

A-1

APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2017 CO 101

Supreme Court Case No. 16S A332
Original Proceeding in Discipline
Appeal from Office of the
Presiding Disciplinary Judge 16PDJ031

In the Matter of Philip Kleinsmith

Judgment Affirmed
en banc
October 30, 2017

Attorneys for Complainant-Appellee:
Office of the Attorney Regulation Counsel
Alan C. Obye, Assistant Regulation Counsel
Denver, Colorado

Attorneys for Respondent-Appellant:
Philip M. Kleinsmith, *Pro Se*
Colorado Springs, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court.
JUSTICE EID dissents, and **JUSTICE COATS** joins
in the dissent,

¶1 In this attorney discipline proceeding, respondent
Philip M. Kleinsmith appeals (1) an order of the

Presiding Disciplinary Judge (“PDJ”) finding that Kleinsmith violated Rule 1.15A and Rule 8.4(c) of the Colorado Rules of Professional Conduct, as well as former Rule 1.15(b) of these Rules,¹ by knowingly converting funds belonging to a third party; (2) an order of the Hearing Board that Kleinsmith should be disbarred for these violations; and (3) an order of the Hearing Board denying Kleinsmith’s post-judgment motions. Kleinsmith principally argues that the PDJ erred in finding that he had knowingly converted funds that were intended for a third party. In his view, he could not have converted those funds because they were the property of his firm, not the property of the third party. Kleinsmith also argues that the PDJ’s reading of the Colorado Rules of Professional Conduct violated his constitutional rights to due process and equal protection.

¶2 Because the PDJ and the Hearing Board properly determined that Kleinsmith engaged in knowing conversion and because we perceive no constitutional violations, we affirm the orders being appealed.

I. Facts and Procedural History

¶3 The material facts in this case are undisputed. Kleinsmith was admitted to the Colorado bar in 1967, and at all times pertinent here, he was a solo practitioner with the law firm of Kleinsmith & Associates,

¹ Former Colo. RPC 1.15(b) was repealed and replaced with Colo. RPC 1.15A(b) on June 17, 2014. For consistency with the record, we will refer to the rule as “former Colo. RPC 1.15(b)” or “former Rule 1.15(b).”

PC ("K&A"). K&A represented U.S. Bank in seventy-four real estate foreclosure actions in Idaho and Montana between 2012 and 2014. In the course of this work, K&A retained First American Title Company, LLC and First American Title of Montana, Inc. (collectively, "First American") to provide title services for U.S. Bank in connection with the foreclosure cases.

¶4 As pertinent here, First American billed K&A \$57,338.00 for its title services. K&A, in turn, billed these costs through to U.S. Bank, although its invoices did not specifically reference First American but rather identified the cost of First American's services as "title commitment." U.S. Bank paid K&A the full amount for First American's title services, and Kleinsmith deposited the funds into K&A's operating account. Rather than paying First American the amounts due and received, however, Kleinsmith used the funds to pay operating expenses of his firm.

¶5 First American subsequently filed a lawsuit in Montana against K&A, but not Kleinsmith, for the unpaid invoices and obtained a judgment in the amount of \$55,782.00. Because this judgment was against K&A, and not Kleinsmith, the Montana court ruled that Kleinsmith was not personally liable for it. First American later domesticated the judgment in Colorado and attempted to collect on it. To date, First American has been able to collect only \$1,179.20 from K&A through bank garnishments.

¶6 After First American obtained the Montana judgment, one of its attorneys requested that Attorney

Regulation Counsel investigate Kleinsmith's failure to pay to First American the amount he received from U.S. Bank for First American's services. Attorney Regulation Counsel then filed a Petition for Immediate Suspension, requesting that the PDJ issue an order to show cause why Kleinsmith should not be immediately suspended from the practice of law while disciplinary proceedings were commenced. Several months later, the PDJ issued a report finding reasonable cause to believe that Kleinsmith had caused immediate and substantial private harm by converting funds. The PDJ thus recommended that this court immediately suspend him from the practice of law. This court accepted that recommendation and suspended Kleinsmith, effective June 10, 2016.

¶7 Attorney Regulation Counsel then filed a disciplinary complaint, alleging that Kleinsmith had violated (1) Colo. RPC 1.15A(b) and former Colo. RPC 1.15(b) (providing that upon receiving funds of a client or third person, a lawyer shall promptly deliver to the client or third person any funds that the client or third person is entitled to receive); (2) Colo. RPC 8.4(c) (providing that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and (3) Colo. RPC 8.4(d) (providing that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Kleinsmith responded, denying that he had violated any of the foregoing Rules.

¶8 Shortly thereafter, Kleinsmith filed a motion for summary judgment, seeking the dismissal of the

complaint in its entirety, and Attorney Regulation Counsel filed a response and cross-motion for summary judgment. The PDJ ultimately denied Kleinsmith's motion but granted, in part, Attorney Regulation Counsel's cross-motion, finding as a matter of law that Kleinsmith had violated Colo. RPC 1.15A(b), former Colo. RPC 1.15(b), and Colo. RPC 8.4(c). Attorney Regulation Counsel then moved to dismiss the remaining charge of violating Colo. RPC 8.4(d), the PDJ granted that motion, and the matter proceeded to a sanctions hearing, where the Hearing Board ultimately disbarred Kleinsmith and ordered him to pay restitution to First American.

¶9 Kleinsmith subsequently filed post-judgment motions, which the Hearing Board denied, and he now petitions this court, pursuant to C.R.C.P. 251.27, to review the PDJ and Hearing Board's orders.

II. Analysis

¶10 Kleinsmith contends that the PDJ erroneously concluded that he converted the funds from U.S. Bank because, under his reading of the Colorado Rules of Professional Conduct, the funds from U.S. Bank were the property of K&A, not First American. Kleinsmith further asserts that the PDJ's orders violated his constitutional rights to due process and equal protection. After setting forth the applicable standard of review, we address these issues in turn.

A. Standard of Review

¶11 This court “has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public.” *Colo. Supreme Court Grievance Comm. v. Dist. Court*, 850 P.2d 150, 152 (Colo. 1993); accord *People v. Varallo*, 913 P.2d 1, 3 (Colo. 1996) (per curiam). Pursuant to C.R.C.P. 251.27(b), we will affirm the Hearing Board’s decision unless we determine, based on the record, that the Board’s findings of fact are clearly erroneous or that the form of discipline imposed by the Board (1) bears no relation to the conduct, (2) is manifestly excessive or insufficient in relation to the needs of the public, or (3) is otherwise unreasonable. See *In re Gilbert*, 2015 CO 22, ¶ 14, 346 P.3d 1018, 1021. We review de novo the Board’s conclusions of law. *Id.*

B. Violation of Colo. RPC 8.4(c)

¶12 Kleinsmith first contends that the PDJ erred in concluding that his use of the funds at issue for his own purposes constituted knowing conversion and thus violated Colo. RPC 8.4(c). We are not persuaded.

¶13 Colo. RPC 8.4(c) states, “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” An attorney’s knowing conversion of funds belonging to a client or a third person violates Colo. RPC 8.4(c). See *Varallo*, 913 P.2d at 10-11 (concluding that an attorney’s knowing use of client funds for his personal benefit constituted a knowing misappropriation of those

funds and violated Colo. RPC 8.4(c)); *People v. Finesilver*, 826 P.2d 1256, 1256-57 (Colo. 1992) (concluding that an attorney's conversion of funds paid by clients for services provided by third-party title companies violated Colo. Code of Prof. Resp. DR 1-102(A)(4), the predecessor to Colo. RPC 8.4(c)). The question in this case thus becomes whether Kleinsmith converted the funds at issue.

¶14 Knowing conversion or misappropriation occurs when a lawyer takes money that has been entrusted to him or her by a client or third party, knowing that it is the client or third party's money and that the client or third party has not authorized the taking, regardless of whether the attorney intended to deprive the client or third party of that money permanently. *See Varallo*, 913 P.2d at 10-11; *see also People v. Lavenhar*, 934 P.2d 1355, 1358-59 (Colo. 1997) (noting that a lawyer's misappropriation of funds belonging to a third party violates the predecessor to Colo. RPC 8.4(c) and warrants disbarment, absent extraordinary mitigating factors).

¶15 Here, we agree with the PDJ that Kleinsmith knowingly converted the funds paid by U.S. Bank for First American's benefit. U.S. Bank entrusted funds to Kleinsmith specifically to pay for the title services that were provided by First American for U.S. Bank. Kleinsmith knew that the funds entrusted to him were for First American, and he also knew that neither U.S. Bank nor First American had authorized him to use the funds for his own purposes. The funds belonged to First American, not to Kleinsmith, and therefore Kleinsmith's use of the funds for his own purposes

constituted conversion of those funds. Accordingly, we conclude that the PDJ correctly found that Kleinsmith had violated Colo. RPC 8.4(c). *See Varallo*, 913 P.2d at 10-11; *Finesilver*, 826 P.2d at 1257.

¶16 We are not persuaded otherwise by Kleinsmith's contention that the funds that U.S. Bank paid belonged to K&A and therefore he could not have converted those funds. In support of this argument, Kleinsmith relies on Colo. RPC 1.15A(a) and (b), which describe how attorneys should handle funds received by a law firm.

