People v. Stevens. 10PDJ002. October 7, 2010. Attorney Regulation.
The Hearing Board suspended Jerry Lee Stevens (Attorney Registration Number 04033) for one year and one day, effective November 7, 2010. Stevens failed to provide his client with competent representation, place client funds into a separate trust account, account for client funds he expended, and explain to his client the basis or rate of the fees and expenses charged. His misconduct constitutes grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.1, 1.5(b), 1.15(a), and 1.15(c).

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** JERRY LEE STEVENS	Case Number: **10PDJ002**

DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)

On August 4 and 5, 2010, a Hearing Board composed of William R. Gray and Henry R. Reeve, members of the Bar, and William R. Lucero, the Presiding Disciplinary Judge ("PDJ"), held a two-day hearing pursuant to C.R.C.P. 251.18. Charles E. Mortimer, Jr., appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Jerry Lee Stevens ("Respondent") appeared pro se. The Hearing Board now issues the following "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."

I. ISSUE AND SUMMARY

A lawyer has the duty to thoroughly prepare his or her client's case, to safeguard and account for the use of client funds, and to explain his or her fee in writing to new clients.

The Hearing Board finds clear and convincing evidence that Respondent failed to provide his client with competent representation, failed to account for client funds he expended, and failed to explain to his client the basis or rate of the fees and expenses charged, as required by Colo. RPC 1.1, 1.15(c), and 1.5(b), respectively. The PDJ previously entered an order finding as a matter of law that Respondent violated Colo. RPC 1.15(a) when he failed to place client funds into a separate trust account.

In light of Respondent's significant experience in the practice of law, the multiple violations at issue here, the vulnerability of the client and his parents, Respondent's prior disciplinary history for similar offenses, and the absence of

significant mitigating factors, the Hearing Board determines that suspension for a year and a day is warranted.

II. PROCEDURAL HISTORY

On January 4, 2010, the People filed a complaint, alleging Respondent violated Colo. RPC 1.1, 1.15(a), 1.15(c), and 1.5(b). Respondent filed an answer on March 4, 2010. On May 12, 2010, the People filed a motion for partial judgment on the pleadings, to which Respondent did not respond. The PDJ granted the motion as to the People's second claim for relief (Colo. RPC 1.15(a)) but denied the People's motion as to the People's fourth claim for relief (Colo. RPC 1.5(b)). During the hearing on August 4 and 5, 2010, the Hearing Board heard testimony and considered the People's exhibits 1-8 and Respondent's exhibits A-G.

III. FINDINGS OF FACT AND RULE VIOLATIONS

The Hearing Board finds the following facts and rule violations have been established by clear and convincing evidence:

Jurisdiction

Respondent took the oath of admission and was admitted to the Bar of the Colorado Supreme Court on May 2, 1973. He is registered upon the official records, Attorney Registration No. 04033, and is thus subject to the jurisdiction of the Hearing Board in these disciplinary proceedings.[1] Respondent's registered address is 7201 East 36th Avenue, No. 161, Denver, CO 80207.

Representation of Marcus Robinson

In early September 2008, Marcus Robinson's ("Robinson") parents, Leo and Patella Robinson, hired Respondent to represent Robinson. Robinson had been charged with third degree assault, resisting arrest, possession of drug paraphernalia, and first degree sexual assault, as well as three second degree assault counts and three habitual offender counts.[2] He faced a possible life prison sentence and was in custody at the time his parents hired Respondent.

Robinson's parents paid Respondent an advance fee of $4,300.00.[3] Robinson's parents also wrote a separate check for $1,500.00 to private investigator Walter Barrett, who worked with Respondent on the case and

[1] *See* C.R.C.P. 251.1(b).
[2] People's exhibit 1.
[3] People's exhibit 3. Patella Robinson wrote a check for $300.00 dated September 6, 2008, a second check for $2,500.00 dated September 9, 2008, and a third check for $1,500.00 dated October 6, 2008.

obtained witness statements at Respondent's direction.[4] Neither when he received payment nor at any later date did Respondent provide a fee agreement or a written statement explaining the basis or rate of his fee to Robinson or to Robinson's parents. When Respondent received the checks from Robinson's parents, he failed to deposit the checks into a trust account; instead, he cashed them immediately. Respondent never provided an accounting to Robinson or Robinson's parents regarding his expenditure of the funds.

Respondent characterizes the scope of his representation of Robinson as limited to a "preliminary defense." Respondent contends that, when he was hired, he informed Robinson's parents that the cost of defending Robinson on the habitual criminal charges was prohibitive and the best he could do was "try to knock the legs out from under the sexual assault charge." Respondent claims he intended to withdraw from representation after the preliminary hearing.

