BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	**§**	
DAVID ROBERT STEINMAN	**§**	**CAUSE NO.** 65234
STATE BAR CARD NO. 00791727	**§**	

PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), brings this action against Respondent, David Robert Steinman, (hereinafter called "Respondent"), showing as follows:

1. This action is commenced by Petitioner pursuant to Part IX of the Texas Rules of Disciplinary Procedure. Petitioner is also providing Respondent a copy of Section 7 of this Board's Internal Procedural Rules, relating to Reciprocal Discipline Matters.

2. Respondent is a member of the State Bar of Texas and is licensed and authorized to practice law in Texas. Respondent may be served with a true and correct copy of this Petition for Reciprocal Discipline at David Robert Steinman, 9310 Stateline Road, Leawood, Kansas 66206.

3. On or about June 11, 2018, a Complaint was entered in the Supreme Court, State of Colorado, Original Proceeding in Discipline Before the Presiding Disciplinary Judge, in a matter styled: *Complainant: The People of the State of Colorado, Respondent: David R. Steinman, #39853, in Cause No. 18PDJ038.* (Exhibit 1)

4. On or about January 11, 2019, an Opinion and Decision Imposing Sanctions Under C.R.C.P. 251.19(b), was entered in the Supreme Court, State of Colorado, Original Preceding in Discipline Before the Office of the Presiding Disciplinary Judge, in a matter styled: *Complainant:*

The People of the State of Colorado, Respondent: David R. Steinman, #39853, Case No. 18PDJ038, that states in pertinent part as follows:

> . . . The Hearing Board therefore ORDERS:
>
> David R. Steinman, attorney registration number 39853, will be SUSPENDED FOR SIX MONTHS, WITH THREE MONTHS TO BE SERVED AND THREE MONTHS TO BE STAYED upon completion of a ONE-YEAR PERIOD OF PROBATION. The suspension will take effect upon issuance of an "Order and Notice of Suspension."
>
> 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.

(Exhibit 2).

5. The Opinion and Decision Imposing Sanctions Under C.R.C.P. 251.19(b), issued by the Hearing Board, which states in pertinent part:

> As a deputy district attorney, Respondent made knowing misrepresentations to his supervisors and to another lawyer on multiple occasions. He violated his duty to exercise honesty and candor, undermining the integrity of the legal profession and the district attorney's office. His misconduct warrants a six-month suspension, with three-months to be served and three months to be stayed upon successful completion of a one-year period of probation, with conditions.

6. Respondent was suspended from the practice of law for a period of six months, with three months to be served and three months to be stayed upon completion of a one-year period of probation. Through his conduct, Steinman violated Colo. RPC 8.4 (c) (dishonesty).

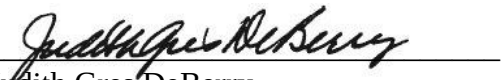
7. Copies of the Complaint and Opinion and Decision Imposing Sanctions Under C.R.P.C. 251.19(b) are attached hereto as Petitioner's Exhibits 1 and 2, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1 and 2 at the time of the hearing in this case.

8. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, that this Board issue notice to Respondent, containing a copy of this Petition with exhibits, and an order directing Respondent to show cause within thirty (30) days from the date of the mailing of the notice, why the imposition of the identical discipline in this state would be unwarranted. Petitioner further prays that upon trial of this matter that this Board enter a judgment imposing discipline identical with that imposed by the Supreme Court of the State of Colorado and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Judith Gres DeBerry
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
Telephone: 512.427.1350
Telecopier: 512.427.4167
Email: jdeberry@texasbar.com

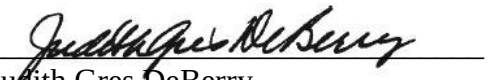


Judith Gres DeBerry
Bar Card No. 24040780
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this Petition for Reciprocal Discipline and the Order to Show Cause on David Robert Steinman, by personal service.

David Robert Steinman
9310 Stateline Road
Leawood, Kansas 66206



Judith Gres DeBerry

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE PRESIDING DISCIPLINARY JUDGE 1300 Broadway, Suite 250 Denver, Colorado 80203	**FILED** JUN 11 2018 PRESIDING DISCIPLINARY JUDGE SUPREME COURT OF COLORADO ▲COURT USE ONLY▲
Complainant: THE PEOPLE OF THE STATE OF COLORADO Respondent: DAVID R. STEINMAN, # 39853	Case Number: 18 PDJ 038
Jacob M. Vos, #41562 Assistant Regulation Counsel James C. Coyle, #14970 Attorney Regulation Counsel Attorneys for Complainant 1300 Broadway, Suite 500 Denver, Colorado 80203 Telephone: (303) 928-7811 Fax No.: (303) 501-1141 Email: j.vos@csc.state.co.us	Supreme Court State of Colorado Certified to be a full, true and correct copy SEP 01 2020 Office of the Presiding Disciplinary Judge By
COMPLAINT	

THIS COMPLAINT is filed pursuant to the authority of C.R.C.P. 251.9 through 251.14, and the People allege as follows:

Jurisdiction

1. Respondent has taken and subscribed the oath of admission, was admitted to the bar of this Court on May 20, 2008, and is registered upon the official records of this Court, registration no. 39853. He is subject to the jurisdiction of this Court in these disciplinary proceedings. Respondent has no registered business address, but his registered home address is 2 Wren, Littleton Colorado 80127.

General Allegations

2. Respondent is a former Assistant United States Attorney, who then transitioned to a role as in-house counsel in the oil and gas industry.

EXHIBIT 1

3. In early 2017 Respondent was in private practice, but he was looking for work as a state or federal prosecutor. He also began working on one civil case as a contract attorney working for one of his former colleagues, William Kelly.

4. The civil case, *Bullrest v. Shean O'Meara*, involved a dispute among owners of a small corporation.

5. Respondent worked on the *Bullrest* matter as a contract attorney for Mr. Kelley's firm, and the firm paid him an hourly rate of $150 per hour.

6. In May of 2017, Respondent received an offer to work as a full-time deputy district attorney for Colorado's 18th Judicial District. He accepted.

7. The district attorney's office notified him he would need to transfer all of his private cases to other attorneys.

8. Additionally, C.R.S. § 20-1-201(1)(a) provides that full-time deputy district attorneys may not engage in the private practice of law, nor may they receive any income from a private law firm.

9. Respondent received the 18th Judicial District Attorney's Office's employment materials, which referenced the prohibition found in C.R.S. § 20-1-201(1)(a).

10. After he was offered the deputy district attorney position, Respondent approached Mr. Kelly and asked Mr. Kelly to take over the *Bullrest* matter, but they did not discuss C.R.S. § 20-1-201(1)(a) and Mr. Kelly was unaware of it.

11. Mr. Kelly refused to take over the case and informed Respondent he did not have the capacity to do so.

12. Respondent decided to keep the *Bullrest* case and try to work towards settlement.

13. Respondent did not inform the district attorney's office of his decision.

14. Though settlement negotiations continued through the summer and into the fall, *Bullrest* failed to settle.

15. Respondent represented the plaintiff in *Bullrest*, and the defendant alleged cross-claims against another interested party.

16. The cross-defendant was represented by attorney Michael Carrigan.

17. In October 2017, Respondent discussed the *Bullrest* matter with Mr. Carrigan by telephone, and Mr. Carrigan identified Respondent's telephone number as belonging to the district attorney's office.

18. Mr. Carriagan, a former prosecutor, found it odd that Respondent was calling from a district attorney's office.

19. When they spoke in October 2017, Mr. Carrigan asked Respondent whether he was working as a deputy district attorney.

20. Respondent denied working for a district attorney's office, and claimed he had a meeting at the district attorney's office and was just using their phone.

21. Respondent's statements were dishonest.

22. Negotiations continued on the *Bullrest* matter and on December 11, 2017, Mr. Carrigan held a settlement conference in his office.

23. Before the conference, Respondent encountered one of Mr. Carrigan's colleagues in the lobby coffee shop.

24. Respondent had worked with Mr. Carrigan's colleague when they were both Assistant United States Attorneys.

25. They discussed Respondent's new job as a deputy district attorney and the fact that Respondent enjoyed prosecuting cases again. Respondent gave the attorney his business card.

26. Respondent took paid time off for the settlement conference, but during the conference he announced that he would need to leave early because he had a 1:30 court hearing.

27. A week or so later, Mr. Carrigan's colleague told him about meeting Respondent in the lobby coffee shop and gave Mr. Carrigan Respondent's 18th Judicial District Attorney's Office business card.

28. On December 20, 2017, Respondent emailed Mr. Carrigan to discuss what steps they needed to take next to settle *Bullrest*.

29. It was around this time that Mr. Kelly informed Respondent that the firm would be terminating Respondent's "tail" malpractice coverage effective December 31, 2017 to make room for a new attorney at the firm, and Respondent needed to get *Bullrest* wrapped up.

30. Respondent called Mr. Carrigan a short time later the same day, December 20, 2017, and Mr. Carrigan asked Respondent whether he was working for a district attorney's office.

31. Respondent responded "absolutely not."

32. Mr. Carrigan then asked Respondent why he had told Mr. Carrigan's colleague he was working there.

33. Respondent then claimed he was only working at the district attorney's office part-time, three days per week.

34. In response to another question from Mr. Carrigan, Respondent claimed the district attorney's office knew of his continuing work on *Bullrest* and granted him permission to continue the work.

35. They then discussed a plan to exchange additional information to hopefully facilitate the settlement of *Bullrest.*

36. At no point in the call did Respondent state he was transitioning off of the *Bullrest* matter.

37. Mr. Carrigan mistrusted Respondent's statements, and he was worried that their opponent in *Bullrest* would try to take advantage of any semblance of impropriety.

38. After their call, Mr. Carrigan wrote Respondent the following email, which he sent at 1:28 pm:

> David,
>
> Thanks for the call today. To make sure my client doesn't have a complication in the future (especially with aggressive opposing counsel like Hal) I wanted to have a written record of what we discussed. Today you informed me:
>
> 1. Your employment with the 18th Judicial DA's office is part time (3 days a week).
>
> 2. The DA's office is aware that you continue to work on civil matters, including this one, and you're doing so with the office's full knowledge and approval.
>
> I would appreciate it [sic] you would respond to this email confirming that this is accurate before we move forward on the Bullrest case.
>
> Thanks.

39. Respondent replied approximately forty minutes later, at 2:10 pm:

> Michael,
>
> All private client work has been disclosed and the work continues under 20-1-201(1)(b)[1] until full time employment, which begins

---

[1] The statute provides: "(1)(a) The district attorney in every judicial district is authorized to appoint such deputy district attorneys as he deems necessary to properly discharge the duties of his office, with the approval of the board of county commissioners or boards of county commissioners of multicounty districts or the city council of a city and county affected, and such deputies shall hold their offices during the pleasure of such district attorney. **Such deputies shall not engage in the private practice of law nor receive any income from any private law firm.**

(b) The district attorney in every judicial district is authorized to appoint one or more part-time deputies to fulfill the duties of the district attorney. The part-time deputies shall be entitled to receive as compensation for services rendered a sum as provided in section 20-1-203. **The part-time deputy may engage in the**

> Jan 1. I will extricate myself from this matter before then, in fact, Bill Kelly will take over after this weekend. Should you have questions please let me know.
>
> David

40. Respondent had not disclosed his private client work to the district attorney's office, and he had been a full-time deputy district attorney since June 2017.

