People v. Cardwell, No. 00PDJ074. 7/11/01. Attorney Regulation. The Presiding Disciplinary Judge and Hearing Board suspended Respondent, Jerry E. Cardwell from the practice of law for a period of three years with eighteen months stayed. Respondent represented a client in a matter involving an alcohol-related driving offense and illegal use of a weapon charge pending in Jefferson County. Shortly thereafter, he represented the client in a matter pending in Arapahoe County involving another alcohol-related driving offense. Respondent negotiated a plea agreement for the client with the Arapahoe County District Attorney, but failed to inform the district attorney's office of the Jefferson County case. Respondent and the client both signed a motion to settle the Arapahoe County charges by plea agreement, stating that the client had "no prior or pending alcohol-related driving offenses in this or any other state." While appearing before the Arapahoe County court, respondent and the client represented to the court that the client had had no prior alcohol-related driving offenses. The client entered a plea of guilty to a reduced charge of DWAI -- first offense -- with respect to the Arapahoe County charges. The client was sentenced as a first time offender. Later, the court had to correct the improper plea and sentence entered on the basis of the misrepresentations. Respondent stated that he mistakenly believed the case in Jefferson County was not final at the time the client entered his plea in Arapahoe County. The Arapahoe County District Attorney subsequently brought charges against respondent, and respondent pled guilty to perjury in the second degree and improperly attempting to influence an official. Respondent's conduct violated Colo. RPC 1.1, Colo. RPC 8.4(d), Colo. RPC 1.2(d), Colo. RPC 3.3(a)(1), Colo. RPC 3.3(a)(2), Colo. RPC 4.1(b), Colo. RPC 8.4(c) and Colo. RPC 8.4(b) constituting grounds for discipline pursuant to C.R.C.P. 251.5(b). Respondent was ordered to pay the costs of the proceedings.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 600 17TH STREET, SUITE 510-S DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** JERRY E. CARDWELL.	Case Number: **00PDJ074**
OPINION AND ORDER IMPOSING SANCTIONS	

Opinion by Presiding Disciplinary Judge Roger L. Keithley and Hearing Board members, Robert A. Millman and Sheila K. Hyatt, both members of the bar.

SANCTION IMPOSED: ATTORNEY SUSPENDED FOR THREE YEARS; EIGHTEEN MONTHS STAYED.

This matter was originally heard by a hearing panel pursuant to prior C.R.C.P. 241.14 on February 26, 1998.[1] By Order dated October 11, 2000, the Supreme Court, after reviewing the hearing board's report,[2] ordered a new hearing before the Presiding Disciplinary Judge ("PDJ") and Hearing Board members.

A trial was held on April 16, 2001, before the PDJ and two Hearing Board members, Robert A. Millman and Sheila K. Hyatt, both members of the bar. Gregory G. Sapakoff, Assistant Regulation Counsel represented the People of the State of Colorado (the "People"). Gary M. Jackson appeared on behalf of Respondent, Jerry E. Cardwell, ("Cardwell") who was also present.

The People's exhibits 1 through 5 and Cardwell's exhibits A, B, C and D were offered and admitted into evidence. The PDJ and Hearing Board heard testimony from the People's witnesses James McHenry, Judge Ethan D. Feldman, and Jerry E. Cardwell. The PDJ and Hearing Board also heard testimony from respondent's witnesses Gary Gutterman, M.D., Robert B. Hunter, Curtis R. Henry, Marshall Fogel, David Walbridge, John Wilson, Marie Cardwell, Julie Hamel, and Jerry E. Cardwell, who testified on his own behalf. The PDJ and Hearing Board considered argument of counsel, the testimony of the witnesses and the exhibits admitted, the complainant's Brief Regarding Issue Preclusion and respondent's Post Trial Brief on Res Judicata and Collateral Estoppel filed May 11, 2001,[3] and made the following findings of fact which were established by clear and convincing evidence.

I. FINDINGS OF FACT

Cardwell has taken and subscribed the oath of admission, was admitted to the bar of this court on May 25, 1983, and is registered upon the official records of the court as attorney registration number 12743. Cardwell is subject to the jurisdiction of this court pursuant to C.R.C.P. 251.1(b).

