



Feb. 13, 2018

Board of Disciplinary Appeals

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

IN THE MATTER OF §
PHILIP M. KLEINSMITH § **CAUSE NO. 60098**
STATE BAR CARD NO. 11567650 §

PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), brings this action against Respondent, Philip M. Kleinsmith, (hereinafter called "Respondent"), showing as follows:

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

2. Respondent is a member of the State Bar of Texas and is licensed but not currently authorized to practice law in Texas. Respondent may be served with a true and correct copy of this Petition for Reciprocal Discipline at Philip M. Kleinsmith, 3005 Leslie Drive, Colorado Springs, Colorado 80909.

3. On or about July 1, 2016, a Complaint (Exhibit 1) was filed with the Presiding Disciplinary Judge, Supreme Court, State of Colorado, in a matter styled: *Complainant: The People of the State of Colorado, Respondent: Philip M. Kleinsmith, #1063*, in Case No. 16 PDJ 031.

4. On or about November 18, 2016, an Opinion and Decision Imposing Sanctions under C.R.C.P. 251.19(b) (Exhibit 2) was entered in the Supreme Court, State of Colorado, before

the Office of the Presiding Disciplinary Judge ("PDJ") in a matter styled: *Complainant, People of the State of Colorado, Respondent: Philip M. Kleinsmith*, in Case No. 16PDJ031.

5. On or about December 21, 2016, an Order and Notice of Disbarment (Exhibit 3) was entered in the Supreme Court, State of Colorado, before the Office of the Presiding Disciplinary Judge in a matter styled: *Complainant, People of the State of Colorado, Respondent: Philip M. Kleinsmith*, in Case No. 16PDJ031, that states in pertinent part as follows:

...Under C.R.C.P. 251.28(a), the Presiding Disciplinary Judge ("the PDJ") hereby ORDERS that PHILIP M. KLEINSMITH, attorney registration number 01063, is DISBARRED from the practice of law...

6. The Opinion and Decision Imposing Sanctions found the following:

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

The PDJ also 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.

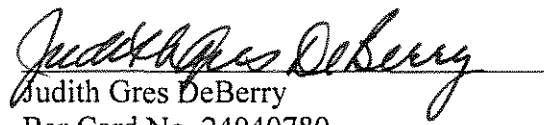
7. Certified copies of the Complaint, Opinion and Decision Imposing Sanctions Under C.R.C.P. 251.19(b), and Order and Notice of Disbarment are attached hereto as Petitioner's Exhibits 1 through 3, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1 through 3 at the time of the hearing in this case.

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

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

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

Philip M. Kleinsmith
3005 Leslie Drive
Colorado Springs, Colorado 80909


Judith Gres DeBerry

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Effective February 19, 2015 and amended September 20, 2016

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SECTION 1: GENERAL PROVISIONS

Rule 1.01 Definitions

- (a) “BODA” is the Board of Disciplinary Appeals.
- (b) “Chair” is the member elected by BODA to serve as chair or, in the Chair’s absence, the member elected by BODA to serve as vice-chair.
- (c) “Classification” is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a “complaint” or an “inquiry.”
- (d) “BODA Clerk” is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- (e) “CDC” is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.
- (f) “Commission” is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.
- (g) “Executive Director” is the executive director of BODA.
- (h) “Panel” is any three-member grouping of BODA under TRDP 7.05.
- (i) “Party” is a Complainant, a Respondent, or the Commission.
- (j) “TDRPC” is the Texas Disciplinary Rules of Professional Conduct.
- (k) “TRAP” is the Texas Rules of Appellate Procedure.
- (l) “TRCP” is the Texas Rules of Civil Procedure.
- (m) “TRDP” is the Texas Rules of Disciplinary Procedure.
- (n) “TRE” is the Texas Rules of Evidence.

Rule 1.02 General Powers

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining

disciplinary proceedings. But TRDP 15.01 applies to the enforcement of a judgment of BODA.

Rule 1.03 Additional Rules in Disciplinary Matters

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

Rule 1.04 Appointment of Panels

- (a) BODA may consider any matter or motion by panel, except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.
- (b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

Rule 1.05 Filing of Pleadings, Motions, and Other Papers

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.
 - (1) **Email Address.** The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.
 - (2) **Timely Filing.** Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day

that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

- (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.
- (4) **Exceptions.**
 - (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.
 - (ii) The following documents must not be filed electronically:
 - a) documents that are filed under seal or subject to a pending motion to seal; and
 - b) documents to which access is otherwise restricted by court order.
 - (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.
- (5) **Format.** An electronically filed document must:
 - (i) be in text-searchable portable document format (PDF);
 - (ii) be directly converted to PDF

rather than scanned, if possible;
and

(iii) not be locked.