41. After his call with Mr. Carrigan, Respondent approached his district attorney's office supervisor, Jacob Edson, and asked whether it was important if he had continued to work on a civil case.

42. Mr. Edson replied that a statute prohibited private work, and pressed for some details of what Respondent had done.

43. Respondent misrepresented his scope of work on the *Bullrest* during the conversation, significantly downplaying the scope of his work.

44. At 1:36 pm on December 20, 2017 – the same day Respondent exchanged the emails with Mr. Carrigan quoted above – Mr. Edson wrote Respondent an email following up on their conversation, stating: "Take a look at C.R.S. 20-1-201(1)(A)."

45. Two minutes later, Respondent replied to Mr. Edson "Well that sure can't get any more clear. I already extricated myself."

46. His statement was dishonest; he had not extricated himself from *Bullrest*.

47. Respondent then sent his reply to Mr. Carrigan, quoted above, at 2:10 PM.

48. Later the same afternoon, Respondent spoke with Mr. Edson and expanded his description of the scope of his civil work, stating that he had done more than simply assist in the settlement of a civil suit during a single instance.

49. Mr. Edson asked Respondent to create a timeline of his involvement in the suit so the office could evaluate what to do.

50. The following morning, December 21, 2017, Respondent gave Mr. Edson a short timeline of events detailing some of his involvement in *Bullrest*.

51. Mr. Edson returned the timeline to Respondent after reviewing it.

52. Later the same day, Respondent again asked to speak with Mr. Edson, and told Mr. Edson that Mr. Carrigan was investigating the matter as a potential ethics violation.

---

private practice of law; except that he or she may not engage in the practice of criminal defense in the same judicial district as the district attorney's office where he or she is employed." (Emphasis added).

53. Mr. Edson asked a number of questions about Respondent's conversations with Mr. Carrigan, but Respondent failed to give clear answers.

54. Meanwhile, Mr. Carrigan had attended law school with the elected District Attorney in the 18th Judicial District, George Brauchler.

55. Mr. Carrigan sent Mr. Brauchler a text message the morning of December 21, 2017, stating he needed to talk with Mr. Brauchler about a member of his staff.

56. Mr. Brauchler called Mr. Carrigan a short time later. Mr. Carrigan discussed Respondent's conduct, and Mr. Brauchler confirmed Respondent had been a full-time deputy district attorney in the office since June 2017.

57. At Mr. Brauchler's request, Mr. Carrigan forwarded his January 20 email exchange with Respondent to Mr. Brauchler.

58. After Mr. Brauchler obtained the Respondent/Carrigan email chain, he called Mr. Edson, reaching him moments after Mr. Edson left Respondent's office in the wake of the conversation regarding Mr. Carrigan's potential investigation.

59. Mr. Brauchler and Mr. Edson discussed the various misrepresentations Respondent made to Mr. Carrigan and the district attorney's office.

60. Shortly thereafter, Mr. Brauchler convened a meeting with Respondent and a number of other members of the district attorney's office and terminated Respondent's employment.

61. The district attorney's office has confirmed that a number of Respondent's emails regarding *Bullrest* were written during the workday during periods when Respondent was not on leave.

CLAIM I
Colo. RPC 4.1(a) (Knowing Misstatements of Material Facts)

62. Colo. RPC 4.1(a) provides that "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

63. Respondent's false statements to Mr. Carrigan regarding whether he was working for a district attorney's office full-time were made in the course of representing a client.

64. Respondent knew the statements were false at the time he made them.

65. They were also false statements of material facts, because the fact that Respondent's continuing work on the *Bullrest* matter violated the Colorado Revised Statutes had the potential to give Respondent and Mr. Carrigan's opponent a tactical advantage in litigation. It was also material to informing the steps Mr. Carrigan needed to take to protect his client.

66. Respondent's false statements to Mr. Edson regarding his work on the *Bullrest* matter were also made in the course of representing his client, the People of the State of Colorado.

67. The Respondent knew the statements were false at the time he made them.

68. Respondent's false statements to Mr. Edson regarding his work on *Bullrest* were false statements of material facts because they informed Mr. Edson's actions regarding Respondent's continued employment at the district attorney's office.

69. Respondent's misrepresentations therefore violated Colo. RPC 4.1(a).

CLAIM II
Colo. RPC 8.4(c) (Dishonesty)

70. Colo. RPC 8.4(c) provides "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."

71. Respondent knowingly misrepresented his work at the district attorney's office to Mr. Carrigan.

72. Respondent also knowingly misrepresented the scope of his work on the *Bullrest* matter to Mr. Edson.

73. Respondent's knowing misrepresentations violated Colo. RPC 8.4(c).

WHEREFORE, the People pray that Respondent be found to have engaged in misconduct under C.R.C.P. 251.5 and the Colorado Rules of Professional Conduct as specified above; Respondent be appropriately disciplined for such misconduct; Respondent be required to take any other remedial action appropriate under the circumstances; and Respondent be assessed the costs of this proceeding.

DATED this 11th day of June, 2018.

Respectfully submitted,

Jacob M. Vos, #41562
Assistant Regulation Counsel
James C. Coyle, #14970
Attorney Regulation Counsel

Attorneys for Complainant

CERTIFICATE OF MAILING

I hereby certify that one copy of the foregoing **COMPLAINT AND CITATION** was placed in the United States mail, postage prepaid, this 11th day of June, 2018, and addressed to:

David R. Steinman
2 Wren
Littleton, CO 80127

CERTIFED MAILING: 9414 7266 9904 2096 4176 51
RETURN RECEIPT REQUESTED
Also sent via regular mail

Patrick L Ridley, Esq.
303 16th St., Suite 200
Denver, CO 80202-5031

Also sent via email: ridley@ridleylaw.com

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 R. STEINMAN, #39853

Case Number:
18PDJ038

OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(b)

In 2017, David R. Steinman ("Respondent") was hired as a full-time deputy district attorney in the 18th Judicial District. The elected district attorney told Respondent that he had to stop working on outside cases, as required by state statute. Respondent later confirmed to the district attorney's office that he was no longer working on outside cases. Yet he represented a client in a civil matter for about six months while employed in the 18th Judicial District. Further, on several occasions he misrepresented his status as a deputy district attorney to a lawyer involved in the civil case. When his deceit was discovered, he misrepresented his involvement in the civil case to his supervisors in the district attorney's office. Respondent stipulated to judgment on the pleadings as to Colo. RPC 8.4(c), which states that it is professional misconduct for a lawyer to make misrepresentations. Respondent's multiple breaches of Colo. RPC 8.4(c) warrant a suspension of six months, with three months to be served and three months to be stayed upon successful completion of a one-year period of probation.

I. PROCEDURAL HISTORY

Jacob M. Vos, Office of Attorney Regulation Counsel ("the People"), filed a complaint with Presiding Disciplinary Judge William R. Lucero ("the PDJ") on June 11, 2018, alleging that Respondent violated Colo. RPC 4.1(a) and 8.4(c). Through his counsel, Patrick L. Ridley, Respondent answered on July 2, 2018, denying the People's claims.

On September 21, 2018, the Court granted the parties' stipulated motion to judgment on the pleadings. In that order, the Court entered judgment on Claim II (Colo. RPC 8.4(c)), dismissed Claim I (Colo. RPC 4.1(a)), and converted the disciplinary hearing to a hearing on the sanctions.

EXHIBIT
2

On November 15 and 16, 2018, a Hearing Board comprising the PDJ and lawyers John A. Sadwith and Patrick D. Tooley held a hearing under C.R.C.P. 251.18. Vos represented the People, and Respondent appeared with his counsel. The Hearing Board considered stipulated exhibits S1-S13, the People's exhibits 8-9, and the testimony of William Kelly, Michael J. Carrigan, Jacob Edson, Bob Troyer, Greg Goldberg, Jaime Steinman, Jaime Pena, and Respondent.

II. FACTUAL FINDINGS[1]

Background

Respondent was admitted to practice law in Colorado on May 20, 2008, under attorney registration number 39853. He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.[2]

After graduating from St. Louis University School of Law in 1994, Respondent clerked for a federal judge in Texas and for the Fifth Circuit Court of Appeals. Following a one-year stint at a D.C. law firm, he worked for the U.S. Attorney's office in Texas from 1998 to 2000. He left Texas for a civil litigation firm in San Diego and then rejoined the U.S. Attorney's office—this time in Denver—from 2002 through about 2006. Respondent next held a series of private sector positions in Colorado. He managed Nestlé's North American litigation and served as general counsel for both RE/MAX and Concord Energy. He left Concord Energy for an energy-related company that terminated his employment in January 2017 due to a funding shortfall.

Events from January 2017 Through June 2017

Respondent began looking for new employment in early 2017. William Kelly, a partner at Kelly & Walker, a professional liability defense firm, offered Respondent work on a contract basis. Kelly and Respondent are close friends; according to Kelly, they have interacted since 2007 on "probably [a] daily basis, professionally and personally." Respondent completed some assignments for Kelly's law partner. In early May, the firm received a litigation referral involving a company called BullRest. Kelly's own time was already fully committed on a large class-action matter, but he accepted the *BullRest* matter because he thought Respondent was well suited to handle the case. No litigation was pending in *BullRest* at the time, and Kelly expected the matter to be resolved within days or weeks.

Later in May 2017, Respondent accepted a job as a deputy district attorney in the 18th Judicial District.[3] The new position would preclude him from continuing to work on any outside cases under C.R.S. section 20-1-201(1)(a), which provides that deputy district

[1] These findings are drawn from testimony at the disciplinary hearing where not otherwise indicated.
[2] *See* C.R.C.P. 251.1(b).
[3] Stip. Facts ¶ 3.

attorneys "shall not engage in the private practice of law nor receive any income from any private law firm." Though the statute provides an exception for part-time deputy district attorneys,[4] Respondent's new position was full-time.

On June 12, 2017, Respondent received a copy of the office's policy manual, which prohibits the private practice of law per C.R.S. section 20-1-201.[5] His employment file contained a separate document stating that deputy district attorneys are statutorily barred from engaging in the private practice of law and that the office "interprets this provision broadly."[6] On June 29, 2017, Respondent attended an orientation at the district attorney's office where office policies were discussed, and he signed a written acknowledgement that he had reviewed the office policy manual.[7] During the orientation, he was shown a slide presentation that also mentioned C.R.S. section 20-1-201. At the disciplinary hearing, Respondent testified that he did not pay close attention to the slide presentation and never noticed any reference to C.R.S. section 20-1-201 in his employment materials.