In late 1995, James McHenry ("McHenry") retained Cardwell to represent him on charges of driving under the influence of alcohol and illegal use of a weapon in Jefferson County Court, Case No. 95M3674 (the "Jefferson County

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[1] The original disciplinary action was denominated Case No. GC96A158.

[2] The action before the Supreme Court was denominated Case No. 98SA501.

[3] The PDJ closed the record on the trial held April 16, 2001 on May 11, 2001, upon submission of post-trial briefs on a legal issue which arose in the course of the trial.

case") arising from his arrest on September 29, 1995. McHenry later retained Cardwell to represent him on charges of driving under the influence of alcohol in Arapahoe County Court Case No. 95T105557 (the "Arapahoe County case") arising from his arrest on November 9, 1995. Cardwell entered his appearance and represented McHenry in both matters. Cardwell knew McHenry had been arrested in Arapahoe County for an alcohol–related driving offense before McHenry entered a plea in the Jefferson County case.

On February 5, 1996, with Cardwell present and upon Cardwell's advice, McHenry entered a guilty plea to a reduced charge of driving while ability impaired by alcohol -- first offense -- ("DWAI") in the Jefferson County case. He received a deferred judgment on a weapons charge for possession of a loaded firearm. That charge was later dismissed after McHenry successfully completed probation. Pursuant to his guilty plea on the DWAI in Jefferson County, McHenry received probation and was sent for an alcohol evaluation. Under the order of the Jefferson County Court, McHenry's requirement for alcohol education and therapy was to be determined by the court after the alcohol evaluation was performed. McHenry understood that he had entered a plea of guilty to the DWAI charge, and had received a deferred judgment on the weapons charge. McHenry commenced level two alcohol classes.

Thereafter, Cardwell negotiated a plea agreement for McHenry with the Arapahoe County District Attorney. Cardwell did not, however, inform the Arapahoe County district attorney's office of the Jefferson County case. Cardwell and McHenry both signed a motion to settle the Arapahoe County charges by plea agreement, stating that McHenry had "no prior or pending alcohol-related driving offenses in this or any other state." Cardwell had previously advised McHenry of the mandatory minimum five day jail sentence that would be imposed for a conviction on his second drinking and driving offense. Cardwell knew that McHenry had fears of going to jail. McHenry read the plea agreement and was concerned about signing it. He discussed it with Cardwell, who said he was "trying to keep McHenry out of jail." Cardwell also said the outcome of the Jefferson County case could be affected by the Arapahoe County plea. Cardwell told McHenry that they would inform the judge this was McHenry's first alcohol-related offense.

On May 6, 1996, three months after the Jefferson County conviction, McHenry and Cardwell appeared before Judge Ethan Feldman in the Arapahoe County case to enter a plea on a plea agreement negotiated by Cardwell on McHenry's behalf. McHenry entered a plea of guilty to a reduced charge of DWAI – first offense -- with respect to the Arapahoe County charges. At the time Cardwell and McHenry signed the motion to settle the Arapahoe County case by plea agreement, both Cardwell and McHenry knew that McHenry had been charged and had entered a guilty plea to the charges in the Jefferson County case and, therefore, had a prior or pending alcohol-related offense.

On May 6, 1996, the day the plea was entered, Cardwell, under questioning by Arapahoe County Judge Feldman, orally represented that McHenry had no prior alcohol-related driving offenses. Cardwell stood by as McHenry confirmed to the judge that this was his first alcohol offense. The following exchange took place between the court, Cardwell and McHenry in the Arapahoe County case:

COURT: All right, and McHenry is going to be entering a plea of guilty today to a charge of driving while impaired, first offense, is that correct?

MR. CARDWELL: That is correct, your honor.

COURT: Have you ever had an alcohol driving offense before?

MR. CARDWELL: No sir.

COURT: Okay, is that your representation, McHenry?

MR. McHENRY: Yes sir.

COURT: Okay, never ever, at any time, any place?

MR. McHENRY: No.

Unaware of McHenry's prior offense in Jefferson County, and acting on the representations of Cardwell and McHenry, Judge Feldman sentenced McHenry as a first time alcohol offender. The conditions of the Arapahoe County plea agreement required that McHenry comply with the education recommendations of the Probation Department's alcohol evaluator.