¶17 Colo. RPC 1.15A(a) provides, "A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B."

¶18 Colo. RPC 1.15A(b), in turn, states, in pertinent part:

Upon receiving funds . . . of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds . . . that the client or third person is entitled to receive. . . .²

² Colo. RPC 1.15A(b), the successor to former Colo. RPC 1.15(b), is not materially different. Instead of stating, "funds . . . in which a client or third person has an interest . . .," it now refers to "funds . . . of a client or third person. . . ."

¶19 Kleinsmith argues that these Rules, when read together with Colo. RPC 1.15B, establish three types of funds received by a law firm: (1) “pure trust funds,” which Kleinsmith identifies as property of a client or third person that is entrusted to the lawyer’s care; (2) “unincurred expense trust funds,” which Kleinsmith identifies as advance payment of fees that have not been earned or of expenses that have not been incurred; and (3) “operating funds,” which Kleinsmith identifies as all funds that a firm receives for legal services. Kleinsmith posits that under the Rules, “pure trust funds” and “unincurred expense trust funds” must be placed in a trust account, whereas “operating funds” may properly be placed in a firm’s operating account and may be used freely by the firm. According to Kleinsmith, because payments of expenses that have been *incurred* (like the funds at issue here) are neither “pure trust funds” nor “*unincurred* expense trust funds,” they must be “operating funds.” Thus, he contends that the monies at issue were necessarily property of the firm, and therefore, he could not possibly have converted them.

¶20 Like the PDJ, we reject Kleinsmith’s interpretation of the foregoing rules. As the PDJ observed, even if the rules permitted Kleinsmith to place the funds he received from U.S. Bank temporarily in his operating account, nothing in the applicable rules allowed him to treat those funds as his own. The mere fact that the applicable rules do not require funds like those at issue to be kept in a trust account does not mean, as Kleinsmith suggests, that a lawyer may use such funds

for his or her own purposes. To the contrary, regardless of where these funds are deposited, a lawyer knowingly converts or misappropriates them when he or she takes them, knowing that they were not intended for him or her and that the taking was unauthorized. See *Varallo*, 913 P.2d at 10-11; *Finesilver*, 826 P.2d at 1256-57; see also *Lavenhar*, 934 P.2d at 1359 (concluding that an attorney improperly converted funds belonging to a third person when the lawyer received money that was clearly intended for another but used some of that money for his personal benefit).

¶21 The plain language of the rules on which Kleinsmith relies supports this determination.

¶22 Specifically, as noted above, Colo. RPC 1.15A(b) states, in pertinent part:

Upon receiving funds . . . of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds . . . that the client or third person is entitled to receive. . . .

¶23 Here, First American unquestionably was entitled to receive the funds from U.S. Bank, and thus Kleinsmith had an obligation to turn over those funds promptly to First American. When he did not do so and instead used the funds for his own purposes, he knowingly converted those funds, thereby violating Colo. RPC 8.4(c). See *Varallo*, 913 P.2d at 10-11; *Finesilver*, 826 P.2d at 1257.

¶24 We also are unpersuaded by Kleinsmith's assertions that (1) because First American did not join U.S. Bank in its lawsuit to recover the funds from K&A, First American must not have believed that U.S. Bank was liable for the funds and (2) U.S. Bank therefore did not intend for Kleinsmith to transfer the funds paid by it to First American. We do not see how the second point follows from the first. Indeed, the more logical conclusion from Kleinsmith's premise is that First American deemed K&A, and not U.S. Bank, responsible for its loss, which is fully consistent with our conclusion that K&A wrongfully converted funds belonging to First American.

¶25 Our conclusion mirrors our decisions in *Finesilver* and a number of cases that followed it.

¶26 In *Finesilver*, 826 P.2d at 1256-57, a lawyer was found to have violated the predecessor of Colo. RPC 8.4(c) when he converted approximately \$200,000 in funds that had been paid by the lawyer's clients for services provided by title companies in connection with foreclosures handled by the lawyer. Affirming an order of disbarment, we concluded that the Hearing Board had correctly found that the lawyer committed knowing conversion and violated the predecessor of Colo. RPC 8.4(c) when he misappropriated "monies paid by clients of the law firm for services provided by [title companies] in the course of foreclosures handled by the law firm." *Id.*

¶27 Similarly, in *Lavenhar*, 934 P.2d at 1361, we affirmed a decision to disbar an attorney for knowing

conversion in violation of Rule 8.4(c)'s predecessor. In that case, the attorney received a check from his landlord that was intended for a contractor working in the same building as the attorney. Instead of inquiring as to why he received the check, which the attorney knew did not belong to him, he improperly used the funds to pay certain personal and law firm expenses. *Id.* at 1358.

¶28 And in *In re Bilderback*, 971 P.2d 1061, 1063-64 (Colo. 1999), we affirmed a finding that an attorney had violated Colo. RPC 8.4(c) and former Colo. RPC 1.15(b) after he collected settlement funds on behalf of an injured client but then did not honor a lien on such funds asserted by the client's doctor to cover services that the doctor had provided to the client.

¶29 Kleinsmith attempts to distinguish *Finesilver*, *Lavenhar*, and *Bilderback* by arguing that the funds at issue in those cases were "pure trust funds" or "unincurred expense funds." None of those cases, however, relied on the distinctions between types of funds that Kleinsmith proposes in this case. Instead, they relied on the attorney's conduct in using for personal purposes funds that the attorney had received from third persons but that were not intended for the attorney. This case presents that precise scenario.

¶30 For these reasons, we conclude that Kleinsmith's actions constituted knowing conversion. Accordingly, we agree with the PDJ's finding that Kleinsmith violated Colo. RPC 8.4(c) here.

C. Constitutional Claims

¶31 Kleinsmith next argues that the PDJ's interpretation violated his constitutional rights to due process (because, he says, the types of funds contemplated by the applicable Rules, and the proper uses of such funds, are unconstitutionally vague) and to equal protection. We address and reject each of these assertions in turn.

¶32 First, Kleinsmith contends that the Rules do not make clear which funds a firm must treat as "trust funds" (i.e., property of a client or third party not to be used by the lawyer for his own purposes) and which funds a firm can treat as "operating funds" (i.e., property of the firm that can be used however the lawyer sees fit). He asserts that the PDJ treated all funds received by a law firm as "trust funds," rendering the definitions in the Rules contradictory and vague and thus violating his right to due process.

¶33 Because disciplinary rules are promulgated for the purpose of guiding lawyers in their professional conduct, "the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer." *See People v. Morley*, 725 P.2d 510, 516 (Colo. 1986).

¶34 Here, we conclude that Rule 8.4(c), Rule 1.15A, and former Rule 1.15(b) are clear and that a licensed lawyer can easily understand that taking for his or her own use funds that a client has paid the lawyer to cover the cost of specific services provided by a third party for the client's benefit constitutes knowing conversion

and violates Colo. RPC 8.4(c). Indeed, to the extent that Kleinsmith identifies any confusion, he has created that confusion through his own misreading of Colo. RPC 1.15A(a) and (b). Even if Kleinsmith's interpretation of these Rules were somehow plausible, however, like a statute, a rule "is not impermissibly vague simply because it can be given two different interpretations." *People v. Young*, 694 P.2d 841, 842 (Colo. 1985).

¶35 Second, Kleinsmith contends that the PDJ's decision violates his right to equal protection because the decision subjects him – as an agent of a law corporation – to a penalty to which non-lawyer agents of other corporations would not be subject.

¶36 Kleinsmith has not asserted that he is a member of a suspect class or that the proceedings before the PDJ interfered with his exercise of a fundamental right. Accordingly, for Kleinsmith to establish an equal protection violation, he must show that any differing treatment that he experienced did not rationally further a legitimate state interest. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14 (1976).

¶37 Here, Colorado has an indisputable interest in regulating attorneys, as opposed to laypeople, in order to protect the public. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (recognizing that states have a "compelling interest in the practice of professions within their boundaries" and that states therefore have "broad power to establish standards for licensing practitioners and regulating the practice of professions"). Moreover, enforcing the applicable Rules of

Professional Conduct is, on its face, rationally related to achieving this legitimate state interest.

¶38 Accordingly, we conclude that Kleinsmith has not established a violation of any of his constitutional rights here.

III.V. Conclusion

¶39 For these reasons, we conclude that the PDJ properly found that Kleinsmith had converted funds belonging to First American and that in doing so, he violated Colo. RPC 8.4(c), Colo. RPC 1.15A, and former Colo. RPC 1.15(b). Accordingly, we affirm the orders of the PDJ and the Hearing Board, including the order disbarring Kleinsmith from the practice of law.

JUSTICE EID dissents, and **JUSTICE COATS** joins in the dissent.

JUSTICE EID, dissenting.