Around the time Respondent was offered the position as a deputy district attorney, he spoke to George Brauchler, the elected district attorney, who made clear that Respondent must extricate himself from his outside cases. Respondent conceded that Brauchler surely expected he would do so. After accepting the job, Respondent spoke to Brauchler's HR Director and to Matt Maillaro, a senior chief deputy district attorney, about whether he could keep any pending private cases. He was told he could not.[8] Respondent later confirmed to the office that he no longer was working on any such cases.[9]

Before starting work at the district attorney's office, Respondent told Kelly he wanted to transfer *BullRest* to him. Respondent remembers informing Kelly that his new job precluded such work; Kelly does not recall that part of the discussion. Kelly testified that he was opposed "in very strong terms" to taking over *BullRest* given the large class-action case he was handling. As Kelly recalls, Respondent replied that because Kelly had done him a favor and Respondent did not want to appear ungrateful, he would keep *BullRest* and work toward settlement.[10] Respondent told the Hearing Board that he believed he could wrap up the case within a month or two and that he wanted to avoid prejudicing his client, whom he liked and who lacked the funds necessary to hire a new lawyer. Neither Respondent nor Kelly informed the *BullRest* clients of Respondent's employment with the district attorney's office.

---

[4] C.R.S. § 20-1-201(1)(b).

[5] Ex. S2 at 00066; *see* Ex. S5. This statutory prohibition differs from longstanding policy at the U.S. Attorney's office, where attorneys may engage in private practice in limited circumstances with managerial approval.

[6] Ex. S3.

[7] Ex. S4.

[8] Ex. S10 at 00036.

[9] Ex. S10 at 00036. Respondent disputes that he provided this confirmation to the district attorney's office. The Hearing Board, however, finds the exhibit memorializing his confirmation to be more reliable on this point.

[10] *See also* Stip. Facts ¶ 4.

Respondent started his position at the district attorney's office on June 29, 2017.[11]

Boulder County Filing

Notwithstanding his new position in the 18th Judicial District, on August 15, 2017, Respondent filed a brief in a civil case separate from *BullRest*—a Boulder County District Court matter involving his acquaintance Martin Tindall.[12] Respondent signed the thirty-page "Response to Subpoena Duces Tecum – Martin H. Tindall" and filed it on behalf of "Steinman Law Offices LLC."[13] Respondent admitted that the People asked him numerous times during the disciplinary investigation and proceeding whether his work on *BullRest* was the only civil work he completed while serving as a deputy district attorney, yet he never mentioned this filing.

Respondent first testified that he did not consider his filing of the response to subpoena duces tecum to be "civil work" and alternately testified that he did not disclose the filing to the People because he had forgotten about it. He explained to the Hearing Board that he submitted the document as a favor for Tindall because the lawyer who had prepared the response either could not or would not file it. Respondent said Tindall did not pay him to file the document and Respondent made clear to counsel in the case that he was not serving as counsel of record. He testified that he decided to file the response because it took him "five seconds" and "six dollars," and he was just "being helpful." When pressed, he admitted that he read the thirty-page filing before submitting it, which, of course, would have taken much longer than five seconds. The Hearing Board finds Respondent's testimony that he forgot about this matter not credible. This was a recent event that we believe he likely remembered. Even if the filing did somehow slip his mind, he failed to diligently research his activities of the relevant timeframe to ensure his representations to the People were correct.

Events from July 2017 Through December 2017

During summer 2017, the posture of *BullRest* shifted. Respondent's clients in the matter—BullRest and one of the company's founders—were involved in a dispute with the other founder. On July 13, Respondent filed on his clients' behalf a complaint he had drafted in May. He prepared the complaint and other court filings, most of which Kelly signed per firm policy. In their answer, the opposing party lodged counterclaims against Respondent's clients as well as one of BullRest's investors, an entity represented by Michael Carrigan, a lawyer at Holland & Hart.[14] Respondent's and Carrigan's clients had similar interests in the litigation.

---

[11] Ex. 55.

[12] Exs. 8-9. The case was captioned *Constantine Marks et al. v. Martin H. Tindall et al.*, no. 2012CV845.

[13] Exs. 8-9.

[14] Both Kelly and Carrigan viewed the opposing party's counsel as aggressive. Kelly attributed the delay in settling the *BullRest* case to opposing counsel's tactics.

Respondent continued to work about one hour a week on *BullRest*. He testified that he billed a total of thirty to thirty-two hours on the case from May through December 2017. During work hours at the district attorney's office, Respondent said, his efforts on *BullRest* were limited to a couple of lunchtime conference calls and answering emails on his personal email account.[15] Meanwhile, Respondent was transferred in August from the county court unit to the economic crimes unit managed by deputy district attorney Jacob Edson.

In October 2017 Respondent phoned Carrigan, whose caller ID identified the incoming call as from the 18th Judicial District.[16] Carrigan asked Respondent if he was working as a district attorney.[17] Respondent said no, falsely claiming that he had a meeting at the district attorney's office and was just using the phone there.[18] At the disciplinary hearing, Respondent explained that his relationship with Carrigan did not get off on the right foot, and he also had tired of other lawyers giving him a "hard time" about deciding to take the deputy district attorney position. He explained that people looked at him as if he had "three heads" when they learned of that decision. Further, he believed his status as a deputy district attorney was none of Carrigan's business. Respondent said that those factors, coupled with his ego, led him to tell Carrigan untruths.

A settlement conference in the *BullRest* case was scheduled for December 11 at Holland & Hart's offices. That morning, Respondent ran into Greg Goldberg, a Holland & Hart attorney with whom he was friendly, in the building's lobby. Goldberg asked what Respondent was doing for work, and he responded that he was a deputy district attorney at the 18th Judicial District. Respondent gave Goldberg his district attorney's office business card and told him he was working on a matter with Carrigan. Several days later, Goldberg mentioned this conversation to Carrigan.

Events of December 20 and 21, 2017

Carrigan felt it was in his client's interest to clarify whether Respondent was in fact working as a prosecutor. Carrigan believed Respondent's status as a deputy district attorney could complicate efforts to resolve *BullRest*, for instance if opposing counsel found out about the situation (an event that never came to pass) or if Respondent's employment status forced him to withdraw from the case.

---

[15] Although Respondent's emails during work hours may have arguably violated an 18th Judicial District policy requiring attorneys to dedicate their work time to office matters, Respondent worked more than forty hours a week as a district deputy attorney and fulfilled his prosecutorial duties, and Respondent's supervisor testified it was not uncommon for attorneys to occasionally send non-work-related emails during work hours.

[16] Stip. Facts ¶ 5.

[17] Stip. Facts ¶ 5.

[18] Stip. Facts ¶ 5.

On the morning of December 20, Respondent and Carrigan spoke by phone.[19] Respondent had hoped that this conversation would be directed toward resolving the *BullRest* case.[20] But Carrigan, who had asked another partner to listen in as a witness, instead asked Respondent again if he was working as a district attorney.[21] Respondent replied, "Absolutely not."[22] As Carrigan recalls, he then asked why Respondent had told "Greg" that he was working in that capacity, and Respondent asked, "Greg who?" According to Carrigan, when he replied, "Greg Goldberg," Respondent's tone switched, then he stammered and said he was working part-time at the district attorney's office. Respondent explained that he made this misrepresentation about part-time work in hopes the response would "placate" Carrigan so the case could move along. Respondent testified that when he made this misrepresentation he was unaware of C.R.S. section 20-1-201, including the statute's exception for part-time work.

Within hours of the call, at 1:28 p.m., Carrigan emailed Respondent, stating:

> To make sure my client doesn't have a complication in the future . . . I wanted to have a written record of what we discussed. Today you informed me:
>
> 1. Your employment with the 18th Judicial DA's office is part time (3 days a week).
>
> 2. The DA's office is aware that you continue to work on civil matters, including this one, and you're doing so with the office's full knowledge and approval.[23]

In the late morning of December 20, after his call with Carrigan but before receiving Carrigan's email, Respondent went to see Edson, asking whether it was important if he had continued to work on a civil case while employed as a district attorney.[24] Edson pressed Respondent for details.[25] Respondent misrepresented and downplayed the scope of his civil work.[26] Edson recalls Respondent saying that he had simply "brokered" or "facilitated" a "communication" or "conversation" by telephone between two parties who were involved

---

[19] Carrigan's later email to Brauchler dated December 21 (described in the text below) states that this conversation took place at 12:30 p.m. on December 20. Ex. S9. Paragraph 13 of the stipulated facts and Respondent's testimony, on the other hand, place the conversation in the morning of December 20, before Respondent's later conversation with Edson. Given the inconsistent evidence on this point, the Hearing Board elects to adopt the chronology set forth in the stipulated facts.

[20] By this date, Respondent had learned that Kelly planned to remove him from Kelly & Walker's malpractice policy to make room for another lawyer at the start of the year. Respondent thus had additional motivation to quickly resolve the case.

[21] Stip. Facts ¶ 7.

[22] Stip. Facts ¶ 8.

[23] Stip. Facts ¶ 10; Ex. S6.

[24] *See* Stip. Facts ¶ 13.

[25] Stip. Facts ¶ 13.

[26] Stip. Facts ¶ 14.

in litigation, or words to that effect. Edson remembers Respondent relating that he was simply filling in for another attorney who was out of town. Based on Respondent's statements, Edson's impression was not that Respondent was representing one side in the litigation. Nevertheless, Edson expressed concern and mentioned the statutory proscription against deputy district attorneys engaging in private practice, noting that Respondent could lose his law license if he violated the statute. Edson remembers that Respondent expressed surprise upon mention of the statute.

Respondent stipulates that he knowingly misrepresented the scope of his involvement in the civil case to Edson.[27] He said he made these misrepresentations because he "panicked," fearful of losing his license to practice law. He also testified that this conversation was the first time he had learned of the statute. The Hearing Board finds incredible Respondent's testimony on the latter point. We do not believe that Respondent's misrepresentation to Carrigan about working as a part-time deputy district attorney was a coincidence and that Respondent was unaware of the exception in C.R.S. section 20-1-201(b) for part-time work. It simply strains credulity to believe that Respondent would have thought to excuse his work on the grounds that it was part-time had he not known of the statute.[28]

At 1:36 p.m., a couple of hours after Edson and Respondent's meeting, Edson emailed Respondent a citation to the statute.[29] Respondent immediately replied, "Well that sure can't get any more clear. I've already extricated myself."[30] This statement was dishonest; Respondent had not extricated himself from the *BullRest* case.[31] Respondent did call Kelly immediately after his conversation with Edson, saying that he needed to get off *BullRest*. Respondent remembers Kelly replying that he would contact his ethics counsel.