On or about May 17, 1996, McHenry reported to Danielle Velasquez, Probation Officer and Alcohol/Drug Evaluation specialist for Arapahoe County. McHenry informed Ms. Velasquez about the prior Jefferson County conviction and stated that Cardwell recommended that he plead guilty to a first offense DWAI in Arapahoe County despite the earlier Jefferson County conviction. McHenry also informed Ms. Velasquez that Cardwell instructed him not to inform the probation department about the prior Jefferson County case. McHenry was concerned about new charges being brought against him for lying in court. Ms. Velasquez forwarded her report to Judge Feldman detailing McHenry's statements.

On May 31, 1996, Cardwell, after having been told by McHenry that he wanted to proceed without counsel, moved to withdraw from the Arapahoe County case. Judge Feldman denied the motion to withdraw and held a hearing on June 13, 1996, at which time he confronted Cardwell about his

prior representations to the court. Cardwell stated that he mistakenly believed the case in Jefferson County was not final at the time McHenry entered his plea in Arapahoe County. The court had to correct the improper plea and sentence entered on the basis of Cardwell's and McHenry's misrepresentations.

The Arapahoe County District Attorney subsequently charged Cardwell with several violations of criminal law. Cardwell pleaded guilty to perjury in the second degree, a class one misdemeanor, in violation of § 18-8-503, 8B C.R.S. (1986), and guilty on a deferred judgment and sentence, to attempting to influence a public servant, a class four felony, in violation of § 18-8-306, 8B C.R.S. (1986). Cardwell was required to pay $4,000 in fines, attend ethics courses and serve two hundred hours of community service. He was subject to four year's probation and was fully cooperative with his case manager. Cardwell has satisfied all conditions of his probation.

II. CONCLUSIONS OF LAW

The People's Second Amended Complaint charged Cardwell with the following violations of The Colorado Rules of Professional Conduct ("Colo. RPC"): Colo. RPC 1.1 (claim one)[failure to provide competent representation to a client]; Colo. RPC 1.2(d) (claim two)[assisting a client in engaging in criminal or fraudulent conduct]; Colo. RPC 3.3(a)(1) (claim three)[knowingly making a false statement of material fact to a tribunal]; Colo. RPC 3.3(a)(2) (claim four) [knowingly failing to disclose a material fact when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client]; Colo. RPC 4.1(b) (claim five)[failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client]; Colo. RPC 8.4(c) (claim six)[conduct involving dishonesty, fraud, deceit or misrepresentation]; Colo. RPC 8.4(d) (claim seven)[conduct prejudicial to the administration of justice]; Colo. RPC 8.4(b)[commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness and fitness to practice law] constituting grounds for discipline as provided in C.R.C.P. 251.5(b)(any act or omission which violates the criminal laws of this state or any other state) (claim eight).

The People moved for Judgment on the Pleadings pursuant to C.R.C.P. 12(c) on claims one, seven and eight, alleging violations of Colo. RPC 1.1[failure to provide competent representation to a client]), Colo. RPC 8.4(d)[engaging in conduct prejudicial to the administration of justice]) and Colo. RPC 8.4(b)[commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness and fitness to practice law] and C.R.C.P. 251.5(b)(any act or omission which violates the criminal laws of this state or any other state) respectively. Cardwell confessed the motion. The PDJ entered Judgment on the Pleadings as to those claims on February 5, 2001.

The remaining claims addressed at trial in the Second Amended Complaint were claim two (Colo. RPC 1.2(d)[assisting a client in engaging in criminal or fraudulent conduct]); claim three (Colo. RPC 3.3(a)(1)[knowingly making a false statement of material fact to a tribunal]); claim four (Colo. RPC 3.3(a)(2)[knowingly failing to disclose a material fact when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client]); claim five (Colo. RPC 4.1(b))[failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client]), and claim six (Colo. RPC 8.4(c)[conduct involving dishonesty, fraud, deceit or misrepresentation]).

Colo. RPC 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Through his conduct in the proceedings in Arapahoe County Court as described above, McHenry knowingly made misrepresentations to the court. Cardwell knew that McHenry's statements, both orally and in writing, were fraudulent and that the court was acting upon McHenry's fraudulent statements. The Jefferson County case resulted in a final conviction. Cardwell assisted McHenry in his fraudulent course of conduct by advising McHenry to enter into a plea in Arapahoe County as a first time offender and by making his own representations to the court supporting McHenry's misrepresentations that he had no other pending or prior alcohol-related offenses. Through his conduct as described above, Cardwell violated Colo. RPC 1.2(d) (a lawyer shall not counsel a client to engage in, or assist a client, in conduct the lawyer knows is criminal or fraudulent).