According to Respondent's testimony, within a short time after he was hired, he met with Robinson, obtained an affidavit of arrest, and visited the scene of the alleged crime. Respondent and Walter Barrett also conducted interviews of witnesses to the alleged crime. Respondent attended a preliminary hearing as Robinson's counsel on September 25, 2008. At that time, Robinson was bound over for trial on all counts. Robinson pled not guilty at an arraignment held November 18, 2008; once again, Respondent attended as Robinson's counsel. On December 16, 2008, Respondent represented Robinson at a case management conference at which a trial date was set for April 6, 2009, and a trial status hearing was set for March 27, 2009.

In October 2008, Respondent collected discovery that was available in the case, but he did not respond to four notices from the prosecution in early 2009 informing him that additional discovery was available. The deputy district attorney prosecuting Robinson's case, Douglas Bechtel ("Bechtel"), testified that the discovery Respondent failed to pick up included a Colorado Bureau of Investigation analysis, a curriculum vitae for a DNA expert, crime scene photographs, and a copy of the victim's medical records, which Bechtel believes stated the victim's blood alcohol level at the time of the alleged crime.

Respondent represented Robinson at a motions hearing that took place on February 19, 2009, but Respondent arrived up to one-and-a-half or two hours late.[5] On the same day, Respondent filed a motion to produce the rape kit of the victim for independent analysis. Respondent did not subsequently obtain the rape kit analysis, for what he claims were tactical reasons. Aside

[4] *Id.* Patella Robinson testified that $1,000.00 of the check dated September 9, 2008, also was intended to pay for Walter Barrett's services. Accordingly, Respondent received a total advance fee of $3,300.00 for his legal work.

[5] Bechtel provided uncontroverted testimony that Respondent was late to this hearing.

from the rape kit motion, Respondent filed no motions on Robinson's behalf at any time during the representation.[6]

On March 27, 2009, the day of the trial status hearing, the court convened at 10:00 a.m. due to inclement weather.[7] When the judge took the bench at 10:00 a.m., Respondent was not present.[8] Respondent still was not present when the judge called Robinson's matter at 10:41.[9] In response to the judge's questioning about Respondent's failure to appear, Robinson stated, "I wasn't real sure if he was coming today or whatnot. He's kind of left me in the dark so far through this whole thing. I was looking for alternate defense counsel."[10] Robinson further explained his relationship with Respondent as follows:

> I tried to ask him questions along through this whole process, and he's consistently just put it off. He just told me, Wait. He said he talked to my family; and when I called there, they said they didn't know anything. They tried to call him on my cell phone at the house, and he either wouldn't answer or would not be available or would call back and then hang up immediately.[11]

Robinson's case was recalled later on the morning of March 27, 2009, when Respondent arrived at court.[12] At that time, Respondent informed the court for the first time that he intended to withdraw from the case, and that he had not yet filed a motion because his "paralegal [was] on furlough."[13] The judge said she would grant his motion to withdraw, and added that she believed Respondent had "done nothing to effectively represent [his] client."[14] The judge also determined that Respondent's inaction had effectively waived Robinson's right to a speedy trial, which pushed Respondent's trial date to September 28, 2009.[15]

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[6] Neither did Respondent obtain the transcript of the preliminary hearing in Robinson's matter.
[7] People's exhibit 7.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* In addition to Robinson's apparent difficulties in communicating with Respondent, Bechtel testified that he had problems reaching Respondent to discuss the case. For example, Respondent's voice mail greeting consisted solely of a "sigh," so Bechtel could not be sure whether he was leaving a message for Respondent or whether he had the wrong number.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* As of the date of the hearing in Respondent's matter, Robinson's case still had not gone to trial.

Colo. RPC 1.1

Colo. RPC 1.1 requires lawyers to represent clients with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Respondent's legal knowledge and skill are not at issue here; rather, the People contend that Respondent acted without the requisite thoroughness and preparation. The People posited the following grounds for this claim: (1) Respondent failed to provide diligent or timely representation of Robinson by appearing late for hearings, neglecting to prepare for trial, failing to file motions, and failing to collect available discovery; and (2) Respondent improperly limited the scope of his representation of Robinson. Respondent vigorously contests the assertion that he incompetently represented Robinson.