At 2:11 p.m., Respondent responded to Carrigan's email from earlier that day, stating: "All private client work has been disclosed and the work continues under 20-1-201(1)(b) until full time employment, which begins Jan 1. I will extricate myself from this matter before then, in fact, Bill Kelly will take over after this weekend."[32] At the time he sent this email, Respondent still had not fully disclosed his private work to the district attorney's office, and

---

[27] Stip. Facts ¶ 19.

[28] As noted above, the Hearing Board elects to adopt the parties' stipulation that Respondent's December 20 conversation with Carrigan preceded Respondent's conversation with Edson. If the events were in fact reversed, as suggested by exhibit S9, it would be all the more clear that Respondent's mention of part-time work to Carrigan was intentionally deceptive because it is undisputed that Edson mentioned the statute to Respondent during their conversation the morning of December 20. Even accepting the chronology set forth in the stipulated facts, however, we conclude that Respondent surely knew of the statute through some source before speaking with Carrigan on December 20.

[29] Stip. Facts ¶ 15; Ex. S7.

[30] Stip. Facts ¶ 15; Ex. S7.

[31] Stip. Facts ¶ 16.

[32] Stip. Facts ¶ 11; Ex. S6.

of course he had been working there full-time for almost six months.[33] Respondent thus stipulates that he knowingly misrepresented his work at the district attorney's office to Carrigan.[34] Soon after Carrigan received Respondent's email, Carrigan advised Brauchler of Respondent's conflicting representations about his employment status at the district attorney's office.[35] At Brauchler's request, Carrigan supplied the December 20 emails he had exchanged with Respondent.

Edson recalls meeting with Respondent one-on-one a second time on December 20. Edson gathered from the conversation that the extent of Respondent's involvement in private litigation was greater than what he previously indicated, though Respondent did not admit he had been representing a civil client. Respondent maintains, however, that he specifically mentioned to Edson involvement in a "settlement conference." Edson asked Respondent to write an account of what had happened in the civil matter, and sometime on December 20 or 21 Respondent produced the requested account. The account, as Edson recalls, essentially matched the narrative Respondent related during their first conversation on December 20: that he had merely facilitated a conversation between two parties.[36]

In a separate meeting, Respondent and Edson spoke with Maillaro, the senior chief deputy district attorney, on December 20. As memorialized in a memorandum Maillaro wrote, Respondent related that he had "taken part in a settlement conference" but said that the extent of his representation was "very little" and he "barely did anything."[37]

On the morning of December 21, Respondent came to see Edson again. Edson recalls that Respondent's demeanor had changed, and Respondent said Holland & Hart's ethics division would be contacting the district attorney's office. Although Respondent testified that he had "recovered [his] faculties" by the time of this conversation, Edson said that Respondent did not give him a "straight answer" when Edson asked what he was talking about. Edson testified that Respondent did not mention the name BullRest or provide any dates or timeframes related to the civil matter. Later that day, Edson was shown the December 20 emails between Carrigan and Respondent, which Edson deemed to be in "very significant" conflict with what Respondent had previously told him.

During the afternoon of December 21, 2017, Respondent was terminated at a meeting with Edson, two managers, the HR Director, and Brauchler.[38] The termination provided for no possibility of rehiring. Respondent was shown a copy of his December 20 email to Carrigan, and he admitted the email was dishonest.[39]

---

[33] Stip. Facts ¶ 12.
[34] Stip. Facts ¶ 18.
[35] Ex. S9.
[36] This document was not admitted into evidence, and its whereabouts are unknown.
[37] Ex. S10 at 00037.
[38] Ex. S10 at 00036. Brauchler attended the meeting by phone.
[39] Ex. S10 at 00036.

Post-Termination Events

Respondent self-reported his misconduct to the People immediately after his firing. He also called Carrigan the same day to apologize. Carrigan found his apology to be "very sincere."

After Respondent's termination, Edson took over most of Respondent's caseload; another attorney in the office assumed responsibility for other cases. It took three or four months to replace Respondent in the economic crimes unit. Edson explained that the unit prefers to have three attorneys but that more often than not the unit has only two attorneys because it is a relatively difficult position to fill.

After speaking with Carrigan several times, Kelly pulled Respondent off *BullRest* and terminated his firm's independent contractor relationship with him. Kelly stepped in to wrap up *BullRest*. He had been on the pleadings and copied on emails, so he testified that he was already "up to speed" on the case. According to Kelly, the matter settled in principle in January or February 2018 and was formally resolved a few months later.

Despite Respondent's positive performance review before his firing,[40] several witnesses testified that the misrepresentations at issue in this case will effectively preclude him from ever again being hired as a prosecutor.

As of the date of the disciplinary hearing, Respondent was working once more as a general counsel. He testified that he has experienced a number of physical symptoms, such as insomnia, as a result of the events underlying this case. He also said he has been drinking too much. Respondent's wife, Jaime Steinman, similarly testified that he has suffered significant emotional and physical consequences. Respondent credibly testified that he deeply regrets his misrepresentations to Carrigan and Edson, he loved his work in the 18th Judicial District, and he feels he let down his colleagues and family. He further regrets putting Carrigan in the difficult position of having to report his misconduct.

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[41] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[42] When imposing a sanction after a finding of lawyer misconduct, a 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 based on aggravating and mitigating factors.

---

[40] Ex. S11 at 00057.

[41] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2015).

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

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

Duty: Respondent failed in the duty he owes to the public to maintain his personal integrity. As explained in the ABA *Standards*, "[t]he public expects lawyers to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal or other dishonest conduct."[43] Further, Respondent neglected his duty to the legal profession. He had an obligation to the district attorney's office to abide by its rules and policies and to honestly deal with the office. As Edson testified, "a prosecutor is one that the executive, judicial, and the citizens of the district place a tremendous amount of faith in." Knowing misrepresentations by a prosecutor compromise the underpinnings of that faith. Indeed, we heard testimony that such misrepresentations are viewed so negatively as to effectively operate as a bar to future prosecutorial employment.

Mental State: The parties agree that Respondent acted knowingly.[44] The Hearing Board further finds that Respondent acted intentionally as to the numerous misrepresentations he made on December 20 and 21, when he avoided telling the truth for the purpose of retaining his job. Under the ABA *Standards*, "intent" is defined as "the conscious objective or purpose to accomplish a particular result."[45]

Injury: We consider both the potential harm and the actual harm that Respondent's conduct caused in several contexts.

It is undisputed that in the *BullRest* litigation Respondent's misrepresentations caused no actual injury to any party. But Carrigan perceived a potential for harm to his client if Respondent's prosecutorial responsibilities forced him to withdraw from the case. Carrigan noted that he worried about having to disclose Respondent's employment to opposing counsel, though he never in fact had to do so. And Respondent's failure to inform his clients that he was working as a deputy district attorney and was obligated to extricate himself from private cases caused those clients potential harm because of the not-insignificant risk that new counsel would need to take over the case mid-stream. Although Kelly ultimately took over *BullRest*, he initially declined to handle the case due to other commitments. Had the case evolved differently, the *BullRest* clients might have been forced to hire new counsel and pay legal fees for that lawyer to get up to speed, thereby delaying the litigation. Even so, we find the potential for harm to the parties in the *BullRest* matter was not substantial.

---

[43] ABA *Annotated Standards for Imposing Lawyer Sanctions* at 209.

[44] The ABA *Standards* define "knowledge" as the "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Id.* at xxi.

[45] *Id.*

Respondent's varied misrepresentations underlying this case did cause some actual harm by requiring several people to needlessly expend time and resources. For example, Kelly had to speak with Carrigan, contact his ethics counsel, and wrap up *BullRest*; Carrigan spent time communicating with Kelly, his partners, and Brauchler about Respondent's misrepresentations; and various employees within the district attorney's office had to dedicate their energies to addressing Respondent's misconduct. In addition, Respondent's precipitous departure from the office led to a staffing reduction in the economic crimes unit for several months, which was less than optimal, though not unusual. The Hearing Board considers this category of injury to be relatively modest.

The last category of harm is harm to the legal profession. Respondent has contributed to a perception of lawyers—and prosecutors—as dishonest. As the Colorado Supreme Court has commented, "Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish."[46] Respondent's dishonesty also undermined trust among lawyers. Edson clearly was deeply troubled by Respondent's deceptions, and Carrigan testified that he viewed Respondent's misrepresentations to him as significant in the "lawyer-to-lawyer" context.

ABA *Standards* 4.0-7.0 – Presumptive Sanction

ABA *Standard* 7.2 states that suspension is generally appropriate when a lawyer knowingly engages in conduct that violates a duty owed as a professional, thereby causing injury or potential injury to a client, the public, or the legal system. The Hearing Board finds that these elements are met here, and we thus apply *Standard* 7.2.[47]

Examination of other arguably relevant standards bolsters the decision to apply a presumptive sanction of suspension here. *Standard* 5.22 calls for suspension where a lawyer in a governmental position knowingly fails to follow proper procedures or rules, thereby causing injury or potential injury to a party or to the integrity of the legal process. In our view, *Standard* 5.22 is less well suited to this case than to cases in which legal proceedings themselves are affected by the misconduct, but the fact that this standard fits here as well—and has been applied in comparable circumstances[48]—supports the determination that suspension is the correct presumptive sanction in this case.

Consideration of *Standard* 5.0 leads us to the same conclusion. Disbarment is generally appropriate under *Standard* 5.11(b) when a lawyer intentionally engages in

---

[46] *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002).

[47] *See, e.g., Id.* at 1184 (citing *Standard* 7.2 as applicable to a prosecutor's deceitful conduct); *Fla. Bar v. Kossow*, 912 So.2d 544, 545, 548 (Fla. 2005) (applying *Standard* 7.2 where a lawyer violated his law firm's policy barring outside legal work and lied to his firm about that work).

[48] *In re Smith*, 29 So. 3d 1232, 1237 (La. 2010) (applying *Standard* 5.22 where an assistant district attorney represented criminal defendants in contravention of applicable law).

dishonesty or misrepresentation (other than certain crimes listed in *Standard* 5.11(a)), where that conduct seriously adversely reflects on the lawyer's fitness to practice law. *Standard* 5.13 calls for public censure when a lawyer knowingly engages in "any other conduct"[49] that involves dishonesty or misrepresentation and that adversely reflects on the lawyer's fitness. We deem neither *Standard* 5.11(b) nor *Standard* 5.13 a good fit here. As to *Standard* 5.11(b), although Respondent's likely disqualification from future prosecutorial positions could be viewed as evidence that his misconduct seriously adversely reflects on his fitness to practice, his misrepresentations were not made in his role in prosecuting cases, so we find that his misconduct does not adversely reflect on his fitness to a serious degree. Meanwhile, *Standard* 5.13 does not adequately address the gravity of the misconduct here, which was intentional rather than merely knowing.[50] Analysis under *Standard* 5.0 thus suggests that the presumptive sanction should occupy a middle ground between disbarment and public censure, reinforcing our sense that applying the presumptive sanction of suspension under *Standard* 7.2 coheres with the overall thrust of the ABA *Standards*.