Claim three alleges a violation of Colo. RPC 3.3(a)(1) which provides that "[a] lawyer shall not knowingly make a false statement of material fact or law to a tribunal." When Cardwell signed the motion to settle the Arapahoe County case by plea agreement stating that McHenry had "no prior or pending alcohol related driving offenses in this or any other state," Cardwell knew the statement was false. Cardwell's submission of the motion containing the false statement concerning prior or pending alcohol-related driving offenses was made to the tribunal and was material to the determination of an appropriate sentence in the Arapahoe County proceedings.

By orally representing to Judge Feldman that McHenry had no prior alcohol-related driving offenses, Cardwell made another false statement to the tribunal. Cardwell's false statement in this regard was also material in that it

was relied upon by the court in determining an appropriate sentence. Cardwell knowingly made false statements of material fact to a tribunal in violation of Colo. RPC 3.3(a)(1).

Claim four alleges a violation of Colo. RPC 3.3(a)(2), which provides that "[a] lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Cardwell knew that McHenry made misrepresentations in the Arapahoe County case, that the misrepresentations were material, and that those representations were relied upon by Judge Feldman in accepting the plea and imposing an appropriate sentence. Cardwell knowingly failed to disclose to the Arapahoe County Court the true facts concerning McHenry's previous guilty plea in the Jefferson County case. Through his conduct as described above, Cardwell violated Colo. RPC 3.3(a)(2).

Claim five alleges a violation of Colo. RPC 4.1(b), which provides "[i]n the course of representing a client a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." In the course of representing McHenry, Cardwell knew that the Arapahoe County Deputy District Attorney was acting in reliance upon representations made by McHenry in entering into a plea agreement in the Arapahoe County case. Cardwell knew that misrepresentations were made to the Arapahoe County District Attorney's Office concerning McHenry's prior alcohol-related offenses.[4] Disclosure of the true facts concerning McHenry's plea to charges in Jefferson County was necessary to avoid assisting McHenry in a criminal or fraudulent act. Cardwell failed to disclose to the Arapahoe County District Attorney's Office material facts concerning the Jefferson County proceedings. Through his conduct, Cardwell violated Colo. RPC 4.1(b).

Claim six alleges a violation of Colo. RPC 8.4(c) which provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Cardwell made written and oral statements in connection with McHenry's plea in the Arapahoe County matter that he knew were false. Cardwell's intent was to keep both the court

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[4] In disciplinary cases, the failure to disclose a material fact may constitute a misrepresentation. *See People v. Egbune*, No. GC98A13 (Colo. PDJ May 12, 1999), 28 Colo. Law 132, 133 (September 1999)(holding that although silence alone does not normally constitute deceit or misrepresentation, under certain circumstances an affirmative obligation arises to respond to inquiries and the failure to do so and thereafter stand mute rises to the level of deceit and misrepresentation); *People v. Campbell*, 932 P.2d 312, 313 (Colo. 1997)(respondent admitting to misconduct that constituted a violation of Colo. RPC 8.4 (c) by failing to advise a treating physician that the client's case had settled where the attorney owed payment for the client's treatment); *People v. Robertson*, 908 P.2d 96, 99 (Colo. 1995) (respondent stipulating to fact that he engaged in misrepresentation by failing to inform a provider of the amount of settlement and pay him the agreed upon amount out of the proceeds).

and the prosecutors ignorant of the Jefferson County offense and conviction in order to succeed in having McHenry sentenced as a first time offender in both cases. Cardwell knew McHenry could not be sentenced as a first time offender in Arapahoe County if he disclosed what he knew about the Jefferson County case, and failed to disclose this information to the Arapahoe County Court. Cardwell's conduct constitutes dishonesty or deceit in violation of Colo. RPC 8.4(c).