- (b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).
- (c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:
 - (1) an “/s/” and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
 - (2) an electronic image or scanned image of the signature.
- (d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.
- (e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

Rule 1.06 Service of Petition

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

service by certified mail, the return receipt must contain the Respondent's signature.

Rule 1.07 Hearing Setting and Notice

- (a) **Original Petitions.** In any kind of case initiated by the CDC's filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23, the hearing date must be at least 30 days from the date that the petition is served on the Respondent.
- (b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23, the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.
- (c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.
- (d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

Rule 1.08 Time to Answer

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

Rule 1.09 Pretrial Procedure

- (a) **Motions.**
 - (1) **Generally.** To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.
 - (2) **For Extension of Time.** All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:
 - (i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;
 - (ii) if an appeal has been perfected, the date when the appeal was perfected;
 - (iii) the original deadline for filing the item in question;
 - (iv) the length of time requested for the extension;
 - (v) the number of extensions of time that have been granted

previously regarding the item in question; and

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

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

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

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

- (1) marked;
- (2) indexed with the title or description of the item offered as an exhibit; and
- (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

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

Rule 1.10 Decisions

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

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

- (1) as required by the TRDP; and

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

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

Rule 1.11 Board of Disciplinary Appeals Opinions

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

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

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

Rule 1.12 BODA Work Product and Drafts

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

Rule 1.13 Record Retention

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

Rule 1.14 Costs of Reproduction of Records

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

Rule 1.15 Publication of These Rules

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

SECTION 2: ETHICAL CONSIDERATIONS

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

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

- (b) A current BODA member must not serve as an expert witness on the TDRPC.
- (c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02 Confidentiality

- (a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.
- (b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.
- (c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction.

Rule 2.03 Disqualification and Recusal of BODA Members

- (a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.
- (b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.
- (c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on

a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse him- or herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

SECTION 3: CLASSIFICATION APPEALS

Rule 3.01 Notice of Right to Appeal

- (a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.
- (b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

Rule 3.02 Record on Appeal

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

SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01 Perfecting Appeal

- (a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 consistent with this

requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21.

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

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

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

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

- (d) **Time to File.** In accordance with TRDP 2.24, the notice of appeal must be filed within 30 days after the date the judgment

is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

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

Rule 4.02 Record on Appeal

- (a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.
- (b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.
- (c) **Responsibility for Filing Record.**
 - (1) Clerk's Record.
 - (i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.
 - (ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each

party, any post submission pleadings and briefs, and the notice of appeal.

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

(2) Reporter's Record.

- (i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:
 - a) a notice of appeal has been filed;
 - b) a party has requested that all or part of the reporter's record be prepared; and
 - c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.
- (ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

(d) Preparation of Clerk's Record.

- (1) To prepare the clerk's record, the evidentiary panel clerk must:
 - (i) gather the documents

- designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);
- (ii) start each document on a new page;
 - (iii) include the date of filing on each document;
 - (iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;
 - (v) number the pages of the clerk's record in the manner required by (d)(2);
 - (vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and
 - (vii) certify the clerk's record.
- (2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.
- (3) The table of contents must:
- (i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;
 - (ii) be double-spaced;
 - (iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;
 - (iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and
 - (v) if the record consists of multiple volumes, indicate the page on which each volume begins.
- (e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:
- (1) file each computer file in text-searchable Portable Document Format (PDF);
 - (2) create electronic bookmarks to mark the first page of each document in the clerk's record;
 - (3) limit the size of each computer file to 100 MB or less, if possible; and
 - (4) directly convert, rather than scan, the record to PDF, if possible.
- (f) **Preparation of the Reporter's Record.**
- (1) The appellant, at or before the time prescribed for perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.
 - (2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual

for Texas Reporters' Records.

