

People v. Breingan, No. 00PDJ067. 9.20.01. Attorney Regulation. The Presiding Disciplinary Judge and Hearing Board disbarred respondent, Charles R. Breingan, from the practice of law in this reciprocal discipline action from the State of New Jersey. Breingan knowingly converted funds belonging to one client, he neglected two clients' matters in violation of Colo. RPC 1.3, he failed to communicate with one client in violation of Colo. RPC 1.4(a), he misrepresented the status of the legal matter to another client in violation of Colo. RPC 8.4(c), and he failed to take steps to protect both clients' interests upon termination by providing them with their files and refund their retainers upon request in violation of Colo. RPC 1.16(d). He failed to cooperate with the disciplinary board in New Jersey in violation of Colo. RPC 8.4(a) and Colo. RPC 8.4(d). Breingan was ordered to pay the costs of the proceeding.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 600 17 TH STREET, SUITE 510-S DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO,	Case Number: 00PDJ067
Respondent: CHARLES R. BREINGAN.	
REPORT, DECISION AND IMPOSITION OF SANCTION	

Opinion by Presiding Disciplinary Judge Roger L. Keithley and Hearing Board members, John E. Hayes, a member of the bar, and Larry A. Daveline, a representative of the public.

SANCTION IMPOSED: ATTORNEY DISBARRED

A sanctions hearing pursuant to C.R.C.P. 251.15 was held on August 2, 2001, before the Presiding Disciplinary Judge ("PDJ") and two hearing board members, John E. Hayes, a member of the bar, and Larry A. Daveline, a representative of the public. Debora D. Jones, Assistant Attorney Regulation Counsel, represented the People of the State of Colorado (the "People"). Charles R. Breingan ("Breingan"), the respondent, did not appear either in person or by counsel.

The Second Amended Complaint (the "Complaint") in this action was filed February 1, 2001. Breingan did not file an Answer. On March 27, 2001, the

People filed a Motion for Default. Breingan did not respond. On May 15, 2001, the PDJ issued an Order granting default, stating that all factual allegations set forth in the Second Amended Complaint were deemed admitted pursuant to C.R.C.P. 251.15(b). Default was granted on all alleged violations of The Rules of Professional Conduct ("Colo. RPC") in the Second Amended Complaint, which were deemed established, e.g., *People v. Richards*, 748 P.2d 341 (Colo. 1987) with the exception of the alleged violation of Colo. RPC 8.4(c) based on the facts set forth in paragraph 21. By Order dated June 7, 2001, that allegation was dismissed.

The People's exhibits 1, 2 and 3 were offered by the People and admitted into evidence. The PDJ and Hearing Board considered the People's argument, the facts established by the entry of default, the exhibits admitted, and made the following findings of fact which were established by clear and convincing evidence.

I. FINDINGS OF FACT

Charles R. Breingan has taken and subscribed to the oath of admission, was admitted to the bar of the Colorado Supreme Court on October 14, 1981 and is registered upon the official records of this court, registration number 11169. Breingan is subject to the jurisdiction of this court pursuant to C.R.C.P. 251.1(b).

All factual allegations set forth in the Second Amended Complaint were deemed admitted by the entry of default. The facts set forth therein are therefore established by clear and convincing evidence. See Complaint attached hereto as exhibit 1.

II. CONCLUSIONS OF LAW

In the Partridge matter (claims one and two), Edwin Partridge ("Partridge") paid Breingan \$325.00 as a retainer to file a civil suit on his behalf. Thereafter, Breingan did not return Partridge's phone calls for two and one-half months. Later, when Partridge encountered Breingan, Breingan stated that he was "waiting for a court date." Partridge asked Breingan to contact him within a couple of weeks. Breingan did not do so. Partridge telephoned Breingan, and Breingan again told Partridge that he was waiting for a court date. Partridge waited two more weeks before again calling Breingan. Breingan's failure to keep Partridge reasonably informed about the status of a matter and promptly comply with reasonable requests for information constitutes a violation of Colo. RPC 1.4(a)(a lawyer shall keep a client reasonably informed about the status of a matter). Eventually, Breingan admitted to Partridge that he had not filed any action on Partridge's behalf. Breingan's failure to file an action on behalf of Partridge constitutes neglect in violation of Colo. RPC 1.3(a lawyer shall act with reasonable diligence and