Cardwell argued in this proceeding that his actions were negligent rather than knowing arising from his lack of experience in criminal law,[5] his failure to research the meaning of "final conviction," and his zeal to help McHenry. He also alleged that he advised McHenry to disclose the prior Jefferson County matter to the probation officer in the Arapahoe County matter. At the conclusion of trial, the PDJ and Hearing Board questioned counsel whether the panel was precluded from considering Cardwell's argument that his false representations in the Arapahoe County case were made negligently and were not knowing or intentional. Both complainant and respondent submitted additional written argument on this issue. For the reasons set forth below, the PDJ and Hearing Board conclude that Cardwell is precluded from arguing in this disciplinary matter that his misconduct was negligent or reckless.

Cardwell pleaded guilty to charges of attempting to improperly influence a public servant in violation of § 18-8-306, 8B C.R.S. (1986) and perjury in the second degree, in violation of § 18-8-503, 8B, C.R.S. (1986) as the result of his conduct in the Arapahoe County McHenry case.

Colorado Revised Statute § 18-8-306 provides:

> Any person who attempts to influence any public servant by means of deceit . . . with the intent thereby to alter or affect the public servant's decision, vote, opinion or action concerning any matter which is to be considered or performed by him or the agency or body of which he is a member, commits a class four felony.

See People v. Janousek, 871 P.2d 1189, 1196 (Colo. 1994)(citing Black's Law Dictionary 405 (5th ed. 1979) which defines deceit as "[a] fraudulent and deceptive misrepresentation . . . used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon," and Webster's Third New International Dictionary 584 (5th ed. 1986), which defines deceit defined as "any trick, collusion, contrivance, false representation, or underhand practice used to defraud another.").

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[5] Notwithstanding his contention that he was inexperienced in handling alcohol-related traffic cases, Cardwell admitted that he had handled more than a dozen such cases at the time of these events.

Colorado Revised Statute § 18-8-503 provides in part:

> A person commits perjury in the second degree if, other than an official proceeding, with an intent to mislead, a public servant in the performance of his duty, he makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law. (emphasis added).

Cardwell's conviction under both of these criminal statutes, of necessity, determined that Cardwell's conduct was intentional and, therefore, knowing. Notwithstanding those determinations in the criminal case, Cardwell argues in this disciplinary case that his conduct was negligent.

C.R.C.P. 251.20(a) provides that proof that an attorney has been convicted of a crime conclusively establishes the existence of the conviction for purposes of disciplinary proceedings and "shall be conclusive proof of the commission of that crime by the respondent." C.R.C.P. 251.20(a) would be rendered meaningless if Cardwell were permitted to relitigate the issues that have already been conclusively established in the prior criminal proceeding. Cardwell's entry of guilty pleas in the criminal cases were an admission by him that each element of the crimes to which he pled were legally established. The rules of procedure governing disciplinary proceedings do not allow an attorney to challenge the elements of the crime to which the plea was entered in defending against the disciplinary charges.

Moreover, Cardwell confessed judgment on the pleadings with respect to a violation of Colo. RPC 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and C.R.C.P. 251.5(b)([a]ny act or omission which violates the criminal laws of this state) based upon Cardwell's conviction under these two criminal statutes. Further, Cardwell admitted, in response to the allegations in paragraph 67 of the Second Amended Complaint that "the respondent's conviction on the above-referenced criminal charges is conclusive proof of his commission of the crimes, including all of the elements of those crimes." (emphasis added). That admission, separate and apart from the mandate of C.R.C.P. 251.20(a), established that Cardwell's conduct was both intentional and knowing for purposes of these disciplinary charges, not negligent.

III. SANCTIONS / IMPOSITION OF DISCIPLINE

The ABA *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") is the guiding authority for selecting the appropriate sanction to impose for lawyer misconduct.

ABA *Standard* 6.11 provides:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The Commentary to 6.11 provides: "[t]he lawyers who engage in these practices violate the most fundamental duty of an officer of the court."

ABA *Standard* 5.11 states:

> Disbarment is generally appropriate when:
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion . . .
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The Commentary to ABA *Standards* 5.11 states "[a] lawyer who engages in any of the illegal acts listed above has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity." Pursuant to C.R.C.P. 251.20(e), "serious crime" includes any felony and any lesser crime a necessary element of which, as determined by its statutory or common law definition, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, or theft; or an attempt or conspiracy to commit such crime; or solicitation of another to commit such crime. Both crimes to which Cardwell pled involve factors identified by ABA *Standard* 5.11, as warranting disbarment.

