds. He acted selfishly when he consumed CBS's and Defy Media's funds without Kira's authorization almost immediately after they were deposited. He never deposited the funds he received from NBC and ABC into his trust account, nor could he account for the whereabouts of these funds. Also during this time, he selfishly failed to respond to Knight's communications, even though he knew that he had not terminated the representation and that he owed Kira over $14,000.00. Respondent was dishonest when he told Knight that he would send the funds in August 2014 but then did not do so until January 2015. We thus choose to apply great weight to this factor in aggravation.

Multiple Offenses – 9.22(d): Respondent engaged in multiple types of misconduct. We assign this aggravator significant weight in our sanctions analysis.

Refusal to Acknowledge Wrongful Nature of Conduct – 9.22(g): Although Respondent stated in his response to the People's petition for immediate suspension that he spent the last five months with a "consuming pit in his stomach" and "has faced the fact that he has failed to do that which he [was] obligated to do and that which [was] right to do,"[78] we conclude that he does not appear to fully appreciate the seriousness of his conduct, including the consumption and comingling of Kira's funds. Nor does he understand how his

[76] ABA *Standards* § 2 at 7.
[77] *See* ABA *Standards* 9.21 & 9.31.
[78] Ex. 3 at 5.

failure to communicate with his client or to delay returning the settlement funds could potentially have harmed Kira. We apply average weight to this factor in aggravation.

Substantial Experience in the Practice of Law – 9.22(i): Respondent has been licensed in Colorado since 1995. At the time of his misconduct, Respondent had substantial experience in the practice of law. His misconduct reflects poorly on such a longstanding practitioner, and we apply this factor in aggravation.

Absence of a Prior Disciplinary Record – 9.32(a): Respondent has been licensed to practice law since 1995 with no instances of discipline. We deem this a factor in mitigation.

Personal or Emotional Problems – 9.32(c): Respondent detailed the personal and emotional problems he suffered during the time of his misconduct in his response to the People's petition for immediate suspension.[79] There, he indicated that he had been caught in "a cycle of financial problems leading to marital problems which then exacerbate[d] the financial problems which cause[d] a new round of marital problems, *ad nauseaum*."[80] Respondent also explained at the hearing that he ignored his professional responsibilities when his wife opened her own law practice in 2014. Her practice caused marital and emotional stress. We therefore apply some weight to this factor in mitigation.

Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct – 9.32(d): Respondent asks the Hearing Board to give him credit in mitigation for paying full restitution to Kira plus interest. The ABA *Standards* recognize a timely good faith effort to make restitution or to rectify the consequences of misconduct as a mitigating factor. While acknowledging that some courts have found that restitution should not be considered, the *Standards* deem it the better policy to consider a good faith effort to make restitution in mitigation in order both to encourage lawyers to reduce the injuries they have caused and to help ensure recognition of the wrongfulness of their conduct.[81] The comment makes clear, "it is the fact that restitution is made voluntarily and of the lawyer's own initiative that is important, even if that occurs in response to a complaint filed with the appropriate regulatory agency."[82] An attorney who makes restitution prior to the initiation of disciplinary proceedings presents the clearest case for mitigation, while an attorney who makes restitution later in the proceeding presents a weaker case.[83]

We have found that Respondent knowingly converted Kira's funds and, when confronted with his transgressions by the People in late 2014, he did not respond or attempt to make Kira whole at that time. Only when the People filed a petition for the immediate suspension of his law license did he acknowledge his ethical lapses and pay Kira the money

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[79] At the hearing, the People objected to the application of this factor because they were unable to investigate Respondent's claim to personal and emotional problems when he exercised his Fifth Amendment right to remain silent at his deposition.

[80] Ex. 3 at 7-8 (emphasis in original).

[81] ABA *Standards* 9.32 cmt.

[82] *In re Fischer*, 89 P.3d 817, 821 (Colo. 2004).

[83] ABA *Standards* 9.32 cmt.

to which it was entitled. The Hearing Board finds that, although these acts demonstrate some effort by Respondent to rectify the consequences of his misconduct, the payments were made after disciplinary proceedings had been brought. Thus, we give this factor comparatively little weight.[84]

Character or Reputation – 9.32(g): Respondent did not call any character witnesses to testify on his behalf at the hearing. He did, however, offer his own opinion as to his character and reputation, which he perceives as "quite good." He considers himself to be cooperative with opposing counsel on his cases. He also explained to the Hearing Board that he often takes cases that can be described as "risky" or "unprofitable" when he believes the client's cause is noble.[85] Because the only evidence of Respondent's character and reputation was his own testimony, we assign only minimal weight to this factor in mitigation.