promptness in representing a client). Breingan's misrepresentations to Partridge of the status of the legal matter constitutes a violation of Colo. RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation). Partridge demanded the return of both his money and the contract that was to be the subject of the action. Although Breingan returned the contract to Partridge, he did not return the retainer. Breingan's failure to promptly refund the client's retainer constitutes a violation of Colo. RPC 1.16(d)(upon termination, a lawyer shall refund any advance payment of fee that has not been earned). Partridge filed a complaint for fee arbitration. Breingan failed to answer and failed to appear before the fee arbitration committee. The fee arbitration committee determined that the entire fee should be returned. Breingan eventually refunded the fee to his client. Breingan failed to provide information on this matter to the New Jersey District IIIB Ethics Committee ("DEC") in violation of Colo. RPC 8.4(d)(engaging in conduct prejudicial to the administration of justice).

In the Raymond matter, Steven D. Raymond ("Raymond") paid respondent a retainer of \$200.00 for the defense of a municipal court traffic violation. Breingan told Raymond that he had contacted the municipal court, and Raymond must appear personally to enter a plea and have his rights explained to him. When Raymond appeared at court he was told that Breingan had never contacted the court. Breingan failed to appear on behalf of Raymond in the municipal court matter and failed to perform any services for Raymond in violation of Colo. RPC 1.3(neglect of a legal matter). Raymond was unable to reach Breingan by telephone. He left a message terminating Breingan's services and demanded a refund of the \$200.00 retainer. Breingan violated Colo. RPC 8.4(c)(engaging in conduct involving dishonesty, deceit fraud or misrepresentation) by performing no legal services for Raymond and failing to return his retainer upon request. Breingan's failing to provide the retainer to Raymond constitutes knowing conversion. Breingan's failure to respond to a request for information from the New Jersey DEC and failure to cooperate in the investigation of the Raymond matter constitutes a violation of Colo. RPC 8.4(d)(engaging in conduct prejudicial to the administration of justice).

Breingan was suspended by the Supreme Court of New Jersey for a total period of six months based on the misconduct set forth above. Breingan's misconduct in New Jersey with regard to the Partridge and Raymond matters constitutes grounds for discipline pursuant to C.R.C.P. 251.21(a)(a final adjudication in another jurisdiction of misconduct constituting grounds for discipline of an attorney, shall, for purposes of proceedings pursuant to these Rules, conclusively establish such misconduct) and a violation of Colo. RPC 8.4(a)(it is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct).

III. ANALYSIS OF SANCTION

Charles R. Breingan was suspended for a period of six months in New Jersey for misconduct which occurred in that jurisdiction. The People request that the PDJ and Hearing Board impose the sanction of disbarment for the same conduct in this reciprocal discipline matter.

C.R.C.P. 251.21(d) provides in relevant part:

Upon receiving notice that an attorney subject to these Rules has been publicly disciplined in another jurisdiction, the Regulation Counsel shall obtain the disciplinary order and prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14. If the Regulation Counsel intends either to claim that substantially different discipline is warranted or to present additional evidence, notice of that intent shall be given in the complaint.

At the conclusion of proceedings brought under this Rule, the Hearing Board shall issue a decision imposing the same discipline as was imposed by the foreign jurisdiction, unless it is determined by the Hearing Board that:

- (1) The procedure followed in the foreign jurisdiction did not comport with requirements of due process of law;
- (2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Hearing Board cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;
- (3) The imposition by the Hearing Board of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or
- (4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Hearing Board.