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations that may justify an increase in the degree of the sanction to be imposed, while mitigating factors may warrant a reduction in the severity of the sanction.[51] As explained below, the Hearing Board applies four factors in aggravation, one of which carries relatively little weight, and five mitigating factors, one of which merits comparatively little weight. We evaluated the following factors.

Aggravating Factors

Dishonest or Selfish Motive – 9.22(b): We believe Respondent's misrepresentations on December 20 and 21 were motivated by the selfish goals of covering up his misconduct and retaining his job.

Pattern of Misconduct – 9.22(c): Respondent repeatedly deceived others over the course of many months. Under this rubric, we consider not only Respondent's misrepresentations to Carrigan and Edson but also his failure to inform Brauchler that he had not extricated himself from civil cases, as Brauchler expected him to do. Respondent's

---

[49] The phrase "other conduct" refers to the types of conduct addressed in *Standards* 5.11(a), 5.11(b), and 5.12. *Standard* 5.11(a) addresses serious criminal conduct that involves false swearing, theft, intentional killing, and other offenses not at issue here, while *Standard* 5.12 addresses knowing criminal conduct that does not involve the elements listed in *Standard* 5.11(a) and that seriously adversely reflects on the lawyer's fitness to practice.

[50] It has been noted that *Standard* 5.0 is not a "perfect fit" for the type of intentional misconduct at issue in this case. *See In re Flannery*, 47 P.3d 891, 895 (Or. 2002).

[51] *See* ABA *Standards* 9.21 & 9.31.

filing of the response to subpoena duces tecum in Boulder County District Court is further evidence of a pattern of obscuring relevant facts.[52]

Substantial Experience in the Practice of Law – 9.22(i): Respondent has practiced law for a quarter century. His lengthy practice is an aggravating factor here.

Status as Prosecutor: We consider Respondent's status as a prosecutor to be an additional aggravating factor.[53] We recognize that Respondent's actions did not involve making false statements to a tribunal or defense counsel, delaying the disclosure of or concealing exculpatory evidence, or engaging in criminal conduct—the type of scenarios that might well justify applying significant weight to this aggravating factor given the potential to compromise the integrity of the criminal justice system and to undermine public trust in the system. But Respondent's outright misrepresentations and misrepresentations by omission to Edson, Maillaro, and Brauchler were related to and occurred in his capacity as a deputy district attorney and reflected adversely on the integrity of the district attorney's office. As such, we apply this factor in aggravation, though we accord it relatively little weight.

Mitigating Factors

Absence of Prior Disciplinary Record – 9.32(a): During his long tenure as a lawyer, Respondent has not been disciplined. This factor deserves consideration in mitigation.

Timely Good Faith Effort to Rectify Consequences of Misconduct – 9.32(d): Respondent called Carrigan the day he was terminated to apologize, and Carrigan accepted the apology as sincere. That same day, Respondent self-reported his misconduct to the People. We give Respondent relatively little credit for these efforts. Awarding greater weight would be inappropriate given that he made no attempts to rectify either his misrepresentations to Carrigan or his unauthorized civil practice until his misconduct had been discovered.[54]

---

[52] We do not treat Respondent's failure to disclose the Boulder County filing to the People as a deceptive practice in this proceeding under *Standard* 9.22(f) because, although we believe that Respondent should have remembered and disclosed this filing, we do not find clear and convincing evidence that he had a deceptive intent.

[53] *See In re Rosen*, 198 P.3d 116, 121 (Colo. 2008) ("While the ABA Standards enumerate a number of . . . aggravating and mitigating factors, they are expressly intended as exemplary . . . ."); *In re Pautler*, 47 P.3d at 1180 (holding prosecutors to a higher ethical standard than other lawyers) (citing *People v. Reichman*, 819 P.2d 1035, 1038-39 (Colo. 1991)); *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989) (considering a respondent's status as a prosecutor when he used a racial epithet as an aggravating factor); *People v. Groland*, 908 P.2d 75, 77 (Colo. 1995) (treating a respondent's status as a prosecutor at the time of criminal misconduct as an aggravating factor); *People v. Freeman*, 885 P.2d 205, 206 (Colo. 1994) (same).

[54] *See People v. Goldstein*, 887 P.2d 634, 642-43 (Colo. 1994) (declining to apply *Standard* 9.32(d) where a lawyer did not confess to his misdeeds or give information to his firm until he was confronted by members of his firm, when it was clear his misconduct would soon be discovered); *cf. In re Pautler*, 47 P.3d at 1184 (finding that the respondent's failure to correct his deceptive actions "[a]fter the immediacy of the events waned" was an

Character or Reputation – 9.32(g): Four lawyers testified about Respondent's character and reputation within the Colorado legal community. First, Bob Troyer, the acting U.S. Attorney in Denver from 2016 until October 2018, testified that he has known Respondent since 2001. They worked together while Respondent was serving as a prosecutor and later as a general counsel, and they have had a social relationship. Troyer recalls that Respondent was energetic, ethical, creative, and a hard worker. In fact, Troyer recommended that Concord Energy hire Respondent due to his ethical character. Troyer said that his own opinion of Respondent as a truthful lawyer is shared by others in the community.

Second, Jaime Pena is a friend of Respondent; they have known each other for decades, since working together as prosecutors in Texas. Their employment as federal prosecutors in Denver also overlapped around 2004 or 2005. Pena characterized Respondent's misconduct as a "one-off." Pena said that Respondent is a "fantastic lawyer," that he has never known Respondent to be dishonest, and that Respondent has had a number of "blue chip" jobs. On cross-examination, Pena testified that he understood Respondent's misrepresentations in this case to have occurred over the space of one or two days or perhaps a week.

Goldberg and Kelly, who were primarily called as fact witnesses, also provided character testimony. Goldberg testified that Respondent has a reputation for truthfulness, while Kelly offered that Respondent is a "straight shooter" and a "great father" who is respected in the legal community as a very good lawyer and an honest person.

On the whole, we believe that Respondent deserves credit in mitigation for his good character and reputation. We note that the testimony provided by these witnesses—all friends of Respondent—reflected generalities rather than concrete examples that would enable us to better understand Respondent's character. In addition, Pena and Goldberg understood Respondent's misconduct to be more limited in nature than it was in fact. We assign this mitigating factor average but not great weight.[55]

---

independent aggravating factor). *But see In re Fischer*, 89 P.3d 817, 821 (Colo. 2004) (noting that even restitution made after the initiation of disciplinary proceedings may warrant some consideration in mitigation).

[55] *See* ABA *Annotated Standards for Imposing Lawyer Sanctions* at 473 (citing Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 Am. U. L. Rev. 1 (1998) for the proposition that "character and reputation evidence often [is] of little probative value and should be admitted only when [the] witness has substantial direct knowledge of [the] lawyer's practice, is aware of [the] alleged misconduct, and is able to provide testimony about [the] character traits at issue in [the] misconduct"); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Tofflemire*, 689 N.W.2d 83, 92 (Iowa 2004) (in a case involving improper billing and timekeeping practices, noting that the character witnesses who spoke to the respondent's trustworthiness, honesty, and other traits were not familiar with the respondent's job duties and performance, nor were they familiar with her billing or timekeeping practices, and thus apparently according diminished weight to that mitigating factor).

Imposition of Other Penalties or Sanctions – 9.32(k): Respondent permanently lost his position at the district attorney's office. He persuasively testified that he loved working as a prosecutor, and we believe this factor deserves consideration in mitigation.

Remorse – 9.32(l): Respondent testified credibly that he rues his decisions to misrepresent his status at the district attorney's office to Carrigan and to misrepresent the scope of his civil work to Edson. Jaime Steinman corroborated that testimony, painting a picture of a man who deeply regrets his misconduct, as well as the effects of that misconduct on his family and his colleagues. We note that Respondent did not express remorse for deciding to work on *BullRest* in the first instance after leading Brauchler to believe he would stop working on outside cases. Nevertheless, we assign Respondent credit in mitigation for his other demonstrable remorse.

Analysis Under ABA *Standards* and Case Law

Here, the People assert that Respondent's misconduct should be met with a suspension for one year and one day. Respondent, on the other hand, believes that a private admonition is the appropriate sanction.

As the Colorado Supreme Court's *In re Attorney F.* decision explains, hearing boards must follow a "two-step framework" for analysis: first, a presumptive sanction is identified based on the applicable duty, injury, and mental state, and second, that presumptive sanction may be adjusted based on consideration of aggravating and mitigating factors.[56] *Attorney F.* indicates that this analysis may be informed by Colorado Supreme Court cases, particularly those decided after the adoption of our current disciplinary system in 1999.[57] Hearing boards are called upon to exercise discretion in imposing a sanction by carefully applying aggravating and mitigating factors.[58] Because "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases,"[59] the appropriate sanction for a lawyer's misconduct must be determined on a case-by-case basis.

Where suspension is the presumptive sanction under the ABA *Standards*, a six-month served suspension is typically viewed as the baseline, to be adjusted based on aggravators and mitigators.[60]

---

[56] *In re Attorney F.*, 2012 CO 57, ¶ 19.

[57] *Id.* at ¶ 20.

[58] *See id.* at ¶ 19; *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).

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

[60] *See* ABA *Standard* 2.3 ("Generally, suspension should be for a period of time equal to or greater than six months . . . ."); *In re Cummings*, 211 P.3d 1136, 1140 (Alaska 2009) (imposing a three-month suspension based on a six-month "baseline" set forth in ABA *Standard* 2.3, considered in conjunction with applicable mitigating factors); *In re Moak*, 71 P.3d 343, 348 (Ariz. 2003) (noting that the presumptive suspension period is six

In reviewing case law, we have considered several factors in gauging the comparability of this particular matter to other cases, including: whether the case involved misrepresentations; whether the lawyer in question was a prosecutor and whether the misconduct took place in a prosecutorial role; whether the lawyer immediately took steps to rectify the misconduct; whether the lawyer had an arguably good motive for the misconduct; whether the misconduct involved illegality or abuse of office; whether the lawyer engaged in an isolated instance or a pattern of misconduct; and the balance of aggravators and mitigators. We have been unable to find any cases from Colorado or other states in which these factors align precisely with the factors in the matter at hand. Below, we analyze a range of cases that are factually analogous to the instant case in at least some dimensions.