Remorse – 9.32(l): Respondent urges the application of this factor, asserting that he is indeed remorseful for his misconduct. He points to his response to the People's petition for immediate suspension, where he states that he is at a "loss of words to express the degree of remorse he feels about the conduct" and that he is "utterly and unabashedly horrified" to find himself in this position, knowing there is "absolutely no one to blame but himself."[86] He also wrote that he felt "terrible" about how he has treated Knight. He went on: "[t]he deep pit of dissatisfaction and mortification that has been lodged in [my] stomach for the past five-odd months is all the more worse" because he liked Knight and "really enjoyed helping" him on what Respondent perceived to be a "righteous and just cause."[87]

At the hearing, Respondent testified that although he did want to apologize to Knight, once these proceedings began he was concerned about communicating with Knight, worried that he might be perceived as tampering with or influencing witnesses. He said that he intended to apologize once these proceedings are concluded. He stated that he was sorry for the aggravation he caused Kira by untimely remitting the funds to which it was entitled. He testified that he "feels bad, very bad," is "absolutely remorseful," and "absolutely wishes that he had more timely submitted the funds after the conclusion of the representation." We appreciate Respondent's expressions of remorse but find that he does not truly appreciate the seriousness of his actions, particularly the potential harm Kira may

[84] *In re Fischer*, 89 P.3d at 821; *People v. Margolin*, 820 P.2d 347, 350 (Colo. 1991) ("[R]estitution of funds that the lawyer has misappropriated from a client is not a significant factor in mitigation.") (citing *In re Wilson*, 409 A.2d 1153, 1156-57 (N.J. 1979) ("We do not attach very much importance, as a rule, to the matter of restitution, because that may depend more on the financial ability or other favoring circumstance than repentance or reformation. A thoroughly bad man may make restitution, if he is able, in order to rehabilitate himself and regain his position in the community; and a thoroughly good man may be unable to make any restitution at all."); *see also* ABA *Standard* 9.32 cmt.

[85] *See also* Ex. 3 at 8.

[86] Ex. 3 at 9.

[87] Ex. 3 at 9.

have suffered. His claims that he always intended to pay Kira in light of the fact that he avoided paying Kira for nearly a year ring very hollow. Thus we give this factor no weight.[88]

Analysis Under ABA *Standards* and Colorado Case Law

The Colorado Supreme Court has directed us to exercise our discretion in imposing a sanction and to carefully apply aggravating and mitigating factors,[89] mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[90] The presumptive sanction may be increased or decreased not only in light of aggravating and mitigating factors, but also in consideration of the Colorado Supreme Court's disciplinary jurisprudence.[91] Ultimately, although prior cases are helpful by way of analogy, a hearing board should determine the appropriate sanction for a lawyer's misconduct on a case-by-case basis.

As the Colorado Supreme Court has explained, lawyers are "almost invariably disbarred" for knowing misappropriation of client funds, even when full restitution is tendered.[92] In *People v. Young*, the Colorado Supreme Court disbarred an attorney for knowingly converting over $200,000.00 from his clients, notwithstanding his lack of prior discipline and full restitution, plus interest.[93] There, the Colorado Supreme Court determined that the mitigating factors were not sufficient to justify a sanction less than disbarment when measured against misappropriation of such magnitude.[94] Likewise, in *People v. Guyerson*, the Colorado Supreme Court determined that disbarment was warranted where the attorney converted a large sum of money from his law firm and clients, despite mitigating factors of absence of prior discipline, substantial personal and emotional problems, cooperation, remorse, and evidence of good character and reputation.[95] Although the attorney was "under tremendous stress, including financial pressure as the

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[88] *See People v. Rudman*, 948 P.2d 1022, 1027 (Colo. 1997) ("While the respondent *expressed* remorse . . . he steadfastly refused to see any misconduct whatsoever . . . .").

[89] *See In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *In re Fischer*, 89 P.3d at 822 (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

[90] *In re Attorney F.*, 285 P.3d at 327 (quoting *People v. Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

[91] *See In re Olsen*, 326 P.3d 1004, 1011 (Colo. 2014).

[92] *Varallo*, 913 P.2d at 11; *see also In re Thompson*, 991 P.2d 820, 823 (Colo. 1999) (disbarring an attorney who knowingly converted $15,000.00 from a client despite absence of prior discipline, and the presence of personal and emotional problems and restitution); *People v. Lavenhar*, 934 P.2d 1355, 1360-61 (Colo. 1997) (disbarring an attorney for knowing misappropriation of client funds even though he had considerable personal and emotional problems and a debilitating head injury); *People v. Lefly*, 902 P.2d 361, 364 (Colo. 1995) (disbarring an attorney for knowingly converting client funds despite mitigating factors, including payment of full restitution to his clients, albeit after the request for investigation was filed); *People v. Ogborn*, 887 P.2d 21, 23 (Colo. 1994) (knowing conversion warrants disbarment even in the absence of prior discipline and the presence of personal and emotional problems); *People v. McGrath*, 780 P.2d 492, 493 (Colo. 1989) (noting "the Court would not hesitate to enter an order of disbarment if there was no doubt that the attorney engaged in knowing conversion of his client's funds").

[93] *People v. Young*, 864 P.2d 563, 564 (Colo. 1993).