Regarding the People's first argument, Respondent explained to the Hearing Board that he was tardy to hearings because he was "rushing from one place to another." This explanation provides no legitimate excuse, though Respondent's tardiness standing alone may not provide conclusive proof of incompetent representation. Respondent further argues that his failure to prepare for trial at the first setting did not reflect incompetence, because it was nearly impossible that the trial would have commenced at that time. Bechtel conceded that it is unusual for a trial to commence on the first setting and that there have been four or five trial settings in Robinson's case already. Respondent's failure to prepare for trial, however, raises concerns regarding his competence, as discussed further below.[16]

With respect to the sufficiency of the work Respondent performed on Robinson's behalf, Respondent admits that he filed no motions in Robinson's case other than the rape kit motion; but Respondent argues that no purpose would have been served by filing any other motions. At the hearing, some time was devoted to the issue of whether Respondent should have filed a "*Martinelli* motion" seeking access to the personnel files of the police officers involved in the incident underlying the charges against Robinson.[17] Respondent claims that such a motion would not have been "well-placed" and that the decision whether to file such a motion is a matter of professional judgment.

The Hearing Board does not believe that Respondent's failure to file such a motion standing alone is proof of incompetence, but we find this decision troubling when viewed together with his failure to communicate with his client on matters he considered to be strategically sound. Indeed, Robinson had

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[16] Jason Cuerdon, the private defense attorney who represented Robinson for a time after Respondent's withdrawal, testified that by the first trial setting the People had not obtained the "pen pack," which is required to prosecute habitual criminal charges. For this reason, it could be argued that a wise strategic choice would have been for Respondent to request that Robinson's trial proceed at the first setting. Respondent's failure to prepare for trial foreclosed this potentially fortuitous option.

[17] *See Martinelli v. Dist. Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

something to gain but nothing to lose if such a motion had been filed.[18] Respondent similarly testified that he neglected to pick up available discovery because it was his "best judgment" that the discovery would not be critical to Robinson's case. Again, the Hearing Board finds Respondent's decision troubling, because it could have detrimentally affected his client's case.[19] We find that developing a good strategy for defending a case begins with a thorough knowledge of the facts.[20] Only then may a lawyer begin to intelligently set a strategy for defense, whether it be to "knock the legs out" from under the prosecution before a trial or defend the case before a jury.

Respondent contends that the results of his representation of Robinson justify the choices he made in representing Robinson.[21] Respondent explains that he knew that some of the witnesses to the events underlying the charges against Robinson were transients, and he wanted to interview them in case they subsequently became unavailable. In a letter to the People, Respondent also characterized his strategy as "wear[ing] down" the prosecutors in order to obtain a reasonable plea bargain offer.[22] Respondent argues that his strategy in representing Robinson paid dividends because initially there was no plea offer on the table, but after he arguably wore down the prosecution, the deputy district attorney offered Respondent a plea of forty-eight years.

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[18] The Hearing Board is mindful of the risks in second-guessing a defense attorney's strategic choices. *See United States v. Gentry*, 429 F. Supp. 2d 806, 812 (W.D. La. 2006) (stating, in a case concerning a claim of ineffective assistance of counsel: "A defense counsel may be forgiven if he has a multitude of possible objections or arguments but chooses for strategic reasons to focus his and the court's attention on what he believes to be the best arguments. A resulting conviction or sentence should not, therefore, be thrown out lightly in such a case merely because counsel elected not to argue every possible defense.").

[19] We note that the Colorado Supreme Court previously determined that an attorney violated Colo. RPC 1.1 by deciding to forgo review of certain case materials. *People v. Bonner*, 927 P.2d 836, 836-37 (Colo. 1996) (adjudging criminal defense lawyer to have provided incompetent representation because he failed to review the district attorney's file and the transcript of the preliminary hearing, even though the lawyer had conducted multiple interviews, subpoenaed witnesses, prepared opening and closing arguments and direct and cross-examination, and drafted jury instructions in preparation for trial).

[20] The case file for Robinson's matter that Respondent produced at the hearing raises concerns regarding Respondent's thoroughness and preparation. *See* Respondent's exhibit D. The file's contents are limited to a copy of an order for HIV testing, two invoices for discovery, two discovery cover sheets, eleven partially filled pages of what appear to be handwritten interview notes, three fax transmittal cover pages from the City and County of Denver Airport Legal Services department, an Office Depot receipt, an unidentified print-out concerning greeting cards and calendars, a copy of the complaint/information in Robinson's case, and a copy of the prosecutor's files in Robinson's case. None of these materials are annotated by Respondent. Aside from the brief interview notes, the file contains no record of legal work or research performed on Robinson's behalf. At the very least, the file provides evidence of slipshod organizational skills, which can lead to incompetent representation. Respondent admitted at the hearing that his organizational skills need work.

[21] Respondent also contends that similar preliminary investigatory work led to successful results for at least one past client.

[22] People's exhibit 4.