Disbarment is the presumptive sanction under both the ABA *Standards* and Colorado case law for commission of a serious crime. *In re Elinoff*, 22 P.3d 60, 64-65 (Colo. 2001)(attorney suspended for three years with one year stayed and subject to conditions of probation for engaging in conduct constituting the offense of bribery, a class three felony); *People v. Lopez*, 980 P.2d 983, 984(Colo. 1999)(disbarring attorney subject to conditional admission for making misrepresentations of material fact on liquor license application, misrepresenting material information to liquor licensing authority, and to prospective investors); *People v. Brown*, 726 P.2d 638, 642 (Colo. 1986)(disbarring District Attorney for the First Judicial District for engaging in

dishonesty and conduct adversely reflecting upon his fitness to practice law by requesting that an employee from the Department of Motor Vehicles remove some points from the attorney's driving record for insurance reasons). Similarly, Colorado law provides that, in the absence of substantial mitigating factors, disbarment is the presumed sanction when an attorney knowingly makes a false statement of material fact to a court. *Lopez,* 980 P.2d at 984(disbarring attorney subject to conditional admission for making misrepresentations of material fact to liquor licensing authority); *People v. Kolbjornsen*, No. 99PDJ004, slip op. at 7 (Colo. PDJ October 28, 1999), 29 COLO. LAW. 114, 115 (May, 2000)(attorney disbarred for knowingly misleading the bankruptcy court by giving false testimony under oath). *See also People v. Nienaber*, 80 Ohio St. 3d 534, 687 N.E. 2d 678, 681 (Ohio 1997)(attorney suspended indefinitely for affirmatively representing to two courts that his client was a first time DUI offender, knowing this representation to be false). An attorney's knowing false statement of material fact or law to a tribunal, and failure to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client goes to the very heart of the integrity of the legal system. As this court stated in *People v. Kolbjornsen*:

> An attorney's misrepresentation of material facts to a court with the aim of benefiting himself or others to the detriment of his adverse party cannot be tolerated under an adversary system which depends upon the honesty of its officers to render fair and just decisions. Judicial officers, members of the profession and the public at large must be able to rely upon the truthfulness of an attorney's statements to the court. Confidence in the truth-seeking process engendered in our system of justice cannot exist absent such reliance.

Kolbjornsen, No. 99PDJ004, slip op. at 6, 29 COLO. LAW. at 115.

The PDJ and Hearing Board considered factors in aggravation and mitigation respectively pursuant to ABA *Standards* 9.22 and 9.32. In mitigation, Cardwell had no prior disciplinary record, *see id.* at 9.32(a); he made a timely good faith effort to rectify consequences of misconduct, *see id.* at 9.32(d); Cardwell has been cooperative toward these proceedings upon rehearing and the prior proceedings, *see id.* at 9.32(e); Cardwell was inexperienced in the practice of criminal law at the time of the actions giving rise to this proceeding, *see id.* at 9.32(f); Cardwell enjoys an excellent character and reputation in the community; *see id.* at 9.32(g); Cardwell has incurred the imposition of criminal charges and penalties associated therewith for the same misconduct, including two hundred hours of community service, completing courses in ethics, the payment of $4,000 in fines and costs, was subject to four year's probation during which time he was fully cooperative with his case

manager, *see id.* at 9.32(k), and he has expressed remorse for his conduct, *see id.* at 9.32(l).

ABA *Standard* 9.32(i) also provides that the PDJ and Hearing Board may consider delay in disciplinary proceedings as a mitigating factor. Cardwell argued that he has suffered considerable consternation as a result of waiting for resolution to the within disciplinary proceeding for approximately a four year period of time, due to the necessity of a rehearing. During the pendency of these disciplinary proceedings, Cardwell has continued to practice law without further violation of The Colorado Rules of Professional Conduct. In aggravation, Cardwell engaged in a dishonest motive, *see id. at* 9.22(b) and he committed multiple offenses, *see id.* at 9.22(d).