¶40 Today the majority upholds the order of the Presiding Disciplinary Judge finding that respondent Kleinsmith knowingly converted funds belonging to a third party and therefore violated Rules 1.15A and 8.4(c) of the Colorado Rules of Professional Conduct. There is no question that Kleinsmith's firm owed First American for the title services it performed. But the majority never truly grapples with the difficult issue presented in this case – namely, whether Kleinsmith's failure to pay First American should be treated as

failure to pay a debt, which plainly occurred here, or a knowing conversion meriting disbarment. For this reason, I respectfully dissent from its opinion.

¶41 The majority concludes that Kleinsmith's conduct constituted knowing conversion because "[the bank] entrusted funds to Kleinsmith specifically to pay for the title services that were provided by First American for [the bank]." Maj op. ¶ 15. Those funds were "for First American" and Kleinsmith was not authorized "to use the funds for his own purposes." *Id.* Ultimately, the majority reasons that Kleinsmith converted those funds because "[t]he funds belonged to First American, not to Kleinsmith[.]" *Id.*

¶42 The majority's description of Kleinsmith's conduct suggests the funds here were of a special character, or that there was a special relationship between the bank and First American, but that is simply not the case. The bank never "entrusted" funds specifically to Kleinsmith in the legal sense of the term. There was no trust or fiduciary relationship between the bank and First American. Indeed, there was no relationship at all between the two. Instead, Kleinsmith's firm hired First American to conduct title services. The firm billed the bank for "title commitment" services, but did not mention First American. Maj. op. ¶ 4. Thus, the bank could not have "entrusted funds" for First American, nor could there have been an entrustment of "specific" funds, or "specific" direction to pay the funds to First American. Similarly, the funds did not "belong" to First American in any legal sense; instead,

Kleinsmith's firm owed a debt to First American, as the Montana judgment concluded. *Id.* at ¶ 5.

¶43 The majority's conclusion that Kleinsmith's "conversion" of funds was "knowing" fares no better. As the majority recognizes, a "knowing" conversion requires the lawyer to know that the funds were someone else's. *Id.* at ¶ 14 (citing *People v. Varallo*, 913 P.2d 1, 10-11 (Colo. 1996)). Kleinsmith had no intention to "misappropriate" or "convert" the funds because he believed that he was entitled to use the funds in question to cover operating expenses of the firm. *Id.* at ¶ 4. His intention was to prioritize the payment of his ailing firm's expenses, not to defraud either the bank or First American. The cases relied upon by the majority are thus distinguishable, as they involve personal use of funds, multiple violations, or both. *See, e.g., In re Bild-erback*, 971 P.2d 1061, 1063-64 (Colo. 1999) (finding that respondent committed multiple acts of misconduct, including "effectively abandoning]" his clients as well as refusing to remit settlement funds in accordance with his client's wishes); *People v. Lavenhar*, 934 P.2d 1355, 1358-59 (Colo. 1997) (finding that respondent committed multiple violations of the Rules of Professional Conduct, including "seriously neglect[ing] a number of client matters," as well as converting a check he received by mistake and using those funds to purchase appliances); *People v. Finesilver*, 826 P.2d 1256, 1256-57 (Colo. 1992) (finding that respondent converted funds from "a number" of clients and paid himself sizable salaries from those converted funds). While Kleinsmith's conduct should not be encouraged,

it does not, in my view, merit disbarment, the “most severe sanction which we have the authority to impose.” *People v. Brown*, 726 P.2d 638, 641 (Colo. 1986).

¶44 Presumably the majority attempts to give the funds and the relationship at issue here a special character because it hopes to separate out this case from one involving an ordinary debt. But because that attempt is unsuccessful, in my view, the majority gives virtually no guidance to practitioners regarding when they are potentially engaging in misconduct. Indeed, the opinion today simply creates a new category of funds that are “entrusted” to the attorney and that “belong” to the service provider to whom the debt is owed, but have no special character under the law. Because today’s opinion muddies, rather than clarifies, the waters of how funds should be handled by practitioners, I respectfully dissent.

I am authorized to state that JUSTICE COATS joins in this dissent.

APPENDIX B

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: PHILIP M. KLEINSMITH	Case Number: 16PDJ031
OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(b)	

Philip M. Kleinsmith ("Respondent"), a solo practitioner, represented a bank in seventy-four real estate foreclosure actions in Idaho and Montana between 2012 and 2014. Respondent's firm hired a title company to provide services for these foreclosure cases. The title company charged Respondent's firm just over \$55,000.00. Respondent's firm, in turn, billed its bank client for the title services. Although Respondent's firm received payment from its client for those services, Respondent used the funds to pay other expenses of his law firm rather than remitting the funds to the title company. Respondent's conversion of funds that should

have been paid to the title company warrants disbarment.

I. PROCEDURAL HISTORY

On April 1, 2016, Alan C. Obye, Office of Attorney Regulation Counsel (“the People”), filed a petition with Presiding Disciplinary Judge William R. Lucero (“the PDJ”), seeking Respondent’s immediate suspension under C.R.C.P. 251.8. After holding a hearing attended by both parties, the PDJ issued a report to the Colorado Supreme Court on May 31, 2016, finding reasonable cause to believe that Respondent had caused immediate and substantial private harm by converting funds, and recommending that Respondent be immediately suspended from the practice of law. The Colorado Supreme Court accepted that recommendation and immediately suspended Respondent on June 10, 2016.

The People then filed a complaint on July 1, 2016, alleging that Respondent violated Colo. RPC 1.15A(b) and Colo. RPC 1.15(b) (2008) (a lawyer shall promptly deliver to the client or third person any funds that the client or third person is entitled to receive);¹ Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving fraud, deceit, misrepresentation, or dishonesty); and Colo. RPC 8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

¹ For purposes of simplicity, the PDJ generally refers below to Colo. RPC 1.15A(b) and Colo. RPC 1.15(b) (2008) simply as “Colo. RPC 1.15(A)(b),” since the language of the two versions is essentially equivalent.

Respondent answered on July 21, 2016, denying that he violated any Rules of Professional Conduct.

On August 1, 2016, Respondent moved for summary judgment. One week later, the People filed a combined response and cross-motion for summary judgment. After considering Respondent's combined reply and response, the PDJ issued an "Order Denying Respondent's Motion for Summary Judgment and Granting in Part Complainant's Cross Motion for Summary Judgment" on September 16, 2016. In that order, the PDJ granted the People's motion for summary judgment as to Claim I of the complaint, which alleged a violation of Colo. RPC 1.15A(b), and Claim II of the complaint, which alleged a violation of Colo. RPC 8.4(c). The PDJ did not find as a matter of law, however, that Respondent had violated Colo. RPC 8.4(d), as charged in Claim III of the complaint.

By order of September 26, 2016, the PDJ granted the People's motion to dismiss Claim III of the complaint. The PDJ also converted the hearing – which had earlier been continued from September 27 to October 25 at the People's request – to a hearing on the sanctions. On October 3, 2016, the PDJ denied Respondent's motion to reconsider the summary judgment order.

Both parties filed hearing briefs in advance of the October 25 hearing. In his brief, Respondent acknowledged the date of the October 25 hearing, but stated merely that he has been disciplined only once before, that he planned to appeal the PDJ's summary

judgment order, and that he did not intend to appear at the hearing unless ordered to do so.

The PDJ presided at the October hearing, along with Hearing Board members Marcy G. Glenn, and James X. Quinn, both lawyers, Obye represented the People, and Respondent did not appear. During the hearing, the Hearing Board considered the People's exhibits 1 and 2 and the testimony of Quinn Stuffelbeam, which he offered by telephone in accordance with an earlier order issued by the PDJ. On October 26, 2016, the People filed a "Status Report Re: Amount of Restitution Owed," to which Respondent did not respond.

II. FACTS AND RULE VIOLATIONS

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 3, 1967, under attorney registration number 01063. He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.²

Summary Judgment Order

The Hearing Board briefly reviews the findings and conclusions in the PDJ's summary judgment order.

Respondent was a solo practitioner and the sole shareholder at the law firm of Kleinsmith & Associates, PC ("K&A"). K&A represented U.S. Bank in

² See C.R.C.P. 251.1(b).

seventy-four real estate foreclosure actions in Idaho and Montana between 2012 and 2014. In the course of this representation, K&A retained First American Title Company, LLC, and First American Title of Montana, Inc. (jointly, "First American") to provide title services for these foreclosure cases. First American invoiced K&A a total of \$57,338.00 for those services.

K&A billed U.S. Bank for First American's services. These "title services" were identified in K&A's invoices as "title commitment," with no specific reference to First American. U.S. Bank paid K&A for First American's services. K&A failed to pay First American, however. Instead, Respondent placed the funds provided by U.S. Bank into the firm's operating account and used those funds to pay other firm expenses.

First American obtained a judgment against K&A in Montana for its unpaid invoices in the amount of \$55,782.00, and it domesticated the judgment in Colorado.³ First American has been able to collect just \$1,179.20 from Respondent through bank garnishments.

The PDJ concluded that Respondent violated Colo. RPC 1.15A(b), which provides that a lawyer shall promptly deliver to a third person any funds that the third person is entitled to receive. Respondent transgressed this rule by failing to promptly transmit to First American the funds he received from U.S. Bank –

³ The judgment was against K&A, not Respondent himself, and the Montana court ruled that Respondent was not personally liable for the judgment.

funds that were intended to pay for title services that First American had provided.

