***People v. Robert E. Abrams*. 19PDJ036. February 12, 2020.**

A hearing board suspended Robert E. Abrams (attorney registration number 37950) for three months, all stayed upon the successful completion of an eighteen-month probationary period, with conditions to include cultural sensitivity training. The probation took effect March 18, 2020.

Abrams was hired by a married couple to file a construction contract lawsuit against their former builder. During the course of the litigation, Abrams developed a negative opinion of the judge presiding over the case. In an email to his clients, Abrams referred to the judge using a derogatory slur that exhibited bias or prejudice on the basis of sexual orientation. This conduct violated Colo. RPC 8.4(g) (in representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person based on the person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, when such conduct is directed to anyone involved in the legal process).

Abrams ultimately secured a favorable outcome for his clients, but the relationship soured and he withdrew from the representation. His clients reported him to the disciplinary authorities. After responding to the clients' disciplinary grievance, Abrams charged them for the time his firm spent preparing a response in the disciplinary matter. Abrams did not reverse those charges for thirteen months. This conduct violated Colo. RPC 1.5(a) (a lawyer shall not charge an unreasonable fee or an unreasonable amount for expenses).

The case file is public per C.R.C.P. 251.31. Please see the full opinion below.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** ROBERT E. ABRAMS, #37950	Case Number: **19PDJ036**

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

Robert E. Abrams ("Respondent") was hired by a married couple to file a construction contract lawsuit against their former builder. During the course of the litigation, Respondent developed a negative opinion of the judge presiding over the case. In an email to his clients, Respondent referred to the judge using a derogatory slur that exhibited bias or prejudice on the basis of sexual orientation, thereby violating Colo. RPC 8.4(g). Respondent ultimately secured a favorable outcome for his clients, but the relationship soured and Respondent withdrew from the representation. His clients reported him to the disciplinary authorities. After responding to the clients' disciplinary grievance, Respondent charged them for the time his firm spent preparing a response in the disciplinary matter. Respondent did not reverse those charges for thirteen months. He thus violated Colo. RPC 1.5(a). Respondent's misconduct warrants a suspension of three months, all stayed upon the successful completion of an eighteen-month period of probation, with conditions to include cultural sensitivity training.

I. PROCEDURAL HISTORY

On May 16, 2019, Justin P. Moore, Office of Attorney Regulation Counsel ("the People"), filed a four-claim complaint against Respondent with Presiding Disciplinary Judge William R. Lucero ("the PDJ"), alleging that Respondent had violated Colo. RPC 1.4(a)(2) (Claim I), Colo. RPC 1.4(b) (Claim II), Colo. RPC 1.5(a) (Claim III), and Colo. RPC 8.4(g) (Claim IV). Respondent submitted his answer on June 6, 2019, through his counsel, Neil S. Sullenberger. The PDJ then set a two-day hearing for December 17 and 18, 2019.

Also on June 6, 2019, Respondent filed a motion to dismiss the People's complaint, raising in part the First Amendment as a defense to Claim IV, premised on Colo. RPC 8.4(g). The PDJ ruled that Respondent's alleged use of a derogatory term that arguably exhibited or

engendered bias was not a matter of public concern warranting First Amendment protection, reasoning that the Colorado Supreme Court chose to enact Colo. RPC 8.4(g) and has not imposed any First Amendment strictures on the rule.

In autumn 2019, the parties filed competing partial motions for summary judgment. The People sought judgment on their third and fourth claims alleging violations of Colo. RPC 1.5(a) and Colo. RPC 8.4(g), respectively; Respondent sought judgment in his favor on the People's fourth claim. The PDJ granted summary judgment in the People's favor as to their third claim, predicated on Colo. RPC 1.5(a). The PDJ denied both parties' bids for summary judgment on the claim premised on Colo. RPC 8.4(g). Closer to the hearing date, the People filed three motions in limine, two of which the PDJ granted and one that the PDJ deemed moot.

A hearing in this matter was held on December 17 and 18, 2019. The PDJ presided over the hearing; he was joined on the Hearing Board by lawyers Sara Bellamy and Maureen A. Cain. Moore and David Shaw represented the People, and Respondent appeared with Sullenberger. A sequestration order was entered, though the PDJ allowed the People's advisory witness, Janet Layne, to remain in the courtroom throughout the hearing. The Hearing Board considered stipulated exhibits S1-S12, the People's exhibits 1-5 and 7, and Respondent's exhibits A, B, J, and O.[1] The Hearing Board heard testimony from Michelle Bales, Nicoli ("Nico") Pento, Steven Givot, Kevin Preblud, and Respondent. At the close of the People's case in chief Respondent moved to dismiss under C.R.C.P. 41; the PDJ denied that motion. The PDJ also denied Respondent's motion to supplement his legal authority, which he filed almost a month after the hearing had concluded.

II. FACTUAL FINDINGS AND LEGAL CLAIMS

Respondent was admitted to practice law in Colorado on October 23, 2006, under attorney registration number 37950. He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.[2]

Findings of Fact

These findings, which we conclude have been established by clear and convincing evidence, are drawn from testimony at the disciplinary hearing where not otherwise indicated.

Respondent, sixty-one, testified that he grew up in Highland Park, Illinois, the son of a "working man" who owned pawn shops in the Chicago "ghettos." Respondent recounted

[1] The parties agreed that the Hearing Board was to disregard the handwriting and markings on exhibits 1-3 and on exhibit B. Bales's statements in exhibit 3 were not admitted for the truth of the matter asserted (though Respondent's statements were). Exhibit J was admitted not for the truth of the matter asserted but rather for its impact on Respondent.

[2] *See* C.R.C.P. 251.1(b).

that he enjoyed an upper-middle class suburban upbringing. He also recalled, however, frequently being picked on—and fighting back—because he was small. His ethos was "you come on me and I'm coming right back." As a result, he developed what he characterized as a "certain Chicago street sense," whereby "you're going to fight to succeed or you are going to die." These formative experiences helped shape Respondent's self-conception as a "Chicago street fighter."

Early on in his life, Respondent said, he decided he wanted to be a civil trial lawyer. Instead, he graduated with a marketing degree from Arizona State University and then attended Columbia University, where he earned a master's degree in media management. Later, he moved to Denver, where he built a successful stone and tile enterprise and a home building company. But his desire to become a lawyer "ate away" at him. So, he sold his tile business and enrolled in the night program at the University of Denver Sturm College of Law, graduating in two-and-a-half years. He was licensed in 2006 and opened a solo practice, which, until quite recently, was called Abrams & Associates. He said his legal career quickly took off. "The referrals were just incredible," he remembered.

Respondent highlighted in his own and other witnesses' testimony his ties to the LGBTQ community. He noted that he represents Tracks, the largest LGBTQ nightclub in Denver. He elicited testimony from Kevin Preblud, chief operating officer of Exdo, a real estate and hospitality company that owns Tracks. According to Preblud, Respondent is always treated as a VIP when he attends events at the nightclub. Respondent also asked his cousin Steven Givot, who identifies as gay, to testify. Givot described the warm familial relationship he and his partners have had with Respondent.