The parties have drawn our attention to two Colorado opinions in particular.[61] The highest-profile Colorado case involving prosecutorial dishonesty is *In re Pautler*.[62] Pautler, a deputy district attorney, assisted with an effort to persuade a suspect to surrender in the immediate wake of three murders.[63] During a telephone call with a sheriff, the suspect said he would not surrender without legal representation.[64] Pautler then impersonated a defense attorney and spoke to the suspect, who believed Pautler represented him.[65] The suspect surrendered.[66] Pautler made no effort to correct his misrepresentations to the suspect in the following days.[67] The defense attorney who later represented the suspect had trouble gaining the suspect's trust due to Pautler's deception; the suspect decided to proceed pro se and was sentenced to death.[68] In the ensuing disciplinary proceeding, the Colorado Supreme Court emphasized lawyers' duty of honesty, declaring: "Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest."[69] The court commented that prosecutors, in particular, serve as "a representative of the system of justice" while also noting that Pautler believed

---

months); *In re Stanford*, 48 So.3d 224, 232 (La. 2010) (imposing a six-month deferred suspension after considering the "baseline sanction" of six months served and deviating downward from that sanction based on one aggravating factor, four mitigating factors, and no actual harm caused); *Hyman v. Bd. of Prof'l Responsibility*, 437 S.W.3d 435, 449 (Tenn. 2014) (describing a six-month served suspension as a baseline sanction, to be increased or decreased based on aggravating or mitigating circumstances); *In re McGrath*, 280 P.3d 1091, 1101 (Wash. 2012) ("If suspension is the presumptive sanction, the baseline period of suspension is presumptively six months.").

[61] We do not devote space to addressing the sanctions analysis on remand in *Attorney F.*, a recent case involving dishonesty by a prosecutor; that hearing board decision was not published or otherwise made public.

[62] 47 P.3d 1175.

[63] *Id.* at 1176-77.

[64] *Id.* at 1177.

[65] *Id.* at 1177-78.

[66] *Id.* at 1178.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 1179.

his actions were protecting the public.[70] Considering Pautler's intentional mental state, the actual injury he caused, and his failure to remediate his conduct, the court affirmed the hearing board's imposition of a stayed three-month suspension.[71] The Hearing Board finds it difficult to compare *Pautler* to the instant case because *Pautler* involved highly unusual facts relating to the capture of a suspect who had threatened to kill additional victims, serious injury stemming from the misconduct, and a course of deceptive actions limited to a few hours or less.[72]

In re Rosen is a more recent case involving dishonesty, this time on the part of an attorney in private practice.[73] Rosen was hired to help settle a personal injury claim.[74] He submitted a settlement demand to the insurer after his client had died and did not notify the insurer of his client's death.[75] He then rejected a counteroffer, saying his client needed additional treatment.[76] Rosen initially believed that the client's claim for pain and suffering would remain valid after his death, yet he soon learned that no valid claim in fact existed.[77] When he did notify the insurance company of his client's death, he falsely said it had occurred after the settlement offer.[78] The insurer ultimately requested return of the settlement check, and Rosen immediately complied.[79] The Colorado Supreme Court refused to disturb the hearing board's finding that Rosen did not intend to permanently deprive the insurer of the funds at issue.[80] Considering a predominance of mitigating factors, the court upheld the hearing board's imposition of a stayed six-month suspension.[81] Three dissenting members of the court would have imposed a served suspension of one year and one day.[82] We find *Rosen*, like *Pautler*, somewhat dissimilar; *Rosen* did not involve misconduct by a prosecutor and the mitigating factors substantially outweighed aggravators there.[83]

A case from Louisiana is somewhat more factually analogous to the instant case. *In re Smith* involved an attorney in private practice who was hired as an assistant district

---

[70] *Id.* at 1183-84.

[71] *Id.* at 1184. In its sanctions analysis, the court commented that "deceitful conduct done knowingly or intentionally typically warrants suspension, or even disbarment." *Id.* Notably, the *Pautler* court did not use the two-step framework for sanctions analysis later explicated in *Attorney F.*: although the *Pautler* opinion discusses presumptive sanctions as well as aggravating and mitigating factors, the opinion does not identify a single presumptive sanction as the starting point for analysis. *See id.*

[72] *Id.* at 1177-80.

[73] 198 P.3d 116.

[74] *Id.* at 117-18.

[75] *Id.* at 118.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 119.

[81] *Id.* at 121.

[82] *Id.* at 121-23.

[83] It appears that the *Rosen* court applied four mitigating factors as well as two aggravating factors that carried limited weight. *Id.* at 121.

attorney.[84] Smith represented two criminal defendants within six weeks of taking his oath as a prosecutor, in violation of both the Louisiana constitution and the state's criminal procedure code.[85] He appeared twice in court for the first defendant and once for the second.[86] Further, he did not immediately withdraw from the second representation upon taking the prosecutorial position, even though the client's trial was scheduled within a few weeks, nor did he give his client an accounting.[87] His criminal representations created concurrent conflicts of interest.[88] Smith was found to have acted knowingly but not intentionally because he apparently believed his perfunctory court appearances to wind up matters for his clients would cause no harm.[89] Indeed, no concrete harm was found, and it was deemed likely that the courts and relevant parties in the underlying matters had consented to the conflicts, though any such consent was not in writing.[90] Applying ABA *Standard* 5.22 (suspension is generally appropriate when a lawyer in a governmental position knowingly fails to follow proper procedures or rules, causing injury or potential injury to a party or to the integrity of the legal process) and considering four aggravators and no mitigators, the court imposed a served suspension of one year and one day.[91] *Smith* differs significantly from the instant case in that *Smith* represented criminal defendants, while Respondent acted as an attorney in civil matters.

The *Smith* case involved moonlighting by a prosecutor (in contravention of the state's constitution, unlike here) but it did not appear to contain the element of explicit dishonesty central to the instant case. The *In re Flannery* decision from Oregon, conversely, addresses deceitful conduct by a prosecutor but not the element of moonlighting.[92] There, a deputy district attorney who had moved two years earlier to Washington state continued to use his Oregon driver's license.[93] At some point he realized that his license was expired and that unless he immediately replaced it he would be unable to rent a car during an upcoming trip.[94] He chose the quicker route of renewing his Oregon license, listing a false address in that state.[95] In doing so, he signed an acknowledgement that making a false statement was a violation of law.[96] When this conduct was discovered, he pleaded guilty to a misdemeanor and lost his position as a prosecutor.[97] Considering a public censure as the presumptive

---

[84] 29 So. 3d at 1233.
[85] *Id.* The decision also considered Smith's failure to remain current on continuing legal education and bar registration requirements. *Id.* at 1234.
[86] *Id.* at 1233.
[87] *Id.* at 1234.
[88] *Id.*
[89] *Id.* at 1235.
[90] *Id.*
[91] *Id.* at 1237.
[92] 47 P.3d 891.
[93] *Id.* at 892.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*

sanction and taking into account two aggravators and five mitigators as well as the determination that the conduct was unlikely to reoccur, the court imposed a public censure.[98] *In re Flannery*, unlike the case before us, involves a single notable instance of dishonesty that was wholly unrelated to the lawyer's service as a prosecutor.

We have also considered cases involving lawyers in private practice who misled their employers. The Florida Supreme Court imposed a served thirty-day suspension on a lawyer who violated his law firm's policy barring outside legal work and lied to his firm about that work.[99] Somewhat similarly, where a lawyer who was employed full-time by a law firm concealed his separate law practice from the firm, used firm resources for his own benefit, and exposed the firm to potential malpractice liability, the Missouri Supreme Court suspended the lawyer's license indefinitely, with leave to apply for reinstatement after six months.[100] That sanction took into account a great preponderance of aggravating factors.[101] And in Maryland, the state supreme court imposed a ninety-day served suspension on a federal agency lawyer who intentionally concealed relevant facts during her job application process.[102]

---

[98] *Id.* at 234-37. Another case involving a prosecutor's criminal conduct is *Freeman*, 885 P.2d 205. There, the Colorado Supreme Court accepted a stipulation to a served six-month suspension for a Boulder prosecutor who received a deferred sentence after pleading guilty to a class-five felony—accessory to a crime. *Id.* at 206. The plea was based on a stipulation that the lawyer found drug paraphernalia in her home but did not use it; rather, she placed it in the trash on the curb to keep it from being used by others. *Id.* The only aggravating factor present was the lawyer's status as a prosecutor, while seven factors mitigated the misconduct. *Id.* at 206-07. We also recognize that there is a separate line of case law involving prosecutors who abuse their positions. *See, e.g., People v. Larsen*, 808 P.2d 1265, 1265-68 (Colo. 1991) (imposing three-year suspension on elected district attorney who bought marijuana from an employee to give to his wife and pleaded guilty to three misdemeanors). Although we heed the *Larsen* court's commentary regarding the seriousness of prosecutorial misconduct, *see id.* at 1267, the Hearing Board views cases of abuse of office as having limited relevance to the matter at hand because such cases involve serious breaches of public trust and significant injury. We also recognize that elected district attorneys appear to be held to an even higher standard than other prosecutors. *See id.*

[99] *Kossow*, 912 So.2d at 545.

[100] *In re Cupples*, 979 S.W.2d 932, 932-37 (Mo. 1998).

[101] *Id.* at 937; *see also Tofflemire*, 689 N.W.2d at 86-89, 95 (imposing indefinite suspension with no possibility of reinstatement for two years where a full-time state agency lawyer who was permitted to engage in outside work was found to have improperly taken sick leave from the agency while claiming to do other work, to have billed substantial hours for another position on days she claimed to have worked eight to ten hours for the agency, and to have "conducted herself with a significant and reckless disregard for the accuracy and truthfulness of her billing and timekeeping records").

[102] *Attorney Grievance Comm'n v. Floyd*, 929 A.2d 61, 62, 74 (Md. 2007). Cases involving non-workplace deceit by lawyers who were not prosecutors include *In re Wyllie*, 957 P.2d 1222, 1223-27 (Or. 1998) (imposing a two-year suspension on a lawyer who submitted an affidavit falsely attesting to completing continuing legal education and advanced a fabricated story during the ensuing disciplinary investigation); *In re Betts*, 217 P.3d 30, 31-35 (Kan. 2009) (publicly censuring a lawyer who gave his wife a falsified automobile insurance card that was discovered when she was stopped for speeding); and *People v. Small*, 962 P.2d 258, 259-61 (Colo. 1998) (publicly censuring a lawyer for falsely testifying about his insurance status during a personal small claims case).

As the foregoing analysis indicates, we have been unable to identify any cases that are truly on all fours with the instant matter. More so than for the category of cases involving, for instance, knowing conversion of client property, we find it difficult to discern themes in the case law that provide consistent and clear guidance as to our application of the ABA *Standards* here. Relevant case law appears to support a sanction ranging from a wholly stayed suspension to a served suspension of a year or more.

With that in mind, we return to the guiding framework set forth above, beginning with the baseline of a six-month served suspension and adjusting that baseline sanction in consideration of aggravating and mitigating factors. As previously explained, we have found four factors in aggravation and five mitigating factors. Given these circumstances, we decide that the most fitting sanction is a suspension of six months, with three months to be served and three months to be stayed upon successful completion of a one-year period of probation, with the conditions that Respondent refrain from violating the Rules of Professional Conduct and successfully complete ethics school. We believe this sanction both follows the required framework for analysis under the ABA *Standards* and appropriately reflects the gravity of Respondent's numerous instances of dishonesty.