Next, the PDJ determined that Respondent's decision to exercise dominion over these funds, using them to pay other firm expenses, also amounted to knowing conversion under Colo. RPC 8.4(c), which proscribes conduct involving dishonesty. In that ruling, the PDJ noted that knowing conversion occurs when a lawyer takes another person's money that has been entrusted to the lawyer, knowing that it is the other person's money and knowing that the person has not authorized the taking.⁴ The PDJ noted that in several cases involving fact patterns similar to this case, the Colorado Supreme Court, cases has held that an attorney's unauthorized use of funds to which another party is entitled amounts to knowing conversion under Colo. RPC 8.4(c). For example, in *People v. Finesilver*, the Colorado Supreme Court concluded that an attorney committed knowing conversion when he misappropriated "monies paid by clients of the law firm for services provided by [a title company] in the course of foreclosures handled by the law firm."⁵

⁴ *People v. Varallo*, 913 P.2d 1, 10-11 (Colo. 1996); see also *People v. Lavenhar*, 934 P.2d 1355, 1358 (Colo. 1997) (indicating that conversion of third-party funds, like conversion of client funds, amounts to a violation of the predecessor to Colo. RPC 8.4(c)).

⁵ 826 P.2d 1256, 1256-57 (Colo. 1992); see also *In re Bilderback*, 971 P.2d 1061, 1063 (Colo. 1999); *People v. Lavenhar*, 934 P.2d at 1358; *Matter of Krause*, 676 A.2d 1340, 1342 (R.I. 1996) (ruling that a lawyer's failure to promptly pay funds owed to clients and third parties violated Rule 8.4(c)).

The PDJ concluded that the elements of a knowing conversion were present in the instant case: U.S. Bank provided funds to Respondent for title services; Respondent knew that First American was entitled to that money for services it had performed in connection with the U.S. Bank representation; and Respondent knew that neither U.S. Bank nor First American had authorized him to use those funds for any purpose other than paying for title services.⁶ In short, the PDJ found, Respondent had no valid basis for treating the funds as his own.

Testimony and Evidence at the Disciplinary Hearing

Quinn Stufflebeam, the CEO of Title Financial Corporation – First American’s parent company – testified at the disciplinary hearing about Respondent’s conduct in this matter. According to Stufflebeam, when a lawyer requests title services associated with a foreclosure, First American provides a title guaranty at the outset of the foreclosure process.⁷ First American fronts its own costs for the work, as well as an underwriter premium split, and generally receives payment from the lawyer at the end of the foreclosure.

When Respondent did not pay First American’s bill, Stufflebeam said, First American hired outside

⁶ 913 P.2d at 10-11.

⁷ See also Ex. 1 (letter to the People dated September 20, 2016, from Phil E. DeAngeli, General Counsel for Title Financial Corporation).

counsel to seek recovery of the funds.⁸ First American's in-house counsel and bookkeeper also spent time in this recovery effort. Stufflebeam estimates that his company's expenditures for outside counsel fees and additional in-house work totalled between \$5,000.00 and \$10,000.00. When asked his opinion about the appropriate sanction, Stufflebeam expressed some hope that First American could collect the money it is owed but also said that he does not want Respondent to have an opportunity to cause financial harm to others.

Shortly after the disciplinary hearing, Stufflebeam confirmed to the People that, taking into consideration receipt of one garnishment check in the amount of \$1,179.20, Respondent currently owes First American \$56,238.80.⁹

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA Standards")¹⁰ and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.¹¹ When imposing a sanction after a finding of lawyer misconduct, a hearing board must consider the duty violated, the lawyer's

⁸ See also Ex. 1 (stating that "First American has spent substantial money attempting to collect the money owed by [Respondent]").

⁹ "Status Report Re: Amount of Restitution Owed" at 1.

¹⁰ Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2015).

¹¹ See *In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

mental state, and the actual or potential injury caused by the lawyer's misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

ABA Standard 3.0 – Duty, Mental State, and Injury

Duty: Respondent violated his duties to the public by failing to maintain his personal integrity and refusing to pay for services rendered to him.¹²

Mental State: In his order granting summary judgment, the PDJ concluded that Respondent acted with a knowing state of mind. The PDJ's order, however, does not preclude the Hearing Board from finding that Respondent acted not only knowingly but intentionally, and we do so here.¹³ Whereas knowledge is the conscious awareness of the nature of the conduct but without the conscious objective or purpose to accomplish a particular result, intent is defined as the conscious objective or purpose to accomplish a particular result.¹⁴ The fact that Respondent used the funds from U.S. Bank to pay his own firm's expenses strongly supports the inference that Respondent's conversion was intentional. So does the fact that a judgment was

¹² See ABA Standard 5.0.

¹³ Although the People did not assert in their complaint or during the hearing that Respondent acted intentionally, the Hearing Board is aware of no legal requirement that the People do so. Rather, the ABA Standards and Colorado Supreme Court case law direct the Hearing Board to make its own independent analysis of Respondent's mental state.

¹⁴ ABA Standards § IV, Definitions.

entered against Respondent's firm yet he still failed to pay the funds he owed.

Injury: Respondent caused First American substantial financial injury by depriving the company of more than \$55,000.00 that it was owed and by forcing the company to allocate resources to the collection effort. In turn, judicial resources were consumed in that collection proceeding. Respondent's conversion also undermined public confidence in the bar because the public expects that lawyers will turn over funds to their rightful owners.

ABA Standards 4.0-7.0 – Presumptive Sanction

The presumptive sanction in this case is established by ABA *Standard* 5.11(b), which states that disbarment is generally warranted when a lawyer engages in intentional but noncriminal conduct involving dishonesty that seriously adversely reflects on his or her fitness to practice law.¹⁵ We conclude that Respondent's conduct in this case does seriously

¹⁵ The Hearing Board notes that the People urged application of ABA *Standard* 4.11, which provides that disbarment is generally appropriate when a lawyer knowingly converts client property and causes the client injury or potential injury. Because this standard specifically applies to conversion of funds belonging to clients, rather than third parties, and because the Hearing Board is aware of just one Colorado Supreme Court case applying ABA *Standard* 4.11 to misappropriation of third party funds, see *People v. Motsenbocker*, 926 P.2d 576, 577 (Colo. 1996), the Hearing Board finds application of ABA *Standard* 5.11 more fitting here. Under application of either standard, however, the result in this case would be the same.

adversely reflect on his fitness as a lawyer because he acted dishonestly, breaching the trust a third party had placed in him to pay for services rendered.¹⁶

**ABA Standard 9.0 –
Aggravating and Mitigating Factors**

Aggravating circumstances include any considerations that may justify an increase in the degree of the sanction to be imposed, while mitigating circumstances include any factors that may warrant a reduction in the severity of the sanction.¹⁷ Respondent has not presented evidence of mitigating factors, nor is the Hearing Board aware of a basis for applying any such factors. We do consider the following six factors in aggravation:

Prior Disciplinary Offenses – 9.22(a): In January 2013, the PDJ publicly censured Respondent in accordance with a stipulation filed by the People and Respondent.¹⁸ This sanction was premised on a disciplinary order entered in Arizona in 2012.¹⁹ Based on a stipulation filed in that matter, the Presiding Disciplinary Judge of the Supreme Court of Arizona ruled that Respondent filed improper arbitration certificates in nine

¹⁶ See, e.g., *In re Thompson*, 991 P.2d 820, 823 (Colo. 1999) (disbarring an attorney who failed to turn over to his law firm funds he owed the firm); Colo. RPC 8.4 cmt. 2 (noting that offenses involving dishonesty or breach of trust indicate a lack of fitness to practice law).

¹⁷ See ABA Standards 9.21 & 9.31.

¹⁸ Ex. 2.

¹⁹ Ex. 2.

separate court matters; failed to appear for two hearings in Wisconsin and then billed the client for corrective motions to remedy his failures to appear; made errors in preparing a real estate notice of sale in a Florida matter; and failed to reasonably communicate with a client before filing a motion to withdraw from representation.²⁰ This conduct violated seven of Arizona's rules of conduct.²¹ Respondent's prior discipline is relatively recent and involved multiple types of misconduct, and we conclude that this discipline warrants consideration in aggravation here.²²

Dishonest or Selfish Motive – 9.22(b): Respondent elected to keep for his own benefit funds that rightfully belonged to a third party. By definition, Respondent's conduct was selfish.

Pattern of Misconduct – 9.22(g): Respondent failed to pay First American for services rendered in seventy-four separate foreclosure matters over a multi-year period.

Refusal to Acknowledge Wrongful Nature of Conduct 9.22(g): In multiple filings throughout this proceeding, Respondent has steadfastly refused to acknowledge that he did anything wrong by keeping the funds owed to First American. He has persisted in this viewpoint

²⁰ Ex. 2.

²¹ Ex. 2. The Third Judicial District Court in and for Salt Lake County, State of Utah, then publicly reprimanded Respondent as an order of reciprocal discipline based on the sanction issued in Arizona. Ex. 2.