The Baleses Retain Respondent

In March 2015, Michelle and Gary Bales hired Joseph Hewitt, owner of New World Building Systems, to design and construct a steel-frame garage on their property in Centennial, Colorado. The Baleses were dissatisfied with Hewitt's work, as they thought that he had not fulfilled the terms of their contract. They sought legal assistance to recover the money that they had paid Hewitt. The couple hired Respondent after interviewing several lawyers; they retained Respondent because of his aggressive, direct style, which they felt would serve them well when litigating against Hewitt.

On October 11, 2015, the Baleses entered into a contract with Respondent's firm for legal services on an hourly basis in their construction contract dispute. The fee agreement called for an unusual tiered billing structure whereby Respondent would apply a billing rate to a given task, rather than to a certain person.[3] An employee might therefore have several different billing rates; the rate selected would depend on the complexity of the task. Michelle Bales ("Bales") testified that she and her husband were cost-conscious clients, and

[3] *See* Ex. S5 at 246-47.

the fee agreement also reflected that orientation, specifying that the Baleses authorized fees "not to exceed $15,000."[4]

The fee agreement did not specify which employees would work on the case. But Respondent testified that it was his habit, practice, and routine to inform his clients verbally that he regularly staffed licensed out-of-state lawyers on his cases. He prides himself on this model, he testified, because it allows his firm to perform complex work at a fraction of the market rates. Though Respondent could not specifically recall advising the Baleses about this practice, he was confident that he had done so sometime early in the representation. Bales was equally confident that he never advised her about the possibility that a non-Colorado lawyer would work on her matter. No contemporaneous notes reflect such an advisement, nor did any witness testify that they ever heard one.

Bales recounted that she was first introduced to Nicoli Pento in October 2015 when a staff member from Respondent's firm instructed her to email certain information to Pento.[5] Pento, a licensed Florida lawyer who had not been admitted in Colorado at that time, quickly became the Baleses' main point of contact at the firm. Bales and Pento both testified that he did most of the work on the case, ranging from law clerk and paralegal tasks to work categorized as legal in nature. He provided the Baleses with case updates, gave them his own and Respondent's legal advice and interpretation of the case, prepared for hearings, drafted pleadings, reviewed documents, calculated damages, and attended court proceedings. Pento, in fact, testified that in retrospect he believes he may have on occasion practiced law without a Colorado license. Respondent primarily supervised Pento and reviewed his work. Sometimes Respondent also fielded the Baleses' emailed questions. According to Bales, Respondent referred to Pento as "my attorney" or "my associate." And though Respondent usually billed Pento out at a law clerk rate, he applied an "associate counsel" rate to seven of Pento's billing entries in the case.[6] Those entries totaled $1,451.21.[7] Bales testified that she and her husband trusted Pento and believed until December 2016 that he was a lawyer licensed to practice law in Colorado.

On December 22, 2015, Respondent filed on behalf of the Baleses a complaint and jury demand in Arapahoe District Court, case number 15CV33009.[8] The case management conference was held on March 1, 2016, before Judge Phillip Douglass.

Respondent and Pento attended the case management conference together. Hewitt appeared pro se. The Baleses were not present. According to Respondent, Judge Douglass's attitude during that conference was rude and "brash and arrogant and condescending." Respondent complained that Judge Douglass attacked him within minutes of the start of the

[4] Ex. S5 at 249 (omitting emphasis contained in original).
[5] Pento worked for Respondent from roughly September 2015 through October 2016.
[6] *See* Exs. S9-S12.
[7] *See* Ex. 7 at 240.
[8] Ex. S6.

conference, and he accused the judge of repeatedly screaming and yelling at him. "All the way through . . . his tone was you will shut up and sit down and do as I tell you," Respondent recalled. Respondent took exception to Judge Douglass's "tone and curt demeanor" and decided to "stand up" to him. According to Respondent, that got the judge "elevated" and was "lighting him up."[9] Given what Respondent described as Judge Douglass's "animosity" toward him, he said, he felt he had no choice but to waive his demand for a jury trial; he reasoned that there was no way to win in front a jury if the judge constantly yelled at him for two days. "It can't happen," he brooded, "it was like I'd just lost [Bales's] case." He also recalled thinking that he would have to explain this development to the Baleses.

The March 2016 Email About Judge Douglass

About a week later, Respondent was called upon to respond to an email from Bales containing several detailed questions. Bales posed the questions in bulleted form; Respondent replied below each question in different colored font.[10] In one line of inquiry, Bales asked about the outcome of the case management conference. Respondent responded, "The judge is an ass and b/c of this we waived the jury trial (which is expensive anyway) b/c we don't want to be yelled at by this judge for two days in front of the jury."[11] Bales replied, "It seems as if things have become fearful with this new judge. What has been transpiring that seems to be creating this?"[12] Respondent answered, "The judge hates me. It happens, it's not the first time. I probably remind him of someone who beat him up [when he] was a fat kid and now that he's a big fat judge he gets even w/ the bullies. Maybe he just hates Jews, who knows?"[13]

Bales's next questions involved Hewitt. She first asked whether the judge had ordered Hewitt to remove certain pictures from Facebook. More discussion on the topic ensued. Then, in a new bulleted line of questioning, she asked, "What explanations does [Hewitt] continue to provide allowing the judge to continue to put up with his behavior?"[14] Respondent explained that Hewitt played the martyr and accused the Baleses of verbally threatening him. Bales said, "We have absolutely no idea of what he is attempting to accuse us of. We have never threatened him in any way. Has he provided proof or documentation of this accusation?"[15] Respondent answered,

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[9] The charged emotional valence Respondent ascribes to the conference is not readily apparent from our review of the transcript, *see* Ex. J, though Pento did confirm that Judge Douglass's tone was "very hostile."

[10] *See* Ex. 4. Bales testified that her questions appear in black and blue; Respondent's responses are in red and green. The full email exchange—though not the color coding—can be found in exhibit A. The Hearing Board assumes that Bales and Respondent each added to this correspondence twice, such that exhibit 4 reflects four series of messages in total (Bales in black, Respondent in red, then Bales in blue, and finally Respondent in green).

[11] Ex. 4.

[12] Ex. 4.

[13] Ex. 4.

[14] Ex. 4.

[15] Ex. 4.

> He tried too [sic], but his evidence was irrelevant, therefore disregarded by the court, which caused your case to be dismissed. While I was getting your case dismissed (Hewitt's defamation case against you) I was getting yelled at by Fatso. The judge is a gay, fat, f[*]g, now it's out there.[16]

Bales testified that Respondent's email concerned her. She wanted facts about her case, not commentary. Though Bales chose not to speak with Respondent about the language he used in the email, she wondered why he was "spewing such invective" and worried that his choice of words presaged further inappropriate behavior or bad judgment. Still, she said, Respondent's email had no actual or potential effect on her case.