- (3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.
- (4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise appear.
- (5) A court reporter or recorder must not lock any document that is part of the record.
- (6) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.
- (g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.
- (h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.
- (i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the

attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

Rule 4.03 Time to File Record

- (a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.
- (b) **If No Record Filed.**
 - (1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.
 - (2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:
 - (i) the appellant failed to request a

reporter's record; or

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

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

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

Rule 4.04 Copies of the Record

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

Rule 4.05 Requisites of Briefs

- (a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.
- (b) **Appellee's Filing Date.** Appellee's brief must be filed within 30 days after the appellant's brief is filed.
- (c) **Contents.** Briefs must contain:
 - (1) a complete list of the names and addresses of all parties to the final decision and their counsel;

- (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
- (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
- (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
- (5) a statement, without argument, of the basis of BODA's jurisdiction;
- (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
- (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
- (8) the argument and authorities;
- (9) conclusion and prayer for relief;
- (10) a certificate of service; and
- (11) an appendix of record excerpts pertinent to the issues presented for review.

(d) **Length of Briefs; Contents Included and Excluded.** In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on

leave of BODA. A computer-generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

- (e) **Amendment or Supplementation.** BODA has discretion to grant leave to amend or supplement briefs.
- (f) **Failure of the Appellant to File a Brief.** If the appellant fails to timely file a brief, BODA may:
 - (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's failure to timely file a brief;
 - (2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or
 - (3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

Rule 4.06 Oral Argument

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

argument is unnecessary for any of the following reasons:

- (1) the appeal is frivolous;
 - (2) the dispositive issue or issues have been authoritatively decided;
 - (3) the facts and legal arguments are adequately presented in the briefs and record; or
 - (4) the decisional process would not be significantly aided by oral argument.
- (c) **Time Allowed.** Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

Rule 4.07 Decision and Judgment

- (a) **Decision.** BODA may do any of the following:
 - (1) affirm in whole or in part the decision of the evidentiary panel;
 - (2) modify the panel's findings and affirm the findings as modified;
 - (3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or
 - (4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:
 - (i) the panel that entered the findings; or
 - (ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.
- (b) **Mandate.** In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

Rule 4.08 Appointment of Statewide Grievance Committee

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

Rule 4.09 Involuntary Dismissal

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

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

SECTION 5: PETITIONS TO REVOKE PROBATION

Rule 5.01 Initiation and Service

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

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

Rule 5.02 Hearing

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

SECTION 6: COMPULSORY DISCIPLINE

Rule 6.01 Initiation of Proceeding

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

Rule 6.02 Interlocutory Suspension

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

file a motion for final judgment that complies with TRDP 8.05.

- (1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.
- (2) If the criminal sentence is not fully probated:
 - (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
 - (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.
- (c) Criminal Conviction Reversed. If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

SECTION 7: RECIPROCAL DISCIPLINE

Rule 7.01 Initiation of Proceeding

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

Rule 7.02 Order to Show Cause

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

Rule 7.03 Attorney's Response

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

SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01 Appointment of District Disability Committee

- (a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.
- (b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for

reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

- (c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.
- (d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.
- (e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

Rule 8.02 Petition and Answer

- (a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06
- (b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.
- (c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the

chair of the District Disability Committee and send notice of the hearing to the parties.

Rule 8.03 Discovery

- (a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.
- (b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.
 - (1) **Motion.** The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
 - (2) **Report.** The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.
- (c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

Rule 8.04 Ability to Compel Attendance

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

Rule 8.05 Respondent's Right to Counsel

- (a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.
- (b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

Rule 8.06 Hearing

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

Rule 8.07 Notice of Decision

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

Rule 8.08 Confidentiality

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District

Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

SECTION 9: DISABILITY REINSTATEMENTS

Rule 9.01 Petition for Reinstatement

- (a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.
- (b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.
- (c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

Rule 9.02 Discovery

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

Rule 9.03 Physical or Mental Examinations

- (a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.
- (b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
- (c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.
- (d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.
- (e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

Rule 9.04 Judgment

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

SECTION 10: APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS

Rule 10.01 Appeals to the Supreme Court

- (a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.
- (b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.
- (c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.