The evidence suggests that Respondent's strategy was much less successful than he asserts. Bechtel testified that he told Respondent that Robinson was facing a likely sentence of forty-eight years *to life*, and that he offered this statement as an explanation of the situation facing Robinson if he were to plead guilty on all counts, not as any form of a plea offer.[23] In fact, there is no evidence that Respondent took actions that would be likely to pressure the prosecution into negotiating a plea deal, since Respondent had little contact with the prosecution and filed just one motion in Robinson's case over the course of six months.

The Hearing Board notes that the work Respondent performed on Robinson's behalf—particularly his interviewing work—was of some value. But the fact that Respondent was of *some* assistance to Robinson does not pass muster under Colo. RPC 1.1. The record, as a whole, shows that Respondent lacked thoroughness in representing his client. This finding is informed by our analysis with respect to the second basis of the People's claim under Colo. RPC 1.1: the limited nature of representation that Respondent undertook.[24]

Colo. RPC 1.2(c) provides: "A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The language of this rule permits, under some circumstances, the provision of unbundled legal services, whereby an attorney provides some services for a client or a non-

[23] The Hearing Board found Bechtel to be a credible witness. By contrast, it was the Hearing Board's impression that Respondent was not entirely forthcoming in this proceeding. For example, Respondent initially emphasized his desire to comply with the rules regarding trust accounts and indicated that these proceedings were a learning process for him. This characterization lost credibility once the People revealed that Respondent had previously been disciplined for a violation of the trust account rules. In addition, the answer Respondent filed in this proceeding raises questions about Respondent's truthfulness. For example, Respondent denied that he failed to provide an accounting for the funds he received from Robinson's parents and denied that he failed to deposit those funds into a trust account. *See* complaint, ¶ 4; answer, ¶ 4. At the hearing, Respondent admitted that he never provided an accounting or deposited the funds into a trust account, with no explanation for why he previously denied these straightforward factual allegations.

[24] Although Respondent was not charged under Colo. RPC 1.2(c), the facts underlying a limited representation directly affect whether the attorney competently represented the client. Where an attorney validly limits the scope of a representation in accordance with the Rules of Professional Conduct, it is permissible for that attorney to take no action on specified claims or issues. On the other hand, where an attorney makes an invalid effort to limit the scope of a representation, the attorney may be found to have failed to competently represent the client on claims or issues the attorney attempted to exclude from the scope of the representation. *See* Colo. RPC 1.2 [cmt] 7 ("Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

client but not the full range of possible legal services.[25] However, before limiting the scope of representation, a lawyer must obtain "informed consent," which is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[26] A lawyer providing unbundled services "must clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests."[27]

Here, Respondent characterized his limited representation as follows in a letter to the People:

> I was retained by Marcus Robinson's parents with the understanding that defense cost of the habitual criminal chare [sic]

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[25] Comments 6 and 7 to Colo. RPC 1.2 and Colo. Bar Assoc. *Ethics Opinion 101: Unbundled Legal Services*, Jan. 17, 1998, contemplate limited representation under circumstances different from those presented here, such as an insurer's retention of a lawyer to represent an insured person or a lawyer helping a pro se litigant prepare for a hearing. Colo. RPC 1.2(c) and case law suggest that there are some situations in which an attorney and a criminal defendant may permissibly decide to limit the scope of a representation. *See People v. Harlan*, 54 P.3d 871, 876, 880-81 (Colo. 2002); *United States v. Roth*, 860 F.2d 1382, 1385, 1389 (7th Cir. 1988). A tension exists between attorneys' ethical obligations to zealously defend their clients and the limited financial resources of some defendants and some attorneys. *See generally* Fern Fisher-Brandveen and Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107 (Feb. 2002); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915 (Summer 1998). Although in some instances a criminal defendant may benefit from a limited defense, we note that limited representation in the criminal context is unusual and poses special risks because of the liberty interests at stake, among other reasons. Furthermore, limited representation in the criminal context may not carry the same benefits as in the civil context. For example, one of the primary advantages of unbundled legal services in the civil context is that such services may increase access to justice for low- to middle-income persons. *See, e.g.*, Brenda Star Adams, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 348-49 (Fall 2005). Another advantage is that such services may alleviate some of the judicial delays and difficulties caused by pro se litigants. Where, as here, a criminal defendant qualifies for public assistance, limited representation by a private attorney does not serve those goals.

[26] Colo. RPC 1.0.