At the disciplinary hearing, Respondent offered three distinct but somewhat interrelated reasons for calling the judge a "f[*]g." First, he testified, he did so to explain to Bales why Judge Douglass was hostile at the case management conference. Respondent recounted that he "had to think it through [and] come up with an opinion," so as he typed the email he was "starting to just piece it together." Respondent went on: "I can read people. I read people very well. My street read on [the judge] is that he was a chubby little fat guy that was beaten up in high school, picked on constantly." Reflecting back to his own high school experiences, Respondent concluded that because he had stood up to the judge, he likely reminded the judge of bullies who probably picked on the judge when he was growing up. Respondent speculated that may have been why the judge treated him with such asperity: "[the judge] now has the role that he's gonna get even with the bullies," Respondent narrated. Second, Respondent said, he used the term "f[*]g" to "advance [Bales's] case," intimating that he selected this language to explain the jury demand waiver. The email, he said, "sets up the whole foundation. . . . She just lost her jury." He went on, "This all stemmed from what happened in advancing her case. I just lost her jury from the judge's belligerence. He was just so patently rude, abrasive, and obnoxious . . . that there was no way I could ever get in front of [a jury] . . . so now I'm stuck with him." Third, he acknowledged that as he wrote the email he "got a little heated about this judge yelling at me and I was fighting back." Respondent testified that he was "blowing off some steam" when he chose his wording.

As for what he meant by the term "f[*]g," Respondent testified at length. Though he conceded that he was aware that a contemporary definition of "f[*]g" is an insulting and contemptuous reference to a gay male,[17] he maintained that he intended to insinuate only that the judge was a weakling who was picked on by bullies. In the parlance of his childhood, he said, weakling, gay, and f*g were all synonymous, derogatory terms: "that's how the bullies talked to the weaklings when I grew up." Respondent recounted that he once was called a f[*]gg[*]t in high school; "I actually broke that kid's nose for doing that," he said. He also added that he used the terms weakling, gay, and f[*]g interchangeably with the word "homo," which he has said was a term he used forty years ago, before he knew what the

[16] Ex. 4.
[17] *See* Ex. S8 at 919.

word meant. All of these insults describe a sissy, not a "sex preference," Respondent claimed. He also insisted that he never used the term at any other time during the representation.

Pento remembered differently. He offered credible testimony that Respondent regularly used similar "slurs" to refer to Judge Douglass. Every time the judge was mentioned in the office, Pento said, Respondent would make a "regressive" comment, calling the judge "fat f[*]gg[*]t," "homo," "Judge Fatso," and derivatives of those terms. However, Pento could not remember a time when Respondent called Judge Douglass either a sissy or a weakling. Respondent uttered these epithets while in the company of other employees of his firm, and possibly within earshot of two other lawyers who shared the same office suite, Pento explained, but never around visiting clients. Pento understood that the comments were intended to be derogatory, as Respondent often demeaned people who disagreed with him. Indeed, Respondent testified that he felt justified in insulting the judge, given the way that the judge had treated him.

Respondent nevertheless conceded that he used unprofessional, inappropriate language in the email, which he said he regrets: "I shouldn't have done it and I'm sorry I did it." He emphatically denied, however, that he harbors anti-LGBTQ bias. He also explained that he wanted to have his day in court because he feels as though the People have misused the color of their authority to enforce standards of political correctness and to paint him as a bigot. "I came down here to clear my name that I'm not a bigot. That's why I'm here," he said.

The Sanctions Order

Early in the litigation, Respondent grew frustrated with the Baleses. Because they feared they would never be able to recover any damages awarded to them, they sought to minimize costs, sometimes by prospectively limiting expenditures and sometimes by retrospectively questioning Respondent's billing statements. Respondent bristled at these efforts. "Oh my god," he seethed, "[Bales] would constantly attack me, micromanage me, and fight with me over money."

Throughout 2016, Respondent and Pento pushed Hewitt for discovery. When Hewitt failed to comply, the firm filed a motion to compel, which was granted. Attorney's fees were also awarded. To collect on that award, Respondent and Pento submitted an affidavit for $1,546.50 in attorney's fees.[18] On December 8, 2016, Judge Douglass granted the Baleses $460.50 for work that Respondent had logged on the motion to compel. The judge refused to expand the award to include fees earned by Pento, however, reasoning that "this largely appears to be work of the nature an attorney would perform that appears to have been performed by an attorney not licensed in the State of Colorado."[19] Judge Douglass also

[18] *See* Ex. 7 at 241.
[19] Ex. 1.

noted that some of that work could have been performed by a law clerk but "decline[d] to undertake the task of differentiating."[20] Judge Douglass thus refused to award any fees for Pento's work.

The next week, Bales contacted Respondent's staff for an update on the case; she received Judge Douglass's order in response. Her first step was to contact Pento to clarify whether he was licensed in Colorado. He responded, "No I'm licensed in Florida. Didn't [Respondent] disclose that to you in the beginning? If he didn't I am sorry."[21] Bales replied, "nope.....lots of surprises with this horrible experience."[22] Bales then emailed Respondent, seeking an explanation of Pento's status. Bales testified that she inquired because Judge Douglass's order was the first time that she had learned Pento was not licensed in Colorado. Respondent simply emailed in return, "The judge is wrong, do you want to pay for a motion to reconsider and fight w/ this judge?"[23]

The Baleses declined to finance a motion to reconsider. And although the attorney-client relationship grew ever more strained, the Baleses also declined to change counsel, relying on Respondent's representation that he was close to securing a default judgment. But the question of attorney's fees remained a sticking point between Respondent and his clients. "Everything was an argument," Respondent puled, "a redundant, cyclical, endless argument."

In July 2017, Judge Elizabeth Weishaupl, who had taken over the case from Judge Douglass, entered default judgment against Hewitt. She awarded the Baleses $200,654.73, which included $52,780.00 in actual damages, trebled to $158,340.00 pursuant to statute, as well as attorney's fees of $31,762.25.[24] According to Respondent, the Baleses could not have hoped for a better outcome. Bales did not disagree, but she also viewed the judgment as uncollectable.

Toward the end of September 2017, Bales and Respondent exchanged several emails about certain unpaid attorney's fees. Bales protested paying the fees that Judge Douglass had declined to award, reasoning that she had never been advised of Pento's unlicensed status. "This is a major concern given the active role Nico had in analyzing, supporting and participating in our case," she wrote.[25]

When Respondent did not address her concern, Bales advised him that she planned to contact the People. Respondent retorted that if she wanted to attack his law license, he would reconsider all of the courtesy discounts he had extended. Bales made one more

[20] Ex. 1.
[21] Ex. 2.
[22] Ex. 2.
[23] Ex. 3.
[24] Ex. S7 at 019. Respondent testified that the attorney's fees award included the sum that Judge Douglass had earlier denied for Pento's work on the case.
[25] Ex. S4 at 103.

attempt, asking Respondent to justify charging her for Pento's time, given that Pento was the "primary support on [their] case for well over a year and [they] were never advised that he was not licensed in the state of Colorado."[26] Respondent replied, "I'm sure you knew he was a FL attorney as I never would have stated otherwise. I billed him as a clerk or paralegal to you even when he did lawyer's analysis."[27] At the disciplinary hearing Respondent described Bales as "muscl[ing]" and "bully[ing]" him into crediting her $1,500.00 by threatening to seek recourse through the disciplinary system.