<p>SUPREME COURT, STATE OF COLORADO</p> <p>ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE PRESIDING DISCIPLINARY JUDGE</p> <p>1300 Broadway, Suite 250 Denver, Colorado 80203</p>	<p>FILED</p> <p>JUL 01 2016</p> <p>PRESIDING DISCIPLINARY JUDGE SUPREME COURT OF COLORADO</p>
<p>Complainant: THE PEOPLE OF THE STATE OF COLORADO</p> <p>Respondent: PHILIP M. KLEINSMITH, # 1063</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case Number:</p>
<p>Alan C. Obye, #42510 Assistant Regulation Counsel James C. Coyle, #14970 Regulation Counsel Attorneys for Complainant 1300 Broadway, Suite 500 Denver, Colorado 80203 Telephone: (303) 457-5800x7812 Fax No.: (303) 501-1141 Email: A.Obye@csc.state.co.us</p>	<p>16 PDJ 031</p> <p>Supreme Court State of Colorado Certified to be a full, true and correct copy</p> <p>FEB:06 2018</p>
<p style="text-align: center;">COMPLAINT</p> <p style="text-align: right;">Office of the Presiding Disciplinary Judge By: <i>[Signature]</i></p>	

THIS COMPLAINT is filed pursuant to the authority of C.R.C.P. 251.8(b)(4), and it is alleged as follows:

Jurisdiction

1. Respondent has taken and subscribed the oath of admission, was admitted to the bar of this Court on October 3, 1967, and is registered upon the official records of this Court, registration no. 1063.
2. Respondent is subject to the jurisdiction of this Court in these disciplinary proceedings.
3. Respondent's registered business address is 6035 Erin Park Dr., Suite 203, Colorado Springs, CO 80918.

Exhibit
1

General Allegations

1. At all times relevant to this Complaint, Respondent was a solo practitioner at the law firm of Kleinsmith & Associates.
2. Respondent represented U.S. Bank in real estate foreclosure actions in 2012, 2013, and 2014.
3. In the course of his representation of U.S. Bank, Respondent retained First American Title Company, LLC, and First American Title of Montana, Inc. (collectively "First American") to provide title services.
4. First American provided title services to Respondent from approximately September 2012 through June 2014 with respect to the foreclosure of numerous properties in Montana and Idaho.
5. First American invoiced Respondent a total of \$57,338 for its services during the period of September 2012 through June 2014.
6. Respondent billed U.S. Bank for the costs of First American's Services.
7. U.S. Bank paid Respondent for all the costs of First American's services.
8. Despite being paid by U.S. Bank, Respondent failed to pay First American for its services.
9. Respondent placed the funds provided by U.S. Bank into his law firm operating account.
10. Respondent used the funds provided by U.S. Bank to pay other expenses of his firm.
11. Respondent did not have authorization from U.S. Bank to use the funds for any purpose other than to pay for title services.
12. First American obtained a judgment against Respondent's law firm in Montana for its unpaid invoices in the amount of \$55,782, and domesticated the judgment in Colorado.
13. First American has been able to collect only \$1,179.20 from Respondent though bank garnishments.

CLAIM I

Colo. RPC 1.15A(b) and former Colo. RPC 1.15(b)

14. All prior paragraphs are incorporated herein by reference.
15. Colo. RPC 1.15A(b), effective June 17, 2014, and former Colo. RPC 1.15(b), repealed and replaced with Rule 1.15A(b) on June 17, 2014, provide 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.

16. Respondent violated Colo. RPC 1.15A(b) and former Colo. RPC 1.15(b) by failing to promptly deliver to First American the funds he received from U.S. Bank that were intended to pay for First American's services.

WHEREFORE, Complainant prays at the conclusion hereof.

CLAIM II
Colo. RPC 8.4(c)
Dishonesty – knowing conversion

17. All prior paragraphs are incorporated herein by reference.

18. Colo. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

19. Respondent engaged in conduct involving dishonesty by knowingly converting the funds he received from U.S. Bank that were intended to pay for First American's services when he exercised unauthorized dominion and control over those funds.

20. By such conduct, Respondent violated Colo. RPC 8.4(c).

WHEREFORE, Complainant prays at the conclusion hereof.

CLAIM III
Colo. RPC 8.4(d)
Conduct prejudicial to the administration of justice

21. All prior paragraphs are incorporated herein by reference.

22. Colo. RPC 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

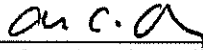
23. Respondent engaged in conduct prejudicial to the administration of justice by failing to promptly deliver to First American the funds he received from U.S. Bank that were intended to pay for First American's services, resulting in First American instituting collection proceedings.