IV. CONCLUSION

As a deputy district attorney, Respondent made knowing misrepresentations to his supervisors and to another lawyer on multiple occasions. He violated his duty to exercise honesty and candor, undermining the integrity of the legal profession and the district attorney's office. His misconduct warrants a six-month suspension, with three months to be served and three months to be stayed upon successful completion of a one-year period of probation, with conditions.

V. ORDER

The Hearing Board therefore **ORDERS:**

1. **DAVID R. STEINMAN**, attorney registration number **39853**, will be **SUSPENDED FOR SIX MONTHS, WITH THREE MONTHS TO BE SERVED AND THREE MONTHS TO BE STAYED** upon completion of a **ONE-YEAR PERIOD OF PROBATION**. The suspension will take effect upon issuance of an "Order and Notice of Suspension."[103]

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.

[103] 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 thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

3. Within fourteen days of issuance of the "Order and Notice of Suspension," 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 other state and federal jurisdictions where he is licensed.

4. The parties **MUST** file any posthearing motion **on or before Friday, January 25, 2019.** Any response thereto **MUST** be filed within seven days.

5. The parties **MUST** file any application for stay pending appeal **on or before Friday, February 1, 2019.** Any response thereto **MUST** be filed within seven days.

6. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** submit a statement of costs **on or before Friday, January 25, 2019.** Any response thereto **MUST** be filed within seven days.

7. Should Respondent wish to resume practicing law in Colorado, he will be required to submit to the People, no more than twenty-eight days before the expiration of the served portion of his suspension, an affidavit complying with C.R.C.P. 2151.29(b).

8. If Respondent is reinstated to practice law in Colorado, he **MUST** successfully complete a **ONE-YEAR PERIOD OF PROBATION** subject to two conditions:

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

   b. He will successfully complete at his own expense the ethics school offered by the People during the period of probation.

HEARING BOARD MEMBERS TOOLEY and SADWITH, *concurring*:

We concur in all aspects of the opinion. We believe the sanction imposed here was determined in conformity with the required framework for analysis under the ABA *Standards*. And we agree that a six-month suspension, with three months to be served and three months to be stayed, appropriately reflects the gravity of Respondent's misconduct. We write separately, however, to address more fully Respondent's argument that prior disciplinary cases involving prosecutors, specifically *In re Attorney F.* and *In re Pautler*, warrant the imposition of a private admonition rather than a suspension.

In *In re Attorney F.*, a deputy district attorney met with a witness over a lunch break after the witness had been cross-examined by defense counsel.[104] Following redirect, the witness was asked on recross if she had met with anyone from the district attorney's office over the lunch break.[105] The witness testified falsely that she had not.[106] During an afternoon recess, the victim advocate asked Attorney F. what she was going to do about the witness's false testimony.[107] Also during the same recess, defense counsel asked Attorney F. if she had conferred with the witness over the lunch break.[108] Attorney F. falsely claimed she had not.[109] Later that evening, Attorney F. realized the seriousness of the situation and contacted her supervisors.[110] She also disclosed to defense counsel that she had in fact met with the witness over the lunch break and that the witness's testimony on that point was untrue.[111]

The hearing board concluded that Attorney F. violated Colo. RPC 8.4(c) and 8.4(d) by making a knowing misrepresentation to defense counsel.[112] Although the hearing board was leaning toward a private admonition, it imposed a public censure because it believed it was required to do so.[113] On appeal, the Colorado Supreme Court held that the hearing board erred when it concluded a public censure was mandated and remanded the case for a redetermination of the appropriate sanction.[114]

In *In re Pautler*, Deputy Sheriff Cheryl Moore was on a telephone call with William Neal, who had committed three gruesome murders, trying to convince Neal to surrender himself.[115] Over the three-and-a-half hour recorded telephone call, Neal confessed in detail to

---

[104] 2012 CO 57, ¶ 3.
[105] *Id.* at ¶ 4.
[106] *Id.*
[107] *Id.* at ¶ 5.
[108] *Id.* at ¶ 6.
[109] *Id.*
[110] *Id.* at ¶ 7.
[111] *Id.*
[112] *Id.* at. ¶ 9.
[113] *Id.* at ¶ 14.
[114] *Id.* at ¶¶ 15, 22.
[115] 47 P.3d 1175, 1176-77 (Colo. 2002).

his crimes.[116] Because Neal was on a cell phone, Sheriff Moore could not determine his whereabouts, and Neal was clear he would not surrender without legal representation.[117] Chief Deputy District Attorney Mark Pautler offered to impersonate a public defender and engage Neal in conversation.[118] Pautler got on the phone call, claiming to be "Mark Palmer" from the public defender's office.[119] Pautler indicated to Neal that he was Neal's attorney, and Neal believed "Mark Palmer" to be his lawyer.[120] Neal ultimately surrendered, but Pautler made no effort to correct his misrepresentations to Neal.[121] Two weeks later, the Jefferson County deputy public defender who had assumed Neal's defense learned of Pautler's misrepresentation while listening to a recording of the telephone call.[122]

The hearing board imposed a three-month stayed suspension for Pautler's violations of Colo. RPC 8.4(c) and 4.3.[123] Pautler appealed and the Colorado Supreme Court affirmed.[124]

Respondent argues that his misrepresentations to Carrigan, Edson, and Maillaro and his misrepresentation by omission to Brauchler are less egregious than those made by Attorney F. and Pautler. This is a forceful argument. After all, Attorney F. made a false representation to defense counsel during a criminal trial. And Pautler's misrepresentations to Neal and his failure to correct those misrepresentations compromised the very integrity of the criminal justice system. But we disagree with Respondent that *In re Attorney F.* and *In re Pautler* mandate an admonition rather than a suspension for the following reasons.

First, when applying the two-step framework outlined in *In re Attorney F.*, we must initially determine the presumptive sanction and then adjust the sanction based on the aggravating and mitigating factors presented.[125] We do not use as our starting point the discipline imposed in other cases. Our approach here not only comports with the two-step framework mandated by *In re Attorney F.*, it also respects the Colorado Supreme Court's observation that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[126]

Second, even though we agree with Respondent that each of his misrepresentations is less egregious than those of Attorney F. or Pautler, each case must be judged on its own merits, considering the totality of the facts and circumstances each case presents. In *In re Attorney F.*, for example, the deputy district attorney made a single misrepresentation to

---

[116] *Id.* at 1177.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1177-78.
[121] *Id.* at 1178.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 1184.
[125] *In re Attorney F.*, ¶ 19.
[126] *Id.* at ¶ 20 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

defense counsel during trial. Here, Respondent made repeated misrepresentations over several months to his supervisors and to Carrigan. Attorney F. also disclosed her wrongful conduct within twenty-four hours, while trial was still ongoing, ensuring the trial court could give a curative instruction, which it did.[127] Conversely, Respondent knowingly engaged in a pattern of deception and failed to admit his wrongdoing to his supervisors and Brauchler until Respondent's employment termination meeting. Put simply, while the sanction in *In re Attorney F.* was appropriate based on the facts of that case, we do not believe such a sanction would be appropriate here.

As for *In re Pautler*, the facts there bear no resemblance to the facts here. The Colorado Supreme Court recognized that the reasons behind Pautler's conduct (namely, having a confessed murderer surrender without further bloodshed) were "not inconsequential."[128] Pautler's misrepresentations were not the result of a selfish motive and occurred during a single telephone call.[129] *In re Pautler* also involved matters of first impression, namely whether allegations of ethical misconduct should be subject to an imminent public harm exception or the defenses of duress and choice of evils.[130]

In summary, we believe the sanction imposed here is entirely fair, reasonable, and faithful to the ABA *Standards*. If we have any reservation at all (and we do), it is not about the appropriateness of the sanction here, but the adequacy of the sanction in *In re Pautler*, which we believe unduly depreciated the seriousness of Pautler's misconduct. That said, we neither discount nor ignore *In re Pautler*. Instead, we recognize that it is one of many cases within the broad fabric of disciplinary decisions that inform our deliberations as to the appropriate sanction to be imposed here.

We concur.

---

[127] *Id.* at ¶ 8.
[128] 47 P.3d at 1181.
[129] *Id.* at 1184.
[130] *Id.* at 1180-81.

DATED THIS 11th DAY OF January, 2019.

William R Lucero

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

John A Sadwith

JOHN A. SADWITH
HEARING BOARD MEMBER

PATRICK D. TOOLEY
HEARING BOARD MEMBER

Copies to:

Jacob M. Vos Office of Attorney Regulation Counsel	Via Email j.vos@csc.state.co.us
Patrick L. Ridley Respondent's Counsel	Via Email ridley@ridleylaw.com
John A. Sadwith Patrick D. Tooley Hearing Board Members	Via Email Via Email
Cheryl Stevens Colorado Supreme Court	Via Hand Delivery

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through June 21, 2018

Contents

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Current through June 21, 2018

I. GENERAL PROVISIONS

Rule 1.01. Definitions

(a) "BODA" is the Board of Disciplinary Appeals.

(b) "Chair" is the member elected by BODA to serve as chair or, in the Chair's absence, the member elected by BODA to serve as vice-chair.

(c) "Classification" is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a "complaint" or an "inquiry."

(d) "BODA Clerk" is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.

(e) "CDC" is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.

(f) "Commission" is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.

(g) "Executive Director" is the executive director of BODA.

(h) "Panel" is any three-member grouping of BODA under TRDP 7.05.

(i) "Party" is a Complainant, a Respondent, or the Commission.

(j) "TDRPC" is the Texas Disciplinary Rules of Professional Conduct.

(k) "TRAP" is the Texas Rules of Appellate Procedure.

(l) "TRCP" is the Texas Rules of Civil Procedure.

(m) "TRDP" is the Texas Rules of Disciplinary Procedure.

(n) "TRE" is the Texas Rules of Evidence.

Rule 1.02. General Powers

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining disciplinary proceedings. But TRDP 15.01 [17.01] applies to the enforcement of a judgment of BODA.

Rule 1.03. Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

Rule 1.04. Appointment of Panels

(a) BODA may consider any matter or motion by panel, except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.

(b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

Rule 1.05. Filing of Pleadings, Motions, and Other Papers

(a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.

(1) Email Address. The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.

(2) Timely Filing. Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

(3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.

(4) Exceptions.

(i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.

(ii) The following documents must not be filed electronically:

a) documents that are filed under seal or subject to a pending motion to seal; and

b) documents to which access is otherwise restricted by court order.

(iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.

(5) Format. An electronically filed document must:

(i) be in text-searchable portable document format (PDF);

(ii) be directly converted to PDF rather than scanned, if possible; and

(iii) not be locked.

(b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).

(c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:

(1) an "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or

(2) an electronic image or scanned image of the signature.