The January 2018 Invoice

Respondent withdrew from the representation in mid-September 2017. He explained, "I would've had to withdraw first before I sued her." According to Respondent, as soon as he fired the Baleses he immediately stopped reading their emails. "I had no interest in anything [Bales] had to say after she ripped me off."[28] As a result, he said, he either deleted or disregarded all of her correspondence after September 2017.

In late December 2017, Respondent received a letter from the People informing him that the Baleses had filed a request for investigation.[29] Respondent responded to that request.[30] Then, on January 27, 2018, Respondent sent an invoice to the Baleses with a description on the first page entitled "Collections."[31] The invoice contained the following four entries for work performed by Respondent or his staff in January 2018 related to responding to the People's request for investigation:

- "Reviewed and edited select responses to A-Reg Complaint and supplemented w/ case law re billing practices and free speech to counter client's arguments of unreasonable atty fees sought to hinder and delay collections matter. Review of out of state atty rule and rules cited in complaint."

- "Draft response to A. Reg complaint pertaining to billing, prepare and send in mailing to A. Reg and Bales; Review all evidence in furtherance of clients to defeat collections."

- "Final edits in support of A-Reg answer and exhibits thereto, to fully assess our claims to collect on client's debt."

[26] Ex. S4 at 099-100.
[27] Ex. S4 at 100.
[28] At his deposition, Respondent expounded, "I found this obnoxious annoying b*tch to be not worthy of reading her shit."
[29] Summ. J. Order at 3. The request for investigation can be found at exhibit 7.
[30] Summ. J. Order at 3.
[31] Ex. S1.

- "Review and respond to A-Reg claim that client asserts against Firm in dispute of owing her attorney fees."[32]

These four entries totaled $897.00.[33]

According to Respondent, this invoice, which was to account for time spent on an internal matter, was mistakenly sent to the Baleses. He said he simply was not as careful as he should have been when reviewing and approving the entries. But he also testified that he had no expectation that the Baleses would pay the invoice. Indeed they did not. Bales emailed Respondent on February 4, 2018, to advise him that she would share the invoice with the People and to register her objection that "the work associated with responding to [the People's] request should be the responsibility of you and your firm."[34] Respondent did not respond; he explained that he never read the email.

In June and September 2018, the People sent Respondent packets of documents for his review and response. Those packets contained copies of Respondent's January 2018 invoice. But only after Respondent received a letter from the People dated February 22, 2019, specifically inquiring about the four billing entries, did he remove the charges. He issued an invoice to the Baleses on February 25, 2019, crediting them $897.00 without explanation.[35] He never verbally informed the Baleses that he withdrew the charges.

Respondent could not justify why he did not remove the charges earlier. But he acknowledged that he was in "no hurry" to withdraw the charges, "knowing full well [Bales] was never going to pay it." So, he said, "I removed all the charges when I got around to removing all the charges." He conceded that this reversal was not timely according to professional standards, but he maintained that the Baleses were not injured by the delay.

After Respondent withdrew from the case, he sued the Baleses in Denver County Court for failing to pay him $4,959.26 in attorney's fees. He also sought an additional attorney's fees award of approximately $14,000.00, which he claimed to have incurred in bringing his collections lawsuit, along with post-judgment interest on both amounts and court costs.[36] Respondent prevailed in the collections suit and was awarded the $4,959.26 he sought, as well as another $6,100.00 in attorney's fees for the time he spent litigating his collections claim.[37]

[32] Ex. S1.
[33] Summ. J. Order at 4.
[34] Ex. S2.
[35] Ex. S3.
[36] Ex. O at 095.
[37] Ex. O at 095.

Rule Violations

Colo. RPC 1.4(a)(2) and Colo. RPC 1.4(b)

Colo. RPC 1.4 governs communications between lawyer and client. Colo. RPC 1.4(a)(2) provides that a lawyer must reasonably consult with the client about the means by which the client's objectives are to be accomplished. Comment 3 to that rule suggests that differing consulting obligations may be imposed depending on "the importance of the action under consideration and the feasibility of consulting with the client." Colo. RPC 1.4(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.

The People claim that Respondent violated both of these rules by failing to inform the Baleses that Pento was not licensed to practice law in Colorado. The People contend that it was not until December 2016, when Judge Douglass issued the order awarding attorney's fees, that the Baleses learned Pento was unlicensed in Colorado. Respondent insists that he did advise the couple about Pento's unlicensed status several times during the course of the representation. And regardless, he argues, Pento's status was neither germane to the means by which the Baleses' objectives were to be accomplished nor pertinent to any of the decisions that the Baleses needed to make.

We find that Respondent failed to inform the Baleses that Pento was not a licensed Colorado lawyer. Respondent's fee agreement was silent on the matter, and no other documents memorialize an advisement. Further, we did not hear any testimony describing a discussion between Respondent and the Baleses about Pento's status. Bales categorically denied ever being apprised; Pento said he never heard Respondent mention his out-of-state law license; and Respondent himself could not specifically recall an advisement. Instead, Respondent maintained that because his habit, practice, and routine was to verbally inform all of his clients that he regularly staffed out-of-state lawyers on his cases, he must have likewise informed the Baleses. We do not credit Respondent's assumptive testimony, particularly because it conflicts not only with Bales's very definitive assertion that she never was informed but also with her contemporaneous expressions of surprise in her emails to Pento and to Respondent. That Bales was surprised was understandable: though most of Pento's work was billed at a "law clerk" rate, on seven occasions his efforts were deemed of sufficient sophistication to warrant "an associate counsel" rate. Bales reasonably assumed that only a person who was properly licensed to perform associate counsel tasks would actually do so.