[27] Colo. Bar Assoc. *Ethics Opinion 101: Unbundled Legal Services*, Jan. 17, 1998; *see Johnson v. Bd. of County Cmm'rs*, 85 F.3d 489, 494 (10th Cir. 1996) (holding that an attorney who had defended claims brought against a sheriff in his official capacity but not in his individual capacity violated Colo. RPC 1.1 by not consulting with the sheriff under Colo. RPC 1.2 about the legal exposure he faced in his individual capacity); *Keef v. Widuch*, 747 N.E.2d 992, 995, 998 (Ill. App. 2001) ("the client must be made to understand that the course of action is not the sole potential remedy and that there exist other courses of action that are not being pursued"); *In re Maternowski*, 674 N.E.2d 1287, 1291 (Ind. 1996) ("meaningful consent to a limitation on the lawyer's scope of representation must be based on full, objective disclosure and unbiased advice"); *Healy v. Axelrod Const. Co. Defined Ben. Pension Plan & Trust*, 155 F.R.D. 615, 620 (N.D. Ill. 1994).

> was prohibitive and best undertaken by the public defender. I informed them that no [sic] advantage of hiring private counsel was solely the logistic of preliminary investigation of the sexual assault charge. That was accomplished.[28]

If Respondent solely represented Robinson on the rape charge between September 2008 and March 2009, that means Robinson lacked any legal representation on the other charges for approximately six months. During that lengthy period, nothing was done to investigate, negotiate with the district attorney, or prepare for trial on the other charges. Respondent certainly knew, or should have known, that no other attorney was assisting Robinson on those charges. This situation is particularly troubling because neither the judge nor the prosecutor in Robinson's case was informed of the limited scope of Respondent's representation, and because Respondent set the matter for trial on all counts. The Hearing Board finds that Respondent's attempt to limit his representation of Robinson was not reasonable under the circumstances presented here.[29]

Moreover, Respondent has provided us with no basis to believe that Robinson provided informed consent to the limited scope of representation as Respondent describes it. Even if Robinson had provided some form of consent, however, the evidence indicates that Robinson may have lacked capacity to provide informed consent to such a significant deviation from the expected attorney-client relationship.[30] The private defense attorney who represented Robinson for a time after Respondent's withdrawal, Jason Cuerdon, testified that Robinson did not understand indeterminate sentences or the ramifications of the charges. Jason Cuerdon further testified that he believed it took some *thirty* meetings with Robinson for Robinson to fully understand that he faced a very long prison sentence. Under these circumstances, the Hearing Board concludes that Robinson could not and did not sufficiently understand the nature of the limited representation that Respondent meant to offer, the risks of that representation, and the alternative courses of action.

Patella Robinson's testimony also indicates that Robinson's parents, who had never before hired a lawyer, did not fully understand that Respondent intended to offer a limited scope of representation.[31] Patella Robinson testified

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[28] People's exhibit 4.

[29] Our determination is limited to these facts. We do not find that limited representation on a single charge or the use of "shadow counsel" necessarily would be improper in every circumstance.

[30] We are not aware of case law providing competency standards for informed consent to a limited representation, but we draw guidance from the rule that a waiver of the right to conflict-free representation must be voluntary, knowing, and intelligent. *People v. Shari*, 204 P.3d 453, 460 (Colo. 2009).

[31] We discuss Respondent's communication with Robinson's parents because this information provides a fuller picture regarding Respondent's efforts to limit the scope of his representation.

that she did not understand the procedures by which defendants are tried and charged, and she suggested she thought it might be possible to clear up the rape charge before the other charges were addressed. She stated that she understood that Respondent would help with the rape charges, but she also testified that she understood Respondent was "going to be [Robinson's] lawyer," he was "going to take care of the case," and he would "take care of whatever needed to be done." Patella Robinson also offered credible testimony that she did not recall Respondent having discussed any alternative defense strategies with her or explained the risks of focusing solely on the rape charge.

Respondent argues that the amount he charged the Robinsons demonstrates his intent to limit his representation. But in these circumstances, where Patella Robinson did not "know the amount of work to expect for the amount of money [she] paid," payment of the requested fee cannot be understood as signaling agreement to a limited scope of representation.[32]

In summary, the Hearing Board determines that Respondent's attempt to restrict the scope of his representation of Robinson was neither reasonable nor the product of informed consent, and that Respondent did not represent Robinson with the requisite thoroughness and preparation. Accordingly, we find that Respondent violated Colo. RPC 1.1.

Colo. RPC 1.15(a), 1.15(c), and 1.5(b)

In an order imposing partial judgment on the pleadings, the PDJ previously determined that Respondent violated Colo. RPC 1.15(a). Respondent violated this rule by failing to deposit Robinson's advance fee in a trust account.[33]

We do not determine here that Respondent's parents had the authority to provide informed consent to a limited scope of representation on behalf of their son, although we note that it may be possible in some cases for parents or other persons to provide such consent on behalf of a client who lacks capacity to do so. *Cf. McDonald v. Hammons*, 936 F. Supp. 86, 88 (E.D.N.Y. 1996) (noting that in some instances a parent can waive a child's right to conflict-free representation). Here, even if the Robinsons had the legal capacity to provide informed consent on behalf of their son, the evidence shows that they were not fully informed by Respondent, and therefore they could not have provided informed consent.