The Complaint alleges that Breingan knowingly converted funds belonging to his client, Steven Raymond. Breingan's retention of the \$200 retainer in the Raymond matter, his failure to perform any legal services, and his failure to return the retainer to Raymond upon demand constitutes knowing conversion. In Colorado, knowing conversion of client funds for a lawyer's personal use and benefit without authorization warrants disbarment. *See, e.g., People v. Wallace*, 936 P.2d 1282, 1284 (Colo. 1997); *People v. Silvola*, 915 P.2d 1281, 1284 (Colo. 1996)(finding that misconduct that occurred over an extended period of time must be deemed to be willful); *People v. Singer*, 897 P.2d 798, 801 (Colo. 1995)(holding that extensive and prolonged neglect is considered willful misconduct); *People v. Elliott*, 99PDJ059, slip op. at 8 (consolidated with 99PDJ086) (Colo. PDJ March 1, 2000), 29 Colo. Law. 112, 114 (May 2000)(disbarring attorney for his accepting advance fees from two clients, performing some but not all of the services for which he was paid,

retaining the fees for one year in one matter and two years in another matter, and abandoning the clients).

The Supreme Court in *People v. Varrallo*, 913 P.2d 1, 11 (Colo. 1996), held:

Knowing misappropriation [for which the lawyer is almost invariably disbarred] "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." *In re Noonan*, 102 N.J. 157, 160, 506 A.2d 722 (1986).

Misappropriation includes "not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Wilson*, 81 N.J. 451, 455 n. 1, 409 A.2d 1153 (1979).

Id. at 12.

Additionally, Breingan neglected both the Partridge and Raymond matters in violation of Colo. RPC 1.3, he failed to communicate with Partridge despite the client's attempts to reach Breingan in violation of Colo. RPC 1.4(a), he misrepresented the status of the legal matter to Partridge in violation of Colo. RPC 8.4(c), and he failed to take steps to protect both clients' interests upon termination by providing them with their files and refund their retainers upon request in violation of Colo. RPC 1.16(d). He failed to cooperate with the disciplinary board in New Jersey in violation of Colo. RPC 8.4(a) and Colo. RPC 8.4(d).

Determination of the appropriate sanction requires the PDJ and Hearing Board to consider aggravating and mitigating factors pursuant to ABA *Standards* § 9.22 and § 9.32 respectively. Since Breingan did not participate in these proceedings, no mitigating factors were established. The PDJ and Hearing Board considered the following aggravating factors pursuant to ABA *Standard* § 9.22. Pursuant to 9.22(a) prior discipline is considered as an aggravating factor. In November 1991, Breingan received a public censure in the State of Colorado, *People v. Breingan*, 820 P.2d 1115 (Colo. 1999) in a reciprocal discipline matter from the State of New Jersey where a public reprimand – the equivalent of a public censure – had been imposed on Breingan. The conduct giving rise to the public censure consisted of neglect of three separate client matters, failing to diligently pursue the claims of one client, and failing to cooperate with the ethics committee of New Jersey. *See In re Breingan*, 576 A.2d 783 (N.J. 1990). Additionally, Breingan has had substantial experience in the practice of law, *see id.* at §9.22(i), having been licensed to practice law in the State of Colorado since October 1981.

The PDJ and Hearing Board find that under Colorado law, Breingan's

engaging in knowing conversion, taken together with the other rule violations, warrants disbarment. See *In re Cleland*, 2 P.3d 700, (Colo. 2000)(attorney's actions in knowingly misappropriating client funds and commingling his personal funds with client funds warrants disbarment); *People v. Lavenhar*, 934 P.2d 1355, 1359 (Colo.1997)(lawyer disbarred who knowingly misappropriated check belonging to third party); *People v. Young*, 864 P.2d 563, 564 (Colo.1993)(knowing misappropriation of clients' funds warrants disbarment even absent prior disciplinary history and despite cooperation and making restitution). Imposition of the same sanction as that imposed by the State of New Jersey – a six month suspension – would be a marked deviation from well-established disciplinary law in this state. Pursuant to Colorado law, the misconduct occasioned in this case warrants that a substantially different form and degree of discipline be imposed under C.R.C.P. 251.21(d). In the absence of respondent's involvement and presentation of possible mitigating factors, disbarment is warranted in this reciprocal discipline action.

IV. ORDER

It is therefore ORDERED:

1. Charles R. Breingan, attorney registration number 11169 is disbarred from the practice of law effective thirty-one days from the date of this Order.
2. Charles R. Breingan is Ordered to pay the costs of these proceedings; the People shall submit a Statement of Costs within ten (10) days of the date of this Order. Respondent shall have five (5) days thereafter to submit a response thereto.