Notwithstanding these factual findings, we conclude the People did not show that Respondent's failure to inform the Baleses of Pento's status violated Colo. RPC 1.4(a)(2) or Colo. RPC 1.4(b). The People have not pointed to any authority suggesting that lawyers must consult with clients concerning the whys and wherefores of internal staffing decisions. Thus, although they are not directly on point, we have considered American Bar Association ("ABA") ethics opinions addressing whether a client must consent to the involvement of a

temporary lawyer at a firm or to the outsourcing of legal services. As to the former, the ABA generally answers in the negative; it opines,

> [W]here the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm.[38]

As to the latter, the ABA concluded that client consent to outsourcing was required,[39] contrasting the outsourcing model to that of the use of temporary lawyers, which is "predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct."[40]

Though these opinions do not address this particular situation—whether a supervising lawyer must disclose to clients his subordinate lawyer's unlicensed status—we do glean a few principles from them. In general, we read the opinions as presumptively exempting lawyers from the requirement of disclosing to clients internal staffing decisions, on the assumption that there is a high degree of supervision and control within the firm structure. Only where a lawyer performs independent work for a client without close supervision does that presumption appear to be called into question. This may be because when a client retains a lawyer, the client is usually doing so with the understanding that a lawyer's entire firm and support staff are likewise being retained. On this basis, we construe these opinions to suggest that internal staffing choices—which are close to the heart of a law firm's business decisions—should be left to the discretion of the retained lawyer, who need not formally consult the client.

Here, while working on the Baleses' case, Pento was neither a temporary lawyer nor an outsourced legal services professional; he was a lawyer employed by Respondent's firm. Pento performed most of the work on the Baleses' case. But we also heard uncontested testimony that Respondent supervised Pento in every phase of the litigation, thereby

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[38] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356 (1988).

[39] *Accord* Colo. RPC 1.4 cmt. 6A (referencing comment 6 to Colo. RPC 1.1, which states that before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide legal services, the lawyer should "ordinarily obtain informed consent from the client").

[40] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008).

ensuring that Pento's—and the firm's—output was compliant with Colorado law. Because the evidence does not clearly and convincingly tilt toward finding that Respondent failed to exercise supervisory control over Pento, we cannot find that the reasonable consultation called for by Colo. RPC 1.4(a)(2) required Respondent to discuss Pento's licensure with the Baleses.

Nor have the People clearly shown that the fit here with Colo. RPC 1.4(b) is any better. Lawyers must explain matters to the extent reasonably necessary to permit clients to make informed decisions. Yet comment 5 to Colo. RPC 1.4(b) suggests that clients are ordinarily responsible only for tactical decisions "that are likely to result in significant expense or to injure or coerce others." We cannot find that the People proved Pento's licensure status was likely to result in significant expense. All of the testimony we received, in fact, suggested the opposite. Nor can we find that the People proved Pento's licensure status was likely to injure another, as Respondent supervised Pento's efforts, and Judge Douglass's sanctions order declining to award Pento's fees was not necessarily a foreseeable or likely outcome. Indeed, Pento's fees were ultimately included in the Baleses' final judgment award. We thus cannot clearly and convincingly find a violation of Colo. RPC 1.4(b).

Colo. RPC 1.5(a)

Colo. RPC 1.5(a) provides, in part, that a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The rule requires lawyers to charge fees that are reasonable under the circumstances.[41] In *People v. Brown*, the Colorado Supreme Court found as a matter of law that a lawyer violated the precursor to Colo. RPC 1.5(a) by charging a client for time that he had spent responding to an attorney grievance.[42] There, the Colorado Supreme Court noted that an attorney's "duty to respond to disciplinary matters is a duty personal to the attorney involved."[43]

Relying on *Brown*, the PDJ granted the People's motion for summary judgment on this claim. The PDJ concluded that Respondent violated Colo. RPC 1.5(a) by charging the Baleses $897.00 for time he and his staff spent on his own defense when responding to the People's investigation. Because Respondent was representing his own interests in that matter, the PDJ reasoned, Respondent should not have charged the Baleses for that work. As Respondent's charges constituted an excessive fee as a matter of law, the PDJ entered summary judgment on this claim.[44]

[41] Colo. RPC 1.5 cmt. 1.
[42] 840 P.2d 1085, 1089 (Colo. 1992).
[43] *Id.*
[44] *See Brown*, 840 P.2d at 1089 (finding that a lawyer violated the precursor to Colo. RPC 1.5(a) when he charged his client for work he performed in responding to a grievance); *accord In re Benett*, 14 P.3d 66, 71

Colo. RPC 8.4(g)

Colo. RPC 8.4(g) provides that it is professional misconduct for a lawyer to:

> engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, parties, judges, judicial officers, or any persons involved in the legal process.

Comment 3 to the rule states that a "lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon . . . sexual orientation . . . violates paragraph (g) . . . ." When used in the rules, knowing "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[45]

The People argue that in the course of representing the Baleses, Respondent knowingly used a word—"f[*]g"—that was directed at Judge Douglass and that manifested or exhibited bias based on sexual orientation.[46] They contend that the rule does not purport to regulate biased views or thoughts; the rule calls only for examination of whether, in the course of representing a client, a lawyer's actions or language manifested bias. Concomitantly, they say, the rule merely requires that they show Respondent knew his comment exhibited bias. The People claim that because Respondent used the term, which he was aware exhibits bias and is derogatory, he violated Colo. RPC 8.4(g).

Respondent disagrees. He interprets the rule, as mediated by comment 3, to require proof that he acted on or in conformity with some personal feeling or held belief: "Here, the People must prove Respondent has a bias towards gays, because one cannot knowingly manifest that which [one does] not actually feel."[47] Because the People cannot show that he has "bias against homosexuals," he argues, neither can they "establish that he 'knowingly manifested' a bias he does not have."[48]

We begin our dissection of this claim by setting forth our understanding of what Colo. RPC 8.4(g) requires the People to prove. On summary judgment, the PDJ construed

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(Or. 2000) (finding that a lawyer who was representing only his own interests in a fee dispute with his former clients could not properly bill them for that time and thus charged an excessive fee).

[45] Colo. RPC 1.0(f).

[46] In closing, the People argued that one could make the case that Respondent intended to engender bias against Judge Douglass, but their arguments were focused on demonstrating that Respondent engaged in conduct that exhibited bias. Given our findings as to the first prong of Colo. RPC 8.4(g), we omit lengthy discussion of the second, save to say that although Respondent's email to the Baleses clearly was intended to engender bias against Judge Douglass, we cannot find by clear and convincing evidence that Respondent intended to engender bias on the basis of sexual orientation.

[47] Respondent's Hr'g Br. ¶ 22.

[48] Respondent's Hr'g Br. ¶ 21.

the first prong of Colo. RPC 8.4(g), when read in light of comment 3, to require a finding of a specific mental state: that Respondent knowingly exhibited, through word or conduct, bias or prejudice based upon a person's sexual orientation. To adopt Respondent's interpretation of this standard—that the People must show Respondent's actions manifested *his own* bias—would be to require the People to extrapolate from Respondent's language or conduct in order to prove that he inwardly harbors some bias or belief. To adopt the People's interpretation—that they must only show Respondent's words or conduct themselves exhibited bias—would be to task the People with proving that Respondent's outward-facing words or actions were violative.