[32] *See Estate of Spencer v. Gavin*, 946 A.2d 1051, 1067 (N.J. Super. 2008) ("the quantum of a lawyer's fees is not dispositive of the presence or absence of an attorney-client relationship and the professional duties attendant to such a relationship").

[33] *See In re Sather*, 3 P.3d 403, 405 (Colo. 2000) ("under Colo. RPC 1.15 an attorney cannot treat advance fees as property of the attorney and must segregate all advance fees by placing them into a trust account until such time as the fees are earned").

We likewise find that Respondent violated Colo. RPC 1.15(c), which requires an attorney to account to the client for the use of client funds.[34] Respondent admitted at the hearing that he did not provide accountings to Robinson or Robinson's parents when he cashed the checks from Patella Robinson.[35]

Finally, we conclude Respondent violated Colo. RPC 1.5(b). This rule provides that, when a lawyer has not regularly represented a client, the lawyer must communicate the basis or rate of the fee to the client in writing, before or within a reasonable time after commencing the representation.[36] At the hearing, Respondent admitted that he had not previously represented Robinson and that he never provided a written explanation of his fee.

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law govern the selection and imposition of sanctions for lawyer misconduct. ABA *Standard* 3.0 mandates that, in selecting the appropriate sanction, the Hearing Board consider the duty breached, the injury or potential injury caused, Respondent's mental state, and the aggravating and mitigating evidence.

ABA Standard 3.0 – Duty, Injury, and Mental State

Duty: The Hearing Board finds Respondent violated his duty to competently represent his client with the thoroughness that was reasonably necessary, to preserve client property with the care required of a professional fiduciary, and to account for the use of client funds.[37] The Hearing Board also finds Respondent breached the duties he owes as a professional when he failed to provide a written explanation of his fee to a new client.[38]

Injury: Respondent's misconduct caused injury and potential injury to his client. Most significantly, Respondent was forced to waive his constitutional right to a speedy trial as a result of Respondent's inaction.[39]

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[34] *See People v. Fritsche*, 849 P.2d 31, 32 (Colo. 1993) (lawyer failed to provide an accounting to client); Colo. RPC 1.15 [cmt] 8 (explaining that an accounting as to the use of client funds is required even if there is no dispute as to ownership of those funds).

[35] In fact, Respondent provided incorrect information to Patella Robinson regarding the use of his fee. He explained that he needed this fee in part to pay for an independent analysis of the rape kit, but he never obtained such an analysis.

[36] *See In re Wimmershoff*, 3 P.3d 417, 419 (Colo. 2000) (lawyer violated Colo. RPC 1.5 by failing to clearly convey the basis and rate of his fee).

[37] *See* ABA *Standard* 4.0.

[38] *See* ABA *Standard* 7.0.

[39] Respondent argues that delay in Robinson's case redounded to Robinson's benefit, because as long as Robinson had not been sentenced, he had some hope of avoiding a long prison sentence. We cannot credit this viewpoint, given that there is no evidence that Robinson

Robinson's statement to the court at the trial status hearing in March 2009 demonstrated another intangible injury: significant confusion on Robinson's part due to the lack of communication regarding Respondent's representation. Further, Respondent's lack of thoroughness and preparation created the possibility for a host of potential injuries. In addition, Respondent's failure to deposit the advance fee in a trust account, to provide an accounting, or to explain his fee caused injury or potential injury by depriving his client and his client's parents of valuable information and by heightening the risk of misuse of the funds.

Mental State: Respondent knew that he failed to place his client's funds in a trust account, failed to provide an accounting regarding his use of those funds, and failed to explain his fee in writing.[40] He also had actual knowledge of his decisions with respect to limiting his representation of Robinson, although he had no conscious intent to deprive Robinson of competent legal representation.[41]

ABA Standard 3.0 – Aggravating Factors

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. The Hearing Board considers evidence of the following aggravating circumstances in deciding the appropriate sanction.

Prior Disciplinary Offenses – 9.22(a): Respondent was suspended for a year and a day in 1994 for disciplinary offenses that are unrelated to the gravamen of this matter. In 2003, Respondent was privately admonished for two rule violations. First, Respondent failed to communicate the basis or rate of his fee to clients in writing, in violation of Colo. RPC 1.5(b). Second, Respondent used his trust account as a personal account, in violation of Colo. RPC 1.15(f).