(d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.

(e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

Rule 1.06. Service of Petition

In any disciplinary proceeding before BODA initiated by service of a petition on the Respondent, the petition must be served by personal service; by certified mail with return receipt requested; or, if permitted by BODA, in any other manner that is authorized by the TRCP and reasonably calculated under all the circumstances to apprise the Respondent of the proceeding and to give him or her reasonable time to appear and answer. To establish service by certified mail, the return receipt must contain the Respondent's signature.

Rule 1.07. Hearing Setting and Notice

(a) **Original Petitions.** In any kind of case initiated by the CDC's filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the hearing date must be at least 30 days from the date that the petition is served on the Respondent.

(b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.

(c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.

(d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

Rule 1.08. Time to Answer

The Respondent may file an answer at any time, except where expressly provided otherwise by these rules or the TRDP, or when an answer date has been set by prior order of BODA. BODA may, but is not required to, consider an answer filed the day of the hearing.

Rule 1.09. Pretrial Procedure

(a) **Motions.**

(1) Generally. To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.

(2) For Extension of Time. All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:

(i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;

(ii) if an appeal has been perfected, the date when the appeal was perfected;

(iii) the original deadline for filing the item in question;

(iv) the length of time requested for the extension;

(v) the number of extensions of time that have been granted previously regarding the item in question; and

(vi) the facts relied on to reasonably explain the need for an extension.

(b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference, or BODA on its own motion may require a pretrial scheduling conference.

(c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.

(d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:

(1) marked;

(2) indexed with the title or description of the item offered as an exhibit; and

(3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

All documents must be marked and provided to the opposing party before the hearing or argument begins.

Rule 1.10. Decisions

(a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.

(b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:

(1) as required by the TRDP; and

(2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.

(c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

Rule 1.11. Board of Disciplinary Appeals Opinions

(a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.

(b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.

(c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

Rule 1.12. BODA Work Product and Drafts

A document or record of any nature—regardless of its form, characteristics, or means of transmission—that is created or produced in connection with or related to BODA's adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, BODA staff, or any other person acting on behalf of or at the direction of BODA.

Rule 1.13. Record Retention

Records of appeals from classification decisions must be retained by the BODA Clerk for a period of at least three years from the date of disposition. Records of other disciplinary matters must be retained for a period of at least five years from the date of final judgment, or for at least one year after the date a suspension or disbarment ends, whichever is later. For purposes of this rule, a record is any document, paper, letter, map, book, tape, photograph, film, recording, or other material filed with BODA, regardless of its form, characteristics, or means of transmission.

Rule 1.14. Costs of Reproduction of Records

The BODA Clerk may charge a reasonable amount for the reproduction of nonconfidential records filed with BODA. The fee must be paid in advance to the BODA Clerk.

Rule 1.15. Publication of These Rules

These rules will be published as part of the TDRPC and TRDP.

II. ETHICAL CONSIDERATIONS

Rule 2.01. Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases

(a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.

(b) A current BODA member must not serve as an expert witness on the TDRPC.

(c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02. Confidentiality

(a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.

(b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.

(c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction

Rule 2.03. Disqualification and Recusal of BODA Members

(a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.

(b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.

(c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse himor herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

III. CLASSIFICATION APPEALS

Rule 3.01. Notice of Right to Appeal

(a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.

(b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

Rule 3.02. Record on Appeal

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

IV. APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01. Perfecting Appeal

(a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 [2.20] consistent with this requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21 [2.20].

(b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21 [2.20].

(1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

(2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.

(c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.

(d) **Time to File.** In accordance with TRDP 2.24 [2.23], the notice of appeal must be filed within 30 days after the date the judgment is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

(e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

Rule 4.02. Record on Appeal

(a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.

(b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.

(c) **Responsibility for Filing Record.**

(1) Clerk's Record.

(i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.

(ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each party, any postsubmission pleadings and briefs, and the notice of appeal.

(iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

(2) Reporter's Record.

(i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:

a) a notice of appeal has been filed;

b) a party has requested that all or part of the reporter's record be prepared; and

c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.

(ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

(d) **Preparation of Clerk's Record.**

(1) To prepare the clerk's record, the evidentiary panel clerk must:

(i) gather the documents designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);

(ii) start each document on a new page;

(iii) include the date of filing on each document;

(iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;

(v) number the pages of the clerk's record in the manner required by (d)(2);

(vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and

(vii) certify the clerk's record.

(2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.

(3) The table of contents must:

(i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;

(ii) be double-spaced;

(iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;

(iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and

(v) if the record consists of multiple volumes, indicate the page on which each volume begins.

(e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:

(1) file each computer file in text-searchable Portable Document Format (PDF);

(2) create electronic bookmarks to mark the first page of each document in the clerk's record;

(3) limit the size of each computer file to 100 MB or less, if possible; and

(4) directly convert, rather than scan, the record to PDF, if possible.

(f) **Preparation of the Reporter's Record.**

(1) The appellant, at or before the time prescribed for

perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.

(2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual for Texas Reporters' Records.

(3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.

(4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise

(6[1]) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.

(g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.

(h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.

(i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

[1] So in original.

Rule 4.03. Time to File Record

(a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.

(b) **If No Record Filed.**

(1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.

(2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:

(i) the appellant failed to request a reporter's record; or

(ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.

(c) **Extension of Time to File the Reporter's Record.** When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.

(d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

Rule 4.04. Copies of the Record

The record may not be withdrawn from the custody of the BODA Clerk. Any party may obtain a copy of the record or any designated part thereof by making a written request to the BODA Clerk and paying any charges for reproduction in advance.

Rule 4.05. Requisites of Briefs

(a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.

(b) **Appellee's Filing Date.** Appellee's brief must be filed

within 30 days after the appellant's brief is filed.

(c) **Contents.** Briefs must contain:

(1) a complete list of the names and addresses of all parties to the final decision and their counsel;

(2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;

(3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;

(4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;

(5) a statement, without argument, of the basis of BODA's jurisdiction;

(6) a statement of the issues presented for review or points of error on which the appeal is predicated;

(7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;

(8) the argument and authorities;

(9) conclusion and prayer for relief;

(10) a certificate of service; and

(11) an appendix of record excerpts pertinent to the issues presented for review.

(d) **Length of Briefs; Contents Included and Excluded.** In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on leave of BODA. A computer generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

(e) **Amendment or Supplementation.** BODA has discretion to grant leave to amend or supplement briefs.

(f) **Failure of the Appellant to File a Brief.** If the appellant fails to timely file a brief, BODA may:

(1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's failure to timely file a brief;

(2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or

(3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

Rule 4.06. Oral Argument

(a) **Request.** A party desiring oral argument must note the request on the front cover of the party's brief. A party's failure to timely request oral argument waives the party's right to argue. A party who has requested argument may later withdraw the request. But even if a party has waived oral argument, BODA may direct the party to appear and argue. If oral argument is granted, the clerk will notify the parties of the time and place for submission.

(b) **Right to Oral Argument.** A party who has filed a brief and who has timely requested oral argument may argue the case to BODA unless BODA, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided;

(3) the facts and legal arguments are adequately presented in the briefs and record; or

(4) the decisional process would not be significantly aided by oral argument.

(c) **Time Allowed.** Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

Rule 4.07. Decision and Judgment

(a) **Decision.** BODA may do any of the following:

(1) affirm in whole or in part the decision of the evidentiary panel;

(2) modify the panel's findings and affirm the findings as modified;

(3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or

(4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:

(i) the panel that entered the findings; or

(ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.

(b) Mandate. In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

Rule 4.08. Appointment of Statewide Grievance Committee

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27 [2.26]. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

Rule 4.09. Involuntary Dismissal

Under the following circumstances and on any party's motion or on its own initiative after giving at least ten days' notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

(a) for want of jurisdiction;

(b) for want of prosecution; or

(c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

V. PETITIONS TO REVOKE PROBATION

Rule 5.01. Initiation and Service

(a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23 [2.22].

(b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23 [2.22], the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

Rule 5.02. Hearing

Within 30 days of service of the motion on the Respondent, BODA must docket and set the matter for a hearing and notify the parties of the time and place of the hearing. On a showing of good cause by a party or on its own motion, BODA may continue the case to a future hearing date as circumstances require.

VI. COMPULSORY DISCIPLINE

Rule 6.01. Initiation of Proceeding

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the Respondent in accordance with the TRDP and Rule 1.06 of these rules.

Rule 6.02. Interlocutory Suspension

(a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA must suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.

(b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must file a motion for final judgment that complies with TRDP 8.05.

(1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.

(2) If the criminal sentence is not fully probated:

(i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or

(ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.

(c) **Criminal Conviction Reversed.** If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

VII. RECIPROCAL DISCIPLINE

Rule 7.01. Initiation of Proceeding

To initiate an action for reciprocal discipline under TRDP Part IX, the CDC must file a petition with BODA and request an Order to Show Cause. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

Rule 7.02. Order to Show Cause

When a petition is filed, the Chair immediately issues a show cause order and a hearing notice and forwards them to the CDC, who must serve the order and notice on the Respondent. The CDC must notify BODA of the date that service is obtained.

Rule 7.03. Attorney's Response

If the Respondent does not file an answer within 30 days of being served with the order and notice but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition.

VIII. DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01. Appointment of District Disability Committee

(a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.

(b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

(c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.

(d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.

(e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

Rule 8.02. Petition and Answer

(a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06.

(b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.

(c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the chair of the District Disability Committee and send notice of the hearing to the parties.

Rule 8.03. Discovery

(a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.

(b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.

(1) Motion. The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.

(2) Report. The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.

(c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

Rule 8.04. Ability to Compel Attendance

The Respondent and the CDC may confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses by subpoena, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and the CDC as provided in TRCP 176.

Rule 8.05. Respondent's Right to Counsel

(a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.

(b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

Rule 8.06. Hearing

The party seeking to establish the disability must prove by a preponderance of the evidence that the Respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee must admit all relevant evidence that is necessary for a fair and complete hearing. The TRE are advisory but not binding on the chair.

Rule 8.07. Notice of Decision

The District Disability Committee must certify its finding regarding disability to BODA, which will issue the final judgment in the matter.

Rule 8.08. Confidentiality

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

IX. DISABILITY REINSTATEMENTS

Rule 9.01. Petition for Reinstatement

(a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.

(b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.

(c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

Rule 9.02. Discovery

The discovery period is 60 days from the date that the petition for reinstatement is filed. The BODA Clerk will set the petition for a hearing on the first date available after the close of the discovery period and must notify the parties of the time and place of the hearing. BODA may continue the hearing for good cause shown.

Rule 9.03. Physical or Mental Examinations

(a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.

(b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.

(c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.

(d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.

(e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

Rule 9.04. Judgment

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

X. APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS

Rule 10.01. Appeals to the Supreme Court

(a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.

(b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.

(c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.