Without hesitation we endorse the People's interpretation. The legal regulation system cannot—and should not attempt to—police lawyers' private beliefs and innermost thoughts. That inner sanctum is beyond the reach of our ethical rules. But the legal regulation system does—and should—set minimum standards for proper conduct when lawyers represent clients and in that role serve as intermediaries between clients and the legal system. This rule does not regulate bigotry; it regulates behavior.[49]

Using that armature, we conclude that Respondent knowingly used the word "f[*]g" in an email to the Baleses when referencing Judge Douglass. Respondent undoubtedly used that term during his representation of the Baleses. He used that term about Judge Douglass, a participant in the legal process. He knowingly typed that term. He knew the common meaning of the term, he knew the term is derogatory, and he knowingly used the term in a derogatory manner. What remains is to determine whether the term exhibited bias or prejudice on the basis of sexual orientation.

The People and Respondent part ways on this question as well. Respondent rails against what he views as the People's attempts to corral his use of language according to their own standards. Their definition of the term "f[*]g" should not rule the day, he implies, as the word has many meanings and interpretations, including his own putative understanding of the term, which was influenced by the idiosyncrasies of his upbringing in Highland Park five decades ago. This is the definition he had in mind at the time he penned the March 2016 email, he claims. The People urge the Hearing Board to reject this etymological "sophistry."[50] They argue that "[r]egardless of what the phrase 'gay, fat, f[*]g' may have meant in the 1700s in Britain, the U.S. in the 1920s, or Chicago in the 1970s, it defies belief that Respondent did not know how a reasonable person would understand it when

[49] Respondent repeatedly warns that overbroad enforcement of Colo. RPC 8.4(g) might bar lawyers from using certain language, even in the defense of clients. *See, e.g.,* Respondent's Hr'g Br. ¶ 32 ("If the Court were to adopt the People's position[] that any use of the term 'f[*]g' during the course of the representation of a client is a *per se* violation, undersigned would be in violation of writing this very paragraph."). Comment 3 to Colo. RPC 8.4 makes clear this argument is a canard: that comment plainly carves out an exception for "[l]egitimate advocacy respecting the [enumerated] factors."

[50] People's Hr'g Br. at 7

Respondent said it in 2016—as a derogatory phrase relating to the sexual orientation of a male."[51]

We find the People have proved by clear and convincing evidence that Respondent violated Colo. RPC 8.4(g). The language Respondent uses in his March 2016 email, the context in which the email was written, and Respondent's own life experiences belie his argument. As an initial matter, Respondent did not use the word "f[*]g" standing alone. The term is preceded by the word "gay," a common term for a person attracted to members of the same sex. And Respondent explained that he equated the word "f[*]g" with the term "homo," another disparaging and offensive slang word for a gay man.

Respondent urges us to consider the context of the writing: that he was attempting to explain to Bales why he felt compelled to waive the jury demand. But his putative definition does not make sense given that context. Bales's first query concerned the outcome of the case management conference and the genesis of Respondent's fraught relationship with Judge Douglass. In response, Respondent said, "I probably remind him of someone who beat him up [when he] was a fat kid and now that he's a big fat judge he gets even w/ the bullies."[52] In that sentence, he invoked the concept of a weakling or sissy who gets picked on by bullies, yet he did not use the word "f[*]g" to describe that concept. In our view, this undercuts his argument that the concept and the term, in his own vocabulary and usage, go hand-in-hand.

Respondent instead used the term much later in the email, when Bales asked about why Judge Douglass tolerated Hewitt's behavior, and then about whether Hewitt had provided proof of certain accusations he had made. Respondent replied, "While I was getting your case dismissed (Hewitt's defamation case against you) I was getting yelled at by Fatso. The judge is a gay, fat, f[*]g, now it's out there."[53] Respondent's use of the slur immediately followed his recollection of being yelled at. These circumstances suggest that Respondent chose the word not to analyze Judge Douglass's psyche but rather to demean someone who he believed had belittled him.[54]

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[51] People's Hr'g Br. at 8. The People cite several cases rejecting similar defenses. *See, e.g., King v. Burris*, 558 F. Supp. 1152, 1157 n.10 (D. Colo. 1984) (*citing Moricoli v. Schwartz*, 361 N.E.2d 74, 76 (Ill. App. 1977)) ("Nonetheless, one use of both terms [f*g and f*agg*ot] predominates in American culture, and this court will follow that interpretation. The sole occasion upon which the word 'f[*]g' is commonly used in the United States in the form of a noun and to connote an adult human being is with reference to a homosexual. To suggest otherwise serves only to further test the gullibility of the credulous and require this court to espouse a naiveté unwarranted under the circumstances."); *see also Patino v. Birken Mfg. Co.*, 41 A.3d 1013, 1029 (Conn. 2012) ("when one definition of a term predominates, courts may follow the interpretation most reasonable in context"); *In re Kelley*, 925 N.E.2d 1279, 1279 (Ind. 2010) (finding a violation of Indiana Professional Conduct Rule 8.4(g) when a lawyer gratuitously asked a company representative if he was "gay" or "sweet").

[52] Ex. 4.

[53] Ex. 4.

[54] Respondent briefly argues against finding a violation because his email was a privileged attorney-client communication, and the "otherwise undisclosed words on the page could not have had any impact on [the]

We also credit Pento's testimony that Respondent regularly referred to Judge Douglass using several variants of these epithets—including "fat f[*]gg[*]t," "homo," and "Judge Fatso." But Respondent never once actually said what he claims to have meant; according to Pento, Respondent never called Judge Douglass a weakling or a sissy. This, too, tends to convince us that Respondent used the term as commonly understood—as a derogatory word describing a gay man.

Finally, we turn to the question of Respondent's life experiences. Respondent contends that the Hearing Board must consider his March 2016 email in light of his life experiences, his ostensible rough and tumble background, and the cognitive biases shaped by his upbringing. He also frames this claim as an "affront" to his "view of the world": "Respondent is simply not a politically correct individual, and will never be politically correct because of his background, where and when he was raised, and life experiences . . . of which Respondent is proud."[55]

We are uncertain how Respondent means to posture this argument. Does he intend this line of argumentation as further support for his claim that he used the term "f[*]g" to mean a weakling or sissy? Or, premised on the First Amendment and the ills of political correctness, does he intend it as an implicit defense of using the term "f[*]g" as it is commonly understood? The Hearing Board addresses each possibility in turn.

To the extent that Respondent points to his background as yet another piece of evidence to show that he wished to call Judge Douglass a weakling or bully, we are not persuaded. Givot, with whom Respondent shared a similar upbringing, did testify that during his childhood one definition of "f[*]g" was a person who was picked on and beaten up. But Givot also said that another commonly understood meaning at the time was a gay man. Further, Givot acknowledged that not only his understanding of the term but also the societal use of the word has changed since he was a child. Given Respondent's other life experiences—corporate counsel to a major LGBTQ venue and close cousin to a gay man—we believe that Respondent was well aware of that linguistic shift at the time he used the term in his email to the Baleses.