[94] *Id.*

[95] 898 P.2d 1062, 1063-64 (Colo. 1995).

sole breadwinner of a family which grew in a fashion he did not anticipate, and a host of serious and costly medical procedures," the Colorado Supreme Court affirmed the hearing panel's recommendation of disbarment, considering the extent of the lawyer's intentional conversion and, in particular, finding significant the lawyer's failure to remedy his misconduct until after it was discovered by his law firm.[96]

However, under exceptional circumstances, even knowing conversion may warrant a sanction less than disbarment.[97] For example, in *People v. Lujan*, the Colorado Supreme Court approved a suspension rather than disbarment for conversion because the respondent presented substantial evidence of mental disability, and proved that the mental disability actually caused the misconduct.[98] Other mitigating factors were also present, including good character and reputation as well as interim rehabilitation.[99]

Accordingly, absent significant or extraordinary mitigating circumstances, disbarment is the presumptive sanction for knowing misappropriation of client funds.[100] In this case, the mitigating factors are not sufficiently preponderant to warrant a sanction other than disbarment, particularly when compared with the factors in aggravation—his selfish motive and substantial experience in the practice of law at the time of his conversions—coupled with the significant sum of money he converted. We do not seek to unduly minimize the personal and emotional strains Respondent may have experienced at the time of his knowing conversions, and we wish to accord him some credit for making full restitution to Kira, even though he did not do so until the People had filed a petition for immediate suspension.[101] We also consider that Kira suffered no actual harm as a result of Respondent's misconduct. Nevertheless, we treat this type of misconduct very seriously not only because it destroys the trust between attorneys and clients, but also because it causes severe damage to the public's perception of attorneys and the public's confidence in the legal profession.

In sum, the nature of Respondent's misconduct posed a significant risk to Kira, and we find no extraordinary extenuating circumstances justifying deviation from the Colorado

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[96] *Id*. at 1064.

[97] *See People v. Dice*, 947 P.2d 339, 340 (Colo. 1997) ("We have repeatedly held that a lawyer's knowing misappropriation of funds . . . warrants disbarment except in the presence of extraordinary mitigating factors.").

[98] 890 P.2d 109, 112–113 (Colo. 1995).

[99] *Id*.

[100] *See Guyerson,* 898 P.2d at 1063 ("When a lawyer knowingly converts client funds, disbarment is 'virtually automatic,' at least in the absence of significant factors in mitigation.") (citing *Young*, 864 P.2d at 564); *In re Cleland*, 2 P.3d at 703 ("As we have said numerous times before, disbarment is the presumed sanction when a lawyer knowingly misappropriates funds belonging to a client or a third person.") (citations omitted).

[101] *See Lefly* 902 P.2d at 364 (finding that knowing conversion of client funds almost always merits disbarment even if the client funds are eventually replaced); *cf. Fischer*, 89 P.3d at 820-21 (suspending, rather than disbarring, an attorney for misappropriating third-party (not client) funds where significant mitigation was present, including full and free disclosure, respondent's admission of all misconduct, acceptance of personal responsibility, full restitution paid before a formal complaint was filed, and considerable character evidence).

Supreme Court's pronouncement that disbarment shall be imposed when an attorney has intentionally converted client funds.

V. CONCLUSION

Respondent's acts of knowing conversion and comingling have no place in a profession dedicated to upholding the law and protecting client interests. His actions undermine the honor and integrity of the many practitioners that comprise the legal system. The Hearing Board thus concludes that Respondent's acts of professional misconduct call for disbarment.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **MICHAEL JOHN HEAPHY**, attorney registration number **26088**, is **DISBARRED.** The disbarment will take effect upon issuance of an "Order and Notice of Disbarment."[102]

2. Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c), concerning winding up of affairs, notice to parties in pending matters, and notice to parties in litigation.

3. Within fourteen days after the effective date of the disbarment, Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the PDJ setting forth pending matters and attesting, inter alia, to notification of clients and of other jurisdictions where the attorney is licensed.

4. The parties **MUST** file any post-hearing motion or application for stay pending appeal with the Hearing Board **on or before September 30, 2015**. No extensions of time will be granted. If a party files a post-hearing motion or an application for stay pending appeal, any response thereto, if any, **MUST** be filed within seven days.

5. Respondent **SHALL** pay the costs of these proceedings. The People **SHALL** submit a "Statement of Costs" within fourteen days from the date of this order. Respondent's response thereto, if any, **MUST** be filed within seven days.

[102] In general, an order and notice of sanction will issue thirty-five days after a decision is entered pursuant to C.R.C.P. 251.19(b) or (c). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

DATED THIS 9th DAY OF SEPTEMBER, 2015.

Original Signature on File
WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Original Signature on File
Barbara Weil Laff
HEARING BOARD MEMBER

Original Signature on File
Forrest W. Lewis
HEARING BOARD MEMBER

Copies to:

Charles E. Mortimer Jr. Office of Attorney Regulation Counsel	Via Email c.mortimer@csc.state.co.us
Michael John Heaphy Respondent	Via Email m.heaphy@vailvalleylaw.com
Barbara W. Laff Forrest W. Lewis Hearing Board Members	Via Email Via Email
Christopher T. Ryan Colorado Supreme Court	Via Hand Delivery