24. By such conduct, Respondent violated Colo. RPC 8.4(d).

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

DATED this 1st day of July, 2016.

Respectfully submitted,



Alan C. Obye, #42510
Assistant Regulation Counsel
James C. Coyle, #14970
Regulation Counsel

Attorneys for Complainant

Supreme Court

SUPREME COURT, STATE OF COLORADO		State of Colorado Certified to be a full, true and correct copy
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203		FEB 06 2018 Office of the Presiding Disciplinary Judge By <i>[Signature]</i>
Complainant: THE PEOPLE OF THE STATE OF COLORADO	Case Number: 16PDJ031	
Respondent: PHILIP M. KLEINSMITH		
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.

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.

Exhibit

2

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). 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 Stufflebeam, 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

² See C.R.C.P. 251.1(b).

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 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—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

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

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)).

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

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 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

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)).

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).

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.

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 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 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 non-criminal conduct involving dishonesty that seriously adversely reflects on his or her fitness to

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

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

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.

practice law.¹⁵ We conclude that Respondent's conduct in this case does seriously 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 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.

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.

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.

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).

Pattern of Misconduct – 9.22(c): 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 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 mitigating factors.²³ We are mindful that “individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different 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.

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).

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).

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 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

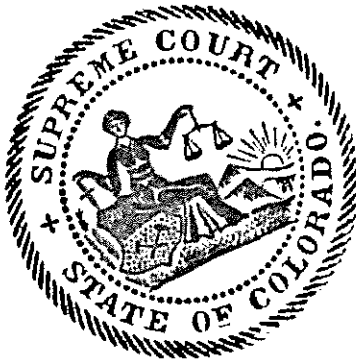
The Hearing Board therefore **ORDERS**:

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 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.

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.

DATED THIS 18th DAY OF November, 2016.



William R. Lucero

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Marcy C. Glenn

MARCY C. GLENN
HEARING BOARD MEMBER

James X. Quinn

JAMES X. QUINN
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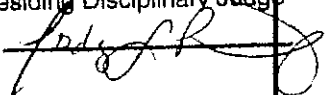
Christopher T. Ryan
Colorado Supreme Court

Via Hand Delivery

Supreme Court

State of Colorado

Certified to be a full, true and correct copy

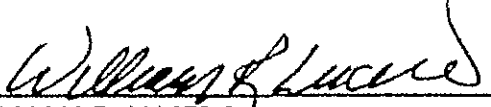
<p style="text-align: center;">SUPREME COURT, STATE OF COLORADO</p> <p style="text-align: center;">ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203</p>	<p style="text-align: center;">FEB 06 2018</p> <p style="text-align: center;">Office of the Presiding Disciplinary Judge</p> <p>By </p>
<p>Complainant: THE PEOPLE OF THE STATE OF COLORADO</p> <p>Respondent: PHILIP M. KLEINSMITH</p>	<p>Case Number: 16PDJ031</p>
<p>ORDER AND NOTICE OF DISBARMENT</p>	

On October 25, 2016, a hearing board held a hearing under C.R.C.P. 251.18. On November 18, 2016, the hearing board issued an "Opinion and Decision Imposing Sanctions Under C.R.C.P. 251.19(b)," disbaring Philip M. Kleinsmith ("Respondent") from the practice of law.

Under C.R.C.P. 251.28(a), the Presiding Disciplinary Judge ("the PDJ") hereby **ORDERS** that **PHILIP M. KLEINSMITH**, attorney registration number 01063, is **DISBARRED** from the practice of law, **EFFECTIVE DECEMBER 23, 2016**, and his name shall be stricken from the list of attorneys authorized to practice in the State of Colorado.

Within fourteen days of issuance of this "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 of other jurisdictions where the attorney is licensed.

DATED THIS 21ST DAY OF DECEMBER, 2016.


 WILLIAM R. LUCERO
 PRESIDING DISCIPLINARY JUDGE

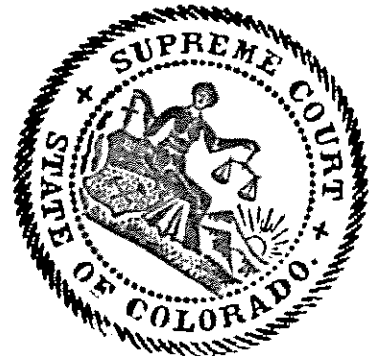


Exhibit
3

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