²² See *In re Jones*, 951 P.2d 149, 152 (Or. 1997).

even after he was immediately suspended and after the PDJ referred him to Colorado Supreme Court case law that clearly indicates his conduct amounts to knowing conversion. Because Respondent has insisted on closing his eyes to applicable law, we apply this factor in aggravation.

Substantial Experience in the Practice of Law – 9.22(i): Respondent has practiced law for almost a half century. He should have been well acquainted with the laws governing handling of third-party funds.

Indifference to Making Restitution – 9.22(j): Save for one small garnishment, which counts neither as aggravation nor as mitigation under ABA *Standard* 9.4(a), Respondent has failed to repay the funds he owes to First American.

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 mitigation factors.²³ We are mindful that “individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different

²³ See *In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *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).

cases.”²⁴ 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.

Time and again, the Colorado Supreme Court has held that knowing or intentional misappropriation of funds from clients or other parties warrants disbarment, except where substantial mitigating factors are present.²⁵ Respondent has presented no mitigating evidence that would justify departure from the presumptive sanction and from guiding Colorado case law. The Hearing Board thus concludes that Respondent should be disbarred.

IV. CONCLUSION

The Rules of Professional Conduct impose upon attorneys special duties to safeguard funds and to promptly turn those funds over to their rightful

²⁴ *In re Attorney F.*, 285 P.3d at 327 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).

²⁵ See, e.g., *Lavenhar*, 934 P.2d at 1359 (imposing disbarment for multiple instances of misconduct, the most serious of which was knowing conversion of third-party funds, and stating that “[w]e have repeatedly held that a lawyer’s knowing misappropriation of funds, whether belonging to a client or third party, warrants disbarment except in the presence of extraordinary factors of mitigation”); *Motsenbocker*, 926 P.2d at 577 (disbarring an attorney who knowingly misappropriated bar association funds); cf. *People v. Lujan*, 890 P.2d 109, 110-12 (Colo. 1995) (stating that disbarment was the presumptive sanction for a lawyer’s theft from her law firm but electing to instead suspend the lawyer for three years in light of overwhelming mitigating evidence).

owners. Respondent failed in his duties, electing to keep tens of thousands of dollars for his own benefit rather than remitting them to the title company that had performed extensive work at his direction. The presumptive sanction of disbarment is warranted for this misconduct.

V. ORDER

The Hearing Board therefore **ORDERS**:

1. **PHILIP M. KLEINSMITH**, attorney registration number 01063, is **DISBARRED FROM THE PRACTICE OF LAW**. The disbarment will take effect upon issuance of an "Order and Notice of Disbarment."²⁶
2. Respondent **SHALL** pay **RESTITUTION** in the amount of \$56,238.80 to First American Title Company of Montana on or before **January 13, 2017**.²⁷ Interest shall accrue from today's date at the rate of eight percent per annum, compounded annually.
3. To the extent applicable, Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c), concerning winding up of affairs, notice to parties in

²⁶ In general, an order and notice of sanction will issue thirty-five days after a decision is entered pursuant to C.R.C.P. 251.19(b) or (c). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

²⁷ See "Status Report Re: Amount of Restitution Owed" at 1.

pending matters, and notice to parties in litigation.

4. Within fourteen days of issuance of the "Order and Notice of Disbarment," Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the PDJ setting forth pending matters and attesting, *inter alia*, to notification of clients and other jurisdictions where the attorney is licensed.
5. The parties **MUST** file any posthearing motion or application for stay pending appeal with the Hearing Board **on or before December 9, 2016**. Any response thereto **MUST** be filed within seven days.
6. Respondent **SHALL** pay the costs of these proceedings. The People **SHALL** submit a statement of costs **on or before December 2, 2016**. Any response thereto **MUST** be filed within seven days.

DATED THIS 18th DAY OF November, 2016.

/s/ William R. Lucero
WILLIAM R. LUCERO
RESIDING DISCIPLINARY
JUDGE

/s/ Marcy G. Glenn
MARCY G. GLENN
HEARING BOARD MEMBER

/s/ James X. Quinn
JAMES X. QUINN
HEARING BOARD MEMBER

B-17

Copies to:

Alan C. Obye
Office of Attorney
Regulation Counsel

Via Email
a.obye@csc.state.co.us.

Philip M. Kleinsmith
Respondent

Via Email
klein@kleinsmith.law.com

Marcy G. Glenn
James X. Quinn
Hearing Board Members

Via Email
Via Email

Christopher T. Ryan
Colorado Supreme Court

Via Hand Delivery

APPENDIX C

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: PHILIP M. KLEINSMITH	Case Number: 16PDJ031
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART COMPLAINANT'S CROSS MOTION FOR SUMMARY JUDGMENT	

Before the Presiding Disciplinary Judge ("the Court") are the following filings: "Respondent's Motion for Summary Judgment Dismissing Petitioner's Complaint" filed by Philip M. Kleinsmith ("Respondent") on August 1, 2016; "Complainant's Response to Respondent's Motion for Summary Judgment and Complainant's Cross Motion for Summary Judgment" filed by Alan C. Obye, Office of Attorney Regulation Counsel ("the People"), on August 8, 2016; and "Respondent's: (1) Reply to Petitioner's Response to Respondent's

Summary Judgment Motion, and (2) Response to Petitioner's Summary Judgment Motion" filed on August 23, 2016.

I. BACKGROUND

The People filed a "Petition for Immediate Suspension Pursuant to C.R.C.P. 251.8" on April 1, 2016. After the Court's issuance of an order to show cause, Respondent submitted a response, the People filed a reply, and the Court held a hearing on May 23, 2016, which Obye and Respondent both attended. On May 31, 2016, the Court issued a "Report Setting Forth Findings of Fact and Recommendation of Immediate Suspension Under C.R.C.P. 251.8(b)(2)." The Court found reasonable cause to believe that Respondent had caused immediate and substantial private harm by converting funds, and the Court therefore recommended that the Colorado Supreme Court immediately suspend Respondent from the practice of law. The Colorado Supreme Court accepted that recommendation and immediately suspended Respondent on June 10, 2016.

The People then filed a complaint on July 1, 2016, alleging that Respondent violated Colo. RPC 1.15A(b) and Colo. RPC 1.15(b) (2008) (a lawyer shall promptly deliver to the client or third person any funds that the client or third person is entitled to receive);¹ Colo. RPC

¹ For purposes of simplicity, the Court generally refers here to Colo. RPC 1.151(b) and Colo. RPC 1.15(b) (2008) simply as

8.4(c) (a lawyer shall not engage in conduct involving fraud, deceit, misrepresentation, or dishonesty); and Colo. RPC 8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). Respondent answered on July 21, 2016, denying that he violated any Rules of Professional Conduct.

In his pending motion, Respondent seeks dismissal of all claims alleged in the complaint. The People oppose that request and ask for summary judgment in their favor on all claims.

II. LEGAL STANDARDS

C.R.C.P. 56(c) provides that summary judgment is appropriate when the pleadings, affidavits, depositions, or admissions show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² Summary judgment permits the parties to pierce the formal allegations of the pleadings and save the time and expense involved in a trial when, as a matter of law and based on undisputed facts, one party could not prevail.³

“Colo. RPC 1.15(A)(b),” since the language of the two versions is essentially equivalent.

² See *Civil Serv. Comm’n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991); *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981).

³ *Roberts v. Am. Family Mut. Ins.*, 144 P3d 546, 548 (Colo. 2006); *Mt. Emmons Mining Co. v. Town of Crested-Butte*, 690 P.2d 231, 238 (Colo. 1984); *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598, 603 (Colo. App. 2004).

The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party.⁴ A material fact is one that will affect the outcome of the case.⁵ This burden is satisfied by demonstrating that there is an absence of evidence in the record to support the nonmoving party's case.⁶ Once the moving party meets the initial burden, the burden shifts to the nonmoving party to establish that there is a triable Issue of fact.⁷ The nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the undisputed facts, with all doubts resolved against the moving party.⁸

III. UNDISPUTED MATERIAL FACTS

As an initial matter, the Court notes that Respondent's response to the People's cross motion for summary judgment does not address the People's statement of material facts as required by Section V of the Court's scheduling order.⁹ With limited exceptions,

⁴ See *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987).

⁵ *Dominguez Reservoir Corp. v. Fell*, 854 P.2d 791, 795 (Colo. 1993).

⁶ *Cont'l Airlines*, 731 P.2d at 712.

⁷ C.R.C.P. 56(e); *Cont'l Airlines*, 731 P.2d at 713.

⁸ *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999).

⁹ See Am. Scheduling Order at 8 (Aug. 3, 2016) ("A party opposing a motion for summary judgment shall provide in its brief a "Response to Movant's Material Facts," admitting or denying the material facts asserted by the movant. Those admissions and denials **shall be made in paragraphs numbered to**

then, the Court's synopsis of undisputed material facts below treats as admitted the People's statements of material fact, where those statements are supported by exhibits and admissions.