McHenry did not suffer significant harm as a result of Cardwell's misconduct. However, Cardwell's conduct resulted in significant harm to the public and the legal system: Cardwell's conduct lessens the trust invested in attorneys by the public. Of particular significance in reaching an appropriate sanction in this case is the mitigating factor of other penalties. The PDJ and Hearing Board conclude that the mitigating factors distinguish this case from cases where disbarment was imposed for similar conduct. *See People v. Rudman,* 948 P.2d 1022, 1026 (Colo. 1997) (in light of mitigating circumstances, suspension for three years, rather than disbarment is appropriate for lawyer who engaged in intentional pattern of lies); *People v Kolbjornsen*, 917 P.2d 277, 279(Colo. 1996)(suspending Kolbjornsen for one year and one day for testifying falsely to a tribunal under oath).

Based upon the mitigating factors the PDJ and Hearing Board conclude that disbarment is not warranted in this matter. However, a significant period of suspension is required. Accordingly, the PDJ and Hearing Board find that a three year period of suspension is warranted. However, because Cardwell has not engaged in further misconduct during the five years this proceeding has been pending, eighteen months of the period of suspension will be stayed. [6]

CONCURRING OPINION by Sheila Hyatt, Hearing Board Member:

I concur in the findings of fact and conclusions of law. I write separately to express some disagreement with the sanction imposed in this case. There is little doubt that the respondent's conduct merits serious sanction. An attorney's knowing misrepresentation of material fact to a court cannot be tolerated. However, in this case the trial judge, in

[6] Because Cardwell will be required to undergo a reinstatement proceeding, the reinstatement board will decide whether conditions should be imposed upon reinstatement and for what period of time based upon evidence available at the time of the reinstatement proceeding. Due to the seriousness of Cardwell's misconduct, conditions upon reinstatement should be given serious consideration.

addition to notifying the Grievance Committee, also notified prosecutors, which resulted in the filing of criminal charges against the respondent. The respondent was arrested, booked, and charged with six felonies and 2 misdemeanors. He eventually pleaded guilty to perjury in the second degree, a Class I misdemeanor, and guilty to a deferred judgment and sentence on attempting to influence a public servant, a Class IV felony. He paid $4,000 in fines, performed 200 hours of community service, attended ethics courses and satisfied all the conditions of 4 years of felony probation. He and his family endured the impact of that experience along with these proceedings, which have been in progress for nearly 6 years. He incurred thousands of dollars of attorney fees in the criminal matter, as well as the fees occasioned by the hearing, remand and rehearing in this case.

Although the Supreme Court initially immediately suspended respondent from the practice of law as the result of his guilty pleas, it withdrew its Order of Immediate Suspension shortly after its issuance and allowed respondent to continue practicing law. (CRCP Rule 251.8). He has been practicing law without any further complaints since then. Apart from the incident giving rise to this proceeding, he had no prior complaints, he has enjoyed a good professional reputation, and he appears to pose no threat of harm to the public. He has acknowledged the seriousness of the offense and has shown remorse, cooperating fully with this tribunal and during the criminal process. He has sought counseling and engaged in appropriate self-examination to insure against any recurrence. In light of these strong mitigating factors, the Regulation Counsel recommended suspension for a year and a day. By contrast, the opinion of the PDJ and one Hearing Board member imposes a three year suspension, with 18 months suspended. I am not inclined to impose a sanction greater than that sought by the Regulation Counsel. In fact, I see no need for the respondent to have to petition for reinstatement, which would be required if the suspension were for a year and a day, but not for a suspension of one year. Under Rule 251.29, a petitioner for reinstatement would have to show by clear and convincing evidence that he has been rehabilitated and is fit to practice law. This respondent has been proving that for the last 4 years, at least. In my opinion, a sanction suspending him for one year properly recognizes the seriousness of the offense, without adding the further delays and financial burdens attendant to a petition for reinstatement.

IV. ORDER

It is therefore ORDERED:

1. JERRY E. CARDWELL, registration number 12743, is suspended from the practice of law for a period of three years, with eighteen months stayed.

2. Cardwell is ORDERED to pay the costs of these proceedings; complainant shall submit a Statement of Costs within fifteen (15) days of the date of this Order, and respondent may file a response within five (5) days thereafter.

DATED THIS 11th DAY OF JULY, 2001.

(SIGNED)

_____

ROGER L. KEITHLEY
PRESIDING DISCIPLINARY JUDGE

(SIGNED)

_____

ROBERT A. MILLMAN
HEARING BOARD MEMBER

(SIGNED)

_____

SHEILA K. HYATT
HEARING BOARD MEMBER