To the extent Respondent argues that his childhood experiences or background excuse him from conforming his conduct to the Rules of Professional Conduct, we roundly reject that contention. In his private life, Respondent is free to speak in whatever manner he chooses. When representing clients, however, Respondent must put aside the schoolyard code of conduct and adhere to professional standards. Just as our language, norms of social engagement, and the Rules of Professional Conduct evolve, so too must Respondent. This is

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case." Respondent Hr'g Br. ¶ 20. We do not see it that way. The rule makes no exception for private or privileged communications, and at least one jurisdiction has found a violation in a somewhat analogous situation. *See In re Schuessler*, 578 S.W.3d 762, 774-75 (Mo. 2019) (finding that a prosecutor's racist and homophobic comment made in the presence only of a detective and other prosecutors about a criminal suspect violated the Missouri analog to Colo. RPC 8.4(g)).

[55] Respondent's Hr'g Br. ¶¶ 24-25.

because lawyers' words and deeds reflect on the values and ideals of today's legal profession. Lawyers are also officers of the court, so their conduct signals to clients the quality of justice and the measure of fairness that can be expected from the legal system as a whole. That system is meant to serve all and dispense justice equally, without regard to race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status; when lawyers represent that system, their conduct must give effect to those principles.

III. SANCTIONS

The ABA *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[56] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[57] 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 misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

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

Duty: By charging his clients for time his firm spent responding to their grievance, Respondent violated his duty as a professional to refrain from charging improper fees. And when, in the course of representing those clients, Respondent used a term that exhibited bias on the basis of sexual orientation, he violated his duties to the legal system and the legal profession; his use of the slur was inimical to the legal system's and the profession's principles of fairness and respect for all persons, regardless of their background or identity.

Mental State: We do not credit Respondent's assertion that he simply missed, through mere carelessness, the January 2018 invoice charging the Baleses for time his firm spent responding to the People's investigation. Instead, we find that he knowingly charged the Baleses these fees to retaliate against them for grieving him. We also find, as discussed above, that Respondent knowingly engaged in conduct that exhibited bias on the basis of sexual orientation when he called Judge Douglass a "f[*]g."

Injury: The Baleses suffered no actual injury when Respondent charged them an excessive fee for defending his own disciplinary matter. Because there was some small chance that they might pay Respondent those fees, however, he did cause them potential harm. Respondent's use of a slur exhibiting bias on the basis of sexual orientation neither injured nor potentially injured the Baleses. But his use of discreditable language cast the profession in a negative light—Bales testified that the email offended her and made her uncomfortable—and it threatened not only to undermine the Baleses' view of Judge Douglass but also to lead them to question the integrity of our system of justice.

[56] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2d ed. 2019).
[57] *See In re Roose,* 69 P.3d 43, 46-47 (Colo. 2003).

ABA *Standards* 4.0-7.0 – Presumptive Sanction

The presumptive sanction for Respondent's two rule violations is set by ABA *Standard* 7.2, which calls for suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, thereby causing injury or potential injury to a client, the public, or the legal system. We thus proceed in our analysis with the presumptive sanction of suspension.

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations that justify an increase in the degree of the sanction to be imposed, while mitigating factors warrant a reduction in the severity of the sanction.[58] As explained below, the Hearing Board applies four factors in aggravation, one of which is accorded substantial weight, and one factor in mitigation, which carries average weight. We evaluate the following factors proposed by the parties.

Aggravating Factors

Dishonest or Selfish Motive – 9.22(b): The People argue that Respondent charged the Baleses for responding to the grievance against him and selfishly failed to reverse those charges for more than a year. Respondent disagrees and argues that we should instead find the converse—that he acted with a lack of selfish or dishonest motive. We side with the People. In anger, Respondent unreasonably charged the Bales for the time his firm spent defending him in the disciplinary process. On several occasions the People brought these improper charges to Respondent's attention, yet he waited to reverse the charges for over thirteen months. We give this aggravating factor average weight.

Multiple Offenses – 9.22(d): The People request that we consider in aggravation Respondent's two distinct types of misconduct. We do so, but because there are just two separate offenses we choose to accord this factor very little weight.

Refusal to Acknowledge Wrongful Nature of Misconduct – 9.22(g): The People advocate for application of this factor; Respondent, again, contends that we should consider its counterpart in mitigation, remorse. We find Respondent's tepid expressions of remorse unbelievable, and we conclude that on the whole Respondent has consistently refused to acknowledge that he has done anything wrong. He has blamed the Baleses, Judge Douglass, the People, and his upbringing, but he has not, in our view, turned his gaze inward to reflect on his own choices. We accord this factor substantial aggravating significance.

Substantial Experience in the Practice of Law – 9.22(i): Respondent has practiced law in Colorado since 2006. We consider this a factor in aggravation but give it limited weight, as

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

Respondent had been licensed for only about ten years at the time he represented the Baleses.[59]

Mitigating Factors

Absence of Prior Discipline – 9.32(a): Respondent has no history of discipline, which we consider in mitigation.

Cooperative Attitude Toward Proceedings – 9.32(e): During his testimony, Respondent declared that he was entitled to mitigation for his cooperation in this proceeding, but he provided no factual support for that assertion. As a result, we cannot find that this factor applies.

Character or Reputation – 9.32(g): Respondent offered the testimony of Givot and Preblud to support application of this factor. Givot testified that Respondent welcomes him at family gatherings, has offered him emotional support, and has cordially received his partners throughout the years. Preblud praised Respondent's business and legal acumen, and he mentioned that Respondent is an "entertaining" dinner companion. While these witnesses' accounts suggest that they are quite fond of Respondent, we do not find that their testimony supports a finding of his good character or reputation.

Other Mitigating Considerations: Respondent maintained that he should be given mitigating credit because he secured a favorable outcome in the underlying matter and because, in his opinion, he had a difficult client with unreasonable expectations about the representation. We do not believe mitigating credit should be given for either factor. Absent ethical lapses, lawyers should not be punished or rewarded in the disciplinary system for the results they obtain for their clients.[60] Nor should lawyers' adherence to their ethical obligations have any relation to their clients' personalities or approaches to the representation.[61]

[59] *People v. Rolfe*, 962 P.2d 981, 983 (Colo. 1998) (finding that ten years in practice qualifies as "substantial experience in the practice of law").

[60] *See generally* Morris B. Hoffman, *10 Trial Mistakes,* 8 W. Va. Law. 11–12 (Nov. 1994) ("Some of the best lawyering I've ever seen has resulted in spectacular losses. And some of the most bumbling lawyers have had the fortune of attaching themselves to strong, and therefore winning, cases.").

[61] *Accord* ABA *Standard* 9.4(b) (explaining that a client's demand for certain improper behaviors or results are neither aggravating nor mitigating); *In re Pro Hac Vice Counsel Supreme Court of State,* 103 A.3d 515, 515 (Del. 2014), *as corrected* (Oct. 22, 2014) ("dealing with a difficult client is neither an aggravating nor a mitigating factor").