DATED THIS 20th DAY OF SEPTEMBER, 2001.

ROGER L. KEITHLEY
PRESIDING DISCIPLINARY JUDGE

LARRY A. DAVELINE
HEARING BOARD MEMBER

JOHN E. HAYES
HEARING BOARD MEMBER

EXHIBIT 1

<p>SUPREME COURT, STATE OF COLORADO</p> <p>ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE PRESIDING DISCIPLINARY JUDGE</p> <hr/> <p>Complainant:</p> <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Respondent:</p> <p>CHARLES R BREINGAN</p> <hr/> <p>Debora D. Jones, #16917 Assistant Regulation Counsel John S. Gleason, #15011 600 17th Street, Suite 200-South Denver, CO 80202</p> <p>Phone Number: (303) 893-8121, ext. 314</p>	<p>COURT USE ONLY</p> <hr/> <p>Case Number: 00PDJ067</p>
<p>SECOND AMENDED COMPLAINT</p>	

THIS COMPLAINT is filed pursuant to the authority of C.R.C.P. 251.9 through 251.14, and C.R.C.P. 251.21. It is alleged as follows:

GENERAL ALLEGATIONS

1. The respondent has taken and subscribed the oath of admission, was admitted to the bar of this court on October 14, 1981, and is registered upon the official records of this court, registration no. 11169. He is subject to the jurisdiction of this court in these disciplinary proceedings. The respondent's registered home address is 4 Linden Road, Burlington, New Jersey 08016.

CLAIM I

[Neglect – Colo. RPC 1.3; Failure to Communicate with a Client – Colo. RPC 1.4(a); Failure to Return Property of a Client After Termination of Representation – Colo. RPC 1.16(d); Dishonesty – Colo. RPC 8.4(c)]

2. On or about June 16, 1996, Edwin Partridge paid the respondent a \$325.00 retainer to file a civil suit regarding a contract action on his behalf. The respondent did not return Partridge's phone calls for two and one-half months.

3. Mr. Partridge then encountered the respondent at "an establishment" in Burlington Township. When Mr. Partridge questioned the respondent about the status of the case, the respondent claimed that he was "waiting for a court date." Partridge asked respondent to contact him within a couple of weeks.

4. Two weeks later, Mr. Partridge still had not heard from the respondent and had to telephone his office to obtain information about the progress of the case. The respondent again told Partridge that he was waiting for a court date. Partridge waited two more weeks before again calling the respondent. At that time, the respondent finally admitted to Partridge that he had not filed any action on Partridge's behalf.

5. Partridge demanded the return of both his money and the contract that was to be the subject of the action. The respondent asked for another opportunity to represent Mr. Partridge. Mr. Partridge refused.

6. One week later, on September 9, 1996, after several telephone calls from Mr. Partridge, the respondent returned the contract by placing it in Mr. Partridge's mailbox. However, the respondent did not return the retainer, alleging that he had bills to pay and that he did not know when he would be able to refund Mr. Partridge's money.

7. Thereafter, Mr. Partridge filed a complaint for fee arbitration, to which the respondent failed to answer. The respondent also failed to appear before the fee arbitration committee. In the respondent's absence, the committee determined that the entire fee should be returned. Although the respondent refunded the fee to his client, when the DEC investigator requested a copy of the canceled check, respondent did not comply with the investigator's request. In fact, the respondent failed to reply to any correspondence from the DEC.

8. The respondent violated Colo. RPC 1.3 (neglect); Colo. RPC 1.4(a) (failure to communicate with a client); Colo. RPC 1.16(d) (failure to return client property after termination of representation); Colo. RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

WHEREFORE, the complainant prays at the conclusion hereof.

CLAIM II

[Conduct Prejudicial to the Administration of Justice - Colo. RPC 8.4(d)]

9. The foregoing paragraphs 1 through 8 are incorporated herein by reference.

10. On March 5, 1998, the New Jersey District IIIB Ethics Committee ("DEC") sent the respondent a copy of a complaint by regular and certified mail to 4 Linden Road, Burlington, New Jersey, the respondent's last known address. The certified mail receipt (green card) was returned, apparently signed by the respondent, without a date of delivery. The respondent did not file an answer.