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 3, 1967, under attorney registration number 01063.¹⁰ He is thus subject to the Court's jurisdiction in this proceeding.¹¹

Respondent was a solo practitioner and the sole shareholder at the law firm of Kleinsmith & Associates, PC ("K&A").¹² K&A represented U.S. Bank in seventy-four real estate foreclosure actions in Idaho and Montana between 2012 and 2014.¹³

In the course of this representation, K&A retained First American Title Company, LLC, and First American Title of Montana, Inc. (collectively, "First American") to provide title services for these foreclosure

correspond to the movant's paragraph numbering."). The Court recognizes that Respondent does – though not in appropriately numbered paragraphs – deny the People's allegation that he was a solo practitioner at Kleinsmith & Associates, PC "if its purpose is to establish that Respondent had or has personal liability for the Judgment entered in the Montana Case & Judgment," and he contests the allegation that "there was an agreement between U.S. Bank and The Firm that The Firm had a duty to so use the funds." Reply & Resp. at 2 ¶¶ 4-5.

¹⁰ Mot. ¶ 1; Resp. at 2 ¶ 1.

¹¹ Mot. ¶ 2; Resp. at 2 ¶ 2.

¹² Resp. at 3 ¶ 1; Resp. Ex. 1 at 11:18-25.

¹³ Mot. ¶ 5; Resp. at 2 ¶ 5.

cases.¹⁴ First American provided title services to K&A between 2012 and 2014 with respect to the foreclosure of numerous properties in Montana and Idaho.¹⁵ First American invoiced K&A a total of \$57,338.00 for those services.¹⁶

K&A billed U.S. Bank for the costs of First American's services.¹⁷ The "title services" billed by K&A to U.S. Bank were identified in K&A's invoices as "title commitment," with no specific reference to First American.¹⁸ U.S. Bank paid K&A for First American's services.¹⁹ K&A failed to pay First American for its services.²⁰ Respondent placed the funds provided by U.S. Bank into the firm's operating account.²¹ Respondent used those funds to pay other expenses of the firm.²²

First American obtained a judgment against K&A in Montana for its unpaid invoices in the amount of \$55,782.00 and domesticated the judgment in Colorado.²³ The judgment was against K&A, not Respondent

¹⁴ Mot. ¶ 6; Resp. at 2 ¶ 6.

¹⁵ Resp. at 3 ¶ 4; Compl., General Allegations ¶ 4; Answer at 1.

¹⁶ Resp. at 3 ¶ 5; Compl., General Allegations ¶ 5; Answer at 1.

¹⁷ Resp. at 3 ¶ 6; Resp. Ex. 1 at 13:20-22.

¹⁸ Mot. ¶ 11; Resp. at 2 ¶ 11.

¹⁹ Resp. at 3 ¶ 7; Compl., General Allegations ¶ 7, Answer at 1.

²⁰ Resp. at 3 ¶ 8; Resp. Ex. 1 at 14:7-11.

²¹ Resp. at 3 ¶ 9; Resp. Ex. 1 at 14:1-6.

²² Resp. at 3 ¶ 10; Resp. Ex. 1 at 14:12-18.

²³ Resp. at 4 ¶ 12; Compl., General Allegations ¶ 12; Answer at 1.

himself, and the court ruled that Respondent was not personally liable for the judgment.²⁴ First American has been able to collect just \$1,179.20 from Respondent through bank garnishments.²⁵

IV. ANALYSIS

The People contend that Respondent violated Colo. RPC 1.15A(b) by failing to promptly transmit to First American the funds he received from U.S. Bank – funds that were intended to pay for title services. Respondent's decision to exercise dominion over these funds, using them to pay other firm expenses, also amounted to knowing conversion under Colo. RPC 8.4(c), say the People. Finally, the People assert that Respondent's failure to pay First American prejudiced the administration of justice in violation of Colo. RPC 8.4(d) because First American had to institute collection proceedings to seek payment of the funds it was owed. The People note that this Court's immediate suspension report previously found that Respondent committed knowing conversion, and the People ask the Court to apply the law-of-the-case doctrine.

Respondent denies that the admitted material facts establish rule violations. He relies on several arguments. First, he asserts that Colo. RPC 1.15A and 1.15.B identify three types of funds received by a law firm: (1) operating funds – funds a client pays a firm

²⁴ Mot. ¶ 12; Resp. at 2 ¶ 12.

²⁵ Resp. at 4 ¶ 13; Compl., General Allegations ¶ 13; Answer at 1.

for legal services already performed and expenses already incurred by the firm, which belong to the firm and should be placed in the firm's operating account; (2) unincurred expense trust funds – advance payments for legal services and expenses, which do not belong to the firm and must be kept in the firm's trust account; and (3) pure trust funds – funds received by a law firm for other persons, sometimes including the lawyer, which are the property of the persons entitled to them and must be deposited into the law firm's trust account and paid promptly to the person entitled to them. Because Colo. RPC 1.15B(a)(1) states that any "advance payment of expenses that have not been incurred" must be placed in a trust fund, Respondent draws the inverse inference that any payment of expenses that *have* been incurred must be placed elsewhere – in the firm's operating account. Based on his interpretation that Colo. RPC 1.15 denominates payments for already-incurred expenses as a firm's operating expenses, Respondent reasons that such funds must be viewed as the firm's own property, and a firm cannot convert its own property. Respondent cites no legal authority other than the rules themselves in support of his interpretation.

Respondent's second argument is that he has been adjudged not personally liable on the Montana judgment for \$55,782.00. Under the doctrines of claim and issue preclusion, he says, he cannot be held responsible in this proceeding for not transmitting the funds to First American.

Third, Respondent asserts that any finding of a rule violation here would violate his constitutional due process and equal protection rights. According to Respondent Colo. RPC 8.4(c) and (d) should be deemed void for vagueness, at least as the People seek to apply them here, and those rules should also be deemed void under the Equal Protection Clause because they establish a “standardless criteria of moral disapproval.”²⁶

The Court does not elect to apply the law-of-the-case doctrine here, as the People suggest. In its earlier report, the Court merely found reasonable cause to believe that Respondent converted funds, and the particular rule violations the People allege here were not at issue. Nevertheless, the Court stands by its earlier legal analysis. As explained below, the Court finds that Respondent’s tortured interpretation of Colo. RPC 1.15A and 1.15B is inconsistent with the context of the rule and at odds with Colorado case law interpreting Colo. RPC 8.4(c).

Colo. RPC 8.4(c) bars dishonest conduct, including knowing conversion. Knowing conversion occurs when a lawyer takes another person’s money that has been entrusted to the lawyer, knowing that it is the other person’s money and knowing that the person has not authorized the taking.²⁷ Several Colorado Supreme Court cases have applied Colo. RPC 8.4(c) in fact

²⁶ Mot. at 10.

²⁷ *People v. Varallo*, 913 P.2d 1, 10-11 (Colo. 1996); *see also People v. Lavenhar*, 934 P.2d 1355, 1358 (Colo. 1997) (indicating that conversion of third-party funds, like client funds, amounts to a violation of the predecessor to Colo. RPC 8.4(c)).

patterns similar to those presented here, holding that the unauthorized use of funds to which another party is entitled amounts to knowing conversion. For example, in *People v. Finesilver*, the Colorado Supreme Court concluded that an attorney committed knowing conversion when he misappropriated “monies paid by clients of the law firm for services provided by [a title company] in the course of foreclosures handled by the law firm.”²⁸ The lawyer also converted funds in violation of the predecessor to Colo. RPC 8.4(c) when he received checks for the benefit of clients but never paid those monies to the clients.²⁹ Somewhat similarly, in *In re Bilderback*, an attorney’s personal injury clients executed lien forms for payment of chiropractic services, yet after the attorney received settlement proceeds he never honored the chiropractor’s liens by paying the fees for his clients’ chiropractic services.³⁰ Through these actions, he violated Colo. RPC 8.4(c).³¹ In *People v. Lavenhar*, likewise, an attorney mistakenly received a check that was intended for a third party, then used the funds for personal and law firm expenses.³² By retaining funds he knew he was not entitled to and

²⁸ 826 P.2d 1256, 1256-57 (Colo. 1992).

²⁹ *Id.* at 1257.

³⁰ 971 P.2d 1061, 1063 (Colo. 1999).

³¹ *Id.*

³² 934 P.2d at 1358.

converting them to his own use and benefit, the attorney committed a knowing conversion.³³

The elements of a knowing conversion under *Varallo* are present in the instant case: U.S. Bank provided \$55,782.00 to Respondent for title services, Respondent knew that First American was entitled to that money for services it had performed in the U.S. Bank representation, and Respondent knew that neither U.S. Bank nor First American had authorized him to use those funds for any purpose other than paying for title services.³⁴ In short, Respondent had no valid basis for treating the \$55,782.00 as his own.

Colo. RPC 1.15A and 1.15B do not compel a different result. Even if those rules permitted Respondent to temporarily place U.S. Bank's funds into his operating account, the rules would not trump the principles discussed above by allowing him to treat those funds as though they belonged to him in perpetuity. Moreover, a holistic reading of the trust account rules does not support the interpretation that a lawyer may do as he or she pleases with monies provided by a client to reimburse third-party expenses. To the contrary, Colo. RPC 1.15(A)(b) states that "[u]pon receiving funds . . . of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third

³³ *Id.*; see also *Matter of Krause*, 676 A.2d 1340, 1342 (R.I. 1996) (ruling that a lawyer's failure to promptly pay funds owed to clients and third parties violated Rule 8.4(c)).