Multiple Offenses – 9.22(d): The Hearing Board finds four separate violations of the Rules of Professional Conduct, as outlined above.

Vulnerability of the Victim – 9.22(h): Respondent's client was vulnerable because he was in custody and facing a sentence of forty-eight years to life in prison, and because he appears to have had limited capacity for understanding the nature of the criminal proceeding. Robinson's parents also were vulnerable because, as noted above, they had no prior experience in hiring a lawyer.

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himself wished to delay his trial. Respondent appears to be speculating regarding Robinson's frame of mind, and Respondent's argument presupposes that Robinson will be found guilty.

[40] Respondent did not challenge the People's characterization of his mental state as knowing for these rule violations.

[41] *See* ABA *Standards* § III, Definitions.

Substantial Experience in the Practice of Law – 9.22(i): Respondent has been a member of the Colorado bar for thirty-seven years. Such a longstanding practitioner should have known that his conduct violated the Rules of Professional Conduct, as outlined above.

ABA Standard 3.0 – Mitigating Factors

Mitigating factors are any considerations or factors that may justify a reduction in the degree of discipline imposed. The Hearing Board considers evidence of the following mitigating circumstances in deciding the appropriate sanction.

Absence of a Dishonest or Selfish Motive – 9.32(b): Respondent testified that he was not motivated by a dishonest or selfish motive, and the People have conceded that Respondent lacked such a motive. The Hearing Board also notes that the testimony is undisputed that in the past Respondent has demonstrated unselfish behavior by providing legal services at minimal cost to clients in need and by volunteering his time to the community. We hasten to add, however, that providing low- or no-fee representation does not absolve a lawyer of his or her duties to provide thorough and competent representation as provided in Colo. RPC 1.1.

Remoteness of Prior Offenses – 9.32(m): Respondent's suspension for unrelated offenses in 1994 is sufficiently remote that the Hearing Board does not consider this suspension to be an aggravating factor in this case. However, the Hearing Board does give weight to Respondent's 2003 private admonition, because the conduct at issue there was not particularly remote and that conduct was closely related to the misconduct we have found here.[42]

Sanctions Analysis under ABA Standards and Case Law

ABA *Standard* 4.42 provides that suspension is generally appropriate when a lawyer causes a client injury or potential injury by knowingly failing to perform services for a client or engaging in a pattern of neglect.[43] ABA *Standard* 4.12 states that suspension is generally appropriate when a lawyer knows or should know that he or she is dealing improperly with client property, such as by failing to place client funds in a trust account or failing to account for the use of those funds, and causes injury or potential injury to a client. Finally, where a lawyer fails to explain his or her fee in writing and thereby causes injury or potential injury to a client, the public, or the legal system,

[42] *See People v. Good*, 790 P.2d 331, 332 (Colo. 1990) (in case concerning attorney neglect, prior neglect occurring fifteen to twenty years earlier was relevant to the discipline to be imposed).

[43] Although Appendix 1 of the ABA *Standards* indicates that ABA *Standard* 4.5 applies to incompetent representation, ABA *Standard* 4.5 is oriented towards lack of legal knowledge or skill rather than lack of thoroughness or preparation. Accordingly, we determine that ABA *Standard* 4.4 (lack of diligence) is more relevant to the conduct at issue here.

ABA *Standard* 7.2 provides that suspension is generally appropriate for the violation of a duty owed as a professional.

The ABA *Standards* further provide that, in cases involving multiple charges of misconduct, "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct."[44]

Respondent's misconduct in this case warrants a suspension for several reasons. First, Respondent's actions and statements at the hearing before us demonstrate a misguided belief that his method of representing clients complies with the Rules of Professional Conduct. For example, Respondent stated that he believes there has been an "elevation of form over substance" in his case. Second, while Respondent appears to be well intentioned, we find Respondent fails to appreciate that the Rules at issue here regarding client communication serve the important goal of empowering clients in their relationships with their attorneys.

The Hearing Board is also concerned about the developing pattern of Respondent's ethical violations. As noted above, Respondent was previously privately admonished for failing to communicate the basis or rate of his fee to clients in writing and for using a trust account as a personal account. While Respondent testified that going forward he would scrupulously endeavor to adhere to these rules, we are concerned that he will not do so because Respondent's prior discipline did not lead him to change his behavior. Respondent also admitted during his testimony that he has defended others in the same manner as he did Robinson. In one instance, Respondent described "shadowing" the public defender, who was the counsel of record, while Respondent provided limited representation much as he did in Robinson's case. It is not clear from this record that the public defender knew about Respondent's shadow representation.