Analysis Under ABA *Standards* and Case Law

The Colorado Supreme Court has directed the Hearing Board to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors.[62] We are mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[63] Though prior cases are helpful by way of analogy, hearing boards must determine the appropriate sanction for a lawyer's misconduct on a case-by-case basis.[64]

In Colorado, lawyers have been publicly censured for charging clients unreasonable fees. For instance in *Brown*, a lawyer was publicly censured for charging his client for time that he spent responding to an attorney grievance, and for prejudicing the administration of justice by refusing to return the client's documents.[65] Likewise, Colorado lawyers have been publicly censured for engaging in conduct that exhibits bias in the course of representing a client. In *People v. Sharpe,* a deputy district attorney in a death penalty case who was conferring with counsel for two defendants declared, "I don't believe either one of those chili-eating bastards," which was perceived as motivated by prejudice against Hispanics.[66] He was publicly censured for conduct adversely reflecting on his fitness to practice law.[67]

Somewhat similar constellations of multiple rule violations have yielded both public censures and short suspensions in this jurisdiction. In *In re Wimmershoff*, a lawyer was publicly censured for failing to explain the basis of his fee, charging an unreasonable fee, and disregarding contingency fee arrangement rules.[68] But another lawyer was suspended for thirty days in *In re Sather* for twice charging an unreasonable fee and failing to communicate with his clients.[69]

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[62] *See In re Attorney F.*, 2012 CO 57, ¶ 19; *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).

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

[64] *Id.* ¶ 15.

[65] 840 P.2d at 1088-89; *see also In re Green*, 11 P.3d 1078, 1089 (Colo. 2000) (publicly censuring a lawyer who charged an unreasonable fee).

[66] 781 P.2d 659, 660 (Colo. 1989).

[67] *Id.*; *see also People v. Gilbert*, 10PDJ067 (Colo. O.P.D.J. January 14, 2011) (publicly censuring a lawyer for violating Colo. RPC 8.4(g) when he referred to a judge as a "c**t"); *In re Kelly*, 925 N.E.2d at 1279 (publicly censuring a lawyer for asking a company representative if he was "gay" or "sweet").

[68] 3 P.3d 417, 418 (Colo. 2000).

[69] 936 P.2d 576, 578-79 (Colo. 1997); *see also In re Igbanugo*, 863 N.W.2d 751, 754-55 (Minn. 2015) (suspending a lawyer for ninety days for failing to communicate with clients, attempting to collect fees that had already been paid, failing to act diligently, and sending harassing letters in an attempt to collect fees); *In re Benett*, 14 P.3d 66, 70-73 (Or. 2000) (suspending a lawyer for six months for engaging in misrepresentation by nondisclosure, for charging clients for time spent responding to a disciplinary investigation, and for refusing to refund the improperly billed money).

Here, two rule violations presumptively call for suspension; that result is supported by the asymmetry between the four aggravators and the lone applicable mitigator. Similar misconduct, however, has generally been met with public censure. Though the case law, taken as a whole, militates in favor of imposing public censure in this instance, we are not compelled to mirror the results of other similar cases; instead, we are to exercise our discretion in determining the appropriate sanction, following the guidance of the ABA *Standards*.[70]

After hearing the testimony, taking the evidence, and assessing Respondent's credibility, we conclude that a fully stayed suspension in this instance is more protective of the public and the profession. Underlying both of Respondent's rule violations is what we perceive as his tendency to lash out inappropriately when he is challenged, attacked, or contradicted. When challenged by Judge Douglass, Respondent responded in anger by disparaging the judge in an email to his clients. When his clients attacked him by filing a grievance, he retaliated by invoicing them for unreasonable charges. We worry about this inclination because disputes are inherent in the practice of law; our justice system is premised on the presentation of competing viewpoints and, often, the triumph of one position over the other. Considering this fixed dynamic, coupled with Respondent's worrying pattern of striking back in unethical ways, we conclude that a stayed suspension, subject to certain probationary conditions, will be most effective in encouraging Respondent to learn and practice restraint and thus in reducing the likelihood that he again engages in such behavior. We therefore conclude that Respondent should be suspended for three months, all stayed on the successful completion of a eighteen-month period of probation with conditions.

IV. CONCLUSION

The lawyer discipline system does not regulate bigotry. It regulates action. Here, we do not find that Respondent is a bigot or is biased. We find only that he engaged in conduct that exhibited bias, thereby violating his duties to the legal profession and the legal system to treat participants in the legal process with respect and dignity. We also find that he improperly charged his clients fees for responding to their grievance. These violations lead us to conclude that Respondent should be suspended for three months, all stayed on successful completion of probationary conditions.

[70] *In re Attorney F.*, ¶ 20.

V. ORDER

The Hearing Board therefore **ORDERS**:

1. **ROBERT E. ABRAMS**, attorney registration number **37950**, will be **SUSPENDED** from the practice of law for **THREE MONTHS**, **ALL STAYED** upon the successful completion of a **EIGHTEEN-MONTH** period of **PROBATION**, with the conditions identified in paragraph 2 below. The probation will take effect upon issuance of an "Order and Notice of Probation."[71]

2. Respondent **SHALL** successfully complete an **EIGHTEEN-MONTH PERIOD OF PROBATION** subject to the following conditions:

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

    b. He will attend at his own expense the ethics school offered by the People, not later than six months after his probation begins;

    c. He will attend at his own expense eight hours of cultural awareness and sensitivity training, not later than twelve months after his probation begins. Respondent and the People shall work in conjunction to select the training course(s); any dispute about course selection should be raised with the PDJ, who will resolve the dispute. Respondent and the People shall select the training course(s) **no later than the effective date of the probation**. When Respondent completes the training, he shall submit an affidavit to the People attesting to his completion of the training.

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

4. No more than twenty-eight days and no less than fourteen days before the expiration of the period of probation, Respondent **SHALL** file an affidavit with the People stating whether he has complied with all terms of probation and shall file with the PDJ notice and a copy of such affidavit and application for an order showing successful completion of the period of probation. On receipt of this notice and

[71] 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.

absent objection from the People, the PDJ will issue an order showing that the probation was successfully completed. The order will become effective upon the expiration of the period of probation.

5. The parties **MUST** file any posthearing motion **on or before Wednesday, February 26, 2020**. Any response thereto **MUST** be filed within seven days.

6. The parties **MUST** file any application for stay pending appeal **on or before Wednesday, March 4, 2020**. Any response thereto **MUST** be filed within seven days.

7. Respondent **SHALL** pay the costs of this proceeding. The People **SHALL** submit a statement of costs **on or before Wednesday, February 26, 2020**. Any response thereto **MUST** be filed within seven days.

DATED THIS 12th DAY OF FEBRUARY, 2020.

[original signature on file]

_____

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

[original signature on file]

_____

SARA BELLAMY
HEARING BOARD MEMBER

[original signature on file]

_____

MAUREEN A. CAIN
HEARING BOARD MEMBER

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