³⁴ 913 P.2d at 10-11.

person any funds . . . that the client or third person is entitled to receive. . . .” Here, First American completed title services for Respondent’s firm, and U.S. Bank gave the firm money to pay for title services. First American was entitled to receive these funds.³⁵

Next, Respondent’s defense that he was adjudged not personally liable for the debt of \$55,782.00 is without merit. Personal liability and duties under the Rules of Professional Conduct are wholly distinct legal concepts.³⁶ The Court’s ruling here is not that Respondent is personally liable to First American; it is that Respondent failed to comply with the Rules of Professional Conduct in his dealings with First American.

The Court also rejects Respondent’s constitutional defenses. The Rules of Professional Conduct are presumed to be constitutional, and a party challenging the rules bears the burden to demonstrate their

³⁵ The Court disagrees with Respondent’s assertion that the drafters of Colo. RPC 1.15B(a)(1) would have required placement in trust of “any payment of fees or of any expenses” if the drafters had meant for funds paid for already-incurred expenses to be placed in trust. Payment of expenses that have been incurred is covered by the existing phrase “all funds entrusted to the lawyer’s care.” And Respondent’s suggestion would indicate that payment of a lawyer’s own incurred fees and expenses for legal services would belong in trust, which is nonsensical.

³⁶ See, e.g., *Bianco Prof’l Ass’n v. Home Ins. Co.*, 740 A.2d 1051, 1055 (N.H. 1999) (stating that an attorney’s “personal liability as a member of a professional association is a matter separate from his culpability as an attorney under the rules of professional conduct”).

unconstitutionality beyond a reasonable doubt.³⁷ In assessing a vagueness challenge to such a rule, a court must examine whether the rule is “readily understandable to a licensed lawyer,” not whether the rule is understandable to a layperson.³⁸ Respondent has failed to show that licensed lawyers cannot comprehend the rules at issue here. To the contrary, the Colorado Supreme Court has determined that the rules governing conversion of funds have been adequately explained and developed in case law.³⁹ For the same reasons, the Court finds Respondent’s equal protection defense – which is in truth a due process argument – to be unavailing.⁴⁰

In accordance with the foregoing analysis, the Court finds as a matter of law that Respondent violated Colo. RPC 8.4(c) and Colo. RPC 1.15A(b) and Colo. RPC 1.15(b) (2008). The Court cannot conclude as a matter of law, however, that Respondent transgressed Colo. RPC 8.4(d). This rule is generally found to be implicated in “conduct connected with court proceedings.”⁴¹ Most leading cases on knowing conversion

³⁷ *People v. Morley*, 725 P.2d 510, 516 (Colo. 1986).

³⁸ *Id.*

³⁹ *Varallo*, 913 P.2d at 6.

⁴⁰ Respondent has not asserted that he is being treated differently from other similarly situated persons, as the Equal Protection Clause forbids. *See, e.g., Mayo v. Nat’l Farmers Union Prop. & Gas. Co.*, 833 P.2d 54, 57 (Colo. 1992).

⁴¹ ABA *Annotated Model Rules of Professional Conduct* 624 (7th ed. 2011); *see also Rogers v. Miss. Bar*, 731 So. 2d 1158, 1171 (Miss. 1999) (finding that a lawyer’s conversion of fees resulting from title work did not violate Rule 8.4(d) because the actions in

in Colorado have not included any determination that the respondent attorneys violated Colo. RPC 8.4(d), though those cases involve somewhat distinguishable circumstances.⁴² Although the facts set forth above in this case are not in dispute, the facts related to the People's Colo. RPC 8.4(d) claim have not yet been fully developed. Based on the standards applicable at the summary judgment stage, however, the Court cannot find such a violation as a matter of law.

V. ORDER

As set forth above, the Court **DENIES** "Respondent's Motion for Summary Judgment Dismissing Petitioner's Complaint" and **GRANTS IN PART** "Complainant's Response to Respondent's Motion for Summary Judgment and Complainant's Cross Motion for Summary Judgment."

This case **REMAINS SET** for a hearing on October 25, 2016. If the People elect to move for dismissal of their Colo. RPC 8.4(d) claim in light of this summary

question "were not related to a judicial proceeding or a matter connected to a judicial proceeding"); *In re Smith*, 848 P.2d 612, 613 (Or. 1993) (stating that conduct must have occurred "during the course of some judicial proceeding or a matter directly related thereto" in order to violate Rule 8.4(d)).

⁴² See, e.g., *In re Cleland*, 2 P.3d 700 (Colo. 2000); *In re Haines*, 177 P.3d 1239 (Colo. 2008); *in re Thompson*, 991 P.2d 820 (Colo. 1999). But see *Varallo*, 913 P.2d at 10 (finding, with little explanation, that a lawyer who failed to pay an investigator for services rendered as part of a dissolution proceeding, resulting in the investigator filing a small claims action against the lawyer, violated not only Colo. RPC 8.4(c) but also Colo. RPC 8.4(d)).

C-15

judgment ruling, the Court will convert the disciplinary hearing in this case to a hearing on the sanctions.

DATED THIS 16th DAY OF SEPTEMBER, 2016.

/s/ William R. Lucero

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY
JUDGE

[SEAL]

D-1

APPENDIX D

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 10, 2016 CASE NUMBER: 2016SA179
Original Proceeding in Discipline Office of the Presiding Disciplinary Judge, 2016PD031	
Petitioner: The People of the State of Colorado, v. Respondent: Philip M. Kleinsmith	Supreme Court Case No: 2016SA179
ORDER OF SUSPENSION	

Upon consideration of the Report Setting Forth Findings of Fact and Recommendation of Immediate Suspension Under C.R.C.P. 251.8(b)(2) filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that PHILLIP KLEINSMITH shall be and the same hereby is, SUSPENDED from the practice of law in the State of Colorado effective immediately.

BY THE COURT, JUNE 10, 2016

APPENDIX E

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
Petitioner: THE PEOPLE OF THE STATE OF COLORADO Respondent: PHILIP M. KLEINSMITH	Case Number: 16PDJ031
REPORT SETTING FORTH FINDINGS OF FACT AND RECOMMENDATION OF IMMEDIATE SUSPENSION UNDER C.R.C.P. 251.8(b)(2)	

In this immediate suspension matter, Alan C. Obye, Office of Attorney Regulation Counsel ("the People"), requests that Philip M. Kleinsmith ("Respondent") be immediately suspended from the practice of law under C.R.C.P. 251.8. The People assert there is reasonable cause to believe that Respondent converted funds, causing immediate and substantial private harm. The Presiding Disciplinary Judge ("the PDJ") agrees and recommends that the Colorado Supreme Court immediately suspend Respondent.

I. BACKGROUND

The People filed their “Petition for Immediate Suspension Pursuant to C.R.C.P. 251.8” on April 1, 2016. The PDJ issued an “Order to Show Cause Under C.R.C.P. 251.8(b)(2)” three days later. Respondent filed a response in opposition on April 29, 2016, and the People replied on May 4, 2016. The next day, Respondent requested a hearing under C.R.C.P. 251.8(b)(3).

The PDJ conducted a hearing on May 23, 2016. Obye represented the People and Respondent appeared pro se. At the hearing, the PDJ admitted stipulated exhibits 1-12 and considered Respondent’s testimony. The PDJ also accepted Respondent’s hearing brief.

II. FINDINGS OF FACT

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 3, 1967, under attorney registration number 01063. He is thus subject to the jurisdiction of the Colorado Supreme Court and the PDJ in this proceeding.¹ Based on the People’s petition and supporting documentation, Respondent’s response, and the evidence and testimony presented at the hearing, the PDJ finds reasonable cause to believe the following facts.

Between 2012 and 2014, Respondent was the sole shareholder and president of Kleinsmith & Associates (“K&A”); he was also the only attorney employed by the

¹ See C.R.C.P. 251.1(b).

firm.² K&A's practice principally involved assisting banks to foreclose on residential mortgages or deeds of trust.³

Respondent retained First American Title Company, LLC, and First American Title of Montana, Inc. ("First American"), to provide title services in connection with K&A's foreclosure practice.⁴ Respondent's client, U.S. Bank, paid Respondent a total of about \$55,000.00 for the cost of First American's services in multiple foreclosure matters.⁵ But between 2012 and 2014, Respondent failed to pay those funds to First American.⁶ Instead, Respondent placed the funds provided by U.S. Bank in his business operating account and used the funds to pay other expenses incurred by his firm, which was struggling financially. Respondent did not have authorization from U.S. Bank to use the funds for any purpose other than to pay for title services.

Stipulated exhibit 12 provides an example of the type of invoice K&A submitted to clients in foreclosure cases.⁷ In that invoice, which was directed to and paid by U.S. Bank for a certain residential foreclosure case,

² Answer at 1.

³ See Answer at 1.

⁴ Pet. Ex. 1 ¶ 3; Answer at 1.