11. On April 18, 1998, the DEC sent the respondent a second letter by regular and certified mail, informing him that, if he did not reply within five days, the matter would be certified to the Board for the imposition of sanctions. The green card from the certified mail was returned indicating delivery on April 18, 1998. The signature appears to be that of the respondent. The respondent did not file an answer to the formal ethics complaint.

12. The respondent violated Colo. RPC 8.4(d) by his failure to cooperate with the New Jersey disciplinary authorities.

CLAIM III

[Neglect - Colo. RPC 1.3; Failure to Surrender Property to Which a Client Was Entitled Upon Termination of Representation - Colo. RPC 1.16(d); Dishonesty and Misrepresentation - Colo. 8.4(c)]

13. The foregoing paragraphs 1 through 12 are incorporated herein.

14. Steven D. Raymond paid respondent a retainer of \$200.00 in May, 1997, for the defense of a municipal court traffic violation.

15. The respondent later told Mr. Raymond that the respondent had contacted the municipal court, but that Mr. Raymond must appear personally to enter a not guilty plea and have his rights explained to him.

16. Mr. Raymond appeared at court and was advised that there was no record of any contact from the respondent.

17. Mr. Raymond later contacted the municipal court and was again advised that there had been no communication by the respondent.

18. Mr. Raymond attempted to reach the respondent by telephone, and left a message terminating his services and demanding a refund of the \$200.00 retainer given to him. Mr. Raymond was subsequently represented by other counsel in the matter in the municipal court.

19. The respondent failed to return the retainer.

20. The respondent's failure to enter a plea on Mr. Raymond's behalf or to enter his appearance on his behalf, and failure to seek discovery, constituted neglect in violation of Colo. RPC 1.3.

21. The respondent's misrepresentations to the client as to his having entered an appearance or plea on the client's behalf constitutes a violation of Colo. RPC 8.4(c).

22. The respondent's failure to return the retainer constituted a violation of Colo. RPC 1.16(d).

23. The respondent's retention of the retainer after performing no work for Mr. Raymond constituted a knowing conversion of the retainer, which is a violation of Colo. RPC 8.4(c).

WHEREFORE, the complainant prays at the conclusion hereof.

CLAIM IV

[Conduction Prejudicial to the Administration of Justice – Colo. RPC 8.4(d)]

24. The foregoing paragraphs 1 through 23 are incorporated herein by reference.

25. The respondent failed to respond to the communications from the New Jersey DEC Secretary.

26. The respondent failed to respond to a written request from the DEC investigator.

27. The respondent stated by telephone on February 17, 1998, that he would refund the retainer, and failed to do so.

28. The respondent's failure to cooperate with the DEC constitutes a violation of Colo. RPC 8.4(d).

WHEREFORE, the complainant prays at the conclusion hereof.

CLAIM V

[Violation of New Jersey Ethics Rules – C.R.C.P. 251.21]

29. The foregoing paragraphs 1 through 28 are incorporated herein by reference.

30. The respondent was disciplined by the Supreme Court of New Jersey and suspended for three months, effective May 1, 1999, and again for another three months, effective August 1, 1999. This discipline resulted from the actions described above. Copies of the disciplinary orders are attached as Exhibits 1 and 2.

31. Pursuant to Colorado attorney discipline case law, the respondent would normally be suspended for a longer period or disbarred for such misconduct.

32. Thus, the complainant hereby gives notice that substantially different discipline is warranted in Colorado from that imposed by New Jersey and will be requested in this matter.

33. The foregoing conduct establishes grounds for discipline as provided in C.R.C.P. 251.5, C.R.C.P. 251.21, and violates Colo. RPC 8.4(a) (violation of the rules of professional conduct).

WHEREFORE, it is prayed that the respondent be found guilty of violations of various rules of conduct, including Colo. RPC 1.3, 1.4(a), 1.16(d), 8.4(a), 8.4(c), 8.4(d), and C.R.C.P. 251.21, which establish grounds for discipline as provided in C.R.C.P. 251.5, and the Colorado Rules of Professional Conduct and that he be appropriately disciplined and assessed the costs of these proceedings.