A final basis for concern is Respondent's apparent view that he satisfies the responsibility of providing zealous representation because he can "outthink" his opposing counsel. As discussed above, although Respondent attended several hearings and conducted interviews on behalf of Robinson, there is little other evidence of legal work that Respondent performed on Robinson's behalf, despite being paid $3,300.00. While Respondent may have a superior intellect, that alone does not assure compliance with Colo. RPC 1.1.

Colorado case law suggests that a lengthy suspension is appropriate where an attorney with prior discipline has failed to diligently work on a client matter and has violated other rules regarding client communication and proper

[44] *See* ABA *Standards* § II at 7.

management of client funds. For example, in *People v. Convery*, an attorney with a prior disciplinary history was suspended for a year and a day for neglecting a legal matter.[45] The neglect in *Convery* was somewhat more serious than the neglect here; the lawyer filed a frivolous motion, failed to respond to interrogatories, failed to take action on the case, leading to the garnishment of the client's bank account, and failed to inform a client of a deposition, causing the court to order the sale of the client's property.[46] *Convery,* however, provides a comparable basis for selecting a sanction in Respondent's case because the lawyer's misconduct in *Convery* was limited to neglect, while Respondent's misconduct encompassed not only neglect but also three separate violations relating to client funds and client communication.[47]

In imposing a sanction, the Hearing Board emphasizes the varied nature of Respondent's violations in this matter, the vulnerability of the victim, and the incipient pattern that this misconduct and Respondent's prior misconduct are forming. Given these factors, we believe a suspension of a year and day is appropriate.

V. CONCLUSION

For the reasons explained above, the Hearing Board determines that Respondent should be suspended for a year and a day. We also note our concern about Respondent's physical and mental health. At the hearing, Respondent's demeanor was erratic, while his testimony and arguments often were difficult to follow and at times were incoherent.[48] The Hearing Board recognizes that the stress of defending oneself in a disciplinary proceeding could contribute to such difficulties. Nevertheless, we are concerned that if Respondent continues to practice law, an underlying physical or mental condition could affect the quality of Respondent's representation of future clients. Accordingly, we will require that Respondent submit to an Independent Medical Examination ("IME") as a condition of reinstatement.

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[45] 758 P.2d 1338 (Colo. 1988).

[46] *Id.* at 1340.

[47] *See also People v. Davies,* 926 P.2d 572, 573 (Colo. 1996) (suspending a lawyer with prior discipline for a year and a day for having incorrectly calculated a client's child support); *People v. Madrid,* 700 P.2d 558, 559-60 (Colo. 1985) (suspending a lawyer for a year and day for having neglected to contact witnesses, file motions, subpoena witnesses, or respond to his client); *People v. Silvola,* 933 P.2d 1308, 1309-10 (Colo. 1997) (suspending a lawyer with several instances of prior discipline for a year and a day for having failed to prepare for a client's trial).

[48] Similar red flags are raised by Respondent's letter to the People of June 9, 2009, regarding the investigation against him, which contained numerous spelling and grammatical errors. *See* People's exhibit 4.

VII. ORDER

The Hearing Board therefore **ORDERS**:

1. **JERRY LEE STEVENS**, Attorney Registration No. 04033, is hereby **SUSPENDED** from the practice of law for one year and one day. The suspension **SHALL** become public and effective thirty-one days from the date of this order upon the issuance of an "Order and Notice of Suspension" by the PDJ and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).

2. As a condition precedent to any petition for reinstatement pursuant to C.R.C.P. 251.29(c), Respondent **SHALL** attend and successfully complete the one-day ethics school and the one-half-day trust account school sponsored by the People.

3. As a condition precedent to any petition for reinstatement pursuant to C.R.C.P. 251.29(c), Respondent **SHALL** submit to an IME by a qualified doctor agreeable to the People. Respondent, not the People, shall be responsible for the cost of the IME. Once a qualified expert is chosen, it is Respondent's duty to advise the Court so that an appropriate order may be drafted and presented to the doctor as to what issues to address in a report to the Court. The doctor shall have access to all records in the People's possession, as well as this opinion, before meeting with Respondent for the scheduled IME.

4. Respondent **SHALL** file any post-hearing motion or application for stay pending appeal with the PDJ **on or before October 27, 2010**. No extensions of time will be granted.

5. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days from the date of this order. Respondent shall have ten (10) days thereafter to submit a response.

DATED THIS 7th DAY OF OCTOBER, 2010.

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WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

(*Original Signature on File*)
WILLIAM R. GRAY
HEARING BOARD MEMBER

(*Original Signature on File*)
HENRY R. REEVE
HEARING BOARD MEMBER

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