⁵ See Pet. Ex. 1 ¶¶ 3, 6; Pet. Ex. A at 1; Answer at 1.

⁶ Pet. Ex. 1 ¶¶ 3, 6; Pet. Ex. A at 1; Answer at 1 ("K&A did not pay \$55,542.00 in [] title work done by [First American] which had been billed and paid for by U.S. Bank to K&A.").

⁷ Ex. 512 at 00236-37.

Respondent listed his incurred attorney fees as \$750.00, and he set forth incurred costs, including \$212.00 for title costs, in a separate section of the invoice.⁸

In a Montana state court, First American obtained a judgment against K&A in the amount of \$55,782.00 and domesticated the judgment in Colorado.⁹ As of March 29, 2016, First American had been able to collect only \$1,179.20 from Respondent through bank garnishments.¹⁰

In 2015, K&A ceased operating, but Respondent continued to practice law as a solo proprietor.¹¹ Although he is licensed in several states, Respondent currently practices in Colorado.

III. LEGAL STANDARDS AND ANALYSIS

Immediate suspension is the temporary suspension of an attorney's license to practice law during the pendency of disciplinary proceedings.¹² An attorney's license is not ordinarily suspended prior to the resolution of a disciplinary matter.¹³ However, the Colorado Supreme Court may immediately suspend an attorney from the practice of law when there is reasonable

⁸ Ex. 512 at 00236-37.

⁹ Pet. Ex. 1 ¶ 4; see Pet. Ex. A at 2;

¹⁰ Pet. Ex. 1 ¶ 7; Answer at 1.

¹¹ Answer at 2.

¹² C.R.C.P. 251.8(a).

¹³ *Id.*

cause to believe that “the attorney is causing or has caused immediate and substantial public or private harm” and the attorney has converted property or funds.¹⁴

Instances of alleged conversion in disciplinary cases are generally analyzed by reference to Colo. RPC 8.4(c), which bars attorneys from engaging in conduct involving dishonesty. Knowing conversion occurs when a lawyer takes another person’s money that has been entrusted to the lawyer, knowing that it is the other person’s money and knowing that the person has not authorized the taking.¹⁵ Intent to permanently deprive the owner of the funds is not a necessary element under Colo. RPC 8.4(c).¹⁶

The People argue here that Respondent knowingly converted client or third-party funds, causing significant harm by depriving First American of money the company had earned and forcing it to institute collection proceedings. The People also assert that Respondent caused U.S. Bank potential harm because it could

¹⁴ C.R.C.P. 251.8(a)(1).

¹⁵ *People v. Varallo*, 913 P.2d 1, 10-11 (Colo. 1996); *see also* *People v. Lavenhar*, 934 P.2d 1355, 1358 (Colo. 1997) (indicating that conversion of third-party funds, like client funds, amounts to a violation of the predecessor to Colo. RPC 8.4(c)). A technical conversion, in contrast to a knowing conversion, occurs where the complainant concedes the misappropriation was negligent or where there is a lack of clear and convincing evidence showing a knowing conversion. *Varallo*, 913 P.2d at 11.

¹⁶ *Varallo*, 913 P.2d at 11.

have been called upon to pay the funds owed to First American.

Respondent, on the other hand, asserts that funds paid to a lawyer for already-incurred expenses belong to the lawyer. He notes that Colo. RPC 1.15(B)(a)(1) requires a lawyer to deposit “advance payment of expenses that have not been incurred” into a trust account.¹⁷ By extension, he reasons, any payment for expenses that *already have been* incurred can be deposited into a business account and treated as the lawyer’s own property.¹⁸

The PDJ concludes that Respondent’s reasoning is contrary to the Rules of Professional Conduct and Colorado case law. As noted above, claims of knowing conversion are governed by Colo. RPC 8.4(c) and the interpretive case law. Here, the PDJ finds that the elements of a knowing conversion under *Varallo* are present: U.S. Bank provided approximately \$55,000.00 to Respondent for title services rendered by First American, Respondent knew that First American was entitled to that money for services it had performed, and

¹⁷ The PDJ observes that Respondent’s failure to repay First American took place over several years, both before and after the adoption of Colo. RPC 1.15A and 1.15B. The version of the rule in effect until June 17, 2014, Colo. RPC 1.15, contained provisions similar to the provisions Respondent cites in Colo. RPC 1.15B.

¹⁸ Respondent also points to Colo. RPC 1.15B(a)(2), asserting that this rule “defines ‘business money’ as monies paid to a lawyer for earned attorneys [sic] fees and expenses that have been incurred.” Hr’g Br. at 1. In fact, Colo. RPC 1.15B(a)(2) simply states that a lawyer must maintain a business account “into which the lawyer shall deposit . . . all funds received for legal services.”

Respondent knew that U.S. Bank had not authorized him to use those funds for any purpose other than paying for title service.¹⁹ In short, Respondent had no valid basis for treating the \$55,000.00 as his own.

This analysis accords with Colorado cases holding that the unauthorized use of funds to which another party is entitled amounts to knowing conversion.²⁰ For example, in *People v. Finesilver*, the Colorado Supreme Court concluded that the attorney committed knowing conversion when he misappropriated “monies paid by clients of the law firm for services provided by [a title company] in the course of foreclosures handled by the law firm.”²¹ The lawyer also converted funds in violation of the predecessor to Colo. RPC 8.4(c) when he received checks for the benefit of clients but never paid those monies to the clients.²² Somewhat similarly, in *In re Bilderback*, an attorney’s clients in a personal injury case executed lien forms for payment of services rendered by a chiropractor, yet after the attorney received settlement proceeds he never honored the chiropractor’s lien by paying the fees associated with his clients’ chiropractic services.²³ Through these actions, he

¹⁹ 913 P.2d at 10-11.

²⁰ Respondent contests the applicability of these cases, arguing that they were decided before Colo. RPC 1.15B was adopted. Because the PDJ does not rely on Colo. RPC 1.15B – and in fact finds Respondent’s analysis of the trust account rules to be incorrect – the PDJ disagrees.

²¹ 826 P.2d 1256, 1256-57 (Colo. 1992).

²² *Id.* at 1257.

²³ 971 P.2d 1061, 1063 (Colo. 1999).

violated Colo. RPC 8.4(c).²⁴ In *People v. Lavenhar*, likewise, an attorney mistakenly received a check that was intended for a third party, then used the funds for personal and law firm expenses.²⁵ By retaining funds he knew he was not entitled to and converting them to his own use and benefit, the attorney committed a knowing conversion.²⁶

Colo. RPC 1.15B does not compel a different result. Even if that rule permitted Respondent to temporarily place U.S. Bank's funds into his business account, the rule would not trump the principles discussed above by allowing him to treat those funds as though they belonged to him in perpetuity. A holistic reading of the trust account rules does not support the interpretation that a lawyer may do as he or she pleases with monies provided by a client to reimburse third-party costs. To the contrary, Colo. RPC 1.15(A)(b) states that "[u]pon receiving funds . . . of a client or third person, a lawyer shall, promptly, or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds . . . that the client or third person is entitled to receive. . . ." Here, First American completed title services for Respondent's firm and that U.S. Bank gave the firm money to pay for

²⁴ *Id.*

²⁵ 934 P.2d at 1358.

²⁶ *Id.*; see also *Matter of Krause*, 676 A.2d 1340, 1342 (R.I. 1996) (ruling that a lawyer's failure to promptly pay funds owed to clients and third parties violated Rule 8.4(c)).

those services. First American was entitled to receive these funds.

Last, the PDJ finds that Respondent's conduct has caused immediate and substantial private harm. First American was deprived of more than \$55,000.00 to which it was entitled based on services performed. First American was forced to sue Respondent to collect this debt, yet the company has been able to collect only a small portion of the money it is owed. Given the sum of money involved and the lengthy period it has been owing – from 2012 until the present – the PDJ has little trouble concluding that the injury First American suffered was immediate and substantial within the meaning of C.R.C.P. 251.8.

IV. RECOMMENDATION

Immediate suspension is appropriate because the People's allegations give rise to reasonable cause to believe that Respondent caused immediate and substantial private harm by converting funds. Therefore, the PDJ **RECOMMENDS** that the Colorado Supreme Court **GRANT** the People's "Petition for Immediate Suspension Pursuant to C.R.C.P. 251.8" and **IMMEDIATELY SUSPEND** Respondent from the practice of law.

DATED THIS 31st DAY OF MAY, 2016.

/s/ William R. Lucero

WILLIAM R. LUCERO [SEAL]
PRESIDING DISCIPLINARY JUDGE

E-10

Copies to:

Alan C. Obye
Office of Attorney
Regulation Counsel

Via Email
a.obye@csc.state.co.us

Philip M. Kleinsmith
Respondent

Via Email
klein@kleinsmithlaw.com

Christopher A. Ryan
Colorado Supreme Court

Via Hand Delivery

APPENDIX F

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 20, 2017
Original Proceeding in Discipline Office of the Presiding Disciplinary Judge, 2016PD031	
In the Matter of Philip Kleinsmith.	Supreme Court Case No: 2016SA332
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 20, 2017.
JUSTICE COATS would grant the petition.
